

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

UNITED STATES SECURITIES AND  
EXCHANGE COMMISSION,

Plaintiff,

v.

EQUITYBUILD, INC., et al.,

Defendants.

Case No. 1:18-cv-5587

Hon. Manish S. Shah

Magistrate Judge Young B. Kim

**REPLY STATEMENT OF CLAIMANT  
DIRECT LENDING PARTNER LLC**

By operation of the EBF Investor-Lenders' release (the "EBF Release"), as well as Equitybuild Finance, LLC's ("EBF") apparent authority to release the EBF Investor-Lenders' Mortgage, Direct Lending Partner LLC (successor to Arena DLP Lender LLC and DLP Lending Fund LLC) ("DLP"), holds the only valid lien on the Group 2 property located at 6160-6260 S. Martin Luther King Dr., Chicago, Illinois, 60637 (the "6160 MLK Property"). The SEC, Receiver, and the Certain Individual Investors challenge DLP's lien priority,<sup>1</sup> arguing that the EBF 6160 MLK Mortgage remains in effect because the EBF Investor-Lenders did not authorize the release of their mortgage, rendering the EBF Release invalid. Further, they suggest that "[b]ecause the MLK Property involves the same facts and same law as Group 1, the Court should reach the same result." (*See* Dkt. 1556 at 1; Dkt. 1564 at 4-7; *but see* Dkt. 941, ¶ 16 ("The ruling as to any

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<sup>1</sup> To the extent other claimants challenge DLP's priority on the 6160 MLK Property (*see* Dkt. 1566), DLP reiterates its lien priority for the reasons expressed herein, as well as in its position statement (Dkt. 1559). Notably, numerous individuals in their separate position statements assert, often as the only basis for their position, that Equitybuild told them they would have a first lien. But, on this particular point, DLP is no worse situated with respect to priority because DLP was also told by borrower's counsel, in writing, and in signed mortgage documentation, that it had a first lien. (*See* Dkt. 1559 at 2.)

particular Group of properties . . . will not have preclusive effect with respect to any property that is not the subject of the pending Framing Report.”.) However, material differences between the release at issue in Group 1 and the EBF Release, warrant a different outcome.

## ARGUMENT

### **I. DLP Reasonably Relied On The Valid EBF Release.**

Both the SEC and the Certain Individual Investors contend that issues with the signatory on the EBF Release render it invalid (Dkts. 1556 at 7, 1564 at 5-6) and, consequently, that DLP’s reliance on the “fraudulent release” was unreasonable. (Dkt. 1564 at 5-6.) But DLP reasonably relied on EBF’s apparent authority—as indicated in the EBF Release itself as well as other documents of record—to release the EBF 6160 MLK Mortgage of record.

The SEC and the Certain Individual Investors primarily argue the EBF Release was invalid due to errors in the signatory, but those purported errors do not render the EBF Release invalid. First, both the SEC and Certain Individual Investors assert that “a release is ineffective if ‘not executed by the mortgagee.’” (Dkt. 1556 at 7; *see also* Dkt. 1564 at 5-7.) Rather than bearing the signatures of approximately 75+ individual investors, the EBF Release is instead signed by the EBF Investor-Lenders’ agent and loan servicer, EBF.<sup>2</sup> (Dkt. 1559-2 at 3.) Specifically, and unlike the Group 1 release which only indicated “Equitybuild Finance, LLC” as the signatory, the EBF Release bears Shaun Cohen’s signature, as “Its [EBF’s] President.” (*Id.*) Given that the Illinois Mortgage Act expressly states that a release may be executed by a mortgagee’s legal

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<sup>2</sup> As the Receiver has acknowledged, the individual EBF Investor-Lenders often rolled over, or swapped in and out of the loans, rendering it impossible to be certain who the actual mortgagees were at any given time. (*See* Dkt. 1571 at 3, 18-19, 21.) These common developments are precisely why loan servicers are employed in the industry, and why it is reasonable for DLP to have relied upon EBF’s authority to issue a release on the mortgagees’ behalf.

representative, *see* 765 ILCS 905/2, the fact that the EBF Release is not signed by 75+ individual investors cannot render it invalid.

Second, the Certain Individual Investors further contend that EBF signature's failure to expressly designate that EBF was signing in its agent capacity further undermines the EBF Release's validity. (Dkt. 1564 at 5-6.) According to the Certain Investor Lenders, to be enforceable a release "must be signed either by the party holding the rights or an agent authorized by that party," citing two cases. (Dkt. 1564 at 6-7.) In addition to the fact that, as noted, the Illinois Mortgage Act permits a "legal representative" such as EBF to execute a release, *see* 765 ILCS 905/2, the two cases the Certain Individual Investors rely on for this proposition are readily distinguishable. Most notably, neither case actually involved a mortgage release.

In *McClintock v. Helberg*, 168 Ill. 384 (1897), an attorney made an unauthorized "surrender[ of] a claim for \$750.00 . . . and a note for \$3690.00 secured by a trust deed upon land which was worth much more than the amount of the note, in exchange for a bond which was, to say the least, of very doubtful value." *Id.* at 392. The court's ruling concerned a release of a cause of action, not a mortgage release. Based on Illinois law specific to attorneys acting as agents in active litigation—specifically that "an attorney has no power, without express authority, to bind his client by a compromise of a pending suit"—the court concluded the appellant should have "inquired as to the authority of the solicitor to make the arrangement." *Id.* at 392-93.

*Schroeder v. Wolf*, 127 Ill. App. 503 (1st Dist. 1906), is equally distinguishable. In *Schroeder*, a trustee sold a note and trust deed to a subsequent buyer without the note holder's knowledge. *Id.* at 509. There was no release of record, rather the trustee simply marked the note "paid." *Id.* The subsequent buyer, however, never reviewed the record, which would have revealed the trust deed remained in force and that there was no release on record. *Id.* at 509. For that reason,

the trustee’s unauthorized “release” did not operate to discharge the lien; “the original trust deed . . . never having been released of record, was not discharged nor its lien affected by the unauthorized arrangement made by [the trustee] . . . for his own use and benefit.” *Id.* at 509-10. The court also noted “[t]here [was] no evidence tending to show that [the trustee] was the agent of the appellee . . . to write ‘paid’ upon the note and trust deed.” *Id.* at 510.

Critically, unlike in *Schroeder*, there is evidence that EBF was the EBF Investor-Lenders’ servicing agent. The EBF 6160 MLK Mortgage—a matter of public record—listed the lenders as “The Persons Listed on Exhibit A to the Mortgage c/o **EquityBuild Finance, LLC**” (Dkt. 1559-1 (emphasis added).) The EBF Release mirrored EBF’s apparent authority in this regard, with EBF signing the EBF Release consistent with the EBF 6160 MLK Mortgage.

Further unlike *Schroeder* (and *McClintock*), the court’s conclusion in *5201 Wash. Investors LLC & Arthur Bertrand v. Equitybuild, Inc.*, 2023 Ill. Cir. LEXIS 79, relating to the very same “care of” mortgage language remains especially instructive on the issue of apparent authority.<sup>3</sup> Published three months after the Court’s Group 1 decision, the *5201 Wash. Investors* decision

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<sup>3</sup> The Receiver discusses *5201 Wash. Investors*, but focuses on distinctions that are immaterial to the court’s conclusion concerning apparent authority. (See Dkt. 1571 at 3, n.2.) For example, the Receiver notes the “issue there was the import of a property buyer’s reliance on a title report rather than, “like here, the due diligence of a lender.” *Id.* The Receiver also contends “DLP has made no effort to—nor could it—show that it was similarly situated to Fannie Mae in that case,” because Fannie Mae “took its assignment of the loan in good faith, for value, and without notice,” while, according to the Receiver, “DLP was on inquiry notice.” *Id.* Neither point changes the relevance of *5201 Wash. Investors*’ apparent authority conclusion, which, as discussed, is based on identical mortgage language of record. Further, the Receiver’s criticism that DLP “has made no effort” to show it is similarly situated to Fannie Mae is unfair and, at a minimum, premature. *Id.* As discussed in Section V, the Court stayed briefing on avoidance claims so the claimants, including DLP, have not yet had an opportunity to take discovery in connection with or otherwise address the Receiver’s avoidance arguments. See also Dkt. 1547 (DLP’s motion requesting leave to take further discovery in response to Receiver’s avoidance disclosure); Dkt. 1549 (minute entry entering and continuing DLP’s motion.) Though the details of DLP’s defense will no doubt be informed by the requested discovery, like Fannie Mae, DLP has an absolute defense to any fraudulent transfer action because it received the grant of the security for its loan in good faith and for equivalent value.

involves *identical* mortgage language—“[t]he first page of the [5201 Wash.] Investor Mortgage identifies the ‘Lender’ as ‘The Persons Listed on Exhibit A to the Mortgage % **Equity Build Finance, LLC.**” *Id.* at \*13. Based on that language, the court concluded “[t]he recorded mortgage **identifies on its face that the Investors designated EBF as their authorized agent.**” *Id.* (emphasis added). The court then explicitly connected the recorded mortgage language to the apparent authority given to EBF, concluding the 5201 Wash. release and public record (again reflecting the mortgage and the identical “c/o” language) were “**consistent with the apparent authority given to EBF on the face of the Investor Mortgage.**” *Id.* at \*12-13 (emphasis added). Accordingly, as in 5201 Wash. Investors, it was reasonable for DLP to believe that “The Persons Listed on Exhibit A to the Mortgage” authorized EBF to act on their behalf; such persons could have designated a different agent other than EBF in the EBF 6160 MLK Mortgage, or not listed any agent at all, but instead chose to publicly designate EBF as their agent for the EBF 6160 MLK Mortgage.<sup>4</sup>

Other Illinois opinions offer similar observations. For example, in *Bank of N.Y. v. Langman*, 2013 IL App (2d) 120609, two mortgagees asserted competing claims of priority, with one mortgagee arguing it “ha[d] priority due to proper reliance on a forged release of the [prior competing] mortgage.” *Id.* at ¶ 1. Though the Illinois Court of Appeals ultimately disagreed that the subsequent mortgagee was entitled to priority for other reasons—the prior mortgagee had *also*

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<sup>4</sup>Moreover, while not relevant to DLP’s reliance on EBF’s apparent authority, neither EBF nor any other Equitybuild entity fraudulently designated EBF as the individual investors’ agent in connection with the EBF 6160 MLK Mortgage. To the contrary, investment documents between the EBF Investor-Lenders and Equitybuild confirm that the individual lenders understood their mortgages for the 6160 MLK Property would publicly designate EBF as their agent. *See, e.g.*, DLP Reply Ex. 1 (completed Investment Package for Steven Roche, indicating lender as “persons listed on Exhibit A to the Note, **c/o Equitybuild Finance, LLC**” (at 3, 9), including in the 6160 MLK Mortgage itself (at 13), available in CloudNine database at REL0001418030).

recorded a pending foreclosure action on its mortgage, independently giving the subsequent mortgagee notice that the prior mortgagee's mortgage was superior—it also disagreed with the contention that the forged release was “patently invalid.” *Id.* at ¶ 19. Notwithstanding that the release was forged, the court noted the release “clearly purport[ed] to extinguish the [prior] debt . . . and the remaining mortgagees in the chain of title had reason to believe that the [prior] mortgage had been released,” thus entitling the subsequent mortgagee to rely upon it. *Id.*

For the same reason, the separate enforceability of the EBF Release as between the EBF Investor-Lenders and EBF has no bearing on the reasonableness of DLP's reliance on EBF's apparent authority to release the EBF 6160 MLK Mortgage. The EBF Release itself had numerous indicia of authenticity. Critically, and unlike the Group 1 release, the EBF Release contained *no scrivener's error* in the signature block, or anywhere else for that matter. The EBF Release further expressly referenced the EBF 6160 MLK Mortgage by record index number, which itself indicated EBF was authorized to act on behalf of the lenders listed on Exhibit A. (Dkt. 1559-2.) DLP would further have no reason to question Shaun Cohen's authority, as EBF's President, to sign on behalf of EBF as indicated in the EBF Release signature block. (*Id.*) Further, that an agent was authorized to act on behalf of the group—here upwards of 75 lenders—would not surprise a subsequent lender like DLP, let alone raise suspicion as to EBF's authority, given that mortgagees commonly delegate the servicing of their loans to servicers. *See* R. Wilson Freyermuth, “Why Mortgagors Can't Get No Satisfaction,” 72 *Mo. L. Rev.* 1159, 1164 (2007). Finally, the EBF Release was prepared and delivered by borrower's counsel, further underscoring the reasonableness of DLP's reliance on EBF's apparent authority to release the EBF 6160 MLK Mortgage.

