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**ALTERNATIVES TO FORECLOSURE:**  
AVOIDING FORECLOSURE AT ALL COSTS THROUGH  
FORBEARANCE AGREEMENTS, DEEDS IN LIEU,  
LOAN SALES, SHORT SALES AND LENDER/BORROWER WORKOUTS

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NON-RECOURSE CARVE OUTS, CASE LAW, BUSINESS DECISIONS  
AND A WINNING WAR STORY TO PONDER

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**ALTERNATIVES TO FORECLOSURE:  
STEP-BY-STEP PROCEDURES AND LEGAL ISSUES<sup>1</sup>**

**I. REINSTATEMENT, FORBEARANCE AND REPAYMENT PLANS**

There are generally no reinstatement provisions in loan documents evidencing commercial real estate loans. However, with consumer loans, such as Fannie Mae loans, there are usually cure periods and specific reinstatement provisions. Counsel should review the loan documents carefully before proceeding with any action to determine if the obligors are entitled to cure defaults or to reinstate their loan under specified circumstances. Failure to comply with cure or reinstatement provisions will serve to delay a client's right to assert remedies and could result in protracted litigation.

**II. FORBEARANCE AND REPAYMENT PLANS**

A forbearance agreement can be a useful tool to avoid protracted litigation with your obligors or to deal with documentation and/or collateral issues.<sup>2</sup> The purpose of a forbearance agreement is to ultimately place the lender in a better position than the lender was in prior to its obligor's default.

A forbearance agreement should contain detailed recitals setting forth, among other things, a detailed description of the original loan documents, a recitation of the collateral securing the loan(s) and a list of the defaults that have occurred.<sup>3</sup> There are certain clauses that are important to include in any forbearance agreement. The following is a list of a number of clauses that should be included:

- (a) The obligors should acknowledge their defaults and/or the validity of any judgments entered in favor of the lender.

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<sup>1</sup> This portion of the program materials was prepared by Michael G. Gallerizzo, Esq. with assistance from Richard A. DuBose, Esq., Michael C. Bolesta, Esq., and Jason W. Hardman, Esq.

<sup>2</sup> A sample forbearance agreement is attached to these materials as Exhibit 1.

<sup>3</sup> Note that it may be necessary to obtain the consent of any subordinated creditors prior to entering into a forbearance agreement, if the subordination agreement you are dealing with does not permit amendments to your loan documents without the subordinating parties' consent.

- (b) The obligors should acknowledge and agree to the amount(s) due under the loan(s).
- (c) There should be a clear statement as to how the loan(s) will be repaid and the forbearance period to which the lender has agreed.
- (d) A detailed list of events of default and the lender's rights and remedies in connection therewith should be included.
- (e) The forbearance agreement should provide for reimbursement of costs, expenses and attorneys' fees to the lender. *See Noyes Air Conditioning Contractors, Inc. v. Wilson Towers, Ltd.*, 122 Md. App. 283, 712 A.2d 126 (1998), authorizing the collection of attorneys' fees because the document forming the basis of the action authorized the reimbursement of such attorneys' fees.
- (f) The lender may want to provide for the payment of forbearance fees as compensation for the existing defaults and the lender's agreement to forbear.
- (g) The forbearance agreement should indicate that it does not constitute a novation of the client's original loan documents or an impairment of any of the lender's rights. *Holzman v. Fiola Blum, Inc.*, 125 Md. App. 602, 726 A.2d 818 (1999).
- (h) The forbearance agreement can also include a waiver of the automatic stay. Such provisions may or may not be enforceable depending on the jurisdiction involved, but are at least "evidence of cause" in a Maryland Bankruptcy Court. *See In re Shady Grove Tech Ctr. Assocs. Ltd. P'ship*, 216 B.R. 386 (Bankr. D. Md. 1998).
- (i) The forbearance Agreement should include a waiver of jury trial. *See ST Systems Corp. v. Maryland Nat'l Bank*, 112 Md. App. 20, 684 A.2d 32 (1996) (enforcing waiver of jury trial provision).
- (j) The forbearance agreement should also include a general release in favor of the lender, a covenant not to encumber or transfer assets, a

confession of judgment clause in favor of the lender (if available), a provision incorporating the terms of the original loan documents to the extent not modified and a “time is of the essence” clause. *See generally, Joppa Sand and Gravel Corp. v. L. Epstein and Sons, Inc.*, 39 Md. App. 34, 382 A.2d 1086 (1978) (noting that courts will generally find time is not of the essence under agreement between parties unless the agreement indicates otherwise).

### **III. MORTGAGE MODIFICATION**

A mortgage modification can be used to modify the existing terms of a lender’s mortgage loan and/or to correct documentation or collateral issues. If a lender’s real estate collateral is subject to junior liens, any modification should avoid increasing the amount secured by the mortgage as the increased amounts will not be secured by a first mortgage lien against the property absent the consent of the junior lien holders.

A mortgage modification should contain detailed recitals setting forth, among other things, a detailed description of the loan documents, a specific description of the property secured and the amount secured by the mortgage. There should also be a statement that the mortgage modification is not increasing the principal amount secured by the original mortgage.

There are certain clauses that are important to include when drafting a mortgage modification. For example:

- (a) The obligor should acknowledge and agree to the amount(s) secured by the mortgage.
- (b) A clear statement of the events of default should be included.
- (c) A statement of remedies should also be included.
- (d) An incorporation of the original mortgage terms is advisable.
- (e) A waiver of jury trial and a general release in favor of the lender should also be included.

- (f) A mortgage modification may also incorporate provisions similar to those contained in a forbearance agreement. *See* Section I.B., *supra*.

#### IV. PARTIAL CLAIM<sup>4</sup>

A. Availability. A Partial Claim is only available on FHA loans. Working together with The Department of Housing and Urban Development (HUD), a lender may agree to help the borrower with a one-time payment from the FHA Insurance Fund.

B. Qualifications. An obligor may qualify for a partial claim if the obligor's loan is:

- (a) At least 4 months but no more than 12 months delinquent;
- (b) The obligor is able to begin making full mortgage payments;
- (c) The obligor has resolved the hardship that caused the obligor to fall behind;
- (d) The obligor may or may not be in foreclosure;
- (e) The obligor has the long-term financial stability to support the mortgage debt or make the payment;
- (f) The obligor does not have the ability to repay the past due amount through a special forbearance or modification;
- (g) The property is the obligor's primary residence; and
- (h) If the obligor has filed for Bankruptcy, the obligor may still qualify for a partial claim, but the Bankruptcy Court must give approval.

C. Requirements and Terms. The obligor will be required to sign a promissory note with HUD and they will place a lien on the existing real estate collateral. This HUD loan is interest-free and will bring the obligor's account up to date immediately, but it is due when the obligor pays off the loan or when the obligor sells or leaves the property.

The terms for the Partial Claim are as follows:

- The note will be interest free.

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<sup>4</sup> The terms and conditions of the partial claim program are set forth in U.S Department of Housing and Urban Development Mortgagee Letter 2003-19, dated November 20, 2003.

- The obligor will not be required to make monthly or periodic payments.
- The note will be due when the mortgage loan is paid off or when the obligor sells the property.
- There will be no repayment penalty.
- The obligor can apply for a refund in the mortgage insurance premium when the note is paid in full.
- The note is payable to HUD.
- The obligor can make partial payments but they must be by cashiers check or certified funds.

If a loan has been modified or reinstated using a partial claim within the past three years, re-default risk is presumed to increase following a subsequent partial claim. Prior to allowing a partial claim in this circumstance, the mortgagee must prepare a written justification, and retain a copy along with supporting documents in the claim review file.

The Partial Claim may be combined with another plan or stand alone. In some cases, a special forbearance may be combined with the Partial Claim to give the obligor and lender additional options.

## V. SALE, PRE-FORECLOSURE SALE OR SHORT PAYOFF

A. Pre-Foreclosure Sale of Loan Documents. A written agreement should be used to document the sale of your loan to a third party and that agreement should contain minimal representations and warranties.<sup>5</sup> The agreement should acknowledge the outstanding amount owed to the lender. The agreement should also provide that the lender shall receive payment for the loan that is being transferred, prior to assignment of the loan to the purchaser.

All loan sales should be “Without Recourse”. The purchaser of the loan should assume all obligations of lender under the loan documents being acquired. The

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<sup>5</sup> A sample loan sale agreement is attached to these materials as Exhibit 2.

purchaser should also indemnify the lender for any damages the lender may sustain, including, attorneys' fees, as a result of the assignment of the loan to the purchaser.

A loan *may* be considered a "security" under the Securities Act of 1933, 15 U.S.C. §§ 77a, *et seq.* ("Securities Act"). Consequently, this statute should be reviewed in connection with any loan sale. If the loan qualifies as a "security", the sale of the loan may need to be registered under the Securities Act unless the loan sale transaction is exempt from such registration under the exemption provisions of the Securities Act. Rule 144, 17 C.F.R. § 230.144, provides a limited exemption from the registration requirement. This rule should also be reviewed, as it sets certain conditions for the sale of "restricted" or "control" securities, including a holding period, informational requirements, volume limitations, and others. To deal, in part, with the securities issues, the purchaser should represent in the loan sale agreement that it is a sophisticated investor, that it does not intend to re-distribute the loan being purchased and that it will not re-distribute the loan being acquired.

The loan sale agreement should also provide for a general release of claims from the Obligors to the lender if you can obtain such an accommodation. Note that if borrower consents to sale of loan documents but not guarantor(s), this may be considered modification of loan documents and could potentially provide the guarantors with an argument that their guaranty has been released.

Due to privacy concerns, loan purchasers should not be permitted to review loan documents or the amounts owed in absence of express written authorization from borrower. The loan sale agreement should not make any representations as to lien priority, credit reviews, ability to repay, etc.

B. Pre-Foreclosure Sale of Property. Depending on the lender's relationship with its obligors, a lender may permit its obligors to list the real estate collateral with broker for sale for a period of time. This can be done as part of a forbearance or modification agreement.

The agreement between the parties should clearly state the duration of listing, the price at which the property is to be offered for sale, expenses that may be paid from the

proceeds of sale and that the lender may obtain an appraisal of the real estate collateral at the obligors' expense. If the obligors have obtained a contract of sale for the real estate collateral, the lender can enter into a forbearance or modification agreement with its obligors that provides the obligors with a period of time to close in connection with the contract of sale. The other terms of any such agreement would be similar to the terms for a forbearance or modification agreement described in Sections I. B and II., *supra*.

C. Short Payoff. A short payoff occurs when a lender releases its lien against its real estate collateral in exchange for less than full payment of its debt or the proceeds arising from the sale of the real estate and either (i) releases the underlying debt; or (ii) does not provide such a release. If possible, obtain the obligors' consent to the sale of the real estate and the short payoff and their consent to satisfy any deficiency pursuant to agreed upon terms.

If the lender releases its borrower, that action may also result in a release of guarantors. Counsel should examine the loan documents regarding this issue.

If the lender is unable to obtain the consent of all of its obligor's to a short payoff, the lender should at least give advance notice to the obligors who will not consent regarding the short payoff and any release of the borrower and the real estate collateral in order to establish an estoppel to any challenge by such obligors to any subsequent action by the lender for a deficiency judgment. Proceeding in this manner may, in all likelihood, result in a substantial savings of time and money for the client when compared against the pursuit of a foreclosure proceeding.

D. FHA, VA, Fannie Mae and Freddie Mac require lenders to work with borrowers in a reasonable manner, whenever the circumstances dictate.

## **VI. ASSUMPTION BY QUALIFIED BUYER**

This is a credit underwriting issue more than a legal issue. Obligor(s) are substituted under the applicable loan documents but the lender's lien against the real estate collateral remains in place. Many loan documents do not permit assumption (*e.g.*, Fannie Mae loans). As part of the assumption transaction, the original obligors can be



released or can remain liable. Counsel should examine the loan documents to determine whether assumption is permitted and/or whether assumption will release any obligors.

## **VII. DEED IN LIEU OF FORECLOSURE**

Under this scenario, the lender or a subsidiary of the lender receives a deed to the real estate collateral generally in exchange for a release of the obligors on the underlying indebtedness.<sup>6</sup> This alternative can result in a substantial savings of time and money for clients when compared against the foreclosure process.

A deed in lieu results in a merger of the two estates, vesting the mortgagee with complete title to the real estate and putting an end to any rights under the mortgage. *See Warfield v. Christiansen*, 201 Md. 253 (1953). Junior liens, however, are not extinguished. Therefore, a lender would take subject to those liens. Accordingly, the deed in lieu of foreclosure alternative is not recommended if junior liens exist against the real estate collateral.

A title search will be necessary to ascertain whether the client's lien is in a first position and if any junior liens exist against the real estate collateral. Moreover, the lender should obtain a title insurance policy when acquiring property by way of a deed in lieu of foreclosure, insuring that the lender has acquired fee simple title to the property, free and clear of all liens and with no title defects unacceptable to the lender. It is recommended that the documents evidencing the deed in lieu of foreclosure transaction specifically indicate that the Lender's mortgage against the real estate collateral shall remain in place and in full force and effect after the deed in lieu of foreclosure transaction settles, so that the lender will have the ability to foreclose that mortgage and extinguish any junior liens or encumbrances against the property in the event that any such liens or encumbrances were missed in the title search or are discovered after the transaction settles.

Before proceeding with a deed in lieu of foreclosure transaction, a lender should consider ordering and obtaining a current appraisal and environmental site assessment of

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<sup>6</sup> A sample deed in lieu of foreclosure and related agreement are attached to these materials collectively as **Exhibit 3**.

the property to be acquired. Furthermore, the lender should consider creating a subsidiary or an affiliate of the lender into which title to the property will be conveyed. By doing so, the lender should protect its general assets from any claim that may arise in connection with the property acquired through the deed in lieu of foreclosure transaction. Prior to acquiring the property, the lender should also address how the lender will manage the property after settlement.

The borrower's and guarantor's respective obligations with respect to any deficiency need not be released under a deed in lieu of foreclosure transaction. The lender can enter into an agreement with its obligors requiring that they pay any deficiency sustained by the lender in accordance with certain agreed upon terms and conditions. Finally, a deed in lieu of foreclosure transaction may constitute a fraudulent conveyance under certain circumstances including, without limitation, any subsequent bankruptcy case the borrower may file.

# EXHIBIT 1

## FORBEARANCE AGREEMENT

THIS FORBEARANCE AGREEMENT ("AGREEMENT") is made as of the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by and among \_\_\_\_\_ ("BORROWER"), \_\_\_\_\_ ("INDIVIDUAL GUARANTORS"), \_\_\_\_\_ ("CORPORATE GUARANTOR") and \_\_\_\_\_ ("BANK"). The BORROWER, the INDIVIDUAL GUARANTOR and the CORPORATE GUARANTOR are hereafter collectively referred to as the "OBLIGORS."

### RECITALS:

R1. The BANK has extended a \_\_\_\_\_ Revolving Floor Plan Line of Credit Loan to the BORROWER ("FLOOR PLAN LINE OF CREDIT") to fund its purchase of new vehicle inventory produced by \_\_\_\_\_, as evidenced by, among other things: (a) a \_\_\_\_\_ Promissory Note Payable Upon Demand, dated \_\_\_\_\_, executed and delivered by the BORROWER to the order of the BANK, as amended and modified from time to time ("FLOOR PLAN LINE OF CREDIT NOTE"); (b) a Floor Plan Line of Credit Agreement, dated \_\_\_\_\_, by and between the BORROWER and the BANK ("FLOOR PLAN AGREEMENT"); and (c) various other documents.

R2. The indebtedness and obligations that are owed by the BORROWER to the BANK under the FLOOR PLAN LINE OF CREDIT NOTE are guaranteed by the INDIVIDUAL GUARANTORS and \_\_\_\_\_ pursuant to a Guaranty and Indemnification Agreement, dated \_\_\_\_\_, executed and delivered by the INDIVIDUAL GUARANTOR and \_\_\_\_\_ in favor of the BANK ("GUARANTY").

R3. The indebtedness and obligations that are owed to the BANK under the FLOOR PLAN LINE OF CREDIT NOTE are secured by, among other things, a first priority duly perfected lien in, to and against all present and future vehicle inventory of the BORROWER produced by \_\_\_\_\_, together with all accessories, parts, substitutions, repossessions or replacements thereof and all proceeds arising from the sale or other disposition of the same, pursuant to the FLOOR PLAN AGREEMENT, certain financing statements recorded with appropriate recording offices and various other documents. All documents evidencing the liens granted to the BANK against the assets of the BORROWER referenced in this Recital are hereafter collectively referred to as the "SECURITY DOCUMENTS."

R4. Pursuant to an Intercreditor Agreement, \_\_\_\_\_, by and between the \_\_\_\_\_ and the BANK ("INTERCREDITOR AGREEMENT"), the \_\_\_\_\_ acknowledged and agreed that until such time as all indebtedness and obligations that are owed to the BANK under the FLOOR PLAN LINE OF CREDIT NOTE are fully satisfied, the BANK would retain a first priority duly perfected security interest and lien in, to and against all new motor vehicle inventory of the BORROWER for which the BANK provided financing, together with all accessories, parts, substitutions or replacements thereof and all proceeds arising from the sale or other disposition of the same.

R5. The FLOOR PLAN LINE OF CREDIT NOTE, the FLOOR PLAN AGREEMENT, the GUARANTY, the SECURITY DOCUMENTS, the INTERCREDITOR AGREEMENT, and all other documents evidencing, securing, guarantying or otherwise documenting the indebtedness and obligations that are owed to the BANK under the FLOOR PLAN LINE OF CREDIT NOTE,

including all amendments and extensions thereto, are hereafter collectively referred to as the "ORIGINAL LOAN DOCUMENTS." The ORIGINAL LOAN DOCUMENTS, this AGREEMENT, all documents to be executed pursuant to this AGREEMENT, all other documents relating thereto and/or executed in connection therewith, and all other documents evidencing, securing, guarantying or otherwise documenting the indebtedness and obligations that are now or hereafter owed to the BANK under the FLOOR PLAN LINE OF CREDIT NOTE, are hereafter collectively referred to as the "LOAN DOCUMENTS." All assets of the OBLIGORS which now serve as security for any or all of the indebtedness now or hereafter owed to the BANK under the ORIGINAL LOAN DOCUMENTS, are hereafter collectively referred to as the "ORIGINAL COLLATERAL." The ORIGINAL COLLATERAL, all assets against which the BANK is to be granted liens pursuant to this AGREEMENT, and all other assets which now or hereafter serve as security for any or all of the indebtedness now or hereafter owed to the BANK under the LOAN DOCUMENTS, are hereafter collectively referred to as the "COLLATERAL."