In short, by operation of the EBF Release, executed and recorded consistent with EBF's apparent authority to act on behalf of the EBF Investor-Lenders, which authority DLP reasonably

relied upon, the EBF Investor-Lenders' Mortgage is no longer a valid lien. Moreover, DLP is not responsible for a third-party's, EBF's, fraud in executing the release; the EBF Investor-Lenders must bear the responsibility for their agent's fraud. *See M&T Bank v. Mallinckrodt*, 2015 IL App (2d) 141233, ¶ 52 (“Where one of two innocent persons must suffer by reason of the fraud or wrong conduct of another, the burden must fall upon him who put it in the power of the wrongdoing to commit the fraud or do the wrong.”) (quoting *Connor v. Wahl*, 330 Ill. 136 (1928)). Accordingly, the DLP Mortgage is the only valid lien on the 6160 MLK Property and is thus entitled to priority to receive the funds liquidated by the Receiver's sale of the 6160 MLK Property.

## **II. The Court Should Disregard Arguments Directed At DLP's Insured Status.**

The Certain Individual Investors suggest DLP is inappropriately seeking to defend its priority position in Court rather than asking “its title insurer . . . to make it whole.” (Dkt. 1564 at 8.) As was the case in the Group 1 proceedings, the Certain Individual Investors' reliance on DLP's insured status as a basis to affect its lien priority is wholly improper, and the Court should disregard DLP's insured status for the same reasons it did in Group 1. (Dkt. 1386 at 11.) Regardless of the applicability of the Federal Rules of Evidence, the rationale underlying Rule 411's prohibition against admitting evidence of an insurance policy to prove whether a person acted negligently or otherwise wrongfully applies with equal relevance here. *See Fed. R. Evid. 411 Advisory Committee Note* (“The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault . . . . At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds.”). Whether or not DLP has an insurance policy in no way sheds light on whether it should be forced to give up its rightful place in line as the first position (and

only) lienholder. More fundamentally, all claimants—whether “institutional” or “individual,” insured or not—are entitled to the Court’s objectivity. Accordingly, as it did in Group 1, the Court should disregard DLP’s insured status in evaluating its priority claim. (*See* Dkt. 1386 at 11.)

### **III. Illinois Law Does Not Permit An “Equitable Lien” Under These Circumstances.**

The Certain Individual Investors further argue, in the alternative, that even if the Court finds that DLP has priority, the Court should hold that the EBF Investor-Lenders should have an equitable lien on the 6160 MLK Property, entitling them to the proceeds of the sale of the properties ahead of DLP. (Dkt. 1564 at 19-20.) In support, the Certain Individual Investors argue “it is undisputed that the release of the Mortgages was recorded without the Individual Investors’ consent and without the Individual Investors’ debt being paid in full,” and further that DLP “enabled” Equitybuild’s “Ponzi scheme” by its “lax due diligence efforts.” (*Id.* at 19- 20.) There is *no* evidence of record, however, that DLP knew the EBF Release was recorded without the EBF Investor-Lenders’ consent—as described, DLP reasonably relied on EBF’s apparent authority to execute the EBF Release—and certainly *no* evidence that DLP “enabled” Equitybuild’s fraud in any way.

Moreover, as noted, it is well established that “[w]here one of two innocent persons must suffer by reason of the fraud or wrong conduct of another, the burden must fall upon him who put it in the power of the wrongdoer to commit the fraud or do the wrong.” *M&T Bank*, 2015 IL App (2d) 141233, at ¶ 52 (internal citation omitted). Here, the EBF Investor-Lenders empowered EBF to act as the collateral agent and servicer of the EBF Investor-Lenders’ loan, including with respect to releases, (*see* Dkt. 1559-7 at § 2(a); *see also* Dkt. 1559-8), and it was the EBF Investor-Lenders’ agent, EBF, that executed a (purportedly) improper release. Simply put, Illinois law does not



burden DLP, an innocent third-party to the relationship between EBF and the EBF Investor-Lenders, with the responsibility for the EBF Investor-Lenders' agent's actions.

**IV. DLP Is Entitled To The Entirety Of Its Secured Claim Up To The Amount Of The Net Proceeds, Or, In The Alternative, The Court Should Stay Briefing On The Specific Amounts Due And Rule Only On Priority.**

The Receiver argues that Post-Receivership Interest and late fees, attorneys' fees, and other ancillary charges permitted by the applicable loan documents should be denied, even to the victorious priority secured creditor. (*See* Dkt. 1571 at 11-16.) The Receiver's argument is grounded primarily in (i) general concepts of equitable discretion, and (ii) that Equitybuild operated as a Ponzi Scheme. (Dkt. 1571 at 11-16.) There are fatal defects as well as procedural issues as to both propositions.

**a. A Secured Creditor Is Entitled To The Complete Recovery Authorized Under Illinois Law.**

The notion that the Court may override a secured mortgagee's rights violates the fundamental precept that equity follows law. *See, e.g., In re BNT Terminals, Inc.*, 1991 Bankr. LEXIS 421, \*20 (Bankr. N.D. Ill. Feb. 21, 1991) (declining to reinstate liens "premised upon 'basic concepts of equity'" because "equity follows law and [defendant's] lawyers have failed to articulate what the basic concepts of equity are that the Court should apply."). At least one court<sup>5</sup> has explicitly considered whether a court administering an equity receivership has "general authority to ignore state law in the name of equity" in order to distribute receivership proceeds on

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<sup>5</sup> To be clear, the substance of the opinion in *Jupiter* was drafted by a Special Master, whom the court appointed to determine which investors were entitled to what portion of what remained in the investment pool. After conducting "a de novo review of the [Special Master's] Report and Recommendation and the objections to it," the court adopted the Special Master's report. (*See In re Real Prop. Located at [Redacted] Jupiter Drive*, No. 2:05-CV-01013-DB (Utah D. Ct.), "Order Adopting the First Report and Recommendation of the Special Master," Dkt. 272 at 1-2.) In light of the district court's adoption of the Special Maser's report, and for ease of reference, Thorofare refers to the *Jupiter* opinion as coming from the court.

a pro rata basis, rather than in accordance with state law priority rules. *In re Real Prop. Located at [Redacted] Jupiter Drive*, No. 2:05-CV-01013-DB, 2007 U.S. Dist. LEXIS 65276 (Utah D. Ct. Jun. 7, 2007). In that case, the court confirmed it *did not* have such broad authority, rejecting an argument that the “the district court’s discretion in supervising a receivership includes the ability to deny ‘state law remedies’ in dealing with receivership assets.” *Id.* at \*11 (quoting competing investor’s brief). Citing Supreme Court authority for the proposition that it is “well-established that a ‘receiver appointed by a federal court takes [a] property subject to all liens, priorities or privileges existing or accruing under the laws of the State,’” the court ultimately agreed it was “governed by the general rule that state law regarding lien priorities is to be respected in receiverships.” *Id.* at \*12. Further observing that “[t]he United States Constitution specifically states that contractual rights are not to be impaired,” the court explained that “[t]he consequences may be harsh for the [competing] Investors, but the law is clear. Equity has its limits.” *Id.* at \*26-27 (citing U.S. Const. Art. I, § 10, cl. 1).

As in *Jupiter*, the Court should decline the Receiver’s invitation to abandon Illinois lien priority rules in favor of equity. Illinois law is clear that the recording of a mortgage creates a security interest in real estate for the payment of the underlying indebtedness. *See* 765 ILCS 5/11 (“Such mortgage, when otherwise properly executed, shall be deemed and held a good and sufficient mortgage in fee to *secure the payment of the moneys therein specified.*”) (emphasis added); *see also Ogle v. Koerner*, 140 Ill. 170, 179 (1892) (“A mortgage. . . vests in the party secured a lien upon the mortgage premises” and “[b]y virtue of that lien the mortgagee is entitled to . . . the proceeds of the sale [of the property in foreclosure] applied to the payment of the debt secured.”). Illinois law further confirms that where a prior recorded mortgage is released of record, the prior mortgage is no longer a lien on the property. *See, e.g., Fannie Mae v. Kuipers*, 314 Ill.

App. 3d 631, 637 (2d Dist. 2000) (“Because no release of lien had been filed, pursuant to section 2 of the Mortgage Act, there was no indication to third parties that the lien was ever extinguished.”); *see also Bank of N.Y.*, 2013 IL App (2d) 120609, ¶ 19 (disagreeing that recorded forged release was “patently invalid[]” where it “clearly purport[ed] to extinguish the [prior] debt . . . and the remaining mortgagees in the chain of title had reason to believe that the [prior] mortgage had been released.”). Accordingly, as the only mortgage lien on the 6160 MLK Property, Illinois law entitles DLP to the payment of the amounts specified in its mortgage.

For DLP, in addition to the remainder of the principal, its mortgage specifies it is entitled to interest. (*See* Dkt. 1559-3 at 15; *see also* Reply Ex. 2, Construction Loan Agreement excerpted from DLP’s Proof of Claim, at §§ 2.1.5, 2.1.6.) The Receiver, however, contends “[a]s a general rule, in equity receiverships, interest on a debtor’s obligations ceases to accrue at the inception of the proceeding,” relying on the Supreme Court’s decision in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 163 (1946). (Dkt. 1571 at 12 (“the *Vanston* Court made clear that interest is not permitted in a federal equity receivership. . .”).)<sup>6</sup> Notably, the *Vanston* case was limited to a challenge to the potential recovery of interest on interest in which the subordinate creditors “concede[d] that the first mortgage bondholders should receive simple interest on the principal due them.” *Vanston*, 329 U.S. at 159. The Receiver’s other cited cases are similarly distinguishable.<sup>7</sup>

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<sup>6</sup> Although 11 U.S.C. 506(b) is not implicated as to DLP because the liquidated value of the 6160 MLK Property is not greater than the amount of DLP’s claim, *Vanston* nevertheless has been limited by that statute. *See In re Urban Communicators PCS Ltd. P’ship*, 379 B.R. 232, 252-53 (Bankr. S.D.N.Y. 2007), *rev’d on other grounds* (while “has never . . . been legislatively or judicially overruled,” it has, been “superseded in the respects that section 506(b) provides.”).

<sup>7</sup> *See SEC v. Capital Cove Bancorp LLC*, 2015 U.S. Dist. LEXIS 174856 (C.D. Cal., Oct. 13, 2015) (concerning default interest); *In re Hollstrom*, 133 B.R. 535, 539 (Bankr. D. Colo. 1991) (concerning default interest); *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 844 (7th Cir. 2015) (involving question of whether a receivership court had the discretion to treat claimants’

The *Jupiter* opinion is instructive on this point, as well. *Jupiter* further held “[h]aving reviewed the cases and the treatises . . . [t]he institution of a receivership does not stop the running of interest contracted for by a secured party any more than it interferes with the priority afforded such a party by state law.” *Id.* at \*23 (citing Clark on Receivers, § 660 (noting that “appointment of a receiver cannot deprive a party to the suit or a claimant of his contractual rights.”)). Accordingly, as noted, the DLP is entitled to interest pursuant to its loan documents. (*See* Dkt. 1559-3 at 15; *see also* Reply Ex. 2.)

**b. The Receiver Has Not Met His Burden Of Proving That The Ponzi Scheme Presumption Applies As To DLP.**

The Receiver improperly assumes the Ponzi scheme presumption applies to trigger the so-called “netting rule.” *See In re Taneja*, 2012 Bankr. LEXIS 3554, \*14 (Bankr. E.D. Va. July 30, 2012) (“A party seeking to raise a [Ponzi scheme] presumption has the burden of proving the predicate facts that give rise to the presumption.”). Specifically, the Receiver argues the Cohens’ operation of a Ponzi scheme “was alleged with specificity by the SEC in its Complaint, and the Cohens did not deny the Ponzi scheme having entered into a Consent Judgment.” (Dkt. 1571 at 15.) But because the application of the Ponzi scheme presumption is not established—particularly, as discussed *infra*, where the Receiver has not yet proven its avoidance claim as to DLP and where DLP has not yet had an opportunity to take discovery or respond to that claim—and the Cohens’ consent judgment alone is inadmissible as evidence of a Ponzi scheme as to DLP’s loan,<sup>8</sup> it does not follow that the “netting rule” applies.

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names as confidential, not whether the court could ignore state and federal rights of secured creditors in their collateral).

<sup>8</sup> Consent judgments are not admissible evidence of the allegations stated therein. *See, e.g., Carpenters Health & Welfare Fund v. The Coca-Cola Co.*, 2008 U.S. Dist. LEXIS 112503, \*14 (N.D. Ga. Apr. 23, 2008) (a consent judgment “falls squarely into the class of evidence deemed inadmissible pursuant to Rule 408”). This rule serves the “high public policy value of encouraging

**c. In The Alternative, The Court Should Defer Decision On Distribution Amounts Until The Resolution Of The Receiver’s Avoidance Claim.**

In the alternative, if the Court disagrees with DLP that DLP is entitled to its entire secured claim under Illinois law, the Court need not and should not decide now what specific amounts to order by way of distribution. The bases for the equitable and Ponzi scheme considerations the Receiver urges should limit DLP’s recovery substantially overlap with the avoidance claims as disclosed by the Receiver (Dkt. 1537), which the Court agreed to stay pending resolution of Group 2 priority (Dkt. 1565). Further, the Receiver has only disclosed his intent to pursue an avoidance claim against DLP’s loan—the Receiver has not *proven* a voidable transfer under the Illinois Uniform Fraudulent Transfer Act, 740 ILCS § 160, as required to trigger the so-called “netting rule.” In fact, the only two authorities the Receiver cites to support his argument that netting should apply are both wholly focused on analyzing whether netting was appropriate upon proof and application of the applicable Uniform Fraudulent Transfer statute for each case. *See Scholes v. Lehmann*, 56 F.3d 750, 757-58 (7th Cir. 1995) (analyzing whether netting was appropriate by applying predecessor statute to Illinois Uniform Fraudulent Transfer Act, 740 ILCS 160, while also discussing analysis under current statute); *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008) (analyzing netting while applying California’s Uniform Fraudulent Transfer Act).

Critically, at the November 16, 2023 hearing the Court also agreed to stay any discovery on avoidance issues pending resolution of the priority dispute. As a result, the claimants, including DLP, have not yet had an opportunity to pursue discovery relating to the Receiver’s Group 2 avoidance disclosure, let alone an opportunity to brief the issue for the Court. Accordingly, out of

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entities . . . to settle their disputes with . . . governmental agencies,” and avoids the “chilling effect” that “would likely” result from admitting the consent judgment as evidence of wrongdoing by private litigants.” *Id.* at \*3.

fairness to the claimants, DLP requests that the Court stay briefing on the specific amounts due until after the Court has adjudicated priority and avoidance issues, which will ultimately impact the distribution amounts, or order such briefing to occur as part of the avoidance briefing when that schedule is set.

### **CONCLUSION**

For the above reasons, and for those stated in DLP's Position Statement (Dkt. 1559), DLP's mortgage interest in the 6160 MLK Property is the only valid mortgage lien of record. DLP is thus entitled to receive the funds liquidated by the Receiver's sale of the 6160 MLK Property in the amounts due as specified in its loan documents. (*See* Dkt. 1559-3; *see also* Reply Ex. 2.)

Dated: January 10, 2024

Respectfully submitted,

*/s/ Andrew R. DeVooght* \_\_\_\_\_

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*Attorneys for Claimant Direct Lending  
Partner LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 10, 2024 I electronically filed the foregoing **REPLY POSITION STATEMENT OF CLAIMANT DIRECT LENDING PARTNER LLC** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record, and further caused the foregoing to be served upon all members of Claims Group 2 by email to the distribution list [ebgroup2service@rdaplawn.net](mailto:ebgroup2service@rdaplawn.net).

*/s/ Andrew R. DeVooght* \_\_\_\_\_  
Andrew R. DeVooght



# EXHIBIT 1

To: Tanna Dreiling[tanna@equitybuild.com]  
From: DocuSign System[dse@docuSign.net]  
Sent: Sun 9/11/2016 10:29:54 AM (UTC-07:00)  
Subject: Completed: 6160-6260 MLK - Steven Roche - Investment Packet

- [6160-6260 S MLK- NOTE.docx.pdf](#)
- [Exhibit A Note.docx.pdf](#)
- [6160-6260 S MLK- MORTGAGE.docx.pdf](#)
- [Exhibit A Mortgage.docx.pdf](#)
- [EquityBuild, Inc. as Borrower - Collateral Agency and Servicing Agreement.pdf](#)
- [EquityBuild, Inc Wire Instructions.pdf](#)
- [Summary.pdf](#)



Your document has been completed

**REVIEW DOCUMENTS**

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docs@equitybuild.com

All parties have completed 6160-6260 MLK - Steven Roche - Investment Packet.

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- Note
  - Mortgage
  - Wire Instructions
  - Collateral Agent Servicing Agreement
- Thank you for choosing EquityBuild, Have a wonderful day

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Case: 1:18-cv-05587 Document #: 1585-1 Filed: 01/10/24 Page 3 of 50 PageID #:109068

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<u>LENDER</u>	<u>BORROWER</u>
The persons listed on <u>Exhibit A</u> to the Note C/O EQUITYBUILD FINANCE, LLC 5068 WEST PLANO PKWY #300 PLANO, TX 75093	EQUITYBUILD, INC. 1083 N COLLIER BLVD. #132 MARCO ISLAND, FL 34145

**COMMERCIAL FLAT  
RATE PROMISSORY  
NOTE**  
With Balloon Payment  
Illinois

Interest Rate	Principal	Funding Date	Maturity Date	Loan Number
16% For 18 Months	\$ <u>50,000.00</u>	10/25/2016	05/01/2018	N/A

THIS LOAN IS PAYABLE IN FULL ON OR BEFORE THE "MATURITY DATE" LISTED HEREIN. YOU MUST REPAY THE ENTIRE PRINCIPAL BALANCE OF THE LOAN AND ANY UNPAID INTEREST, AND FEES AND COSTS, THEN DUE TO THE LENDER. **LENDER IS UNDER NO OBLIGATION TO REFINANCE, EXTEND OR MODIFY THE LOAN AT THAT TIME.** YOU WILL, THEREFORE, BE REQUIRED TO MAKE PAYMENT OUT OF OTHER ASSETS THAT YOU MAY OWN, OR YOU WILL HAVE TO FIND A LENDER (WHICH MAY OR MAY NOT BE THE LENDER YOU HAVE THIS LOAN WITH), WILLING TO LEND YOU THE MONEY. IF YOU REFINANCE THIS LOAN AT MATURITY, YOU MAY HAVE TO PAY SOME OR ALL OF THE CLOSING COSTS NORMALLY ASSOCIATED WITH A NEW LOAN EVEN IF YOU OBTAIN REFINANCING FROM THE SAME LENDER. FOR VALUE RECEIVED, the undersigned Borrower(s), Maker(s) and/or Guarantor(s) (hereinafter the "Borrower") promises to pay **The persons listed on Exhibit A to this Note C/O EquityBuild Finance, LLC** (hereinafter collectively referred to as the "Holder" or "Lender"), at **5068 West Plano Pkwy. #300 Plano, TX 75093**, the principal sum of

FIFTY THOUSAND \_\_\_\_\_ and 00/100 DOLLARS (\$ 50,000.00 ) together

with interest from the above date at the interest rate of **SIXTEEN PERCENT (16.0%)** per annum on the unpaid principal balance until paid. The principal of this Note, plus accrued interest at the rate aforesaid, shall be due and payable in **EIGHTEEN (18)** installments as follows:

- a) ONE (1) interest payment in the amount of ONE HUNDRED THIRTY-THREE and 33 /100 DOLLARS (\$ 133.33 ), beginning on or before **OCTOBER 25, 2016**; and
- b) SIXTEEN (16) equal and consecutive interest only payments in the amount of SIX HUNDRED SIXTY-SIX and 67 /100 DOLLARS (\$ 666.67 ) beginning on or before **JANUARY 01, 2016**; and continuing each and every month thereafter; and
- c) One (1) final balloon payment on or before **MAY 01, 2018**, at which time the entire principal balance, together with accrued but unpaid interest thereon, and any costs and expenses, shall be due and payable.

Anything in this Note contrary notwithstanding, the entire unpaid balance of the principal sum and all unpaid interest accrued thereon shall, unless sooner paid, be and become due and payable on **MAY 01, 2018** ("Maturity Date").

1. **Application of Payments.** All payments on this Note shall be made in lawful money of the United States of America and shall be applied first to any late charges due hereunder, second to the payment of accrued but unpaid interest and the remainder to the reduction of principal. The Borrower shall make all payments when due, without set-offs of any nature.

2. **Late Charge/Dishonored Check.** There shall be a grace period of five (5) days for any payment due under this Note. The Borrower shall pay a late charge of 5% of the monthly payment amount, or \$50.00, whichever is greater, if such payment is received by Lender after the grace period. If the Maturity Date of the Note has expired the late fee will be at the rate of 1.5% per month plus the face amount of the Note. In the event any check given by Borrower to Lender as a payment on this Note is dishonored, or in the event there are insufficient funds in Borrower's designated account to cover any preauthorized monthly debit from Borrower's checking account, then, without limiting any other charges or remedies, Borrower shall pay to Lender a processing fee of \$50.00 (but not more than the maximum amount allowed by law) for each such event.

3. **Security.** To secure the payment and performance of obligations incurred under this Note, this Note shall be secured by and subject to the terms of a Mortgage of even date herewith from the Borrower which encumbers real property and improvements located at

**6160-6260 S Martin Luther King Dr, Chicago, IL 60637**, and the maturity hereof is subject to acceleration as therein set forth. Both this Note and the Mortgage are given in consideration of a loan of even date herewith in the amount of the principal sum by the Lender to the Borrower.

In addition to the property described above, Borrower grants Lender a security interest in all of Borrower's right, title and interest in all monies and instruments of Borrower that are now or in the future in Lender's custody or control.