R6. The OBLIGORS and [REDACTED] are currently in default on their respective obligations to the BANK under the ORIGINAL LOAN DOCUMENTS for various reasons. As a result of these defaults, the BANK is immediately entitled to exercise and enforce various rights, remedies and recourse under the ORIGINAL LOAN DOCUMENTS and applicable law with respect to the OBLIGORS, [REDACTED] and the ORIGINAL COLLATERAL.

R7. The OBLIGORS have asked the BANK to: (a) forbear from exercising and enforcing the BANK'S rights, remedies and recourse under the ORIGINAL LOAN DOCUMENTS and applicable law with respect to the OBLIGORS and the COLLATERAL to and until 5:00 p.m. on [REDACTED]; (b) continue making certain limited advances to the BORROWER under the FLOOR PLAN LINE OF CREDIT and all LOAN DOCUMENTS evidencing the same as provided for below; (c) accept payment of all indebtedness and obligations that are now or hereafter owed to the BANK under the LOAN DOCUMENTS as provided for in this AGREEMENT; and (d) agree to the other terms and conditions set forth herein. The BANK has now had an opportunity to review the OBLIGORS' requests and in connection therewith, is willing to agree as set forth below.

**WITNESSETH:**

NOW, THEREFORE, in consideration of these premises, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto, intending to be legally bound, agree as follows:

**RECITALS:**

1. Recitals. The recitals set forth above are true and accurate in every respect and are hereby incorporated in this AGREEMENT by reference.

2. Acknowledgement of Defaults. The OBLIGORS acknowledge and agree as follows: (a) that the OBLIGORS are presently in default on their respective obligations to the BANK under the ORIGINAL LOAN DOCUMENTS for various reasons (collectively, the "EXISTING DEFAULTS"); (b) that as a result of the EXISTING DEFAULTS, the BORROWER, but for the agreement of the BANK as set forth herein, would not be entitled to receive any further advances from the BANK under the FLOOR PLAN LINE OF CREDIT or any of the ORIGINAL LOAN DOCUMENTS evidencing the same; and (c) that as a result of the EXISTING DEFAULTS, the BANK, but for its agreement to forbear as set forth herein, would be

immediately entitled to exercise and enforce various rights, remedies and recourse under the ORIGINAL LOAN DOCUMENTS and applicable law with respect to the OBLIGORS and the ORIGINAL COLLATERAL.

3. Guaranty of Payment and Performance. By way of this AGREEMENT, the CORPORATE GUARANTOR guarantees to the BANK the prompt, punctual and full payment and performance of all indebtedness and obligations now or hereafter owed by the BORROWER to the BANK under the FLOOR PLAN LINE OF CREDIT NOTE and all other ORIGINAL LOAN DOCUMENTS ("NEW GUARANTY"). The term "LOAN DOCUMENTS," as used herein, shall mean and include the NEW GUARANTY provided for in this Section and all other LOAN DOCUMENTS described above. The NEW GUARANTY set forth in this Section is: (a) irrevocable, absolute and unconditional, direct, immediate and primary; (b) guaranties payment and not just collection; (c) makes the CORPORATE GUARANTOR a surety to the BANK with respect to the indebtedness and obligations guaranteed hereby; and (d) shall remain in full force and affect and shall not be extinguished or discharged until all indebtedness and obligations now or hereafter owed by the BORROWER to the BANK under the FLOOR PLAN LINE OF CREDIT NOTE and all other LOAN DOCUMENTS have been fully satisfied.

4. Outstanding Balance Owed Under Loan Documents. The OBLIGORS acknowledge and agree that as of [REDACTED], the total outstanding principal and interest balance due and owing to the BANK under the LOAN DOCUMENTS was as follows:

Principal:	[REDACTED]
Interest as of [REDACTED]	[REDACTED]
Total Principal and Interest Balance Due and Owing to the Bank Under the Loan Documents as of [REDACTED]	[REDACTED]

5. Costs, Expenses and Attorneys' Fees. In addition, there is also due and owing from the OBLIGORS to the BANK, under the LOAN DOCUMENTS, all actual costs, expenses and attorneys' fees which the BANK has incurred and may incur in the future under, in connection with or due to the defaults existing under the ORIGINAL LOAN DOCUMENTS, including, but not limited to, all actual costs, expenses and attorneys' fees which the BANK has incurred and may incur in the future in preparing, negotiating and consummating this AGREEMENT and in preparing, negotiating, consummating and/or recording any and all other documents called for in and/or contemplated by this AGREEMENT. All such costs, expenses and attorneys' fees, and all costs involved in carrying out the transactions contemplated by this AGREEMENT, including, but not limited to, the attorneys' fees and expenses of the BANK, record search charges and recording costs, audit fees, collateral monitoring fees, consultant fees and other charges incurred by the BANK shall be the sole and absolute responsibility of the OBLIGORS and shall be paid for by the OBLIGORS to the BANK as provided for in Section [REDACTED] below, so that this entire matter shall be totally cost free to the BANK. As of [REDACTED] said costs, expenses and attorneys' fees, excluding recording costs, totaled [REDACTED] and consisted of attorneys' fees of the BANK'S counsel, [REDACTED] expenses incurred by [REDACTED] and record search charges incurred by the BANK of [REDACTED]. In addition, all costs, expenses and attorneys' fees incurred by the BANK under or in connection with the LOAN DOCUMENTS after [REDACTED] shall also

be the responsibility and obligation of the OBLIGORS and shall be paid for by the OBLIGORS to the BANK as provided for in Section [REDACTED] below.

6. Forbearance Fees. As part of this AGREEMENT, and in consideration for the various agreements of the BANK as set forth herein, the OBLIGORS shall pay the BANK a forbearance fee in the amount of [REDACTED] ("FORBEARANCE FEE"), in immediately available funds, on or before the earlier of 5:00 p.m. on [REDACTED], closing in connection with any sale of the BORROWER'S assets as contemplated in Section [REDACTED] below, closing in connection with any refinance of the indebtedness owed to the BANK under the LOAN DOCUMENTS as contemplated in Section [REDACTED] below, or the occurrence of an EVENT OF DEFAULT (as hereafter defined) under this AGREEMENT; provided, however, that if all indebtedness and obligations that are owed to the BANK under the LOAN DOCUMENTS are immediately satisfied by 5:00 p.m. on [REDACTED], the FORBEARANCE FEE shall be deemed waived and shall not be due and payable from the OBLIGORS to the BANK. The FORBEARANCE FEE called for herein shall be the sole and absolute property of the BANK, shall be deemed earned by the BANK immediately and shall not be applied by the BANK to reduce any of the indebtedness that is owed to the BANK under the LOAN DOCUMENTS other than the FORBEARANCE FEE itself.

7. Interest Rate. Commencing on the date of this AGREEMENT and continuing to and until all indebtedness and obligations that are owed by the OBLIGORS to the BANK under the LOAN DOCUMENTS have been fully satisfied, interest shall continue to accrue on the unpaid principal balance that is owed from time to time to the BANK under the FLOOR PLAN LINE OF CREDIT NOTE at the rate obtained by adding two percentage points (2%) to the BANK'S Prime Rate of Interest (as hereafter defined). The term "Prime Rate of Interest," as used herein, shall mean the rate announced by the BANK from time to time as its Prime Rate of Interest. Upon the occurrence of an EVENT OF DEFAULT (as hereafter defined) hereunder, interest, thereafter, shall accrue on the unpaid principal balance that is owed from time to time to the BANK under the FLOOR PLAN LINE OF CREDIT NOTE at the rate obtained by adding five percentage points (5.0%) to the BANK'S Prime Rate of Interest. Interest shall be calculated on the basis of a 360-days per year factor applied to the actual number of days on which there exists an unpaid principal balance under the LOAN DOCUMENTS. Changes in the applicable interest rate shall be effective as of and immediately upon the occurrence of a change in the BANK'S Prime Rate of Interest.

8. Confirmation of Obligations. As an additional part of this AGREEMENT, the BORROWER and the INDIVIDUAL GUARANTOR (collectively, the "ORIGINAL OBLIGORS") acknowledge, ratify and confirm their respective obligations to the BANK under the ORIGINAL LOAN DOCUMENTS and further acknowledge, ratify and confirm that the ORIGINAL OBLIGORS are and shall remain absolutely and unconditionally obligated to pay the BANK all present and future indebtedness that is owed to the BANK under the LOAN DOCUMENTS, notwithstanding the BANK'S execution of this AGREEMENT and the various agreements of the BANK as set forth herein.

9. Collateral and Representations Relating Thereto. At the present time, all present and future indebtedness that is owed by the ORIGINAL OBLIGORS to the BANK under the ORIGINAL LOAN DOCUMENTS is secured by first priority duly perfected security interests and liens in, to and against the ORIGINAL COLLATERAL. As an additional part of this AGREEMENT, the OBLIGORS acknowledge and confirm that all present and future indebtedness that is owed by the OBLIGORS to the BANK under the LOAN DOCUMENTS shall hereafter be secured by first priority duly perfected security interests and liens in, to and against the ORIGINAL COLLATERAL, by second priority duly perfected liens and security interests in,

to and against all of the BORROWER'S other assets and by third priority indemnity deed of trust liens against the "██████████ PROPERTIES" described in Section █ below. By way of this AGREEMENT, the BORROWER hereby grants and confirms to the BANK a first priority duly perfected lien and security interest in, to and against the ORIGINAL COLLATERAL and a second priority duly perfected security interest and lien in, to and against all of the BORROWER'S other present and future assets including, without limitation, all present and future inventory, accounts, documents, chattel paper, deposit accounts, investment property, equipment, general intangibles, instruments, causes of action (including tort claims) and other assets of the BORROWER and all proceeds and products thereof and all business records, documents and information pertaining thereto. Prior to the execution of this AGREEMENT by the parties hereto, the OBLIGORS shall have taken such steps and executed and recorded such documents as are necessary to release any liens against the ORIGINAL COLLATERAL which are senior in priority to the BANK'S liens and any liens against the "██████████ PROPERTIES" described in Section █ below that preclude the BANK from obtaining third priority indemnity deed of trust liens against the same (collectively, the "RELEASE DOCUMENTS"). The OBLIGORS shall deliver recorded copies of the RELEASE DOCUMENTS to the BANK simultaneously with the execution of this AGREEMENT by the parties hereto, but in no event later than 5:00 p.m. on ██████████. The OBLIGORS shall also immediately execute and deliver such additional documents in favor of the BANK, and the BANK shall be entitled and authorized to prepare and record such documents including, without limitation, deeds of trust, security agreements, financing statements and other documents as are necessary to maintain, confirm and/or perfect the BANK'S security interests and liens in, to and against the COLLATERAL as provided for above.

10. Confirmation of Intercreditor Agreement; Subordination of Other Loans; Miscellaneous. The INTERCREDITOR AGREEMENT shall remain in place and in full force and effect and shall be fully enforceable by the BANK until all present and future indebtedness and obligations that are owed to the BANK under the LOAN DOCUMENTS have been fully satisfied. Simultaneously with the execution of this AGREEMENT by the parties hereto, but in no event later than 5:00 p.m. on ██████████, the OBLIGORS shall cause ██████████ to execute and deliver a Letter Agreement in favor of the BANK, in a form and substance that is acceptable to the BANK in all respects ("LETTER AGREEMENT"), and pursuant to which the ██████████ shall acknowledge and agree, *inter alia*, that the INTERCREDITOR AGREEMENT shall remain in place and fully enforceable by the BANK, notwithstanding the execution of this AGREEMENT by the parties hereto and the various agreements of the BANK and the OBLIGORS as set forth herein, that the BANK shall retain a first priority duly perfected security interest and lien in, to and against the ORIGINAL COLLATERAL, notwithstanding the execution of this AGREEMENT by the parties hereto and the various agreements of the BANK and the OBLIGORS as set forth herein and that any lien ██████████ holds against the ORIGINAL COLLATERAL shall at all times constitute a second priority lien until all indebtedness and obligations that are owed by the OBLIGORS to the BANK under the LOAN DOCUMENTS are fully satisfied. The OBLIGORS also agree as follows:

(a) during the pendency of this AGREEMENT, the OBLIGORS will not loan or advance any funds to any individual or entity, without first obtaining the prior written consent of the BANK;

(b) during the pendency of this AGREEMENT, the BORROWER shall not: (a) pay any form of a dividend or distribution to any of its stockholders or members; or (b) repay any portion of any loan(s) or indebtedness due and payable from the BORROWER to any other



OBLIGOR or to any of their principals, officers, stockholders or directors, except for salaries, benefits and other similar compensation to [REDACTED];

(c) all amounts now or hereafter due and owing from any OBLIGOR hereunder to any other OBLIGOR (collectively, the "SUBORDINATED LOANS"), and all related liens and security interests, are hereby subordinated, in all respects, to all indebtedness and obligations that are now or hereafter due and owing from the OBLIGORS to the BANK under the LOAN DOCUMENTS and to all present and future liens held by the BANK in, to and against the COLLATERAL;

(d) No payments shall be made on any of the SUBORDINATED LOANS until such time as all indebtedness and obligations that are now or hereafter owed to the BANK under the LOAN DOCUMENTS have been fully satisfied; and

(e) the OBLIGORS agree to immediately execute and deliver such subordination agreements and other documents to and in favor of the BANK with respect to the SUBORDINATED LOANS as the BANK deems necessary, all in a form and substance that is acceptable to the BANK in all respects.

11. Additional Collateral. Simultaneously with the execution of this AGREEMENT by the parties hereto, but in no event later than 5:00 p.m. on [REDACTED] the OBLIGORS shall take such steps, execute such documents and do all other things necessary to cause the BANK to be granted third priority indemnity deed of trust liens and security interests in, to and against the properties generally known as [REDACTED] (" [REDACTED] PROPERTIES"), to secure payment and performance of all indebtedness and obligations now or hereafter owed to the BANK under the NEW GUARANTY and the other LOAN DOCUMENTS, plus attorneys' fees and expenses incurred by the BANK enforcing such third priority liens, such third priority indemnity deed of trust liens being subject to prior liens in favor of [REDACTED] and the [REDACTED] securing the maximum principal sum of [REDACTED] as to [REDACTED] and [REDACTED] as to [REDACTED]

The various documents to be executed and delivered to the BANK pursuant to this Section (collectively, the "NEW SECURITY DOCUMENTS") shall be in a form and substance that are acceptable to the BANK in all respects and shall contain such terms and conditions as the BANK may require. The BANK shall be entitled to record the NEW SECURITY DOCUMENTS, at the OBLIGORS' expense, immediately after the NEW SECURITY DOCUMENTS are executed and delivered to the BANK. The various liens being granted to the BANK pursuant to this Section or any other Section of this AGREEMENT shall be in addition to all other liens held by the BANK in, to and against all ORIGINAL COLLATERAL and shall not in any way impair, affect or diminish the liens and security interests held by the BANK in, to and against the ORIGINAL COLLATERAL. Upon the occurrence of an EVENT OF DEFAULT (as hereafter defined) hereunder, the BANK shall be immediately entitled to exercise and enforce all of its rights and remedies under the LOAN DOCUMENTS and applicable law with respect to the OBLIGORS, the [REDACTED] PROPERTIES, the other COLLATERAL and the OBLIGORS' other respective assets.

12. Sale of the Assets. During the term of this AGREEMENT, the OBLIGORS shall use every effort to sell the BORROWER'S assets at prices and pursuant to such other terms and conditions as are acceptable to the BANK in all respects and to close in connection therewith on or before 5:00 p.m. on [REDACTED]. On or before 5:00 p.m. on [REDACTED], the OBLIGORS shall execute and deliver an Asset Purchase Agreement relating to the

BORROWERS' assets which provides for a sale of the BORROWERS' assets to a third party purchaser at prices and pursuant to such other terms and conditions as are acceptable to the BANK in all respects and for closing in connection with such sale on or before 5:00 p.m. on [REDACTED] shall deliver a fully executed copy of such Asset Purchase Agreement to the BANK and the failure to comply with any of these requirements shall constitute an immediate EVENT OF DEFAULT (as hereafter defined) hereunder. If the OBLIGORS are successful in their efforts at selling the BORROWER'S assets as aforesaid, all net proceeds arising from the sale of the BORROWER'S assets, after payment of closing costs and other deductions hereafter approved by the BANK, shall be paid to the BANK simultaneously with the closing to be held in connection with such sale, for application by the BANK to reduce the indebtedness that is owed to the BANK under the LOAN DOCUMENTS in such order, proportion or manner as the BANK, in its sole and absolute discretion, deems appropriate. On the [REDACTED] day of each month during the term of this AGREEMENT, the OBLIGORS shall provide the BANK with a written status report setting forth their progress in selling the various assets of the BORROWER as contemplated herein, and shall also immediately provide the BANK with copies of all letters of intent, contracts of sale, asset purchase agreements and other documents which any of the OBLIGORS execute, deliver or receive in connection with their efforts at selling the BORROWER'S assets as described in this Section. Notwithstanding the forgoing, the OBLIGORS understand and agree that their respective obligations to make the payments called for in Section [REDACTED] or any other Section of this AGREEMENT or any other LOAN DOCUMENT shall not be contingent upon the OBLIGORS' ability to sell the BORROWER'S assets as contemplated in this Section.