4. **Events of Default.** An Event of Default will occur under this Note in the event that Borrower any guarantor or any other third party pledging collateral to secure this Note:
- a. Fails to make any payment of principal and/or interest or any other sum due hereunder when the same is due pursuant to the terms of this Note;
  - b. If Borrower, guarantor or such third party:
    - i. Applies for or consents to the appointment of a receiver, trustee or liquidator of Borrower, guarantor or such third party or of all or a substantial part of its assets;
    - ii. Files a voluntary petition in bankruptcy, whether by the Federal Bankruptcy Act or any similar State statute, or admits in writing its inability to pay its debts as they come due;
    - iii. Makes an assignment for the benefit of creditors;
    - iv. Files a petition or an answer seeking a reorganization or an arrangement with creditors or seeking to take advantage of any insolvency law;
    - v. Performs any other act of bankruptcy; or
    - vi. Files an answer admitting the material allegations of a petition filed against Borrower, guarantor or such third party in any bankruptcy, reorganization or insolvency proceeding; or
  - c. Permits the entry of any order, judgment or decree by any court of competent jurisdiction adjudicating Borrower, guarantor or such third party a bankrupt or an insolvent, or approving a receiver, trustee or liquidator of Borrower, guarantor or such third party or of all or a substantial part of its assets; or
  - d. There otherwise commences with respect to Borrower, guarantor or such third party or any of its assets any proceeding under any bankruptcy, reorganization, arrangement, insolvency, readjustment, receivership or like law or statute, and if the order, judgment, decree or proceeding continues unstayed for any period of 60 consecutive days, or continues in effect for more than 10 days after any stay thereof.
  - e. Fails to perform or violates any obligations or covenants under the terms of this Note or any Mortgages or any additional loan documents or any other present or future written agreements regarding this Note or any other indebtedness or obligations between Borrower, guarantor or such third party and Lender;
  - f. Defaults under the terms of any note, mortgage, security instrument, or any other loan

documents or written agreements for any other loans secured by the property representing the collateral for this Note;

g. Permits the entry of any judgment or lien, or the issuance of any execution, levy, attachment or garnishment proceedings against Borrower, guarantor or such third party;

h. Sells or otherwise conveys any property which constitutes security or collateral for the payment of this Note without the prior written consent of the Lender and/or the destruction, loss or damage to such collateral in any material respect and/or the seizure, condemnation or confiscation of the collateral;

i. Provides or causes to be provided any false or misleading signature or representation to be provided to Lender;

j. Has a garnishment, judgment, tax levy, attachment or lien entered or served against Borrower, any guarantor, or any third party pledging collateral to secure this Note or any of their property;

k. Dies, becomes legally incompetent, is dissolved or terminated, or ceases to operate its business;

l. Has a majority of its outstanding voting securities sold, transferred or conveyed to any person or entity other than any person or entity that has the majority ownership as of the date of the execution of this Note;

m. Causes Lender to deem itself insecure due to a significant decline in the value of any real or personal property securing payment of this Note, or Lender, in good faith believes the prospect of payment or performance is impaired;

n. Fails to keep an insurance policy in place on the subject property being used as collateral for this loan with Lender as the mortgagee and/or as the loss payee including its successor and/or assigns;

o. Fails to keep property taxes current on property used as security for this Note.

5. **Rights of Lender On Event of Default.** In the Event of Default as set forth herein, or in the event of the breach of any covenant or obligation contained in the herein referred to Mortgage or Loan Documents on the part of the undersigned to be kept, observed or performed, the Lender, at its sole and absolute discretion, may exercise one or more of the following remedies without notice or demand (except as required by law):

a. Declare the entire unpaid balance of principal of this Note, along with accrued and unpaid interest thereon and all other charges, costs and expenses, provided for herein and in the Mortgage immediately due and payable. Such acceleration shall be automatic and immediate in the Event of Default is a filing under the Bankruptcy Code;

b. Collect the outstanding obligations of Borrower with or without judicial process;

c. Cease making advances under this Note or any other agreement between Borrower and Lender;

d. Take possession of any collateral in any manner permitted by law;

e. require Borrower to deliver and make available to Lender any collateral at a place reasonably convenient to Borrower and Lender;

f. Sell, lease or otherwise dispose of any collateral and collect any deficiency balance with or without resorting to legal process;

g. Assume any and all mortgages/deeds of trust in existence at the time of default on all collateral securing loans made to Borrower;

h. Set-off Borrower's obligations against any amounts due to Borrower including, but not limited to, monies and instruments, maintained with Lender; and

i. Exercise all other rights available to Lender under any other written agreement or applicable law.

At any time an Event of Default shall have occurred and be continuing and/or after maturity of the Loan, including maturity upon acceleration, the unpaid principal balance, all accrued and unpaid interest and all other amounts payable under the Note shall bear interest at the "Default Rate" set forth in this Note. The unpaid principal balance shall continue to bear interest after the Maturity Date at the Default Rate set forth in this Note until and including the date on which it is paid in full. Any regularly scheduled monthly installment of interest that is received by Lender before the date it is due shall be deemed to have been received on the due date solely for the purpose of calculating interest due. Any accrued interest remaining past due for 30 days or more shall be added to and become part of the unpaid principal balance and shall bear interest at the rate or rates specified in this Note, and any reference herein to "accrued interest"

shall refer to accrued interest which has not become part of the unpaid principal balance. Interest under this Note shall be computed on the basis of a 360-day year consisting of twelve 30-day months. Borrower shall make all payments of principal and interest under this Note without relief from valuation and appraisal laws.

Lender's remedies in this Section are in addition to any available at common law and nothing in this Section shall impair any right which the Holder has under this Note, or at law or in equity, to accelerate the debt on the occurrence of any other Event of Default, whether or not relating to this Note. Lender's rights or remedies as provided in this Note shall be cumulative and concurrent and may be pursued singly, successively, or together against Borrower or any guarantor or third party (without first having to proceed against Borrower), at Lender's sole and absolute discretion. Borrower shall pay to Lender on Lender's demand the amount of all expenses incurred by Lender (a) in enforcing its rights under this Note, or (b) as the result of a default by Borrower under this Note, including but not limited to the cost of collecting any amount owed hereunder, and any reasonable attorney's fees. The failure by Lender to exercise any of its options contained herein shall not constitute a waiver of the right to exercise such option in the event of any subsequent default.

6. **Costs and Expenses.** To the extent permitted by law, Borrower agrees to pay any and all reasonable fees and costs, including, but not limited to, fees and costs of attorneys and other agents (including without limitation paralegals, clerks and consultants), whether or not such attorney or agent is an employee of Lender, which are incurred by Lender in collecting any amount due or enforcing any right or remedy under this Note, whether or not suit is brought, including, but not limited to, all fees and costs incurred on appeal, in bankruptcy, and for postjudgment collection actions. Said collection fees shall be in the minimum amount of Fifteen Percent (15%) of the amount of the judgment as collected (or, if collected without judgment, a minimum fee of Fifteen Percent (15%) of the amount collected), which attorney's fee shall not be diminished by any other fees, costs or damages, but in no event shall the attorney's fees be less than \$3,000.00.

7. **Extensions.** The Borrower shall remain liable for the payment of this Note, including interest, notwithstanding any extension or extensions of time of payment or any indulgence of any kind or nature that the Lender may grant or permit any subsequent owner of the encumbered property, whether with or without notice to the Borrower and the Borrower hereby expressly waives such notice.

8. **Confessed Judgment.** UPON ANY DEFAULT BY THE BORROWER AS SET FORTH IN THIS NOTE, AND TO THE EXTENT PERMITTED BY LAW, THE BORROWER HEREBY AUTHORIZES ANY ATTORNEY AT LAW TO APPEAR FOR THE BORROWER IN ANY COURT OF COMPETENT JURISDICTION AND WAIVE THE ISSUANCE AND SERVICE OF PROCESS AND CONFESS A JUDGMENT AGAINST THE BORROWER IN FAVOR OF THE LENDER FOR SUCH AMOUNTS AS MAY THEN APPEAR TO BE UNPAID HEREON TOGETHER WITH COSTS, EXPENSES AND ATTORNEY'S FEES IN THE MINIMUM AMOUNT OF FIFTEEN PERCENT (15%) OF THE AMOUNT DUE FOR COLLECTION (BUT IN NO EVENT SHALL SUCH FEES BE LESS THAN \$3000.00), AND TO RELEASE ALL PROCEDURAL ERRORS AND WAIVE ALL RIGHTS OF APPEAL. IF THE CONFESSION OF JUDGMENT ABOVE PROVIDED FOR IS AUTHORIZED OR RECOGNIZED BY THE LAW OF THE JURISDICTION CONTROLLING BUT SUCH LAW REQUIRES SPECIAL FORMALITIES AND PROCEDURE, THEN THE SAID ATTORNEY IS EMPOWERED TO EXECUTE THE NECESSARY FORM AND COMPLY WITH SUCH SPECIAL PROCEDURES. THIS POWER OF CONFESSION OF JUDGMENT SHALL NOT BE EXHAUSTED BY ANY ONE OR MORE EXERCISES, AND THE POWER SHALL CONTINUE UNDIMINISHED AND MAY BE EXERCISED FROM TIME TO TIME AS OFTEN AS LENDER SHALL ELECT UNTIL ALL AMOUNTS PAYABLE TO LENDER UNDER THIS NOTE SHALL HAVE BEEN PAID IN FULL.

9. **Forbearance.** The Lender shall not by any act or omission to act be deemed to waive any of its rights or remedies hereunder unless such waiver is in writing and signed by the Lender and then only to the extent specifically set forth therein. A waiver on one occasion shall not be construed as continuing or as a bar to or waiver of such right or remedy on any other occasion. All remedies conferred upon the Lender by this Note or any other instrument or agreement connected herewith or related hereto shall be cumulative and none is exclusive, and such remedies may be exercised concurrently or consecutively at the Lender's option.

10. **Modification and Waiver.** Borrower and/or every person at any time liable for the payment of the debt evidenced hereby, waives the exercise of all exemption rights which it holds at law or in equity concerning the debt evidenced by this Note whether under state constitution, homestead laws or otherwise. Borrower and any endorsers or

guarantors hereof severally waive valuation and appraisal, presentment and demand for payment, notice of intent to accelerate maturity, notice of acceleration of maturity, protest or notice of protest and nonpayment, bringing of suit and diligence in taking any action to collect any sums owing hereunder or in proceeding against any of the rights and properties securing payment hereof, and trial by jury in any litigation arising out of, relating to, or connected with this Note or any instrument given as security hereof.

From time to time, without affecting Borrower's obligation to pay any sums due under this Note and perform Borrower's covenants herein, without affecting the obligations of any endorser hereto or guarantor hereof, without giving notice to or obtaining the consent of Borrower or any endorser hereto or guarantor hereof, and without liability on the part of the Holder, Holder may, acting in its sole and absolute discretion, extend the Maturity Date or any other time for payment of interest hereon and/or principal hereof, reduce the payments hereunder, release anyone liable under this Note except a renewal of this Note, modify the terms and time of payment of this Note, join in any extension or subordination or exercise any option or election hereunder, modify the rate of interest or period of amortization or principal due date of this Note, or exercise any option or election hereunder. No one or more such actions shall constitute a novation.

#### 11. Voluntary and Involuntary Prepayments.

(a) A prepayment premium shall be payable in connection with any prepayment made under this Note as provided below:

(i) Borrower may voluntarily prepay all of the unpaid principal balance of this Note on a Business Day designated as the date for such prepayment in a Notice from Borrower to Lender given at least 30 days prior to the date of such prepayment. Such prepayment shall be made by paying (A) the amount of principal being prepaid, (B) all accrued interest, (C) all other sums due Lender at the time of such prepayment, and (D) the prepayment premium calculated pursuant to Section 11(f) of this Note. For purposes of this Note, a "**Business Day**" means any day other than a Saturday, Sunday or any other day on which Lender is not open for business. For all purposes including the accrual of interest, but excluding the determination of the prepayment date under Section 11(f) of this Note, any prepayment received by Lender on any day other than the last calendar day of the month shall be deemed to have been received on the last calendar day of such month.

(ii) Borrower may voluntarily prepay less than all of the unpaid principal balance of this Note (a "**Partial Prepayment**") at any time. Upon delivery of the Partial Prepayment, a prepayment premium calculated pursuant to Section 11(f) of this Note, based on the amount being prepaid, shall be due and payable to Lender upon demand.