13. Alternative Financing. During the term of this AGREEMENT, the OBLIGORS shall also obtain financing from sources other than the BANK ("ALTERNATIVE FINANCING SOURCES") in an amount that is sufficient to satisfy all indebtedness and obligations that are owed by the OBLIGORS to the BANK under the LOAN DOCUMENTS and shall use all loan proceeds arising from such financing to pay the BANK all indebtedness and obligations that are owed to the BANK under the LOAN DOCUMENTS on or before the earlier of closing in connection with such financing or 5:00 p.m. on [REDACTED]. On or before 5:00 p.m. on [REDACTED] the OBLIGORS shall provide the BANK with a fully executed non-contingent written commitment for financing from an ALTERNATIVE FINANCING SOURCE that is acceptable to the BANK in all respects and that provides for financing to the OBLIGORS in an amount that is sufficient to pay the BANK all indebtedness and obligations that are now or hereafter owed by the OBLIGORS to the BANK under the LOAN DOCUMENTS and for a closing in connection therewith prior to 5:00 p.m. on [REDACTED]. The failure of the OBLIGORS to a) seek or obtain the above-described financing, b) supply the BANK with the fully executed non-contingent written commitment for financing called for above prior to 5:00 p.m. on [REDACTED], or c) to otherwise comply with the terms and conditions of this Section, shall constitute an immediate EVENT OF DEFAULT (as hereafter defined) under this AGREEMENT. During the term of this AGREEMENT, the OBLIGORS shall keep the BANK apprised of their progress in obtaining the above-described financing and shall provide the BANK with a written status report on the [REDACTED] day of each month during the term of this AGREEMENT listing the ALTERNATIVE FINANCING SOURCES from whom the OBLIGORS have sought financing, how each such ALTERNATIVE FINANCING SOURCE has responded to the OBLIGORS' application for financing, whether the OBLIGORS believe that the requested financing will be provided and if so, the amount, applicable terms and the expected closing date for such financing. In addition, during the term of this AGREEMENT, the OBLIGORS shall immediately provide the BANK with copies of all letters of intent, commitment letters and other documents which are submitted, prepared, and/or executed in connection with the OBLIGORS' efforts at obtaining financing referenced above. It is understood and agreed, however, that the

OBLIGORS' respective obligations to make the payments called for in Section [REDACTED] or any other Section of this AGREEMENT, shall not be contingent upon the OBLIGORS' ability to obtain the financing referenced in this Section.

14. Modification of Floor Plan Line of Credit. The FLOOR PLAN LINE OF CREDIT and the ORIGINAL LOAN DOCUMENTS evidencing, securing or otherwise documenting the same are hereby amended and modified such that between the date of this AGREEMENT and the earlier of 3:00 p.m. on [REDACTED] closing in connection with any sale of the BORROWER'S assets as contemplated in Section [REDACTED] above, closing in connection with any refinance of the indebtedness owed to the BANK under the LOAN DOCUMENTS as contemplated in Section [REDACTED] above, or the occurrence of an EVENT OF DEFAULT (as hereafter defined) under this AGREEMENT, the BANK will continue making certain advances to the BORROWER under the FLOOR PLAN LINE OF CREDIT and the various LOAN DOCUMENTS evidencing the same, subject, however, to the following terms, covenants and limitations:

(a) As a condition precedent to the BORROWER'S right to receive any further advances from the BANK under the FLOOR PLAN LINE OF CREDIT and all related LOAN DOCUMENTS, no "EVENT OF DEFAULT" (as hereafter defined) shall hereafter occur under this AGREEMENT or any other LOAN DOCUMENT.

(b) From the date of this AGREEMENT forward, the total indebtedness owed to the BANK under the FLOOR PLAN LINE OF CREDIT and all LOAN DOCUMENTS evidencing the same shall not exceed the total sum of [REDACTED];

(c) From the date of this AGREEMENT forward, the total indebtedness owed to the BANK under the FLOOR PLAN LINE OF CREDIT and all LOAN DOCUMENTS evidencing the same relating to the BORROWER'S purchase of new [REDACTED] vehicle inventory shall not exceed the total sum of [REDACTED];

(d) Any further advances from the BANK to the BORROWER under the FLOOR PLAN LINE OF CREDIT and all related LOAN DOCUMENTS to fund the BORROWER'S purchase of the new [REDACTED] vehicle inventory shall be: (i) limited to such amounts that will not cause the balance due under the LOAN DOCUMENTS related to the BORROWER'S purchase of new vehicle inventory to exceed the sum of [REDACTED]; and (ii) shall be further limited to such amounts and to such purchases that are acceptable to the BANK in all respects;

(e) All of the terms, covenants and conditions set forth in the ORIGINAL LOAN DOCUMENTS that are applicable to any request for an advance under the FLOOR PLAN LINE OF CREDIT, to the extent not modified herein, shall also be applicable to any advance hereafter requested by the BORROWER under the FLOOR PLAN LINE OF CREDIT and must be strictly complied with by the BORROWER as a condition precedent to the BORROWER'S right to receive any further advances from the BANK under the FLOOR PLAN LINE OF CREDIT;

(f) All advances hereafter made by the BANK to the BORROWER under the FLOOR PLAN LINE OF CREDIT shall constitute additional indebtedness due and owing to the BANK under the LOAN DOCUMENTS, shall be secured by first priority duly perfected security interests and liens in, to and against the ORIGINAL COLLATERAL, by secured priority duly perfected liens and security interests in, to and against the BORROWER'S other assets and by

third priority indemnity deed of trust liens against the ██████████ PROPERTIES, and shall be due and payable from OBLIGORS to the BANK as provided for below; and

(g) Upon the earlier of 3:00 p.m. on ██████████, the occurrence of an EVENT OF DEFAULT (as hereafter defined) under this AGREEMENT or any other LOAN DOCUMENT, closing in connection with any sale of the BORROWER'S assets as contemplated in Section █ above or closing in connection with any refinance of the indebtedness owed to the BANK under the LOAN DOCUMENTS as contemplated in Section █ above, the revolving nature of the FLOOR PLAN LINE OF CREDIT shall automatically terminate and the BANK, thereafter, shall not be obligated to make any further advances to the BORROWER or to any other person or entity under the FLOOR PLAN LINE OF CREDIT or any of the LOAN DOCUMENTS evidencing the same.

*[IF TERMINATING A LINE OF CREDIT FACILITY, INCLUDE THIS PROVISION:*

*No Further Advances Under Line of Credit. The OBLIGORS acknowledge and agree that due to the matured status of the LINE OF CREDIT, the revolving nature of the LINE OF CREDIT has terminated and as a result thereof, MARYLAND PAPER, hereafter, shall not be entitled to receive any further advances from the BANK under the LINE OF CREDIT or any of the ORIGINAL LOAN DOCUMENTS evidencing the same. The parties hereto further acknowledge and agree that the above-described termination of the revolving nature of the LINE OF CREDIT was valid, proper and binding and shall not create any defense, offset or counterclaim in favor of any of the OBLIGORS with respect to their respective obligations to the BANK under the LOAN DOCUMENTS.]*

15. Payment of Administrative Fees, Audit Fees, and Other Fees and Expenses Related to Line of Credit, Bank Accounts With the Bank, etc. At all times hereafter, the OBLIGORS shall pay the BANK all administrative fees, cash management fees and other fees and charges called for in the LOAN DOCUMENTS, any fees relating to the "BANK ACCOUNTS" (as hereafter defined) of the BORROWER referenced below, and any other fees relating to cash management services and/or collateral control monitoring services provided by the BANK to the OBLIGORS, when and as such fees and charges are due. These charges shall include, without limitation, a monthly charge of \$500.00 payable from the BORROWER to the BANK for collateral monitoring services.

16. Banks Accounts; Collateral Account; Deposits; Collateral Collections and Applications Thereof; Overdrafts; Miscellaneous. The OBLIGORS agree as follows with respect to the various bank accounts of the BORROWER and the other matters addressed below:

(a) Until all indebtedness and obligations that are now or hereafter owed to the BANK under the LOAN DOCUMENTS have been fully satisfied, the BORROWER shall maintain its operating account ("OPERATING ACCOUNT") and all of its other bank accounts with the BANK (collectively with the OPERATING ACCOUNT, the "BANK ACCOUNTS");

(b) From the date of this AGREEMENT forward, the OBLIGORS shall take such steps, execute such documents and do all other things necessary to ensure that all present and future accounts, receivable collections, ACH transfers, checks, credit card collections, other collections and cash of the BORROWER arising from the sale or other disposition of the ORIGINAL COLLATERAL including, without limitation, all proceeds arising from the sale or other disposition of all present and future new ██████ vehicle inventory of the

BORROWER and all proceeds arising from the sale or other disposition of any of the other ORIGINAL COLLATERAL, are deposited and/or transferred into the collateral account at the BANK established in connection with the FLOOR PLAN LINE OF CREDIT ("COLLATERAL ACCOUNT") or tendered directly to the BANK for application as provided for below. The BANK, on a daily basis, shall be immediately entitled to: (i) debit the COLLATERAL ACCOUNT for all amounts on deposit therein which constitute or represent readily available funds or proceeds arising from the sale or other disposition of present or future new [REDACTED] vehicle inventory of the BORROWER to the extent of the amounts the BANK financed with respect to such vehicle inventory, and the BANK may immediately apply the amount of all such debits to reduce the indebtedness that is now or hereafter owed to the BANK under the FLOOR PLAN LINE OF CREDIT and all related LOAN DOCUMENTS in such order, proportion or manner as the BANK, in its sole and absolute discretion, deems appropriate; and/or (ii) apply all amounts tendered to the BANK pursuant to this Section, to the extent of the amounts the BANK financed with respect to the present or future new [REDACTED] vehicle inventory of the BORROWER to which such amounts relate, to reduce the indebtedness that is owed to the BANK under the LOAN DOCUMENTS in such order, proportion or manner as the BANK, in its sole and absolute discretion, deems appropriate. All remaining readily available funds on deposit in the COLLATERAL ACCOUNT or not applied by the BANK as aforesaid, after the BANK debits or applies the portion payable to the BANK as indicated above, will be transferred on a daily basis into the BORROWER'S OPERATING ACCOUNT at the BANK and shall only be used by the BORROWER to pay its ordinary and necessary business expenses. The OBLIGORS understand and agree that the BORROWER shall have no access to the COLLATERAL ACCOUNT or to any of the funds on deposit therein and that the BORROWER shall have no check writing, wiring or other withdrawal capabilities with respect COLLATERAL ACCOUNT;

(c) The OBLIGORS understand and agree that the BANK will only honor presentments made against the BANK ACCOUNTS if there are sufficient readily available funds on deposit in the BANK ACCOUNTS to cover the same and that the OBLIGORS will be in default under this AGREEMENT if a presentment is hereafter made against any of the BANK ACCOUNTS and there are not sufficient readily available funds on deposit therein to cover the presentment or if the OBLIGORS otherwise fail to comply with any of the other terms or conditions of this Section.

17. Submission of Financial Information and Documentation; Periodic Audits and Field Examinations. At the time of the execution of this AGREEMENT by the parties hereto, but in no event later than 5:00 p.m. on [REDACTED], the OBLIGORS, as a condition precedent to the BANK'S obligation to execute and deliver this AGREEMENT to the OBLIGORS, shall cause the BANK to be provided with the following financial information and documentation:

(a) a copy of a current financial statement for the BORROWER, in a form that is acceptable to the BANK and containing such information and detail as the BANK may require;

(b) a copy of the most recent monthly [REDACTED] statements submitted by the BORROWER to [REDACTED];

(c) copies of documents relating to any litigation pending against any of the OBLIGORS;

(d) copies of current accounts receivable and accounts payable agings for the BORROWER; and

(e) documentation evidencing the OBLIGORS' compliance with Section [REDACTED] below.

Furthermore, during the term of this AGREEMENT, the OBLIGORS shall provide the BANK with the following additional financial information and documentation on the dates hereinafter set forth:

(aa) On each business day during the term of this AGREEMENT, the OBLIGORS shall provide the BANK with a report showing all new [REDACTED] vehicles of the BORROWER that were sold or purchased during the previous business day and the source of all funds deposited in the COLLATERAL ACCOUNT during the previous business day;

(bb) on the [REDACTED] day of each month during the term of this AGREEMENT, the BORROWER shall provide the BANK with copies of the BORROWER'S most recently submitted monthly dealership statement(s) to [REDACTED];

(cc) on the [REDACTED] day of each month during the term of this AGREEMENT, the BORROWER shall also provide the BANK with copies of current accounts receivable and accounts payable agings for the BORROWER;

(dd) On a daily basis during the term of this AGREEMENT, the BORROWER shall provide the BANK with a report setting forth: (i) the specific vehicle COLLATERAL and other COLLATERAL to which deposits into the COLLATERAL ACCOUNT relate; (ii) all new [REDACTED] vehicle inventory of the BORROWER sold by the BORROWER during the previous business day; (iii) all new [REDACTED] vehicle inventory ordered by the BORROWER during the previous business day; and (iv) all expenses paid by the BORROWER during the previous business day. Attached to each report shall be back-up documentation supporting each of the matters covered therein. Furthermore, on a daily basis during the term of this AGREEMENT, the BORROWER shall also provide the BANK any reports that the BORROWER previously hereto has been submitting to the BANK on a daily basis and any other reports the BANK may require to monitor its COLLATERAL and the BORROWER'S business operations; and

(ee) the OBLIGORS shall also provide the BANK with all other financial information and documentation called for in the ORIGINAL LOAN DOCUMENTS, when and as due thereunder, and shall also provide the BANK with all other financial information, documentation and other reporting which the BANK may request from time to time from any of the OBLIGORS. All information and documentation to be submitted by the OBLIGORS to the BANK pursuant to this Section shall be in a form and content that is acceptable to the BANK and shall contain such information and detail as the BANK may require.

During the term of this AGREEMENT, the BANK, at the expense of the OBLIGORS, and at such frequency as the BANK, in its sole and absolute discretion, deems appropriate, shall also be entitled to:

(aaa) conduct floor plan audits of the BORROWER, the assets of the BORROWER which serve as collateral for the indebtedness that is owed to the BANK under the LOAN DOCUMENTS, and such other matters as the BANK deems appropriate. The OBLIGORS shall fully assist and cooperate with the BANK and its representatives during the

course of each such floor plan audit and shall provide the BANK and its representatives with such information, documentation and assistance during each such audit as the BANK or its representatives may request including, without limitation, ensuring the presence of all of the BORROWER'S demonstrator vehicles and providing the location of any off-premises vehicles. The OBLIGORS shall immediately reimburse the BANK for the cost of each such audit within (5) business days of the BANK'S submission of a bill for same to the OBLIGORS; and

(bbb) conduct periodic field examinations and other audits of the BORROWER, the BORROWER'S books and records and the BORROWER'S business, at such times and intervals and in such manner and fashion as the BANK, in its sole and absolute discretion deems appropriate. The OBLIGORS shall fully and entirely cooperate with the BANK and its representatives during the course of each such field examination and other audit, shall immediately provide the BANK and its representatives with copies of, or access to such financial information and documents relating to the BORROWER and its business as the BANK and its representatives may require or that may be necessary to conduct such examination or other audit, and shall immediately reimburse the BANK for the BANK'S cost of each such field examination or other audit within (5) business days of the BANK'S submission of a bill for the same to the OBLIGORS.

*[IF EMPLOYING A CONSULTANT, INSERT THIS PROVISION:*

*Consultant. The BANK, at the expense of the OBLIGORS, has retained the services of an independent consultant ("CONSULTANT") to, during the term of this AGREEMENT or such shorter time period as BANK, in its sole and absolute discretion, deems appropriate: (a) conduct a diagnostic review for the BANK of the BORROWERS, the BORROWERS' businesses and the BORROWERS' books, records and other financial papers; (b) review and analyze for the BANK various financial information and other matters related to the BORROWERS, the BORROWERS' business operations and the BANK'S COLLATERAL; (c) conduct on-site monitoring for the BANK of the BORROWERS and their business operations; (d) monitor the BANK'S COLLATERAL and the BORROWERS' practices with respect to the same; and (d) to perform various other monitoring and consultant type tasks for the BANK. Throughout the entire term of this AGREEMENT, the OBLIGORS shall: (aa) fully and completely cooperate with CONSULTANT during the course of the CONSULTANT'S on-site inspections of the BORROWERS and their business operations, the CONSULTANT'S review of the BORROWERS' financial information, the CONSULTANT'S monitoring of the BORROWERS' business operations and the BANK'S COLLATERAL and the CONSULTANT'S performance of its other tasks related to the BORROWERS and their businesses; and (bb) shall immediately provide the CONSULTANT with access to BORROWERS' business operations, employees and all books, records and other financial information relating to the BORROWERS, the BORROWERS' business operations and the BANK'S COLLATERAL as the CONSULTANT may request. By way of this AGREEMENT, the OBLIGORS agree to reimburse the BANK for all charges and expenses of CONSULTANT for performing the tasks referenced herein and such reimbursement shall occur within 5 business days after the BANK provides the BORROWERS with an invoice from CONSULTANT for any such charges or expenses.]*

18. Payment of the Indebtedness Owed to the Bank Under the Loan Documents. The indebtedness and obligations that are owed to the BANK under the LOAN DOCUMENTS including, without limitation, all principal, accrued and unpaid interest, late charges, FORBEARANCE FEES, prepayment fees, costs, expenses and attorneys' fees owed thereunder, shall be paid to the BANK in the following manner:

(a) Initial Payments. Simultaneously with the execution of this AGREEMENT by the parties hereto, but in no event later than 5:00 p.m. on [REDACTED], the OBLIGORS shall tender or cause to be tendered to the BANK, in immediately available funds, the following payments:

(i) A payment sufficient in amount to cover all costs, expenses and attorneys' fees due and owing to the BANK under the LOAN DOCUMENTS as of [REDACTED]; and

(ii) An additional payment sufficient in amount to cover all scheduled monthly payments of interest or principal and interest due and owing to the BANK under the ORIGINAL LOAN DOCUMENTS as of [REDACTED].

(b) Interim and Final Payments-Floor Plan Line of Credit.

(i) Commencing on [REDACTED] and continuing on the first (1<sup>st</sup>) day of each month thereafter up to and including [REDACTED], the BORROWER shall tender to the BANK, in immediately available funds, monthly interest payments equal to all accrued and unpaid interest then due and owing to the BANK under the FLOOR PLAN LINE OF CREDIT NOTE and all related LOAN DOCUMENTS, when and as each such monthly payment comes due;

(ii) Furthermore, during the term of this AGREEMENT, the OBLIGORS shall tender such payments to the BANK, in immediately available funds, as are necessary to cause the BORROWER to be in compliance with the terms of Section [REDACTED] above;

(iii) Moreover, from the date of this AGREEMENT forward, the OBLIGORS shall also cause the BANK to receive all other payments called for under the FLOOR PLAN LINE OF CREDIT NOTE, this AGREEMENT and all other related LOAN DOCUMENTS, when and as due hereunder or thereunder. Such payments shall include, without limitation, the payments called for or contemplated in Sections [REDACTED] of this AGREEMENT, when and as due under those Sections;

(iv) Additionally, during the term of this AGREEMENT, the BORROWER shall tender immediate payment to the BANK of all proceeds arising from the sale or other disposition of all present and future new [REDACTED] vehicle inventory of the BORROWER, when and as such proceeds are received by the BORROWER or as otherwise provided for in Section [REDACTED] above;

(v) The BORROWER shall also pay the BANK all administrative fees, expenses and other charges referenced in Sections [REDACTED] above, when and as due under such Sections or the various documents referenced therein; and

(vi) On or before the earlier of 5:00 p.m. on [REDACTED], closing in connection with the sale of the BORROWER'S assets as required in Section [REDACTED] above, closing in connection with any refinance of the indebtedness owed to the BANK under the LOAN DOCUMENTS as contemplated in Section [REDACTED] above or the occurrence of an EVENT OF DEFAULT (as hereafter defined) hereunder, the OBLIGORS shall tender to the BANK, in immediately available funds, a payment equal to all remaining indebtedness that is owed at that time to the BANK under the FLOOR PLAN LINE OF CREDIT NOTE and all other LOAN DOCUMENTS including, without limitation, all principal, accrued and unpaid interest, late



charges, FORBEARANCE FEES, prepayment fees, costs, expenses and attorneys' fees owed thereunder.