(iii) Upon Lender's exercise of any right of acceleration under this Note, Borrower shall pay to Lender, in addition to the entire unpaid principal balance of this Note outstanding at the time of the acceleration, (A) all accrued interest, (B) and all other sums due Lender, and (C) the prepayment premium calculated pursuant to Section 11(f) of this Note, to the extent such prepayment premium does not exceed the maximum rate permitted by applicable law.

(iv) Any application by Lender of any proceeds of collateral or other security to the repayment of any portion of the unpaid principal balance of this Note prior to the Maturity Date and in the absence of acceleration shall be deemed to be a partial prepayment by Borrower, requiring the payment to Lender by Borrower of a prepayment premium. The amount of any such partial prepayment shall be computed so as to provide to Lender a prepayment premium computed pursuant to Section 11(f) of this Note without Borrower having to pay out-of-pocket any additional amounts.

(b) Notwithstanding the provisions of Section 11(a), no prepayment premium shall be payable with respect to (A) any prepayment made after the expiration of the Prepayment Premium Period (as defined in Section 11(f) of this Note), or (B) any prepayment occurring as a result of the application of any insurance proceeds or condemnation award under the Security Instrument.

(c) Any permitted or required prepayment of less than the unpaid principal balance of this Note shall not extend or postpone the due date of any subsequent monthly installments or change the amount of such installments, unless Lender agrees otherwise in writing.

(d) Borrower recognizes that any prepayment of the unpaid principal balance of this Note, whether voluntary or involuntary or resulting from a default by Borrower, will result in Lender's incurring loss, including reinvestment loss, additional expense and frustration or impairment of Lender's ability to meet its commitments to third parties. Borrower agrees to pay to Lender upon demand damages for the detriment caused by any prepayment, and agrees that it is extremely difficult and impractical to ascertain the extent of such damages. Borrower therefore acknowledges and agrees that the formula for calculating prepayment premiums set forth in Section 11(f) represents a



reasonable estimate of the damages Lender will incur because of a prepayment.

(e) Borrower further acknowledges that the prepayment premium provisions of this Note are a material part of the consideration for the Loan, and acknowledges that the terms of this Note are in other respects more favorable to Borrower as a result of the Borrower's voluntary agreement to the prepayment premium provisions.

(f) Any prepayment premium payable under this Section 11 shall be computed as follows:

(i) If the prepayment is made between the date of the initial funding of the loan evidenced by this Note and the last day of the **month of close** (the "**Prepayment Premium Period**"), the prepayment premium shall be the interest at the Note rate herein that would be earned on full loan amount for the balance of the Prepayment Premium Period.

(ii) If the prepayment is made after the expiration of the Prepayment Premium Period, there shall be no prepayment premium due.

12. **Default Rate.** So long as (a) any monthly installment under this Note remains past due for thirty (30) days or more or (b) any other Event of Default has occurred and is continuing, interest under this Note shall accrue on the unpaid principal balance from the earlier of the due date of the first unpaid monthly installment or the occurrence of such other Event of Default, as applicable, at a rate (the "**Default Rate**") equal to the lesser of **seven (7)** percentage points above the rate stated in the first paragraph of this Note or the maximum interest rate which may be collected from Borrower under applicable law. If the unpaid principal balance and all accrued interest are not paid in full on the Maturity Date, the unpaid principal balance and all accrued interest shall bear interest from the Maturity Date at the Default Rate. Borrower acknowledges that (a) its failure to make timely payments will cause Lender to incur additional expenses in servicing and processing the Loan, (b) during the time that any monthly installment under this Note is delinquent for thirty (30) days or more, Lender will incur additional costs and expenses arising from its loss of the use of the money due and from the adverse impact on Lender's ability to meet its other obligations and to take advantage of other investment opportunities; and (c) it is extremely difficult and impractical to determine those additional costs and expenses. Borrower also acknowledges that, during the time that any monthly installment under this Note is delinquent for thirty (30) days or more or any other Event of Default has occurred and is continuing, Lender's risk of nonpayment of this Note will be materially increased and Lender is entitled to be compensated for such increased risk. Borrower agrees that the increase in the rate of interest payable under this Note to the Default Rate represents a fair and reasonable estimate, taking into account all circumstances existing on the date of this Note, of the additional costs and expenses Lender will incur by reason of the Borrower's delinquent payment and the additional compensation Lender is entitled to receive for the increased risks of nonpayment associated with a delinquent loan. During any period that the Default Rate is in effect the additional interest accruing over and above the rate stated in the first paragraph of this Note shall be immediately due and payable in addition to the regularly scheduled principal and interest payments. Lender shall impose the Default Rate without any notice requirement to Borrower, guarantor or any third party pledging collateral as security for this Note.

13. **Loan Charges/Maximum Rate Permitted By Law.** Neither this Note nor any of the other Loan Documents shall be construed to create a contract for the use, forbearance or detention of money requiring payment of interest at a rate greater than the maximum interest rate permitted to be charged under applicable law. If any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower in connection with the Loan is interpreted so that any interest or other charge provided for in any Loan Document, whether considered separately or together with other charges provided for in any other Loan Document, violates that law, and Borrower is entitled to the benefit of that law, that interest or charge is hereby reduced to the extent necessary to eliminate that violation. The amounts, if any, previously paid to Lender in excess of the permitted amounts shall be applied by Lender to reduce the unpaid principal balance of this Note. For the purpose of determining whether any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower has been violated, all Indebtedness that constitutes interest, as well as all other charges made in connection with the Indebtedness that constitute interest, shall be deemed to be allocated and spread ratably over the stated term of the Note. Unless otherwise required by applicable law, such allocation and spreading shall be effected in such a manner that the rate of interest so computed is uniform throughout the stated term of the Note. If Lender reasonably determines that the interest rate (together with all other charges or payments that may be deemed interest) stipulated under this Note is or may be usurious or otherwise limited by law, the unpaid balance of this Note, with accrued interest at the highest rate permitted to be charged by stipulation in writing between Lender and Borrower, at the option of Lender, shall immediately become due and payable.

14. **Waiver of Jury Trial.** THE BORROWER WAIVES TRIAL BY JURY IN ANY ACTION OR

PROCEEDING ARISING OUT OF, OR IN ANY WAY PERTAINING TO, THIS NOTE OR ANY DEED OF TRUST/MORTGAGE ARISING FROM THIS NOTE. THIS WAIVER CONSTITUTES A WAIVER OF TRIAL BY JURY OF ALL CLAIMS AGAINST ALL PARTIES TO SUCH ACTIONS OR PROCEEDINGS. THIS WAIVER IS KNOWINGLY, WILLINGLY AND VOLUNTARILY MADE BY THE BORROWER, AND THE BORROWER HEREBY REPRESENTS THAT NO REPRESENTATIONS OF FACT OR OPINION HAVE BEEN MADE BY ANY INDIVIDUAL TO INDUCE THIS WAIVER OF TRIAL BY JURY OR TO IN ANY WAY MODIFY OR NULLIFY ITS EFFECT.

15. **Notices.** Any Notice or other communication required, permitted or desirable under the terms of this Note shall be sufficiently given if sent to each party as follows:

Lender: The persons listed on Exhibit A to this Note  
C/O EquityBuild Finance, LLC  
5068 West Plano Pkwy, #300  
Plano, Texas 75093  
Fax: 239-244-8666  
Email: shaun.d.cohen@gmail.com

Borrower: EquityBuild, Inc.  
1083 N Collier Blvd. #132  
Marco Island, FL 34145  
Fax: 202-204-8423  
Email: jerry@equitybuild.com

Any notice, demand, consent, approval, request or other communication or document to be given hereunder to a party hereto shall be (a) in writing, and (d) deemed to have been given (i) on the 3<sup>rd</sup> business day after being sent as certified or registered mail in the United States mails, postage prepaid, return receipt requested, or (ii) on the next business day after being deposited (with instructions to deliver it on that business day) with a reputable overnight courier service, or (iii) (if the party's receipt thereof is acknowledged in writing) on being sent by telefax or another means of immediate electronic communication, in each case to the party's address set forth above or any other address in the United States of America which it designates from time-to-time by notice to each other party hereto, or (iv) (if the party's receipt thereof is acknowledged in writing) on being given by hand or other actual delivery to the party.

16. **Entire Agreement/Severability.** The terms and conditions of this Note together with the terms and conditions of the Mortgages which are incorporated herein by reference as if set forth fully herein contain the entire understanding between the Borrower and Lender with respect the indebtedness evidenced hereby. Such understanding may not be modified, amended or terminated except in a written document duly executed by Borrower and Lender. In the event that any one or more of the provisions set forth in this Note or any accompanying Arbitration Agreement is determined by law to be invalid, illegal or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired hereby, and each provision in this Note shall be construed liberally in favor of Lender to the fullest extent of the law.

17. **Joint and Several Liability/Credit Reporting.** The liability of the undersigned, as well as any endorsers and/or guarantor(s), shall be both joint and several. This Note shall be binding upon the heirs, successors and assigns of Borrower and Lender. Information concerning this Note may be reported to credit reporting agencies and will be made available when requested by proper legal process.

18. **Governing Law.** This Note is delivered and made in, and shall be construed pursuant to the laws of the State of Illinois Unless applicable law provides otherwise, Borrower consents to the jurisdiction and venue of any court of competent jurisdiction located in **Cook County**, Illinois.

19. **Construction.** As used herein, Person means a natural person, trustee, corporation, partnership, limited liability company or other legal entity, and all references made (a) in the neuter, masculine or feminine gender shall be deemed made in all genders, (b) in the singular or plural number shall also be deemed made in the plural or singular number, and (c) to any Section, subsection, paragraph or subparagraph shall, unless therein expressly

indicated to the contrary, be deemed made to that part of the Note. The headings of those parts are provided only for convenience of reference, and shall not be considered in construing their contents. Each document referred to herein as being attached hereto as an exhibit or otherwise designated herein as an exhibit hereto shall be a part hereof.

20. **Time of Essence.** Time shall be of the essence of this Note, but (other than as to payment of principal and/or interest) if the last day for a Person to exercise a right or perform a duty hereunder is a Saturday, Sunday or statutory holiday, it shall have until the next day other than such a day to do so.

21. **Assignment.** Borrower agrees not to assign any of Borrower's rights, remedies or obligations described in this Note without the prior written consent of Lender, which consent may be withheld by Lender in its sole discretion. Borrower agrees that Lender is entitled to assign some or all of its rights and remedies described in this Note without notice to or the prior consent of Borrower.

22. **Commercial Purpose.** It is expressly stipulated, warranted and agreed that the loan evidenced by this Note and any Loan Documents is a "commercial loan" under applicable State or Federal law, and all proceeds shall be used for business, commercial or investment purposes and expressly not for personal, family or household purposes.

23. **Extension.** Intentionally omitted.

24. **Arbitration.** If arbitration has been agreed to, Borrower(s) and Lender have entered into a separate Arbitration Agreement on this date, the terms of which are incorporated herein and made a part hereof by reference.

25. **Contingency Funds.** Intentionally omitted.

26. **Demand Feature.** Intentionally omitted.

27. **Consent To Relief From Automatic Stay.** Borrower hereby agrees that if any of them shall (i) file with any bankruptcy court of competent jurisdiction or be the subject of any petition under Title 11 of the U.S. Code, as amended; (ii) be the subject of any order for relief issued under such Title 11 of the U.S. Code, as amended; (iii) file or be the subject of any petition seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency, or other relief for debtors; (iv) seek, consent to or acquiesce in the appointment of any trustee, receiver, conservator or liquidator; (v) be the subject of any order, judgment or decree entered by any court of competent jurisdiction approving a petition filed against Borrower for any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency, or relief for debtors, Lender shall thereupon be entitled to relief from any automatic stay imposed by Section 362 of Title 11 of the U.S. Code, as amended, or from any other stay or suspension of remedies imposed in any other manner with respect to the exercise of the rights and remedies otherwise available to Lender under the Loan Documents.