(c) Miscellaneous Payment Terms.

(i) Unless otherwise provided for herein, all payments called for in this Section or any other Section of this AGREEMENT or in any other LOAN DOCUMENT may be applied by the BANK in such order, proportion or manner as the BANK, in its sole and absolute discretion, deem appropriate.

19. Due Diligence. At the present time, the BANK are performing certain due diligence with respect to the OBLIGORS and the COLLATERAL, including, without limitation, obtaining certificates of good standing for the BORROWER and the CORPORATE GUARANTOR (collectively, the "CORPORATE OBLIGORS"), obtaining UCC, judgment and tax lien reports for the OBLIGORS, obtaining a title bring-to-date for the RAILROAD AVENUE PROPERTIES and certain other due diligence. The cost and expense of this due diligence shall be the sole and absolute responsibility of the OBLIGORS and shall be paid for by the OBLIGORS to the BANK in accordance with the terms and conditions of Sections [REDACTED] above. In addition, during the term of this AGREEMENT, the BANK, at the expense of the OBLIGORS, shall be entitled to conduct such additional due diligence with respect to the OBLIGORS and the COLLATERAL as the BANK, in its sole and absolute discretion, deems necessary and at such times as the BANK deems appropriate. The cost of conducting such due diligence shall also be the sole and absolute responsibility of the OBLIGORS and shall be paid for by the OBLIGORS to the BANK in accordance with the terms and conditions of Sections [REDACTED] above or on demand. The OBLIGORS shall fully assist and cooperate with the BANK in obtaining or conducting any of the due diligence contemplated herein. All due diligence which the BANK orders and obtain pursuant to this Section shall be conducted by companies or person(s) that are acceptable to the BANK in all respects and shall be set forth in reports that are acceptable to the BANK in form and content, and the results of all such due diligence and the reports prepared in connection therewith must otherwise be acceptable to the BANK. The OBLIGORS acknowledge and agree that they will not be entitled to receive any copies or the substance of any reports prepared for the BANK in connection with any due diligence the BANK performs or obtains pursuant to this Section.

20. Taxes; Lien Payoffs. The OBLIGORS represent and warrant to the BANK that: (a) as of the date of this AGREEMENT, the OBLIGORS are current in their tax payments to the Internal Revenue Service, the State of Maryland and all other taxing authorities ("TAXING AUTHORITIES") with respect to all forms of taxes including, without limitation, federal and state income taxes, real estate property taxes, withholding taxes, personal property taxes and sales taxes; and (b) that during the pendency of this AGREEMENT, the OBLIGORS will make all payments which the OBLIGORS are required to make to the TAXING AUTHORITIES with respect to all forms of taxes, when and as said payments are due.

21. Insurance. The OBLIGORS shall maintain fire, casualty and other hazard insurance with respect to all of the COLLATERAL, in amounts and under such insurance policies as are acceptable to the BANK. Simultaneously with the execution of this AGREEMENT by the parties hereto, but in no event later than 5:00 p.m. on [REDACTED], the OBLIGORS shall provide the BANK with documentation evidencing the existence of all such insurance policies. In addition, in the event that the BANK has not been named as a sole loss payee, mortgagee or additional insured under each such policy, as the case may be, the

OBLIGORS shall take all steps as are necessary to cause the BANK to be named as such under each such insurance policy and copies of documents evidencing each such amendment shall be provided to the BANK at the time of the execution of this AGREEMENT by the parties hereto or at such other time as the BANK may agree to. All insurance proceeds payable from any such insurance policies, and all insurance proceeds payable in connection with or as a result of any of the COLLATERAL, shall be paid directly to the BANK to the extent of the indebtedness and obligations that are owed to the BANK under the LOAN DOCUMENTS and will be applied by the BANK to reduce such indebtedness and obligations in such order, proportion or manner as the BANK, in its sole and absolute discretion, deem appropriate.

22. Maintaining Collateral; Reduction of Demonstrator Vehicle Inventory. At all times hereafter, the OBLIGORS shall maintain the [REDACTED] PROPERTIES and all other COLLATERAL in good repair and shall perform such maintenance and repairs with respect to the [REDACTED] PROPERTIES and the other COLLATERAL as is customarily performed in connection with assets of these types.

23. Further Assurances. The OBLIGORS agree to execute and deliver to the BANK such other and further documents as may, from time to time, in the sole opinion of the BANK or its counsel, be necessary, convenient or proper to carry out the terms and conditions of this AGREEMENT and the other LOAN DOCUMENTS, all in a form and substance acceptable to the BANK PARTIES.

24. Representations And Warranties. The OBLIGORS severally represent and warrant to the BANK as follows:

(a) To the best of their knowledge, all information, documents reports, statements, financial statements and data submitted by or on behalf of the OBLIGORS in connection with this AGREEMENT are true, accurate and complete in all material respects as of the date made and contain no knowingly false, incomplete or misleading statements;

(b) To the best of their knowledge, information and belief, the making and performance of this AGREEMENT will not immediately, or with the passage of time, the giving of notice or both: (i) violate the CORPORATE OBLIGORS' charters, by-laws or other organizational documents; (ii) violate any laws or result in a default under any contract, agreement, or instrument to which any of the OBLIGORS is a party or by which any of the OBLIGORS or any of their respective property is bound; or (iii) result in the creation or imposition of any security interest in, or lien or encumbrance upon, any assets of any of the OBLIGORS except in favor of the BANK or as otherwise provided for herein;

(c) The CORPORATE OBLIGORS are duly organized, validly existing, and in good standing under the laws of the State(s) in which they are incorporated or organized, and their operations and affairs have been effective and validly commenced;

(d) The entry into this AGREEMENT by the CORPORATE OBLIGORS has been validly and effectively approved by their respective directors, officers, stockholders, members or partners as may be required by the CORPORATE OBLIGORS' organizational documents, all amendments thereto and applicable law;

(e) The person(s) signing this AGREEMENT on behalf of the CORPORATE OBLIGORS is/are authorized under the CORPORATE OBLIGORS' organizational documents,

any amendments thereto, any related documents, and applicable law to execute this AGREEMENT and any other related documents on behalf of the CORPORATE OBLIGORS;

(f) This AGREEMENT, the LOAN DOCUMENTS as modified by this AGREEMENT, and all other documents and instruments executed by the OBLIGORS as called for in or contemplated by this AGREEMENT, are valid and binding obligations, fully enforceable against the OBLIGORS in accordance with their respective terms, and as to which the OBLIGORS have no setoffs, defenses or counterclaims;

(g) None of the OBLIGORS is in violation of any applicable law;

(h) There is no action, suit or proceeding pending against any of the OBLIGORS; and

(i) None of the OBLIGORS expects any material adverse change in their respective assets, liabilities, properties, businesses or conditions, financial or otherwise.

25. Events Of Default. The following shall constitute events of default under this AGREEMENT and additional events of default under the LOAN DOCUMENTS (individually, "EVENT OF DEFAULT" and collectively, the "EVENTS OF DEFAULT"):

(a) The failure of any of the OBLIGORS to make, in a timely manner, any of the payments which they are required to tender to the BANK pursuant to this AGREEMENT or any other LOAN DOCUMENT, time being of the essence;

(b) The failure of any of the OBLIGORS to do anything they are required to do under this AGREEMENT or under any other LOAN DOCUMENT as modified by this AGREEMENT;

(c) Any of the OBLIGORS doing anything they are prohibited from doing under this AGREEMENT or under any other LOAN DOCUMENT as modified by this AGREEMENT;

(d) Any violation or breach by any of the OBLIGORS of any representation, covenant, warranty or obligation contained in this AGREEMENT or in any other LOAN DOCUMENT as modified by this AGREEMENT, or the failure of any OBLIGOR to comply with any term or condition of this AGREEMENT or any other LOAN DOCUMENT as modified by this AGREEMENT;

(e) The occurrence of a default under any agreement under which any of the OBLIGORS is a party;

(f) Any of the OBLIGORS providing the BANK with any information that is not true, accurate and complete to the best of the OBLIGORS' respective knowledge, information and belief;

(g) The entry of a judgment or lien against any of the OBLIGORS which is in excess of Ten Thousand Dollars (\$10,000.00) in amount, excluding costs, expenses and attorneys' fees;

(h) The attachment of any asset of any of the OBLIGORS;

(i) The commencement of a voluntary or involuntary federal bankruptcy proceeding, state insolvency proceeding or other similar type of proceeding by or against any of the OBLIGORS;

(j) The death of an OBLIGOR who is a natural person;

(k) The occurrence of any event which the BANK deems to impair any of the COLLATERAL in any respect including, without limitation, the value thereof;

(l) The recordation of any federal, state or local tax lien against any of the OBLIGORS;

(m) The occurrence of a material adverse change in the financial condition of any of the OBLIGORS after the date of the execution of this AGREEMENT; or

(n) The issuance of a criminal indictment against any OBLIGOR.

26. Incorporation; Limited Modification; No Cure or Grace Periods, Etc. The terms and conditions of the ORIGINAL LOAN DOCUMENTS and all other LOAN DOCUMENTS are incorporated herein by reference and made a part hereof as if fully set forth herein. **All cure periods or grace periods provided for in the ORIGINAL LOAN DOCUMENTS, and all provisions in the ORIGINAL LOAN DOCUMENTS which required the BANK to provide notice to the OBLIGORS upon the occurrence of a default thereunder, are hereby deleted and shall no longer have any force or effect.** Except as modified by this AGREEMENT, the parties hereto acknowledge and agree that all other terms and conditions of the ORIGINAL LOAN DOCUMENTS shall remain unchanged, in full force and effect and are hereby ratified and confirmed by the parties thereto in all respects. From the date of this AGREEMENT forward, the OBLIGORS shall strictly comply with the terms and conditions of the ORIGINAL LOAN DOCUMENTS to the extent not modified herein. In the event of any inconsistencies between the terms and conditions of this AGREEMENT and the terms and conditions of any other LOAN DOCUMENT, the terms and conditions of this AGREEMENT shall govern and control.

27. Waivers. The BANK may at any time or from time to time waive all or any of its rights under this AGREEMENT or under any other LOAN DOCUMENT, but any such waiver or indulgence by the BANK at any time or from time to time shall not constitute, unless specifically so expressed by the BANK PARTIES, in writing, a future waiver of performance or exact performance by the OBLIGORS.

28. No Novation or Impairment of Rights. This AGREEMENT and any documents executed, delivered and/or recorded pursuant to this AGREEMENT shall not cause a novation of any of the ORIGINAL LOAN DOCUMENTS, nor shall they extinguish, terminate or impair the OBLIGORS', [REDACTED] or any other person or entities' respective obligations to the BANK under the LOAN DOCUMENTS. In addition, this AGREEMENT and any documents executed, delivered and/or recorded pursuant to this AGREEMENT shall not release, affect or impair the validity, priority or enforceability of any security interests or liens held by the BANK in any assets of the OBLIGORS or any other person or entity including, but not limited to, the COLLATERAL

29. Covenant Not To Encumber Assets Or Transfer Assets Out Of The Ordinary Course Of Business. **THE OBLIGORS AGREE THAT NO FURTHER ENCUMBRANCES OF ANY TYPE, WHETHER VOLUNTARY OR INVOLUNTARY, AND WHETHER BY MORTGAGE, SECURITY AGREEMENT AND FINANCING STATEMENT, DEED OF TRUST, JUDGMENT OR LIEN, SHALL BE PLACED AGAINST ANY OF THE COLLATERAL, WITHOUT THE PRIOR WRITTEN CONSENT OF THE BANK.** The OBLIGORS further agree that except as provided for above, the OBLIGORS will not sell, transfer or convey any of their assets during the pendency of this AGREEMENT, except in the ordinary course of their businesses, without the prior written consent of the BANK.

30. Forbearance; Rights and Remedies. The BANK, subject to the terms and conditions set forth herein, agrees to forbear from exercising and enforcing any rights, remedies or recourse which the BANK may be entitled to assert under the ORIGINAL LOAN DOCUMENTS and applicable law with respect to the OBLIGORS and the COLLATERAL to and until 5:00 p.m. on [REDACTED] provided that no EVENT OF DEFAULT hereafter occurs under this AGREEMENT or under any other LOAN DOCUMENT as modified by this AGREEMENT. If, however, an EVENT OF DEFAULT hereafter occurs under this AGREEMENT or under any other LOAN DOCUMENT as modified by this AGREEMENT, the BANK, immediately thereafter, shall be entitled to: (a) impose the default rates of interest provided for in Section [REDACTED] above with respect to the principal balance then owed to the BANK under the LOAN DOCUMENTS; (b) accelerate and/or demand immediate payment of all indebtedness that is owed at that time by the OBLIGORS to the BANK under the LOAN DOCUMENTS; (c) foreclose, liquidate, collect and otherwise enforce the BANKS' rights and remedies with respect to all of the COLLATERAL; (d) confess judgment against the OBLIGORS pursuant to the terms of Section [REDACTED] below and/or the ORIGINAL LOAN DOCUMENTS; and/or (e) assert and enforce all other rights, remedies and recourse available to the BANK under this AGREEMENT, the other LOAN DOCUMENTS and applicable law with respect to the OBLIGORS and the COLLATERAL. By entering into this AGREEMENT, the BANK is not waiving any defaults which presently exist under the ORIGINAL LOAN DOCUMENTS, nor is the BANK waiving any of its rights, remedies or recourse in connection with those defaults. Furthermore, it is also understood, acknowledged and agreed between the parties hereto that notwithstanding the BANKS' execution of this AGREEMENT, the BANK has specifically reserved all of its respective rights, remedies and recourse under the LOAN DOCUMENTS and applicable law with respect to the OBLIGORS and the COLLATERAL including, without limitation, the BANKS' right, subject to the terms and conditions set forth herein, to immediately assert and enforce all such rights, remedies and recourse.

31. Waiver of the Automatic Stay. In the event that a bankruptcy case is hereafter filed by or against any of the OBLIGORS, the OBLIGORS specifically agree that the automatic stay provisions of Section 362 of the United States Bankruptcy Code applicable to any such bankruptcy case shall be immediately terminated as to the BANK and all COLLATERAL which constitutes property of the bankruptcy estate created thereby, so that the BANK may immediately assert all of its rights and remedies under the LOAN DOCUMENTS and applicable law with respect to the COLLATERAL. The OBLIGORS further agree not to contest any motion to terminate or modify the automatic stay filed by the BANK in any such bankruptcy case and to immediately execute and deliver to the BANK and to file with the Bankruptcy Court such documents, pleadings and papers as are necessary for the BANK to obtain such an immediate termination of the automatic stay.

32. Confession of Judgment. Upon the occurrence of an EVENT OF DEFAULT hereunder or a default or event of default under any other LOAN DOCUMENT, each

OBLIGOR irrevocably authorizes and empowers any attorney admitted to practice before any court of record in the United States to appear on behalf of each such OBLIGOR in any such court, in one or more proceedings, or before any prothonotary thereof, and to confess judgment against each such OBLIGOR, without prior notice or opportunity for prior hearing, in favor of the BANK, for the full amount then owed by each such OBLIGOR to the BANK under the LOAN DOCUMENTS, plus an attorneys' fee equal to fifteen percent (15%) of said amounts, plus court costs. In addition to all other courts where jurisdiction and venue would be proper, the OBLIGORS also consent to the jurisdiction and venue of the courts of any county of the State of Maryland and the United States District Court for the District of Maryland for the entry of said judgment(s). The OBLIGORS waive and release all errors, defects, and imperfections whatsoever in the entry of said judgment(s) and hereby agree that no writ of error or objection or motion or rule to open or strike said judgment(s) or appeal shall be made or taken thereto. The OBLIGORS also waive any right to notice or a hearing prior to the entry of said judgments and further waive the benefit of any and every statute, ordinance, or rule of court which may be lawfully waived conferring upon the OBLIGORS any right or privilege of exemption including, but not limited to, any homestead exemption, stay of execution, or supplementary proceedings, or other relief from the enforcement or immediate enforcement of a judgment or related proceedings on a judgment. The authority and power to appear for and enter judgment(s) against the OBLIGORS pursuant to the authority granted herein shall not be exhausted by one or more exercises thereof, or by any imperfect exercise thereof, and shall not be extinguished by any judgment(s) entered pursuant thereto; such authority and power may be exercised on one or more occasions from time to time, in the same or different jurisdictions, as often as the BANK may deem necessary or advisable. Any judgment(s) entered in favor of the BANK against any of the OBLIGORS, whether by confession or otherwise, shall bear interest at the rate equal to the higher of twelve percent (12%) per annum or the highest interest rate provided for under the LOAN DOCUMENTS.

33. Governing Law; Consent to Jurisdiction and Venue. The performance and construction of this AGREEMENT and the other LOAN DOCUMENTS as modified by this AGREEMENT shall be governed by the laws of the State of Maryland. The OBLIGORS hereby consent to the personal jurisdiction and venue of any court in the State of Maryland in connection with any legal proceeding arising out of or related to this AGREEMENT or the other LOAN DOCUMENTS.

34. Invalidity. If any term, provision or condition, or any part thereof, of this AGREEMENT or any other LOAN DOCUMENT, shall for any reason be found or held invalid or unenforceable by any court or governmental agency of competent jurisdiction, such invalidity or unenforceability shall not affect the remainder of such term, provision or condition or any other term, provision or condition, and this AGREEMENT and the other LOAN DOCUMENTS shall survive and be construed as if such invalid or unenforceable term, provision or condition had not been contained therein.

35. Binding Effect. This AGREEMENT and the other LOAN DOCUMENTS shall be binding upon and inure to the benefit of the parties hereto and their respective personal representatives, successors and assigns.

36. Amendment. This AGREEMENT and the other LOAN DOCUMENTS may only be altered, modified or amended by a writing executed by all of the parties hereto.

37. Time. Time is of the essence with respect to this AGREEMENT and the other LOAN DOCUMENTS.

38. Tense and Gender; Defined Terms; Captions; Effective Date; Execution In Counterparts and Via Facsimile; Miscellaneous. As used herein, the plural shall refer to and include the singular, and the singular the plural, and the use of any gender shall include and refer to any other gender. All defined terms are completely capitalized throughout this AGREEMENT. All captions are for the purpose of convenience only. This AGREEMENT shall be executed and delivered by the parties hereto on or before 5:00 p.m. on [REDACTED]. The effective date of this AGREEMENT shall be [REDACTED]. This AGREEMENT may be executed and delivered in counterparts. Signed counterparts may be delivered via facsimile, with all executed copies delivered via facsimile to be deemed to have the same force and effect as if bearing all required original signatures. The executed originals and counterparts of this AGREEMENT shall be delivered by the OBLIGORS to the BANK or its counsel via overnight mail.

39. Notices. Any notice required or permitted by or in connection with this AGREEMENT or any other LOAN DOCUMENT, without implying any obligation to provide any such notice, shall be in writing at the appropriate addresses set forth below or to such other addresses as may be hereafter specified by written notice by the BANK or any of the OBLIGORS. Any such notice shall be deemed to be effective one (1) day after dispatch if sent by telegram, mailgram, Purolator delivery, Airborne, Express Mail or Federal Express. Notwithstanding the foregoing, all notices shall be considered to be effective immediately if accomplished by hand delivery or facsimile.

**If to the BANK PARTIES:**

[REDACTED]

**With a copy to:**

[REDACTED]

**If to any of the OBLIGORS:**

[REDACTED]

40. Waiver Of Jury Trial. The parties hereto agree that any suit, action, or proceeding, whether claim or counterclaim, brought or instituted by or against any of the OBLIGORS, the BANK, or any of their successors or assigns, on or with respect to this AGREEMENT or any other LOAN DOCUMENT, or which in any way relates, directly or indirectly, to the obligations of any of the OBLIGORS to the BANK under this AGREEMENT or under any other LOAN DOCUMENT, or the dealings of the parties with respect thereto, shall be tried only by a court and not by a jury. **THE PARTIES HERETO EXPRESSLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING.** The OBLIGORS acknowledge and agree that this provision is a specific and material aspect of the agreement between the parties and that the BANK would not enter into this AGREEMENT if this provision, or any other provision of this AGREEMENT, were not contained herein.

41. Release of the Bank Parties. As an additional part of this AGREEMENT, and in consideration for the various agreements of the BANK as set forth herein, the OBLIGORS, jointly and severally, release, acquit, exonerate and forever discharge the BANK, all of the BANKS' affiliates, parent corporations and subsidiaries, and all of the BANKS' past, present and future directors, officers, employees, agents and attorneys (collectively, the "RELEASED PARTIES") from any and all claims, causes of action, suits and damages (including claims for attorneys' fees) which the OBLIGORS jointly or severally ever had or now have against any or all of the RELEASED PARTIES.

IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT as of the date first written above with the specific intention of creating an instrument under seal.

WITNESS/ATTEST:

\_\_\_\_\_

WITNESS/ATTEST:

\_\_\_\_\_

\_\_\_\_\_

OBLIGORS:

\_\_\_\_\_

By: \_\_\_\_\_ (SEAL)  
\_\_\_\_\_, President

\_\_\_\_\_

By: \_\_\_\_\_ (SEAL)  
\_\_\_\_\_, Managing Member

\_\_\_\_\_ (SEAL)  
\_\_\_\_\_



BANK:

[REDACTED]

By: \_\_\_\_\_ (SEAL)  
[REDACTED], Vice President

**ACKNOWLEDGMENTS**

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY, that on this \_\_\_\_ day of [REDACTED] before me, the undersigned, a Notary Public of the jurisdiction aforesaid, personally appeared [REDACTED] who acknowledged himself to be the PRESIDENT of [REDACTED], a MARYLAND corporation, and who further acknowledged that [REDACTED] in such capacity, and being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of [REDACTED] by [REDACTED] as PRESIDENT.

\_\_\_\_\_  
NOTARY PUBLIC (SEAL)

My Commission Expires:  
\_\_\_\_\_

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY, that on this \_\_\_\_ day of [REDACTED] before me, the undersigned, a Notary Public of the jurisdiction aforesaid, personally appeared [REDACTED] who acknowledged himself to be the MANAGING MEMBER of [REDACTED], a MARYLAND limited liability company, and who further acknowledged that [REDACTED] in such capacity, and being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of [REDACTED] by [REDACTED] as MANAGING MEMBER.

\_\_\_\_\_  
NOTARY PUBLIC (SEAL)

My Commission Expires:  
\_\_\_\_\_

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY, that on this \_\_\_\_ day of [REDACTED] before me, the

undersigned, a Notary Public of the jurisdiction aforesaid, personally appeared [REDACTED] known to me or satisfactorily proven to be the person whose name is subscribed above, and acknowledged that [REDACTED] executed the foregoing instrument for the purposes therein contained.

\_\_\_\_\_(SEAL)  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

STATE OF \_\_\_\_\_, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY, that on this \_\_\_\_ day of [REDACTED], before me, the undersigned, a Notary Public of the jurisdiction aforesaid, personally appeared [REDACTED] who acknowledged [REDACTED] to be a VICE PRESIDENT of [REDACTED] and who further acknowledged that [REDACTED], in such capacity, and being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of [REDACTED] by [REDACTED] as [REDACTED]

\_\_\_\_\_(SEAL)  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

# EXHIBIT 2

**LOAN SALE AGREEMENT**

This Loan Sale Agreement (the "Agreement") is effectively made as of \_\_\_\_\_, by and between \_\_\_\_\_ ("Seller"), and \_\_\_\_\_ ("Buyer") (collectively, the "Parties").

**RECITALS**

R-1. The Seller previously extended various loans and credit facilities (collectively, the "Loans") to \_\_\_\_\_.

R-2. The Loans are evidenced by various documents specifically described on Exhibit A attached hereto and made a part hereof (collectively, the "Loan Documents").

R-3. As of April 13, 2009, the total aggregate amount due and owing from the Borrowers under the Loan Documents, as itemized on Exhibit B attached hereto and made a part hereof, is \_\_\_\_\_.

R-4. In connection with the Loans, the Seller previously issued certain Irrevocable Letters of Credit, designated as: (i) Irrevocable Letter of Credit No. \_\_\_\_\_ in the amount of \_\_\_\_\_ (\$ \_\_\_\_\_) for the account and the benefit of \_\_\_\_\_; (ii) Irrevocable Letter of Credit No. \_\_\_\_\_; (iii) Irrevocable Letter of Credit No. \_\_\_\_\_; (iv) Irrevocable Letter of Credit No. \_\_\_\_\_; (v) Irrevocable Letter of Credit No. \_\_\_\_\_ (collectively, the "Original Letters of Credit").

R-5. The Buyer desires to purchase the Loans and the Loan Documents from the Seller and has agreed to arrange for the return and termination of the Original Letters of Credit.

R-6. The Seller has agreed to sell the Loans and the Loan Documents to the Buyer, without recourse, representation, warranty or guaranty of any kind other than as specifically set forth in Section 5 below, pursuant to the terms and conditions of this Agreement.

**WITNESSETH**

NOW, THEREFORE, in consideration of the mutual promises set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Purchase of Loans and Loan Documents; Purchase Price. The Buyer shall purchase the Loans and the Loan Documents from the Seller on or before the Closing Date (as defined herein) for a sum equal to \_\_\_\_\_ (\$ \_\_\_\_\_) (the "Purchase Price").

2. Payment of Purchase Price; Closing Date. The Buyer shall deliver the Purchase Price to the Seller in the form of a wire transfer on or before \_\_\_\_\_ (the "Closing Date"). The wire transfer of the Purchase Price from the Buyer to the Seller in accordance with this Section shall be accomplished utilizing the wire instructions attached hereto as Exhibit C.

3. Transfer of Loans and Loan Documents to Buyer. Provided that the Seller receives the Original Letters of Credit and the Buyer delivers the Purchase Price to the Seller on or before the Closing Date, the Seller shall be deemed to have sold, transferred, conveyed and assigned to the Buyer, without recourse, representation, warranty or guaranty of any kind other than the representations specifically provided by the Seller in Section 5 of this Agreement, all of the Seller's right, title, and interest in and to the Loans and the Loan Documents. If the Purchase Price or the Original Letters of Credit are not delivered to the Seller on or before the Closing Date, the Seller's agreement to transfer the Loans and the Loan Documents to the Buyer pursuant to this Agreement shall be null, void and of no further force and effect.

4. No Recourse, Representations or Warranties Regarding Loans and Loan Documents. The Buyer acknowledges and agrees that the Seller is selling the Loans and the Loan Documents to the Buyer subject to all matters known and unknown, in "AS IS / WHERE IS" condition, without recourse, covenants, representations or warranties of any kind whatsoever, express or implied, including, without limitation, those regarding, concerning or pertaining to: (i) the enforceability of the Loan Documents, (ii) the creditworthiness of the Borrowers, (iii) the collectability of the indebtedness that is owed under the Loan Documents, (iv) the assets of the Borrowers; (v) the existence or nature of any collateral for the Loans, (vi) the existence, validity or priority of any liens securing the Loans, (vii) the value of any collateral for the Loans; or (viii) any matter not specifically identified herein. The Buyer further acknowledges that any loan document relating to the Loans that is not listed on Exhibit A attached hereto is not being assigned or sold by the Seller to the Buyer.

5. Representations by Seller. Notwithstanding Section 4 above, the Seller represents to the Buyer that:

(a) The Seller is the owner of the Loans and the Loan Documents;

(b) The Seller has not previously sold, transferred or assigned its interest in the Loans or the Loan Documents to any third party;

(c) \_\_\_\_\_ is a \_\_\_\_\_ of the Seller and is authorized to execute this Agreement and the other documents called for herein on behalf of the Seller; and

(d) This Agreement constitutes the valid, binding, and enforceable obligation of the Seller.

6. Representations, Warranties and Agreements of Buyer. The Buyer represents and warrants to the Seller and otherwise agrees as provided for below:

(a) \_\_\_\_\_ are each \_\_\_\_\_ of the Buyer and are authorized and empowered to execute this Agreement and the other documents called for herein on behalf of the Buyer.

(b) The Buyer has the power and authority to execute and deliver this Agreement, to perform the Buyer's obligations under this Agreement, and to purchase the Loans and the Loan Documents from the Seller;

(c) This Agreement constitutes the valid, binding and enforceable obligation of the Buyer;

(d) The Buyer has examined copies of the Loan Documents prior to the execution of this Agreement;

(e) The Buyer is represented by counsel of its choice and has exercised its own independent judgment, as determined by it to be necessary and advisable, in its decision to enter into this Agreement;

(f) The Buyer (either alone or with the Buyer's attorneys, accountants, or other advisors) possesses the requisite business and investment knowledge and experience to evaluate the potential risks and merits of the Buyer's purchase of the Loans and the Loan Documents;

(g) The Buyer is purchasing the Loans and the Loan Documents for investment purposes, solely for its own account, and not with a view to re-distribute or to re-sell the same; and

(h) The Buyer will not sell the Loans or the Loan Documents, except pursuant to an effective registration statement under any applicable federal and state securities laws, or pursuant to a valid exemption therefrom.

7. Delivery of Original Letters of Credit. The Parties expressly agree that the sale of the Loans and the Loan Documents to the Buyer is expressly conditioned upon the Borrowers causing the beneficiaries under each of the Original Letters of Credit to deliver the Original Letters of Credit and all related documents to the Seller, along with letters indicating that the Original Letters of Credit have been released and terminated.

8. Indorsement of Notes; Delivery of Loan Documents. Provided that the Original Letters of Credit are returned and terminated and the Purchase Price is delivered to the Seller on or before the Closing Date, the Seller shall deliver to the Buyer the following documents:

(a) The originals of each promissory note listed on Exhibit A, to the extent they are in the Seller's possession, and, if not, then copies of each such promissory note, along with original Allonges executed by the Seller in order to indorse the promissory notes as follows:

“For value received, pay to the order of \_\_\_\_\_  
without recourse, representation, warranty or guaranty of any  
kind, other than as specifically set forth in Section 5 of the  
Loan Sale Agreement, dated \_\_\_\_\_, by  
and between \_\_\_\_\_.

NAME OF SELLER

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

(b) Original Assignments of Deeds of Trust executed by the Seller in order to assign each of the deeds of trust and indemnity deeds of trust listed on Exhibit A to the Buyer (“Deed Of Trust Assignments”);

(c) Original Assignments of Assignments of Leases & Rents executed by the Seller in order to assign each of the assignments of leases & rents listed on Exhibit A to the Buyer (“Assignment Of Leases & Rents Assignments”); and

(d) The originals of the other Loan Documents to the extent they are in the Seller’s possession, and, if not, then copies of the other Loan Documents, as set forth on Exhibit A.

9. Authorization to File. Provided that the Original Letters of Credit have been delivered to the Seller and terminated by the beneficiaries thereunder, and the Purchase Price has been paid to the Seller on or before the Closing Date, the Seller, after the Closing Date, hereby authorizes the Buyer to record the Deed Of Trust Assignments and the Assignment of Leases & Rents Assignments in the Land Records of \_\_\_\_\_, and to file any assignments (the “UCC Assignments”) in order to assign all applicable financing statements relating to the Loans and the Loan Documents from the Seller to the Buyer. The Buyer shall be solely responsible for recording the Deed of Trust Assignments, the Assignment of Leases & Rents Assignments, the UCC Assignments, and any continuation statements to continue any financing statements, and for paying for any recording fees, costs and expenses associated therewith.

10. Assumption of Obligations. Immediately after the Buyer acquires the Loans and the Loan Documents pursuant to the terms and conditions of this Agreement, the Buyer shall be deemed to have assumed any obligations arising after the Closing Date of this Agreement, which the Seller may have had under or in connection with the Loans and the Loan Documents or any other matters relating thereto.

11. Closing Costs; Loan Assumption Costs; Sales Taxes; Other Fees and Expenses. Other than “Attorneys’ Fees” as defined and as addressed in the “Agreement, Consent and Acknowledgment” attached hereto, the Buyer shall pay all costs, expenses, fees, charges, sales tax

and other taxes, if applicable, associated with the transfer of the Loans and the Loan Documents by the Seller to the Buyer in connection with this Agreement.

12. No Broker Fee. The Seller shall not pay a commission to any broker or agent in connection with the transactions contemplated herein.

13. Confidentiality. The terms of this Agreement shall be kept strictly confidential from any persons or entities not party thereto, and will not be disclosed to any such persons or entities.

14. Waivers. No waiver or indulgence by the Seller at any time and from time to time shall constitute, unless specifically so expressed by the Seller in writing, a future waiver of performance or exact performance by the Buyer.

15. No Third Party Beneficiary Rights. No person not a party to this Agreement shall have any benefit hereunder nor have third party beneficiary rights as a result of this Agreement.

16. No Assignment. The Buyer shall have no right of assignment or substitution with respect to the Agreement, without the prior written consent of the Seller.

17. Binding Obligation. This Agreement shall be binding upon the Parties hereto and their successors and assigns; provided, however, that no assignee of the Buyer's rights in the Loans or the Loan Documents shall have any right to make a claim against the Seller for breach of any representation or warranty made by the Seller in this Agreement.

18. Final Agreement. This Agreement contains the final and entire agreement and understanding of the Parties with respect to the matters addressed herein, and any terms and conditions not set forth in this Agreement are not a part of the agreement and understanding of the Parties.

19. Amendment. This Agreement may be amended or altered only by a writing signed by the party to be bound by the change or alteration.

20. Governing Law; Consent to Jurisdiction; Forum Selection. The performance and construction of this Agreement and the transactions contemplated hereby shall be governed by the laws of the State of Maryland, and the Parties consent to the jurisdiction and venue of the courts of any county of the State of Maryland, or the United States District Court for the District of Maryland, to hear any suit, action or proceeding instituted on, under or connection with this Agreement. The Parties further agree that any suit, action or proceeding arising out of this Agreement shall be brought in any federal district court or circuit court in the State of Maryland where venue shall be appropriate.

21. Invalidity of any Part. If any provision or part of any provision of this Agreement shall for any reason be held invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions of this Agreement, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision or part thereof



had never been contained herein, but only to the extent of its invalidity, illegality, or unenforceability.

22. Time. Time is of the essence with respect to this Agreement and the terms and conditions hereof.

23. Tense and Gender; Defined Terms; Captions; Counterparts. As used herein, the plural shall refer to and include the singular, and the singular the plural, and the use of any gender shall include and refer to any other gender. All defined terms are capitalized throughout this Agreement. All captions are for the purpose of convenience only. This Agreement shall be executed and delivered by the Parties on or before the Closing Date. This Agreement may be executed and delivered in counterparts and signed counterparts may be delivered via facsimile or electronic means, with all copies delivered via facsimile or electronic means to be deemed to have the same force and effect as if bearing the original signatures.

24. Further Assurances. The Parties agree to take such actions and execute such documents, at no cost or expense to the Seller, which may be reasonably necessary in order to effectuate and consummate the terms of this Agreement. This provision shall survive the closing hereunder.

25. Waiver of Jury Trial. The Parties further agree that any suit, action or proceeding, whether claim or counterclaim, brought or instituted by or against either party hereto or any successor or assign of any Party on or with respect to this Agreement or which in any way relates, directly or indirectly, to the sale of the Loans and the Loan Documents or any event, transaction, or occurrence arising out of or in any way connected with the sale of the Loans and the Loan Documents, or the dealings of the Parties with respect thereto, shall be tried only by a court and not by a jury. **THE BUYER AND THE SELLER EXPRESSLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION, OR PROCEEDING.** The Buyer acknowledges and agrees that this provision is a specific and material aspect of the agreement between the Parties and that the Seller would not enter into the transaction with the Buyer if this provision were not part of this Agreement.