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**THE PERSONS SIGNING BELOW ACKNOWLEDGE THAT THEY HAVE BEEN GIVEN AMPLE OPPORTUNITY TO READ THIS AGREEMENT AND SEEK INDEPENDENT LEGAL COUNSEL AND ACKNOWLEDGE THEY HAVE COMPLETELY READ AND UNDERSTAND AND AGREE TO THE TERMS AND CONDITIONS OF THIS NOTE AND THE ACCOMPANYING ARBITRATION AGREEMENT (IF APPLICABLE), AND FURTHER ACKNOWLEDGE RECEIPT OF AN EXACT COPY OF THIS NOTE AND THE ARBITRATION AGREEMENT.**

DATED: \_\_\_\_\_

BORROWER(S): EQUITYBUILD, INC.

\_\_\_\_\_(SEAL)  
JERRY COHEN, President

STATE OF \_\_\_\_\_, COUNTY OF \_\_\_\_\_: ss:

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me, a notary public, personally appeared \_\_\_\_\_, to me known (or proved to me on the basis of satisfactory evidence) to be the person(s) who executed the foregoing instrument and acknowledged the same for the purpose therein contained and in my presence signed and sealed the same.

\_\_\_\_\_  
NOTARY PUBLIC

My Comm. Expires: \_\_\_\_\_

**Exhibit A**

**Lender Name:** Steven Roche

**Lender Amount:** \$50,000.00

**Percentage of Ownership of Total Loan:** 100%

**Monthly Interest Payment Amount to Be Received:** \$8.33 per diem representing 6% APR and then thereafter \$666.67 Monthly representing 16% APR

DocuSigned by:  
  
**Lender Signature**

Mail To:

\_\_\_\_\_ [The Above Space For Recorder's Use Only] \_\_\_\_\_

**MORTGAGE**

THIS MORTGAGE ("Security Instrument") is given on October 25<sup>th</sup>, 2016. The mortgagor is EquityBuild, Inc. ("Borrower").

This Security Instrument is given to The Persons Listed on Exhibit A to the Mortgage C/O EquityBuild Finance, LLC whose address is 5068 West Plano Pkwy. #300 Plano, TX 75093 ("Lender").

Borrower owes Lender the principal sum of Four Million Three Hundred Seventy Thousand and 00/100 Dollars (U.S. \$4,370,000.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument (Mortgage), which provides for a final payment of the full debt, if not paid earlier, due and payable May 1<sup>st</sup>, 2018. This Security Instrument secures to Lender:

(a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extension and modifications; (b) the payment of all other sums, with interest advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender the following described property located in COOK County, Illinois:

PIN: 20-15-317-040-0000

which has the address of 6160-6260 S Martin Luther King Dr, Chicago, IL 60637 ("Property Address");

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents, royalties, mineral, oil and gas rights and profits, water rights and stock and all fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANT. Borrower and Lender covenant and agree as follows:

1. Payment of Principal and Interest; Prepayment and Late Charges. Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayment and late charges due under the Note.

2. Hazard Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage" and any other hazards for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's approval which shall not be unreasonably withheld.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard mortgage clause. Lender shall have the right to hold the policies and renewals. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration and repair of the Property damaged, if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. If Borrower abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay sums secured by this Security Instrument, whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of the payments. If under paragraph 19 the property is acquired by Lender, Borrower's rights to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to Lender to the extent of sums secured by this Security Instrument immediately prior to the acquisition.

3. Preservation and Maintenance of Property; Leaseholds. Borrower shall not destroy, damage or substantially change the Property, allow the Property to deteriorate or commit waste. If this Security Instrument is on a leasehold, Borrower shall comply with the provisions of the lease, and if Borrower acquires fee title to the Property, the leasehold and fee title shall not merge unless Lender agrees to the merger in writing.

4. Protection of Lender's Rights in the Property; Mortgage Insurance. If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorneys' fees, and entering on the Property to make repairs. Although Lender may take action under this paragraph 4, Lender does not have to do so.

5. Successor and Assigns Bound; Joint and Several Liability; Co-signers. The covenants and agreements of this Security Interest shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 9. Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey the Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forebear or make any accommodations with regard to the terms of this Security Instrument or the Note without the Borrower's consent.

6. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any other address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

7. Governing Law; Severability. This Security Instrument shall be governed by federal law and the law of jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

8. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

9. Transfer of the Property or a beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.



NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

10. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument without charge to Borrower. Borrower shall pay any recordation costs.

11. Assignment of Rents and Leases. As additional security for the payment of the Indebtedness, Mortgagor assigns and transfers to Mortgagee, pursuant to 1953 PA 210, as amended by 1966 PA 151 (MCLA 554.231 et seq., MSA 26.1137(1) et seq.), all the rents, profits, and income under all leases, occupancy agreements, or arrangements upon or affecting the Premises (including any extensions or amendments) now in existence or coming into existence during the period this Mortgage is in effect. This assignment shall run with the land and be good and valid as against Mortgagor and those claiming under or through Mortgagor. This assignment shall continue to be operative during foreclosure or any other proceedings to enforce this Mortgage. If a foreclosure sale results in a deficiency, this assignment shall stand as security during the redemption period for the payment of the deficiency. This assignment is given only as collateral security and shall not be construed as obligating Mortgagee to perform any of the covenants or undertakings required to be performed by Mortgagor in any leases. In the event of default in any of the terms or covenants of this Mortgage, Mortgagee shall be entitled to all of the rights and benefits of MCLA 554.231-.233, MSA 26.1137(1)-(3), and 1966 PA 151, and Mortgagee shall be entitled to collect the rents and income from the Premises, to rent or lease the Premises on the terms that it may deem best, and to maintain proceedings to recover rents or possession of the Premises from any tenant or trespasser. Mortgagee shall be entitled to enter the Premises for the purpose of delivering notices or other communications to the tenants and occupants. Mortgagee shall have no liability to Mortgagor as a result of those acts. Mortgagee may deliver all of the notices and communications by ordinary first-class U.S. mail. If Mortgagor obstructs Mortgagee in its efforts to collect the rents and income from the Premises or unreasonably refuses or neglects to assist Mortgagee in collecting the rent and income, Mortgagee shall be entitled to appoint a receiver for the Premises and the income, rents, and profits, with powers that the court making the appointment may confer. Mortgagor shall at no time collect advance rent in excess of one month under any lease pertaining to the Premises, and Mortgagee shall not be bound by any rent prepayment made or received in violation of this paragraph. Mortgagee shall not have any obligation to collect rent or to enforce any other obligations of any tenant or occupant of the Premises to Mortgagor. No action taken by Mortgagee under this paragraph shall cause Mortgagee to become a "mortgagee in possession."

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:

BORROWER: EquityBuild, Inc.

\_\_\_\_\_(SEAL)  
Jerry Cohen, President

\_\_\_\_\_[Space Below This Line For Acknowledgement]\_\_\_\_\_

STATE OF FLORIDA, \_\_\_\_\_ County ss:

I hereby certify that on this day, before me, an officer duly authorized in the state aforesaid and in the county aforesaid to take acknowledgements, personally appeared Jerry Cohen, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he/she executed the same for the purpose therein expressed.

WITNESS my hand and official seal in the county and state aforesaid this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

My Commission expires:

{Seal}


\_\_\_\_\_  
Notary Public

**Lender Name:** Steven Roche

**Lender Amount:** \$50,000.00

**Percentage of Ownership of Total Loan:** 1.14%

**Monthly Interest Payment Amount to Be Received:** \$8.33 per diem representing 6% APR and then thereafter \$666.67 Monthly representing 16% APR

DocuSigned by:  
  
**Lender Signature**

EquityBuild Finance, LLC, as agent and trustee has been authorized by the above listed lenders to receive the payoff in its name and issue and execute a release of said mortgage, upon payment in full of any outstanding balance.

**COLLATERAL AGENCY AND SERVICING AGREEMENT**

**among**

**EQUITYBUILD FINANCE, LLC,**

**as Collateral Agent and Loan Servicer,**

**and**

**EACH OF THE LENDERS PARTY HERETO**

**DATED AS OF** 9/11/2016

## COLLATERAL AGENCY AND SERVICING AGREEMENT

This **COLLATERAL AGENCY AND SERVICING AGREEMENT** (as amended, supplemented or otherwise modified from time to time, this “**Agreement**”) is made as of 9/11/2016, by and among (i) EquityBuild Finance, LLC, a Florida limited liability Borrower (in its individual capacity, “**EBF**”, and in its capacity as collateral agent for the Lenders (as defined below), and in its capacity as loan servicer for the Lenders, the “**Collateral Agent**” or the “**Servicer**”), and (ii) each of the Lenders party hereto (together with their respective successors and assigns as beneficiaries of the Note (as defined below), the “**Lenders**”), and is acknowledged, consented and agreed to by EquityBuild, Inc. (the “**Borrower**”).

### RECITALS

**A.** Reference is made to that certain Note, dated 10/25/2016 (as the same from time to time hereafter may be amended, restated, supplemented or otherwise modified, the “**Note**”) by the Borrower in favor of the Lenders, pursuant to which, subject to the terms and conditions set forth therein, the Lenders shall make individual investment loans (each an “**Investment**”) to the Borrower as a collective secured loan (the “**Loan**”).

**B.** The Lenders have agreed to make the Loan to the Borrower, but only upon the condition, among others, that the Borrower grant to the Collateral Agent, for the benefit of the Lenders, as security for the Borrower’s obligations to the Lenders and the Collateral Agent under or in respect of the Note and the Mortgage (as defined below), a perfected lien on, and security interest in, the Collateral (as defined below).

**C.** The Lenders desire that EBF act as the collateral agent for and on behalf of all of the Lenders regarding the Collateral, all as more fully provided herein; and the Collateral Agent and the Lenders have entered into this Agreement to, among other things, further define the rights, duties, authority and responsibilities of the Collateral Agent and the relationship among the Lenders regarding their *pari passu* interests in the Collateral.

**D.** The Lenders also desire to retain EBF as the loan servicer to act as their agent to employ commercially reasonable and prudent practices to collect all scheduled payments on the Loan, and to protect to the best of the Servicer’s ability, the security for the Loan.

### AGREEMENT

**NOW, THEREFORE**, in consideration of the foregoing premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, EBF and the Lenders agree as follows:

## 1. DEFINED TERMS.

As used in this Agreement, and unless the context requires a different meaning, the following terms have the respective meanings indicated below, all such definitions to be equally applicable to the singular and plural forms of the terms defined.

**Actionable Default** – means the existence and continuance of any Event of Default (as defined in the Note) beyond any grace period in respect thereof provided in the Note or the acceleration of the maturity of the Note.

**Affiliate** – means, with respect to any specified Person, any other Person that directly or indirectly, through one or more intermediaries, has control of, is controlled by, or is under common control with, such specified Person. For these purposes, “control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management of any Person, whether through the ownership of voting securities, by contract or otherwise.

**Agent Professionals** – means attorneys, legal counsel, accountants, appraisers, business valuation experts, environmental engineers, turnaround consultants, or other professionals or experts at any time retained by EBF in the discharge of its duties hereunder or under any of the Collateral Documents.

**Agent-Related Persons** – means EBF, in its capacity as Collateral Agent or Servicer, and any successor collateral agent or loan servicer, and any co-agents or separate agents appointed pursuant to Section 5, together with their respective Affiliates, and the officers, directors, employees, representatives, agents and Agent Professionals of such Persons and Affiliates.