26. Release of Seller. In consideration for the various agreements of the Seller as set forth herein, the Buyer hereby releases and discharges Seller and Seller's parent corporations, subsidiaries, affiliates, officers, directors, agents, employees, servants, attorneys and representatives (collectively, the "Released Seller Parties") from any and all claims, actions, causes of action, suits, damages, obligations and liabilities of any kind or character whatsoever, known or unknown, suspected or unsuspected, in contract or in tort, at law or in equity, which the Buyer has or may have against any or all of the Released Seller Parties in connection with the purchase of the Loans, the Loan Documents and this Agreement, other than claims arising under or pursuant to this Agreement.

27. Indemnification. The Buyer agrees to indemnify and hold the Seller harmless from and against any and all actions, causes of action, liabilities, claims, demands, losses, damages, costs and expenses (including, but not limited to, attorneys' fees and litigation

expenses incurred by the Seller), arising out of or relating to: (i) the Seller's execution of this Agreement or the other documents called for herein, (ii) the Seller's sale and assignment of the Loans and the Loan Documents to the Buyer pursuant to this Agreement, and/or (iii) the inaccuracy or breach by the Buyer of any representation or warranty which it has made in this Agreement.

IN WITNESS WHEREOF, this Agreement is executed under seal and is effective on the date first above written.

WITNESS/ATTEST:

SELLER:

\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_ (SEAL)

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**ACKNOWLEDGMENT**

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY, that on this \_\_\_\_ day of May, 2009, before me, the undersigned, a Notary Public of the jurisdiction aforesaid, personally appeared \_\_\_\_\_ who acknowledged himself to be a \_\_\_\_\_ of \_\_\_\_\_, and who further acknowledged that he, as such Vice President, being authorized to do so, executed the foregoing instrument for the purposes therein contained and in the capacity therein stated.

IN WITNESS My Hand and Notarial Seal.

\_\_\_\_\_  
NOTARY PUBLIC (SEAL)

My Commission Expires:  
\_\_\_\_\_

[SIGNATURES CONTINUE ON FOLLOWING PAGE]

IN WITNESS WHEREOF, this Agreement is executed under seal and is effective on the date first above written.

**WITNESS/ATTEST:**

**BUYER:**

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_ (SEAL)  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**ACKNOWLEDGMENTS**

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY, that on this \_\_\_\_ day of May, 2009, before me, the undersigned, a Notary Public of the jurisdiction aforesaid, personally appeared \_\_\_\_\_, who acknowledged himself to be a \_\_\_\_\_ of \_\_\_\_\_, and who further acknowledged that he, as such \_\_\_\_\_, being authorized to do so, executed the foregoing instrument for the purposes therein contained and in the capacity therein stated.

IN WITNESS My Hand and Notarial Seal.

\_\_\_\_\_  
NOTARY PUBLIC (SEAL)

My Commission Expires:

\_\_\_\_\_

[ACKNOWLEDGMENTS CONTINUE ON FOLLOWING PAGE]

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY, that on this \_\_\_\_ day of May, 2009, before me, the undersigned, a Notary Public of the jurisdiction aforesaid, personally appeared \_\_\_\_\_, who acknowledged herself/himself to be a \_\_\_\_\_ of \_\_\_\_\_, and who further acknowledged that he/she, as such \_\_\_\_\_, being authorized to do so, executed the foregoing instrument for the purposes therein contained and in the capacity therein stated.

IN WITNESS My Hand and Notarial Seal.

\_\_\_\_\_(SEAL)  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

**AGREEMENT, CONSENT AND ACKNOWLEDGMENT**

The undersigned, \_\_\_\_\_ (collectively, the "Obligors") hereby consent to the terms and conditions of the above-referenced Loan Sale Agreement ("Agreement") and to consummation of the transactions described therein. The Obligors acknowledge that the "Loan Documents," as such term is defined in the Agreement, are binding and enforceable against the Obligors in accordance with all stated terms, and that the Obligors have no defenses or rights of offset against the enforcement of the Loan Documents in accordance with all stated terms. The Obligors shall be obligated to reimburse the "Seller" as such term is defined in the Agreement, for all attorneys' fees and expenses which the Seller has incurred and may incur in the future under, in connection with or due to the preparation, negotiation, consummation or enforcement of the Agreement (collectively, "Attorneys' Fees"). As of \_\_\_\_\_, Attorneys' Fees totaled \$ \_\_\_\_\_ and shall be delivered to the Seller by the Obligors via wire transfer or certified check on or before the "Closing Date," as such term is defined in the Agreement. **THE OBLIGORS HEREBY RELEASE AND DISCHARGE THE RELEASED SELLER PARTIES, AS SUCH TERM IS DEFINED IN THE AGREEMENT, FROM ANY AND ALL CLAIMS, ACTIONS, CAUSES OF ACTION, SUITS, DAMAGES, OBLIGATIONS AND LIABILITIES OF ANY KIND OR CHARACTER WHATSOEVER, KNOWN OR UNKNOWN, SUSPECTED OR UNSUSPECTED, IN CONTRACT OR IN TORT, AT LAW OR IN EQUITY, WHICH THE OBLIGORS EVER HAD OR NOW HAVE AGAINST ANY OR ALL OF THE RELEASED SELLER PARTIES.**

IN WITNESS WHEREOF, this Agreement, Consent And Acknowledgment is executed under seal and is effective as of \_\_\_\_\_.

**WITNESS/ATTEST:**

**OBLIGORS:**

\_\_\_\_\_

\_\_\_\_\_(SEAL)  
Name: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_(SEAL)  
Name: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_(SEAL)  
Name: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_(SEAL)  
Name: \_\_\_\_\_

**WITNESS/ATTEST:**

**OBLIGORS:**

\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

By: \_\_\_\_\_ (SEAL)  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_ (SEAL)  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**ACKNOWLEDGMENTS**

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY that on this \_\_\_\_\_ day of May, 2009, before me, the undersigned Notary Public of the State of Maryland, personally appeared \_\_\_\_\_, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS MY Hand and Notarial Seal.

\_\_\_\_\_  
NOTARY PUBLIC (SEAL)

My Commission Expires:

\_\_\_\_\_

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY that on this \_\_\_\_\_ day of May, 2009, before me, the undersigned Notary Public of the State of Maryland, personally appeared \_\_\_\_\_, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS MY Hand and Notarial Seal.

\_\_\_\_\_(SEAL)  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY that on this \_\_\_\_\_ day of May, 2009, before me, the undersigned Notary Public of the State of Maryland, personally appeared \_\_\_\_\_, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS MY Hand and Notarial Seal.

\_\_\_\_\_(SEAL)  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY that on this \_\_\_\_\_ day of May, 2009, before me, the undersigned Notary Public of the State of Maryland, personally appeared \_\_\_\_\_, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS MY Hand and Notarial Seal.

\_\_\_\_\_(SEAL)  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY that on this \_\_\_\_ day of May, 2009, before me, the undersigned Notary Public of the State of Maryland, personally appeared \_\_\_\_\_, and acknowledged himself/herself to be the \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_ corporation, and that he, as such \_\_\_\_\_, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of \_\_\_\_\_, by himself as \_\_\_\_\_.

IN WITNESS MY Hand and Notarial Seal.

\_\_\_\_\_(SEAL)  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

STATE OF MARYLAND, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY that on this \_\_\_\_ day of May, 2009, before me, the undersigned Notary Public of the State of Maryland, personally appeared \_\_\_\_\_, and acknowledged \_\_\_\_\_ to be the \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_, and that he, as such \_\_\_\_\_, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of \_\_\_\_\_, by himself as \_\_\_\_\_.

IN WITNESS MY Hand and Notarial Seal.

\_\_\_\_\_(SEAL)  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_



**EXHIBIT A**  
(Loan Documents)

**EXHIBIT B**  
(Outstanding Loan Balances)

EXHIBIT C

*Wiring Instructions*  
*(SELLER)*

BANK NAME: \_\_\_\_\_

ABA NUMBER: \_\_\_\_\_

ACCT NUMBER: \_\_\_\_\_

ACCT NAME: \_\_\_\_\_

REFERENCE: \_\_\_\_\_

PHONE ADVICE: \_\_\_\_\_

# EXHIBIT 3

DEED IN LIEU OF FORECLOSURE AGREEMENT

THIS DEED IN LIEU OF FORECLOSURE AGREEMENT is made as of the \_\_\_\_ day of \_\_\_\_\_, 2008 (this "Agreement") by, between, and among \_\_\_\_\_, a \_\_\_\_\_, with a mailing address of \_\_\_\_\_, \_\_\_\_\_ ("Borrower"), with a mailing address of \_\_\_\_\_, \_\_\_\_\_ ("Guarantor"), and \_\_\_\_\_, a \_\_\_\_\_ corporation, with a mailing address of \_\_\_\_\_, \_\_\_\_\_ ("Lender").

RECITALS

A. Borrower owns fee simple title to the real estate and the improvements thereon commonly known as " \_\_\_\_\_ " located at \_\_\_\_\_, \_\_\_\_\_, and legally described on Exhibit A attached hereto, which real estate includes, but is not limited to, \_\_\_\_\_.

B. Lender made a loan to Borrower in the amount of \_\_\_\_\_ and 00/00 Dollars (\$\_\_\_\_.00) ("Loan") which Loan was made pursuant to a certain Loan Agreement dated \_\_\_\_\_ between Borrower and Lender (as amended, the "Loan Agreement"). The Loan is evidenced by a certain Promissory Note dated \_\_\_\_\_ made by Borrower, as maker, in favor of Lender, as payee, in the face principal amount of \_\_\_\_\_ and 00/00 Dollars (\$\_\_\_\_.00) (as amended, the "Note"). The Loan is secured by, among other things, a certain Mortgage, Assignment of Leases and Rents, and Security Agreement dated \_\_\_\_\_ made by Borrower, as mortgagor, in favor of Lender, as mortgagee, recorded in the real property records of \_\_\_\_\_ County, State of \_\_\_\_\_ as Document No. \_\_\_\_\_ (as amended, the "Mortgage"). The Borrower's obligations under the Note are guaranteed by Guarantor pursuant to a certain Guaranty of Payment and Performance dated \_\_\_\_\_ made by Guarantor, as guarantor, in favor of Lender, as lender (as amended, the "Guaranty"). In addition to the Loan Agreement, the Note, the Mortgage, and the Guaranty, the Loan is evidenced, secured, and governed by the agreements, instruments, and documents identified on Exhibit B attached hereto and by this reference made a part hereof (such agreements, instruments, and documents, as amended, together with the Loan Agreement, the Note, the Mortgage, and the Guaranty are sometimes herein collectively referred to as the "Loan Documents").

C. As of \_\_\_\_\_, 199\_, the total outstanding principal balance of the Loan was \$\_\_\_\_\_ and the total accrued and unpaid interest thereon was \$\_\_\_\_\_.

D. Borrower is in default under the Loan Documents in that [describe defaults] ("Borrower's Default"). The Loan has been accelerated and the entire principal amount of Loan together with all accrued interest thereon is now due and owing.

E. In order to avoid the financial hardship and damage to reputation that would result from the Borrower's Default, Borrower has requested that the parties resolve Borrower's Default by Borrower's conveyance of the real estate legally described on Exhibit A and other property to Lender, or to a person or other entity designated by Lender ("Buyer"), in lieu of foreclosure in consideration of \_\_\_\_\_ and other consideration.

F. The fair market value of the "Property" (as hereinafter defined) does not exceed the total outstanding unpaid principal of, interest accrued and unpaid on, and other outstanding indebtedness due and owing under the Loan Documents.

G. Lender wishes to accept the conveyance of the Property pursuant to this Agreement to avoid the necessity of litigation, foreclosure, the delays associated therewith, and to avoid the delays associated with Borrower's statutory redemption rights, if any, with respect to the Property, and Lender acknowledges that the provisions of this Agreement directly benefit Lender in this regard.

NOW, THEREFORE, for and in consideration of the foregoing premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Borrower, Guarantor, and Lender do hereby agree as follows:

ARTICLE I  
Incorporation/Property Transferred in Lieu of Foreclosure

1.1 Incorporation. The recitals to this Agreement are fully incorporated herein by this reference thereto with the same force and effect as though restated herein.

1.2 Transfer of Property. Subject to the terms, provisions, conditions, covenants, and agreements herein contained, and subject to the matters set forth on Exhibit C hereto (the "Permitted Exceptions") Borrower agrees to sell, grant, transfer, assign, and convey to Lender (or Buyer) and Lender agrees to acquire, or cause Buyer to acquire, from Borrower absolutely and free of any right of redemption or other right or interest of Borrower or anyone claiming by, through, or under Borrower, the following real and personal property (collectively, the "Property"): (a) good, valid, indefeasible, and marketable fee simple title to the land ("Land") legally described on Exhibit A attached hereto, all buildings, fixtures, and other improvements situated on the Land (all said buildings and other improvements hereinafter called the "Improvements"), all of Borrower's right, title, and interest in and to and all easements, rights, tenements, and appurtenances thereunto belonging or appertaining to the Land and Improvements, and all of Borrower right, title, and interest in and to any and all streets, alleys, or public ways adjacent thereto, before or after vacation thereof ("Real Estate"); (b) all of Borrower's right, title, and interest as lessor or lessee in all leases, licenses, and other agreements to occupy all or any part of the Real Estate together with all rents and other sums due, accrued or to become due under each such lease, license, and agreement, all rents that are received and allocable to periods following the "Closing Date" (as hereinafter defined) and all guarantees by third parties of the tenants' obligations under said leases, and all lease security and other deposits, if any (together, the "Leases"); (c) all right, title, and interest of Borrower in and to all plans and specifications relating to Improvements (the "Plans and Specifications") and all unexpired claims, warranties, and guarantees, if any, received in connection with the construction or equipping of the Real Estate, if and to the extent assignable (all warranties and guarantees pursuant to which any affiliate of Borrower or its partners is an obligor, and all claims against any affiliate of Borrower or its partners concerning the design and construction of the Real Property shall be deemed assignable, and Borrower shall cause the applicable obligors to consent to such assignments) ("Warranties"); (d) all of Borrower's right, title, and interest in and to the service, supply, and maintenance contracts and equipment leases listed on Exhibit D attached hereto and incorporated herein (the "Assigned Contracts"); (e) all licenses, permits, certificates of occupancy, and franchises (including, without limitation, those listed on Exhibit E attached hereto) issued by any federal, state, county, or other governmental authority relating to the use, maintenance, or operation of the Real Property (the "Licenses and Permits"), running to, or in favor of, Borrower and/or the Real Estate; and (f) all other tangible and intangible personal property, equipment, and supplies located at or used in connection with the Real Estate, including without limitation, the items listed on Exhibit F attached hereto now owned or hereafter acquired

by the Borrower in connection with the development, leasing, management, use, and/or operation of the Real Estate including, but not limited to, logos, trade styles, and trade names (including, without limitation, the name " \_\_\_\_\_"), brochures, manuals, lists of prospective tenants, advertising material, assignable utility contracts, assignable telephone numbers [franchise agreements], and [ \_\_\_\_\_ ] (together, the "Personal Property").

## ARTICLE II Consideration

2.1 Covenant Not to Sue. In consideration for the transfer by Borrower of the Property to Lender (or, at Lender's option, Buyer), and subject to the terms, provisions, and conditions herein contained, at the "Closing" (as hereinafter defined), Lender shall [(i)] deliver a covenant not to sue ("Covenant Not to Sue") Borrower, Guarantor, and certain other persons, which Covenant Not to Sue shall be in the form of Exhibit G attached hereto[,] [and] [(ii)] pay \$ \_\_\_\_\_ to Borrower or certain of the creditors of Borrower described on Exhibit S as "To Be Paid by Lender"].

## ARTICLE III Title

3.1 Owners Title Policy. As a condition to Lender's obligation to close, Buyer must, at Closing, obtain from \_\_\_\_\_ ("Title Company") an ALTA Form \_\_\_\_\_ Owner's Title Insurance Policy or equivalent acceptable to Lender ("Title Policy"), dated as of the Closing Date naming Buyer, as the insured, which Title Policy shall show fee simple title to the Real Estate vested in Buyer subject only to the Permitted Exceptions. The Title Policy must (a) insure as separate parcels any easements appurtenant to the Real Property, (b) be in the amount of the indebtedness evidenced by the Note which is outstanding on the Closing Date (or such lesser amount as Lender shall accept), (c) contain full extended coverage insurance over all general exceptions set forth in such policy [(other than matters which would be deleted by delivery of a current plat of survey to the Title Company)], (d) delete any so-called "creditors" rights exclusion or exceptions, and (e) include such reinsurance (with such reinsurers) as Lender may require, together with direct access agreements with such reinsurers.

3.2 Loan Title Policy. As an additional condition to Lender's obligation to close, Lender shall receive, at Closing, the following endorsements to ALTA Loan Policy (\_\_\_\_ Form) issued by Title Company as Policy No. \_\_\_\_\_ ("Loan Policy") (which endorsements shall be dated as of the Closing Date): (a) a date-down endorsement showing fee simple title in Buyer, and insuring the Mortgage as a [first] priority encumbrance on the Real Property, subject only to the Permitted Exceptions and (b), at Lender's option, a non-merger endorsement acceptable to Lender (collectively, the "Loan Policy Endorsements"). Such Loan Policy Endorsements must also be approved by all reinsurers of the Loan Policy.

3.3 Borrower Cooperation. Borrower shall cooperate with Lender to permit Lender, or, as applicable, Buyer, to obtain the Title Policy and the Loan Policy Endorsements.

## ARTICLE IV Closing

4.1 Closing. Provided all terms, provisions, and conditions contained in this Agreement to be satisfied on or before Closing have been timely satisfied so as to provide for the closing of the transaction contemplated hereby, including without limitation, the vesting in Lender or Buyer of good, valid, indefeasible, and marketable fee simple title to the Real Property, subject only to the Permitted Exceptions, closing of the transaction contemplated hereby ("Closing"), shall take place at the office of \_\_\_\_\_, in \_\_\_\_\_, \_\_\_\_\_, at 10:00 A.M. (\_\_\_\_\_, \_\_\_\_\_ time) on \_\_\_\_\_ ("Closing Date") through an escrow with the Title Company, or on such other date or such other place as may be mutually agreed upon in writing by Borrower and Lender. The agreement ("Escrow Agreement") for such escrow shall in the form of Exhibit H attached hereto. Each party shall have the right to inspect all documents prior to, at the time of, and after their deposit in escrow. To accommodate Closing, the parties will enter into the Escrow Agreement with Title Company concurrently with their execution and delivery of this Agreement. This Agreement shall not be merged into the Escrow Agreement, but the Escrow Agreement shall be deemed auxiliary to this Agreement, and as between the parties hereto, upon failure of the escrow or otherwise, the provisions of this Agreement shall be controlling.