**Agreement** – has the meaning specified for such term in the Preamble hereto.

**Business Day** – means a day (i) other than Saturday or Sunday and (ii) on which commercial banks are open for business in New York, New York.

**Collateral** – has the meaning specified for such term in Mortgage.

**Collateral Agent** – has the meaning specified for such term in the Preamble hereto.

**Collateral Documents** – means the Mortgage and any other document now or hereafter evidencing a security interest, lien or other encumbrance granted to secure the obligations payable under the Note or any guarantee thereof.

**Enforcement Notice** – means a written notice given by the Required Lenders to the Collateral Agent stating that an Actionable Default exists.

**EBF** – has the meaning specified for such term in the Preamble hereto.

**Lenders** – has the meaning specified for such term in the Preamble hereto.

**Liens** – means any pledges, liens, claims, encumbrances or security interests.

**Mortgage** – has the meaning specified for such term in Note.

**Obligations** – means and includes all present and future indebtedness, obligations and liabilities of every kind and nature of the Borrower from time to time owed to any Lender under the Note arising from, evidenced by or relating to the Note or the Mortgage.

**Note** – has the meaning specified for such term in Recital A hereto.

**Person** – means any individual, partnership, corporation, limited liability Borrower, unincorporated organization or association, trust or other entity.

**Required Lenders** – means the Lenders acting by a majority of principal advanced by the Lenders under the Note.

**Servicer** – has the meaning specified in the Preamble hereto.

**Total Investments** – means, with respect to Investments that remain outstanding in whole or in part, the total original amount of Investments a Lender has loaned to the Borrower; provided that for purposes of Section 10(e) hereof, such amounts shall be rounded down to the nearest whole \$25,000 increment. By way of example only, if actual Total Investments equaled \$176,000, for purposes of Section 10(e), such Total Investments would equal \$175,000.

## **2. APPOINTMENTS; IRREVOCABLE DELEGATION OF AUTHORITY.**

### **(a) Appointment as Collateral Agent and Loan Servicer.**

The Lenders hereby appoint and designate EBF as collateral agent on their behalf hereunder and under the Mortgage. The Lenders hereby also appoint and designate EBF as the loan servicer with respect to the Loan. EBF hereby accepts such appointments on the terms and conditions set forth herein and acknowledges that it holds the Collateral and acts under the Mortgage as agent for and on behalf of the Lenders. The Lenders hereby authorize and direct the Collateral Agent to (a) enter into the Mortgage and the Note for and on behalf of and for the benefit of the Lenders in accordance with the terms hereof and thereof, (b) exercise such rights and powers under this Agreement, the Note or the Mortgage as the case may be, as are specifically granted or delegated to the Collateral Agent by the terms hereof and thereof, together with such other rights and powers as are reasonably incidental thereto or as are customarily and typically exercised by agents performing duties similar to the duties of the Collateral Agent hereunder and under the Collateral Documents, subject, however, to any express limitations set forth herein or in the Mortgage, and (c) perform the obligations of the Collateral Agent thereunder. The Lenders hereby agree to be bound by the provisions of the Mortgage and the Note. The duties of the Collateral Agent and the Servicer shall be deemed ministerial and administrative in nature, and neither the Collateral Agent nor the Servicer shall have, by reason of this Agreement or either of the Mortgage or the Note, a fiduciary relationship with any Lender and/or any Affiliate thereof.

**(b) Irrevocable Delegation of Authority.**

Each Lender does hereby irrevocably delegate to the Collateral Agent all of each such Lender's rights and powers under the Note and the Mortgage and agrees for the benefit of the Collateral Agent and the other Lenders not to exercise any right or power of such Lender under the Note or the Mortgage.

**3. LIMITATIONS ON DUTIES AND ACTIONS OF COLLATERAL AGENT AND THE SERVICER.**

Neither the Collateral Agent nor the Servicer shall have any duties or responsibilities except those expressly set forth in this Agreement and the Mortgage. Neither the Collateral Agent nor the Servicer shall be liable for any action taken or omitted by it, or any action suffered by it to be taken or omitted, excepting only its own gross negligence or willful misconduct, as finally determined by a court of competent jurisdiction. IN THE ABSENCE OF WRITTEN INSTRUCTIONS FROM THE REQUIRED LENDERS, NEITHER THE COLLATERAL AGENT NOR THE SERVICER SHALL FORECLOSE UPON ANY LIEN WITH RESPECT TO ANY OF THE COLLATERAL OR TAKE ANY OTHER ACTION WITH RESPECT TO THE COLLATERAL OR ANY PART THEREOF.

**4. RECOURSE THROUGH COLLATERAL AGENT; SHARING OF COLLATERAL.**

**(a) Recourse Through Collateral Agent.**

Each of the Lenders acknowledges and agrees that (i) it shall only have recourse to the Collateral through the Collateral Agent and that it shall have no independent recourse to the Collateral and (ii) the Collateral Agent shall have no obligation to, and shall not, take any action hereunder or under the Mortgage except upon written instructions from the Required Lenders in accordance with Section 6(a).

**(b) Sharing of Collateral.**

No Lender shall contest the validity, perfection, priority or enforceability of, or seek to avoid, any Lien securing any Obligation, and each party hereby agrees to cooperate, at no cost to the Collateral Agent, in the defense of any action contesting the validity, perfection, priority or enforceability of any such Lien. No Lender shall have the right to obtain any of the Collateral or the benefit of any Lien on any property of the Borrower solely in respect of Obligations owing to such Lender or any group of Lenders comprised of less than all the Lenders.

**5. CO-AGENTS; COLLATERAL AGENT'S AND SERVICER'S USE OF PROFESSIONALS.**

**(a) Co-Agents.**

Each of the Collateral Agent and the Servicer shall have power to appoint one or



more Persons to act as a co-agent or co-agents, jointly with the Collateral Agent and/or the Servicer, or to act as a separate agent or separate agents, with respect to all or any part of the Collateral or to enforce the Lender's rights under the Note, and to vest in such Person or Persons, in such capacity, such rights, powers, duties and obligations of the Collateral Agent and/or the Servicer, with the consent of the Required Lenders (such consent not to be unreasonably withheld or delayed), in any case only as may be necessary or desirable for the purpose of meeting any legal requirements of any jurisdiction in which any part of the Collateral may at the time be located. Absent any specific agreement to the contrary, any co-agent or co-agents or separate agent or separate agents so appointed shall, to the extent applicable, have the rights, powers, obligations and duties of the Collateral Agent and/or the Servicer hereunder. Neither the Collateral Agent nor the Servicer shall be responsible for the negligence, default or misconduct of any such co-agent or separate agent selected by it with reasonable care nor for any fees or expenses of such co-agent or separate agent.

**(b) Agent Professionals.**

The Collateral Agent and the Servicer may employ one or more Agent Professionals to advise or assist it from time to time, but shall not be responsible for the negligence, default or misconduct of any such Agent Professionals selected by it with reasonable care. The Collateral Agent and the Servicer shall be entitled to rely on the advice and statements of Agent Professionals so selected. The Borrower shall pay reasonable remuneration for all services performed by Agent Professionals for the Collateral Agent and the Servicer in the discharge of its duties hereunder and under the Collateral Documents in accordance with Section 11(b) hereof.

**6. INSTRUCTIONS FROM LENDERS; ENFORCEMENT NOTICE.**

**(a) Instructions from Lenders.**

Unless otherwise excused as provided herein, both the Collateral Agent and the Servicer shall act on all written instructions received from the Required Lenders, with respect to any action to be taken or not to be taken in connection with this Agreement, the Mortgage or the Note, including, without limitation, actions to be taken in connection with an insolvency proceeding in respect of the Borrower; *provided, however*, that the Collateral Agent shall act only on written instructions from all Lenders with respect to the amendment or termination of the Mortgage, or, except as provided in the Mortgage, any Lien on property of the Borrower granted under the Mortgage. If either the Collateral Agent or the Servicer shall request instructions from the Lenders with respect to taking any particular action in connection with this Agreement, the Mortgage, the Note or any such Lien, the Collateral Agent and the Servicer shall be entitled to refrain from taking such particular action unless and until it shall have received written instructions from the Required Lenders (in which event it shall be required to act in accordance with such written instructions unless otherwise excused as provided herein), and neither the Collateral Agent nor the Servicer shall incur any liability to any Person for so refraining. Without limiting the foregoing, no Lender shall have any right of action whatsoever against the Collateral Agent or the Servicer as a result of the Collateral Agent or the

Servicer taking or not taking any action hereunder or pursuant to or in accordance with the written instructions of such Required Lenders, except for the Collateral Agent's or the Servicer's own gross negligence or willful misconduct in connection with any action taken or not taken by it, as finally determined by a court of competent jurisdiction. Notwithstanding anything to the contrary contained in this Agreement or any of the Collateral Documents, (i) the failure of the Collateral Agent or the Servicer to take any action shall not constitute gross negligence or willful misconduct by the Collateral Agent or the Servicer hereunder (A) following a request by the Collateral Agent or the Servicer for the Required Lenders' consent to such action and the failure of the Required Lenders to respond to such request or (B) in the absence of written instructions from the Required Lenders and (ii) neither the Collateral Agent nor the Servicer shall be required to take any action that is, in its opinion (which may be, but is not required to be, based on the advice of legal counsel), contrary to applicable law or the Note or the Mortgage or that would, in its reasonable opinion, subject it or any Agent-Related Persons to liability or that would require it to expend or risk its own funds.

**(b) Enforcement Notices.**

The Collateral Agent shall, as soon as practicable but in any event, if applicable, within ten (10) Business Days following receipt thereof, furnish to each of the Lenders:

- (i) a copy of each Enforcement Notice received by the Collateral Agent;
- (ii) a copy of each certificate or other written notice received by the Collateral Agent rescinding or withdrawing an Enforcement Notice;
- (iii) a copy of any written notice or other written communication given or received by the Collateral Agent under the Note or the Mortgage; and
- (iv) such other written notices required by the terms of this Agreement to be furnished by or to the Collateral Agent.

Any Enforcement Notice shall be deemed to have been given when actually received by the Collateral Agent and to have been rescinded or withdrawn when the Collateral Agent has actually received from the notifying party a written notice rescinding or withdrawing such Enforcement Notice. Any Enforcement Notice shall be deemed to be outstanding and in effect at all times after such notice has been given until such time, if any, as such notice has been rescinded or withdrawn.

**7. NO RESPONSIBILITY OF COLLATERAL AGENT OR SERVICER FOR CERTAIN MATTERS.**

Neither the Collateral Agent nor the Servicer shall be responsible in any manner whatsoever for the correctness of any recitals, statements, information, representations or warranties contained herein or in the Mortgage except for those made by it herein. Neither the Collateral Agent nor the Servicer makes any representation or warranty as to, and is not responsible in any way for: (i) the description, value, location, existence, or condition of any Collateral; (ii) the financial condition of the Borrower or the title of the

Borrower to any of the Collateral; (iii) the sufficiency of the security afforded by this Agreement, the Note or the Mortgage or whether registration in respect thereof has been properly effected or maintained; (iv) the validity, genuineness, correctness, perfection, or priority of any Lien with respect to the Collateral; (v) other than in respect of itself as to the Collateral Agent's and the Servicer's representations in Section 15(p) hereof, the validity, proper execution, enforceability, legality, or sufficiency of this Agreement, the Note, the Mortgage or any instrument deposited with the Collateral Agent or the Servicer; (vi) the identity, authority or right of any Lender executing any document; or (vii) the filing or renewal of any registration of the Mortgage or any public filing required under applicable law to perfect any of the Collateral Agent's Liens, for the benefit of the Lenders, in any of the Collateral. Neither the Collateral Agent nor the Servicer shall be required to ascertain or inquire as to the performance by the Borrower of any of its covenants or obligations hereunder or under the Mortgage or the Note. In no event shall either the Collateral Agent or the Servicer be responsible or liable for special, indirect, or consequential loss or damage of any kind whatsoever (including, but not limited to, loss of profit) irrespective of whether the Collateral Agent or the Servicer has been advised of the likelihood of such loss or damage and regardless of the form of action.