4.2 Closing Deliveries, Etc. The following deliveries and/or actions shall constitute the Closing and, as described above, and, to the extent provided in the Escrow Agreement, shall be effected through the Escrow Agreement and, if not specified in the Escrow Agreement to be deposited in, and delivered under, the Escrow Agreement, shall be delivered at the Closing. Such deliveries, showings, and actions shall be deemed to be taken simultaneously and no one of which shall be deemed completed until all of such deliveries, showings, and actions have been completed.

A. Title Documents. The following title, transfer, and original documentation and other matters shall be duly authorized, properly executed, acknowledged (if applicable) and/or delivered:

(a) The Title Policy. The Title Policy (or a "marked-up" title commitment to issue the Title Policy) together with executed reinsurance agreements containing direct access provisions with all reinsurers shall be delivered to Lender.

(b) Endorsements to the Loan Policy. The Loan Policy Endorsements (or a "marked-up" commitment to issue the Loan Policy Endorsements) shall be delivered to Lender.

(c) ALTA Statement [Owner's Affidavit]. Borrower shall deliver to Lender and Title Company its duly executed [American Land Title Association Loan and Extended Coverage Statement] [Owner's Affidavit].

(d) GAP Affidavit. Borrower shall execute and deliver to Title Company, a GAP Undertaking and Affidavit satisfactory to Title Company so as to permit issuance of the Title Policy and Loan Policy Endorsements on the Closing Date.

(e) Searches. [Borrower shall deliver to Lender] [Lender shall have received], Uniform Commercial Code Financing statement, tax lien, and judgment searches of Borrower and its general partner dated not earlier than \_\_\_\_\_ issued by a search firm acceptable to Lender confirming the existence of no financing statements



filed against the Property, tax liens (against the Property or Borrower) or judgments (against the Property or Borrower) other than the Permitted Exceptions.

(f) Search Certificate. Borrower shall deliver to Lender, a statement of Borrower in the form of Exhibit I attached hereto to the effect that Borrower has not executed any financing statements other than the financing statements constituting a part of the Loan Documents.

B. Transfer Documents. The following Property transfer documentation shall be duly authorized, properly executed, acknowledged (if applicable), and delivered to Lender:

(a) Deed. Borrower's duly executed, acknowledged, and stamped recordable deed in form and substance as set forth on Exhibit J attached hereto.

(b) Bill of Sale. Borrower's duly executed bill of sale in form and substance as set forth on Exhibit K attached hereto.

(c) Assignment of Leases, Rents, and Security Deposits. Borrower's duly executed Assignment of Rents, Leases, and Security Deposits in the form of Exhibit L attached hereto. Lender will execute and deliver (or cause Buyer to execute and deliver) to Borrower an acceptance of such assignment in the form of the Acceptance attached as part of the exhibit referred to in the preceding sentence.

(d) Assignment. Borrower's duly executed Assignment in the form of Exhibit M attached hereto. Lender will execute and deliver (or cause Buyer to execute and deliver) to Borrower an acceptance of such assignment in the form of the Acceptance attached as part of the exhibit referred to in the preceding sentence.

(e) Non-Foreign Status Certificate Statement. Borrower's duly executed Non-Foreign Status Certificate in the form of Exhibit N attached hereto.

(f) Certified Rent Roll. A schedule of Leases accompanied by a Rent Roll Certificate in the form of Exhibit O attached hereto certified by Borrower. The rent roll shall include (i) the name and address of each tenant; (ii) the commencement and expiration dates of each Lease; (iii) the base rent; and (iv) escalations, "stops," base years, yearly escalation collections (to date), if any, and other pass-throughs; (v) annual percentage rent collections (to date); (vi) rent concessions, if any; (viii) security deposits and interest, if any, thereon; (ix) rental delinquencies; (x) extension, renewal, expansion, and other options, if any; and (xi) unpaid leasing commissions and tenant improvement expenses.

(g) Tenant Letters. Borrower's duly executed letters to the tenants of the Real Property in the form of Exhibit P attached hereto.

(h) Estoppel Certificate. Estoppel certificates executed by each [non-residential] tenant of the Real Property, in the form required under the Leases in question.

(i) Non-Tenant Estoppel Certificates. Estoppel certificate satisfactory to Lender executed by (i) each party to an Assigned Contract [ and (ii) [as designated by Lender, each beneficiary of an easement, restriction or condition of record]].

(j) Transfer Declarations. Borrower's completed and executed state, county, and municipal transfer or exemption declarations. If the declarations have been properly completed, Lender or Buyer shall execute such declarations if legally required.

(k) Deed In Lieu Certificate. Borrower's Deed In Lieu of Foreclosure Certificate dated the Closing Date in the form of Exhibit Q attached hereto.

(l) Certificate(s) of Title. Certificate(s) of title endorsed to Lender, or, at Lender's option, Buyer, transferring to Buyer all Personal Property registered on any so-called certificates of title.

C. Original Documents. The following documentation shall be delivered:

(a) Leases/Contracts. Borrower shall deliver the original Leases and Contracts to Lender.

(b) Licenses and Permits. Borrower shall deliver the original Licenses and Permits to Lender.

(c) Warranties. Borrower shall deliver the original Warranties to Lender.

(d) Plans and Specifications. Borrower shall deliver to Lender, if available, the original Plans and Specifications.

(e) Management Documents. Borrower shall deliver (or cause the managing agent to deliver) to Lender (or Buyer), copies of all books, records, bills, invoices, lease files, credit reports, and other documents related to the ownership, operation, management, use, maintenance, or leasing of the Property (the "Management Documents"), or, with Lender's permission only, for any such items not physically delivered to Lender on the Closing Date, a letter from Borrower to Lender stating where such item is located, and a letter from Borrower and its managing agent addressed to the keeper of such records, directing such keeper to release all such Management Documents to Lender or to Lender's designee.

D. Borrower Documents. The following documents of Borrower shall be delivered to Lender:

(a) Partnership Agreement and Certificates. Certified copy of Borrower's Partnership Agreement together with Borrower's Certificate of Limited Partnership issued by the \_\_\_\_\_ Secretary of State (dated not earlier than \_\_\_\_\_) and a Certificate of Existence for Borrower from the \_\_\_\_\_ Secretary of State dated not earlier than \_\_\_\_\_.

(b) Corporate Documentation. Certified copy of the articles of incorporation of the general partner of Borrower (certified by the \_\_\_\_\_ Secretary of State) (dated not earlier than \_\_\_\_\_) together with a certificate of good standing for the general partner of Borrower from the \_\_\_\_\_ Secretary of State (dated not earlier than \_\_\_\_\_), a certified copy of the bylaws of the general partner of Borrower, a certified copy of the general partner's board of directors' resolution and shareholder consent approving the transaction, and a certificate of incumbency for the general partner of Borrower.

(c) Consents. Consents of [all] the partners of Borrower authorizing the execution of this Agreement and the execution and delivery of all documents required pursuant hereto.

E. Other Deliveries. The following deliveries, showings, and occurrences shall have been delivered or shall have occurred:

(a) Security and Other Deposits. Borrower shall deliver (with such assignments as Lender shall require) to Lender or, at Lender's option, Buyer, all cash and non-cash security and other deposits and interest, if any, required by law or agreement to be paid thereon.

(b) Possession. Borrower shall deliver possession of the Real Property and the other Property to Lender, subject to the rights of existing tenants and the Permitted Exceptions.

(c) Keys to Premises. Borrower shall deliver to Lender or Lender's designee, a key code inventory and all keys to the Real Estate or, with Lender's permission, a letter executed by Borrower and the Borrower's managing agents addressed to the person(s) or entities possessing the keys directing such persons or entities to deliver the keys to Lender or Lender's designated representative.

(d) Legal Opinion. Borrower shall cause to be delivered to Lender, an opinion addressed to Lender and Buyer from counsel to Borrower, dated as of the Closing Date, in the form of Exhibit R attached hereto.

(e) Evidence of Termination. Borrower shall deliver to Lender, evidence of termination (at no cost to Lender or Buyer and free of all liens or claims for liens by reason of the terminated agreements) of all (i) management, brokerage, and leasing commission agreements and (ii) service and maintenance contracts that are not Assigned Contracts.

(f) Payments to Lender. Borrower shall pay to Lender an amount equal to \$\_\_\_\_\_ plus any prepaid rents allocable to the period following Closing.

(g) Property Manager's Waiver. Borrower shall deliver to Lender, a lien waiver from each property manager [and leasing broker or agent] for the Property and waiver of any and all rights or claims to real estate brokerage, leasing or management fees, and commissions with respect to any sale, lease, or the operation of the Property or any part of the Property.

(h) Miscellaneous Waivers. Borrower shall deliver to Lender, lien waivers and lien releases from each person listed in the Payable Statement attached hereto as Exhibit S or any other person who, pursuant to applicable law or agreement, may have a right to a lien on the Property or any portion thereof on account of work or services performed or provided to, or for the benefit of, the Property [Borrower may, in lieu of providing such lien waivers, deliver to the issuers of the Title Policy and Loan Policy Endorsements such documentation and funds as such issuers may require to insure against any of such claims on the Title Policy and Loan Policy (as modified by the Loan Policy Endorsements); in any event, Borrower shall notwithstanding non-delivery of any such releases or waivers,

induce the issuer of the Loan Policy Endorsements and the Title Policy to waive any exceptions with respect to any of such claims.

(i) Release of Lender by Borrower, et al. Borrower and Guarantor shall deliver to Lender, a release of Lender and its respective affiliates, successors and assigns and other parties reasonably designated by Lender, in the form of Exhibit T attached hereto.

(j) Covenant Not to Sue Borrower. Lender shall deliver the Covenant Not to Sue to Borrower.

(k) Additional Consents. Borrower shall deliver to Lender, any and all consents from persons whose consent is required by Borrower for the closing of this transaction.

(l) Settlement Statement. Beneficiary and Lender shall jointly execute and deliver a settlement statement to each other.

4.3 Approvals and Monetary Deposits. All items to be delivered to pursuant to the provisions of Paragraphs 4.1 and 4.2 shall be subject to the approval of the parties. All deliveries and deposits of funds described in Paragraph 4.2 shall be in good immediately available funds.

4.4 Expenses of Closing. Except as set forth on Exhibit U, each party shall pay its own expenses in connection with the Closing.

#### ARTICLE V Covenants

5.1 Cooperation. Commencing on the date of this Agreement, Borrower will reasonably cooperate, upon Lender's request, with Lender and Buyer, including, without limitation, any management company designated by Lender to facilitate an orderly transfer of the ownership and management of the Property.

5.2 Audit. Commencing on the date of this Agreement, Borrower will permit Lender and/or Lender's designated representatives to audit and review Borrower's books and records.

5.3 Rent Collections. Borrower agrees that in the event that Borrower or any affiliate of Borrower receives any rental payment or other payment from any tenant or other occupant or user of the Property following Closing, Borrower will deliver to Lender or Lender's designee, with proper endorsements, such funds not later than two (2) business days following receipt of such funds.

#### ARTICLE VI Representations and Warranties

6.1 Representations and Warranties of Lender. Lender represents and warrants to Borrower and Guarantor as follows:

(a) Lender is an organized and existing corporation in good standing under the laws of the State of its incorporation and if such State of \_\_\_\_\_ is other than the State of \_\_\_\_\_, Lender is authorized to do business in the State of \_\_\_\_\_.

(b) Lender has 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. Borrower represents and warrants to Lender as follows:

(a) Organization and Authority. Borrower is a[n] \_\_\_\_\_ limited partnership, and duly formed, organized, validly existing, and, as applicable, in good standing under the laws of \_\_\_\_\_. Borrower and Guarantor have the capacity, right, power, and authority to execute this Agreement and to perform their respective obligations hereunder and to consummate the transaction described herein contemplated by this Agreement including the execution and delivery of all documentation required by this Agreement. The execution of this Agreement has been authorized by all necessary partnership or corporate authorizations of Borrower. The execution, delivery, and performance of this Agreement by Borrower and Guarantor does not breach, conflict with, or contravene: (i) Borrower's partnership agreement or certificate; (ii) any agreement, instrument, document, or indenture to which Borrower or Guarantors are a party or by which they or the Property is bound; (iii) any applicable law; or (iv) any judgment, writ, or order directed to Borrower or Guarantors or by which Borrower or Guarantors may be bound.

(b) Bankruptcy. Guarantor and Borrower have not filed a petition in any case, action, or proceeding under the Bankruptcy Code or any similar state law; no petition in any case, action, or proceeding under the Bankruptcy Code or any similar state law has been filed against Borrower or Guarantor that has not been dismissed or vacated; and neither Borrower nor Guarantor have filed an answer or otherwise admitted in writing insolvency or inability to pay their debts or made an assignment for the benefit of creditors or consented to an appointment of a receiver or trustee of all or a material part of their property. The transaction contemplated herein is not a preference, voidable transfer, fraudulent conveyance, or otherwise in violation of the [Bankruptcy Code] or any other similar state or federal law.

(c) Absence of Litigation. Neither Borrower nor Guarantor have received any written notice of any, nor is there any, pending or, to the best of Borrower's knowledge any threatened, litigation or administrative proceeding involving in any manner the Real Property or the ownership, leasing, operation, management, use, or maintenance thereof or this transaction.

(d) Arm's-Length Transaction. Borrower and Guarantor have requested conveyance of title to the Property in lieu of the exercise of Lender's remedies pursuant to the Loan Documents and throughout the negotiation, preparation, and execution of this Agreement has been, and will through the Closing be represented by competent legal counsel of their own choosing. This Agreement was entered into out of the free will of Borrower and Guarantor and pursuant to arm's-length negotiations and Borrower and Guarantor believe this Agreement is fair. Lender has not taken advantage of Borrower or Guarantor by threats, intimidation, overreaching, unconscionable conduct, or otherwise and Borrower and Guarantors are proceeding in this transaction as volunteers in what they perceive to be their own best interest.

6.3 Representations and Warranties of Guarantors. Guarantor represents and warrants to Lender as follows:

(a) Guarantor is over the age of 18, is competent, and has sufficient legal capacity to enter into, deliver, and perform his/her respective obligations under this Agreement and the documents to be executed and delivered by him/her pursuant to this Agreement.

(b) Guarantor has not filed a petition in any case, action, or proceeding pursuant to the Bankruptcy Code or any similar state law; no petition, in any case, action, or proceeding under the Bankruptcy Code or any similar state law has been filed against Guarantor that has not been dismissed or vacated; and Guarantor has not filed an answer or otherwise admitted in writing insolvency or inability to pay Guarantor's debts or made an assignment for the benefit of creditors nor consented to an appointment of a receiver or trustee of all or any material part of his/her property.

(c) Guarantor has requested Lender to enter into this Agreement of Guarantor's own free will and has been represented by competent legal counsel of their own choosing. Guarantor agrees that this Agreement is fair. Lender has not taken advantage of Guarantor by threats, intimidation, overreaching unconscionable conduct or otherwise. Guarantor is proceeding in this transaction as a volunteer in what he perceives to be Guarantor's own best interests.

6.4 Additional Representations and Warranties. Borrower also makes the representations and warranties set forth on Exhibit V.

6.5 Indemnity. Borrower agrees to defend, indemnify, and hold Lender, Buyer, and their respective partners, successors, assigns, members, officers, participants, shareholders, directors, and personal representatives (collectively, the "Lender-Connected Parties") harmless from and against any losses, damages, costs (including, without limitation, attorneys' fees, court costs, and costs of appeal), expenses, judgments, liens, decrees, fines, penalties, liabilities, claims, actions, suits, and causes of action arising, directly or indirectly, from (a) any breach by Borrower or Guarantor of warranty or representation contained in this Agreement or in the documents executed and delivered by Borrower pursuant to this Agreement (with this Agreement, sometimes collectively referred to as the "Borrower Documents"); (b) any breach, default, or violation by Borrower or Guarantor of any covenant, agreement, or provision of the Borrower Documents; and (c) any claims or liabilities pertaining to the Property arising prior to the Closing [other than claims or liabilities arising under the Loan Documents [which for purposes of this Section 6.5, does not include the Environmental Indemnification Agreement].

## ARTICLE VII

### No Obligation of Lender to Third Parties

7.1 No Third-Party Beneficiary. Borrower acknowledges and agrees that the transfer to Lender or Buyer of title to the Real Property pursuant to the terms of this Agreement shall not create any obligations on the part of Lender to third parties that have claims of any kind whatsoever against Borrower with respect to the Property, and Lender does not assume or agree to discharge any liabilities pertaining to the Property except as otherwise expressly provided in this Agreement.

## ARTICLE VIII

### Absolute Conveyance

8.1 Conveyance. The conveyance of the Property to Lender or Buyer according to the terms of this Agreement is an absolute conveyance of all of its right, title, and interest in and to the Property in fact as well as form and was not and is not now intended as a mortgage, trust conveyance, deed of trust, or security instrument of any kind, and that the consideration for such conveyance is exactly as recited herein and Borrower has no further interest (including rights of redemption) or claims in and to the Property or to the rents, proceeds, and profits that may be derived thereof, of any kind whatsoever.

ARTICLE IX  
No Merger

9.1 Merger. Notwithstanding Lender's or Buyer's acquisition of the Property, the indebtedness evidenced by the Note shall not be cancelled, shall survive the Closing and delivery of any deeds and/or releases, and all of the Loan Documents shall remain in full force and effect after the transaction contemplated by this Agreement has been consummated. The parties further agree that the interest of Lender in the Property after Buyer's acquisition of the Property shall not merge with the interest of Lender in the Property under the Loan Documents. It is the express intention of each of the parties hereto (and all of the conveyances provided for in this Agreement shall so recite) that such interests of Lender and Buyer in the Property shall not merge, but be and remain at all times separate and distinct, notwithstanding any union of said interest in Lender at any time by purchase, termination, or otherwise and that the lien of the Mortgage in the Property shall be and remains at all times a valid and continuous lien on the Property until and unless released of record by Lender or its successors and assigns.

ARTICLE X  
Notices

10.1 Notice. Any notice pursuant to this Agreement shall be given in writing by (a) personal delivery, or (b) reputable overnight delivery service with proof of delivery, or (c) United States Mail, postage prepaid, registered or certified mail, return receipt requested, or (d) legible facsimile transmission sent to the intended addressee at the address set forth below, or to such other address or to the attention of such other person as the addressee shall have designated by written notice sent in accordance herewith, and shall be deemed to have been given either at the time of personal delivery, or, in the case of expedited delivery service or mail, as of the date of first attempted delivery at the address and in the manner provided herein, or, in the case of facsimile transmission, as of the date of the facsimile transmission provided that an original of such facsimile is also sent to the intended addressee by means described in clauses (a), (b), or (c) above. Unless changed in accordance with the preceding sentence, the addresses for notices given pursuant to this Agreement shall be as follows:

To Borrower and Guarantor:

.....  
.....  
.....  
Attention: .....  
Facsimile No.: .....

With a copy to:

.....

\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
Facsimile No.: \_\_\_\_\_

To Lender:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
Facsimile No.: \_\_\_\_\_

With a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
Facsimile No.: \_\_\_\_\_

All notices shall be deemed effectively given on the date that such notice is received or refused.

ARTICLE XI  
Miscellaneous

11.1 Entire Agreement. This Agreement, and the exhibits attached hereto, and all other instruments and documents executed and delivered at Closing by either party hereto, embody the entire agreement between the parties in connection with the transaction contemplated hereby and there are no oral or parol agreements, representations, or inducements existing between the parties relating to the transaction contemplated hereby that are not expressly set forth herein and covered hereby. This Agreement may not be modified except in writing signed by all of the parties hereto.

11.2 Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, Buyer and the respective heirs, administrators, executors, personal representatives, successors, and assigns of the parties hereto and Buyer.

11.3 Waivers. No written waiver by any party at any time of any breach of any provision of this Agreement shall be deemed a waiver of a breach of any other provision herein or a consent to any subsequent breach of the same or any other provision. If any action by any party shall require the consent or approval of another party, such consent or approval of such action on any one occasion shall not be deemed a consent to or approval of such action on any subsequent occasion or a consent to or approval of any other action on the same or any subsequent occasion.

11.4 Captions. The captions, section numbers, and article numbers appearing in this Agreement are inserted only as a matter of convenience and do not define, limit, construe, or describe the scope or intent of such paragraphs or articles of this Agreement nor in any way affect this Agreement.

11.5 Time is of Essence; Counterparts; Governing Law. All parties hereto agree that time is of the essence in this transaction and that this Agreement may be executed in counterparts



and shall be governed by and interpreted in accordance with the laws of the State of \_\_\_\_\_.

11.6 Appointment of Designee. Lender does hereby reserve the right to appoint Buyer to accept title to the Property at the time of the Closing.

11.7 Brokers. Lender and Borrower represent and warrant to the other that it has had no direct dealings with any real estate brokers, salesmen, agents, finders, or consultants in connection with the conveyance of the Property to Lender.

11.8 Lender's Liability. In no event shall Lender be personally or individually liable for any obligation set forth in this Agreement. Except to the extent expressly provided in the Borrower Documents, neither Buyer nor Lender is assuming any obligations or liabilities of Borrower or Guarantor.

11.9 Borrower's Liability; Guarantor's Liability. Notwithstanding any provision contained in this Agreement to the contrary, or in any agreement to be delivered pursuant to this Agreement, it is agreed that the limited partners of Beneficiary and the officers, shareholders, and directors of general partner shall not be individually or personally liable to Lender by reason of a breach of any obligation of Borrower pursuant to this Agreement, all recourse of Lender or Buyer against Borrower to be satisfied solely from the assets of Borrower (it being agreed that any obligation of a limited partner, shareholder, director, or officer of its general partner to contribute funds or loan funds to Borrower and any negative capital account on the part of a limited partner of Borrower shall not be deemed an asset of Borrower for the purposes of this Agreement). Proceeds of the Property received by Borrower or paid to any affiliate of Borrower shall be deemed assets of Borrower.

11.10 Value. Borrower hereby confirms to Lender that this value of the Property does not exceed the indebtedness owing to Lender pursuant to the Loan Documents.

11.11 Survival. The terms and provisions of this Agreement shall survive the Closing and delivery of the deed and other documents to be delivered to Lender pursuant to this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties hereto have executed this Agreement as of the day and year first above written.

BORROWER:

LENDER:

GUARANTOR:

## LIST OF EXHIBITS

EXHIBIT A	LEGAL DESCRIPTION
EXHIBIT B	LIST OF LOAN DOCUMENTS
EXHIBIT C	PERMITTED EXCEPTIONS
EXHIBIT D	ASSIGNED CONTRACTS
EXHIBIT E	LICENSES AND PERMITS
EXHIBIT F	LIST OF TANGIBLE PERSONAL PROPERTY
EXHIBIT G	FORM OF COVENANT NOT TO SUE
EXHIBIT H	FORM OF ESCROW AGREEMENT
EXHIBIT I	FORM OF SEARCH CERTIFICATE
EXHIBIT J	FORM OF DEED
EXHIBIT K	FORM OF BILL OF SALE
EXHIBIT L	FORM OF ASSIGNMENT AND ACCEPTANCE OF LEASES
EXHIBIT M	FORM OF ASSIGNMENT
EXHIBIT N	FORM OF NON-FOREIGN STATUS CERTIFICATE
EXHIBIT O	FORM OF RENT ROLL CERTIFICATE
EXHIBIT P	FORM OF TENANT LETTER
EXHIBIT Q	FORM OF DEED IN LIEU OF FORECLOSURE CERTIFICATE
EXHIBIT R	FORM OF LEGAL OPINION
EXHIBIT S	PAYABLE STATEMENT
EXHIBIT T	FORM OF RELEASE
EXHIBIT U	EXPENSES
EXHIBIT V	ADDITIONAL REPRESENTATIONS AND WARRANTIES

## FORM OF COVENANT NOT TO SUE

\_\_\_\_\_, a \_\_\_\_\_ corporation ("Lender"), for and in consideration of the sum of Ten and No/100 Dollars (\$10.00), in hand paid, and for other good and valuable consideration, the receipt and sufficiency of which hereby are acknowledged, pursuant to that certain Deed In Lieu of Foreclosure Agreement dated as of \_\_\_\_\_ (the "Purchase Agreement") between Lender, \_\_\_\_\_, a \_\_\_\_\_ limited partnership ("Borrower"), and \_\_\_\_\_ ("Guarantor"), does hereby covenant and agree not to sue Borrower, Guarantor, and their respective heirs, executors, administrators, personal representatives, successors, assigns, and past, present, and future affiliates, officers, directors, employees, shareholders, and agents, on account of any and all liabilities, duties, responsibilities, obligations, claims, demands, actions, damages, costs, losses, and expenses now existing or hereafter arising out of or in any way relating to or connected with, directly or indirectly, the "Property" (as defined in the Purchase Agreement), the "Loan" (as defined in the Purchase Agreement), and the "Loan Documents" (as defined in the Purchase Agreement) excluding, however, those specific matters or obligations of Borrower arising under the specific terms of the Purchase Agreement [and][,] the "Borrower Documents" (as defined in the Purchase Agreement) [and the Environmental Indemnification Agreement].

Notwithstanding the foregoing, Lender reserves, on its own behalf and on behalf of "Buyer" (as defined in the Purchase Agreement), the right to sue (including, without limitation, the right to counterclaim against) and obtain and satisfy a judgment against Borrower and Guarantor to the full extent of any indemnification obligations of Borrower and Guarantor under the Purchase Agreement or by reason of claims of causes or action arising out of (a) any breach of the covenants, representations, warranties, and agreements by Borrower and Guarantor set forth in the Borrower Documents, (b) fraud, or (c) Borrower's failure to pay to Lender or Buyer rents collected by Borrower allocable to any period following the Closing Date. The foregoing covenant not to sue will be null, void, and of no force and effect, if (x) Borrower or Guarantor commences any action, suit, or proceeding against Lender, Buyer, or any other "Lender-Connected Party" (as defined in the Purchase Agreement) in connection with the Purchase Agreement seeking to rescind the transaction contemplated thereby (in whole or in part) or attacking the validity thereof (in whole or in part) or (y) if on or before the 367th day following the "Closing Date" (as defined in the Purchase Agreement) Borrower files [or General Partner files against Borrower] a petition under any chapter or section of Title 11 of the United States Code, as amended. Furthermore, Lender shall have the right to sue and (including, without limitation, the right to counterclaim against) obtain and satisfy a judgment against Borrower if Borrower is a necessary or reasonably necessary party in any action brought against Lender or any affiliate of Lender. Nothing contained herein shall affect, and Lender hereby expressly reserves, the right to foreclose the "Mortgage" (as defined in the Purchase Agreement) by judicial or, to the extent permitted by applicable law, nonjudicial foreclosure and, in connection with any such foreclosure, Borrower and/or Guarantor may, in Lender's sole discretion, be named as a party defendant, and Lender will be permitted to seek, obtain, and satisfy a judgment in any such foreclosure proceedings, provided, however, that Borrower and Guarantor shall not be personally liable for satisfaction of such judgment.

Date: \_\_\_\_\_

\_\_\_\_\_, a \_\_\_\_\_ corporation

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

(The Above Space for Recorder's Use Only)

**SPECIAL**  
**WARRANTY DEED**

\_\_\_\_\_, a \_\_\_\_\_ ("Grantor"), for and in consideration of the sum of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration in hand paid to the undersigned by \_\_\_\_\_, a \_\_\_\_\_ ("Grantee"), whose mailing address is \_\_\_\_\_, the receipt and sufficiency of such consideration being hereby acknowledged. Grantor does hereby GRANT, SELL, AND CONVEY unto Grantee that certain real property being more particularly described in Exhibit A attached hereto and made a part hereof for all purposes, together with all improvements and fixtures situated thereon (collectively, the "Property").

TO HAVE AND TO HOLD the Property, together with all and singular the rights and appurtenances thereto in anywise belonging, unto Grantee and its successors and assigns and to WARRANT AND FOREVER DEFEND all and singular the Property unto Grantee, its successors and assigns, against every person whomsoever lawfully claiming, or claim the same, or any part thereof, by, through, or under Grantor but not otherwise, and Grantor agrees to execute and deliver to Grantee such additional documents as may be requested by Grantee to confirm or complete the conveyance of the Property as described herein.

This Special Warranty Deed is given by Grantor as a deed in lieu of foreclosure. It is the purpose and intent of Grantor and Grantee that the interests of Grantee shall not merge with the interests of \_\_\_\_\_ under its Mortgage upon the Property.

EXECUTED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

**GRANTOR:**

\_\_\_\_\_  
a \_\_\_\_\_

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

STATE/Commonwealth of \_\_\_\_\_, CITY/COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY that on this \_\_\_\_ day of \_\_\_\_\_, 2008, before me, the undersigned Notary Public of the County and State aforesaid, personally appeared \_\_\_\_\_, and acknowledged himself to be the \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_, and that he, as such \_\_\_\_\_, being authorized so to do, executed the foregoing instrument on behalf of \_\_\_\_\_, for the purposes therein contained by signing the name of \_\_\_\_\_ by himself as the \_\_\_\_\_.

IN WITNESS MY Hand and Notarial Seal.

\_\_\_\_\_(SEAL)  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

This instrument was prepared by and after recording is to be returned to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

EXHIBIT A

Description of the Real Property

**THE FINE PRINT CAN COST YOU OR SAVE YOU A MILLION OR MORE****NON-RECOURSE CARVE OUTS, CASE LAW, BUSINESS DECISIONS AND A WINNING  
WAR STORY**

Edward Wender  
Venable, LLP  
750 E. Pratt Street  
Baltimore, Md. 21202  
410-244-7606

**I. BACKGROUND**

Nonrecourse carve outs are the laundry list of items found in a note or mortgage, usually at the end when most people are tired of reading, which set forth when and to the extent the principals of the Borrower may face personal liability to repay what is otherwise a non-recourse loan. Typically, the Lender will tell borrowers that this is standard language. While the language is largely standard, some specific items are negotiable. Moreover, it is important to understand these provisions in considering actions post closing.

Generally the carve outs are one of 5 categories:

- Diversion of security – fraudulent acts generally, failure to pay insurance proceeds to lender, failure to pay Lender net rents (after payment of operating expenses) received after an event of default, collecting rent more than 30 days in advance and similar instances.
- Impairment of Security – payment of taxes (permits a senior lien to arise), creation of mechanics' liens, or waste (failure to maintain the property).
- Protection of Lenders against risks which may render the security worthless – environmental indemnities, intentional waste, failure to maintain insurance or certain criminal activities.
- Behavior Modification Provisions – compliance with separateness and bankruptcy remote provisions; restrictions on transfers, and compliance with limitations on distributions.
- Bankruptcy Provisions – filing voluntary bankruptcy or taking actions to facilitate or assist in the filing of an involuntary bankruptcy.

**II, KEY POINTS TO READ/CONFIRM/WEEP**

- Is recourse only to the extent of a loss caused by the violation of non-recourse carveout or does it trigger full recourse for the entire unpaid balance?
  - This can be negotiable (other than with respect to voluntary bankruptcy and, is very limited with respect to involuntary bankruptcy filings).
  - Generally, recourse is only to the extent of loss for diversions of security or impairment of security.



- Should also be available for failure to maintain separateness covenants in any immaterial respect (but this is not always possible).
- On very large loans, sponsors have negotiated limits on the maximum amount of full recourse.
- Is recourse only for the guarantor's actions or are you responsible for actions of others? Do you control the actions of others?
  - This may be negotiable, but generally you will be held to account for actions of affiliates.
  - Generally responsible for actions of co-guarantors.
  - Try to limit responsibility for actions of agents.
- Can your control the risk of violation of the non-recourse carve-outs?
- Can you avoid total recourse as a result of a violation of a non-recourse carve out?

### III. Case Law

- Very few cases decided to date.
- Courts enforce the provisions as written – very unfavorably to guarantors.
- Guarantors held liable for full recourse even though the defaults and triggering events were controlled by an independent third party agent. *Heller Financial, Inc. v. Lee* 2002 WL 1888591 (n. D. Ill 2002)
  - Loan Documents had a covenant that no liens would arise against the project (a hotel), subject to a right to contest.
  - An independent third party managed the hotel.
  - The hotel manager permitted six liens to be imposed on the hotel. A few small mechanics liens and three tax liens totally slightly over \$800,000. The liens were not bonded off as required under the Loan Documents.
  - Heller accelerated the debt based on the existence of the liens and sold the collateral.
  - Heller sought to recover a deficiency from the guarantors based on a violation of the non-recourse provisions which provided for recourse if liens were imposed on the hotel in violation of the Loan Documents.<sup>1</sup>
  - Court ruled that the Guarantors were liable for the full deficiency – even though the Guarantors could have resolved the liens by payment of \$800,000 (less than the deficiency).
- Full Recourse (\$10,700,000 liability) because the Borrower retained settlement proceeds (\$2,000,000) in violation of the loan documents. The Court strained to construe the security provisions to include proceeds received to settle an appeal of a zoning decision relating to adjacent property. *Blue Hills Office Park, LLC v. J. P. Morgan Chase Bank* 477 F. Supp. 2<sup>nd</sup> 366 (D. Mass. 2007).
  - Borrower appealed a zoning decision relating to adjacent property.

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<sup>1</sup> In this instance the loan was secured by a pledge of the ownership interests in the owner of the hotel, so that the Court emphasized that the imposition of a lien on the hotel itself would wipe out the value of the collateral.

- Neighboring property owner paid \$2,000,000 to buy a dismissal of the appeal.
- Borrower defaults on loan (principal tenant vacated).
- Court held that the \$2,000,000 was proceeds or products of the real estate and thereof included in the collateral base.
- Also Borrower sold 1,000 workstations for \$100,000 and kept the funds.
- Held liable for full recourse for making transfers of property without obtaining the Lender's consent.
- Held liable under the Guaranty for violating the Separateness Covenants – commingled the \$2,000,000 with funds of its parent entities.
- Held liable because they failed to maintain an independent director.
- Held liable for filing bankruptcy even though the filing of bankruptcy delayed foreclosure for only one month. 111 Debt Acquisition LLC v. Six ventures, Ltd. C2-08-768 (U. S. Dt. Ct, S. D. Ohio, 2009).
  - September 2008 filed for bankruptcy – a bankruptcy filing was a springing recourse event.
  - October 2008, Bankruptcy Court granted mortgagee relief from the automatic stay allowing a foreclosure sale.
  - Guarantors held liable for full recourse.
- Caveat – While case law has been Lender-friendly, the cases decided to date all involved (a) solvent guarantors, and (b) were not decided by debtor-oriented bankruptcy courts. If the guarantors (as opposed to the Borrower) were in bankruptcy, the non-recourse issues would be heard in a Bankruptcy Court which would tend to protect guarantors and their other creditors.
- General Growth bankruptcy could involve litigation which touches on these issues.

#### IV. Business Decisions

- Read non-recourse provisions carefully up front.
- Try to negotiate changes.
  - Make as many as possible to read that liability is for actual damages, not automatic full recourse.
  - Try to make violation of special purpose entity (SPE) requirements to trigger recourse only to the extent of actual damage or if substantive consolidation (a bankruptcy risk) occurs.
  - Seek to avoid liability for acts of others you or your client do not control.
  - Assume that the provisions will be enforced as written.
  - Review the Separateness Covenants up front. There is a long laundry list and if there are some which will be difficult with which to comply, then ask them to delete. The list may include some which are impractical.
- After closing, before any significant actions are taken, have counsel review non-recourse language so that you do not trigger recourse by actions or inactions after closing.
  - You might to decide to take the risk if the downside is liability for actual damages.

- Review documents before filing bankruptcy or considering assisting in an involuntary filing
  - MacLowe lost much of his New York portfolio to foreclosure of mezzanine loans without filing bankruptcy, because of fear of personal liability.
  - Senior Lenders to the Extended Stay Hotel Group agreed to indemnify the sponsor (David Lichtenstein) against recourse liability (up to \$100,000,000) in order to induce Extended Stay Hotel to file a voluntary bankruptcy which would permit the senior lenders to take over the company.
- Review the Separateness Covenants to put in place safeguards to avoid inadvertent non-compliance.
- Maintain an independent director at all times if required.
- Seek to install safeguards to avoid having others violate the separateness covenants or other covenants which trigger recourse liability.
- Obtain indemnification from partners if they violate the Separateness Covenants (may not be an adequate remedy).

V. War Story