**8. LIMITED DUTIES OF COLLATERAL AGENT REGARDING COLLATERAL; FURTHER ACTS WITH RESPECT TO COLLATERAL.**

(a) The Collateral Agent shall not be responsible for insuring any of the Collateral or for the payment of taxes, charges, fines, levies, assessments or for ensuring or protecting the validity, genuineness, correctness, perfection, or priority of any Lien upon any of the Collateral, and shall be indemnified therefor as provided in Section 12. Furthermore, the Collateral Agent shall not be responsible for the maintenance or safeguarding of any Collateral, except as provided in the immediately following sentence when the Collateral Agent has actual possession of any Collateral. The Collateral Agent shall not have any duty to any of the Lenders with respect to any Collateral, including, without limitation, any Collateral in its possession or control or in the possession or control of any agent or nominee of the Collateral Agent selected by it with reasonable care, or any income therefrom or for the preservation of rights against prior parties or any other rights pertaining to the Collateral, except as stated in the next succeeding paragraph.

(b) Beyond the exercise of reasonable care in the custody thereof and the duty to account for monies actually received by it, the Collateral Agent shall have no duty as to any Collateral in its possession or control or in the possession or control of any agent or bailee or any income thereon or as to preservation of rights against prior parties or any other rights pertaining thereto and the Collateral Agent shall not be responsible for filing any financing or continuation statements or recording any documents or instruments in any public office at any time or times or otherwise perfecting or maintaining the perfection of any security interest in the Collateral. The Collateral Agent shall be deemed to have exercised reasonable care in the custody of the Collateral in its possession if the Collateral is accorded treatment substantially equal to that which it accords its own property and shall not be liable or responsible for any loss or diminution in the value of any of the Collateral, by reason of the act or omission of any carrier, forwarding agency or other agent or bailee selected by the Collateral Agent with

reasonable care. The Collateral Agent shall not be responsible for the existence, genuineness or value of any of the Collateral or for the validity, perfection, priority or enforceability of the Liens in any of the Collateral, whether impaired by operation of law or by reason of any action or omission to act on its part hereunder, except to the extent such action or omission constitutes gross negligence, bad faith or willful misconduct on the part of the Collateral Agent, or for the validity or sufficiency of the Collateral or any agreement or assignment contained therein, for the validity of the title of the Borrower to the Collateral, for insuring the Collateral or for the payment of taxes, charges, assessments or Liens upon the Collateral or otherwise as to the maintenance of the Collateral.

## **9. DUTIES AS LOAN SERVICER.**

### **(a) Specific Loan Services/Functions.**

In its capacity as the Servicer, EBF shall: (a) issue payment coupons or monthly statements to the Borrower directing Loan repayment to the Lenders or the Servicer; (b) issue payoff demands, beneficiary statements and mortgage ratings; (c) demand, receive and collect all Loan payments, deposit them by the next business day into the Servicer's trust account and/or facilitate having them paid directly to Lender, in each case within 25 days of the date due; (d) issue annual Form 1099 income tax statements to the Borrower and Lenders; (e) answer Borrower inquiries, demands and requests; (f) grant appropriate payment deferrals, but not of the maturity of the Loan unless approved by the Required Lenders; (g) monitor the continued effectiveness and claims on any property insurance listed in the Loan escrow instructions; (h) request and receive notices of default on senior liens; (i) receive notices of property tax delinquencies, should a tax service be ordered through escrow or subsequently; and (j) execute and deliver on Lenders' behalf and in Lenders' name any documents necessary or convenient for the purpose of maintaining or enforcing the Loan.

### **(b) Protective Advances.**

Upon request of the Servicer, Lenders shall make such advances as approved by the Required Lenders to be necessary and prudent to protect and to collect Lenders' interest in the Loan. If any Lender fails to make advances approved by the Required Lenders, the other Lenders are authorized to advance the amount the non-paying Lender failed to advance and to receive payment in full with interest at 10% per annum before any further payments are made to the non-paying Lender and, the non-defaulting Lenders shall also have the option, exercisable within 30 days after Lender's failure to pay, to purchase such Lender's interest in the Loan for the outstanding principal balance and any accrued interest, fees and costs owed to the defaulting Lender, payable within 15 days after the election to purchase is made. The Servicer, in its absolute discretion, may advance its own funds to protect the security of the Loan, including advances to cure senior liens, property insurance, foreclosure expenses, repair, advertising, litigation expenses and similar items, but not Loan payments. The Servicer shall be reimbursed such advances, with interest at the interest rate then payable with respect to the Loan, from the next Loan payment, or within 10 days after a written request to Lenders. To secure the Servicer's

advances, Lenders hereby irrevocably assign to the Servicer, to the extent of advances owed to the Servicer, the first Loan payments received after an advance is made. A defaulting or non-paying Lender will be liable to the remaining Lenders for all damages incurred as result of his/her/their failure to act or failure to advance funds including, but not limited to, actual attorneys' fees, court costs and fees, or any damages related to loss of the security for the Loan.

**(c) Loan Documents.**

To the extent not maintained by the Collateral Agent, the Servicer shall retain custody as agent for Lenders of the original Note and Mortgage.

**(d) Real Estate Owned.**

The Servicer is also Lenders' agent (in conjunction with the Collateral Agent) to liquidate any real estate acquired by Lenders in foreclosure of the property securing the Loan (the "**Property**"). During the foreclosure process, the Servicer's servicing fee shall continue as set forth in Section 12 herein. Additionally, at the option of Lenders and by separate fee agreement to be signed by the parties, the Servicer shall: (i) arrange appropriate property insurance; (ii) manage the Property, including arranging maintenance and construction, tenant relations, repair and security; (iii) arrange for the valuation and resale of the Property, including hiring a Realtor® or broker to list, show and sell the Property; and (iv) accept reasonable offers on the Property, at the price and terms approved by the Required Lenders and execute all necessary and appropriate documentation to carry out the sale.

**(e) Servicing Fees.**

The Servicer's fee to each Lender to service any Loan shall be up to 4% interest per annum on the Investment made by such Lender in the Loan, as such amount may adjust from time to time upon making an Investment in the Loan (or upon making Investments in any other Loan) in accordance with this Section 9(e). The Servicer's fee to a Lender in respect of its Investment is calculated as follows:

- (i) 1.5% interest per annum on the Investment if either: (a) the original Investment in the Loan equals or exceeds \$360,000; or (b) the original amount of the Total Investments equals or exceed \$1,010,000; or
- (ii) For so long as clause (i) is not applicable, 2.5% interest per annum on the Investment if either: (a) the original Investment in the Loan equals or exceeds \$210,000; or (b) the original amount of the Total Investments equals or exceeds \$510,000; or
- (iii) For so long as clauses (i) or (ii) are not applicable, 3.5% interest per annum on the Investment if either: (a) the original Investment in the Loan equals or exceeds \$110,000 or (b) the original amount of the Total Investments equals or exceeds \$260,000; or

- (iv) For so long as clauses (i), (ii) or (iii) are not applicable, 4% interest per annum on the Investment in the Loan.

The fee is deducted from the interest payment payable by the Borrower under the Note. The Servicer shall be further compensated for work in respect of delinquent payments or other default by Borrower by assessing and receiving late charges, and by collecting an additional 2% of the principal amount of the Loan of any payments (whether interest or late fees) made to Lenders (or for their benefit) after the assessment of default interest on the Borrower under the Note that equal or exceed 2% interest per annum of the principal amount of the Loan. Said additional amounts shall only be collected if default interest is, in fact, charged to the Borrower. Lenders shall receive any benefit of the default interest rate and late fee payments in excess of the 2% interest per annum on the principal amount of the Loan collected by the Servicer.

**(f) Origination Fee.**

On the Closing Statement of the Loan the Collateral Agent may charge the Borrower an origination fee (“**Origination Fee**”) of up to 5% of the principal amount of the Loan.

**10. RELIANCE ON WRITINGS.**

Both the Collateral Agent and the Servicer shall be entitled and fully authorized to rely and act, and shall be fully protected in relying and acting, upon any writing, instruction, resolution, notice, consent, certificate, affidavit, letter, telegram, facsimile, telex or other document believed by it to be genuine and correct and to have been signed or sent by or on behalf of the proper Person or Persons, and statements of the Borrower (including, without limitation, counsel to the Borrower) or the Lenders. Neither the Collateral Agent nor the Servicer shall have any duty to verify or confirm the content of any writing, instruction, resolution, notice, consent, certificate, affidavit, letter, telegram, facsimile, telex or other document.

## **11. RESIGNATION AND REMOVAL OF COLLATERAL AGENT AND/OR SERVICER.**

### **(a) Resignation or Removal.**

Both the Collateral Agent and the Servicer may at any time resign, effective upon 30 days prior written notice (or such shorter period as may be agreed to by the Required Lenders and such party) to the Lenders and the Borrower, and either may be removed for or without cause at any time by the Required Lenders, effective upon 30 days' notice. In the event of any resignation or removal, the Required Lenders shall have the right to appoint a successor Collateral Agent and/or Servicer (which successor Collateral Agent and/or Servicer may be one of the Lenders or a financial institution that is engaged in the provision of agency services in syndicated commercial loan transactions or a trust Borrower that is engaged in the provision of trust services in secured private placement transactions), but, if the Required Lenders have not appointed a successor Collateral Agent and/or Servicer, as the case may be, within 30 days after the resigning Collateral Agent's and/or Servicer's giving of notice of resignation or its removal, the retiring Collateral Agent and/or Servicer, as the case may be, shall, at the expense of the Borrower, on behalf of the Lenders, subject to the above provision regarding the identity and nature of a permissible successor Collateral Agent and/or Servicer, either appoint a successor Collateral Agent and/or Servicer or apply to the appropriate court to make such appointment. Upon the acceptance of any appointment as a Collateral Agent and/or Servicer, as the case may be, hereunder by a successor, to be evidenced by the successor Collateral Agent's or Servicer's, as the case may be, execution and delivery to the Borrower, the Lenders and the retiring Collateral Agent and/or Servicer, as the case may be, of a counterpart of this Agreement, such successor Collateral Agent and/or Servicer, as the case may be, shall thereupon succeed to and become vested with all the rights, powers, privileges, duties and obligations of the retiring Collateral Agent and/or Servicer, as the case may be, and the retiring Collateral Agent and/or Servicer, as the case may be, shall be discharged from any further duties and obligations as Collateral Agent and/or Servicer, as the case may be, as appropriate, under this Agreement, the Note and the Mortgage. The payment and indemnity obligations of the Borrower provided for in Section 12 shall survive any such removal or resignation in favor of the retiring Collateral Agent and/or Servicer, as the case may be, in respect of any matter arising during or after its tenure as Collateral Agent and/or Servicer, as the case may be. For the avoidance of doubt, removal hereunder of EBF as the Collateral Agent in no way constitutes a removal of EBF as the Servicer and vice versa.

### **(b) Vesting.**

Upon the request of any successor Collateral Agent and/or Servicer, at the expense of the Borrower, the Lenders, the Borrower and the predecessor Collateral Agent and/or Servicer, as the case may be, shall promptly execute and deliver such instruments, conveyances, and assurances reflecting terms consistent with the terms hereof, the Mortgage and the Note for the purpose of more fully and certainly vesting and confirming in such successor Collateral Agent and/or Servicer, as the case may be, its

interest in, and Liens upon, the Collateral and all rights, powers, duties, and obligations of the predecessor Collateral Agent and/or Servicer, as the case may be, hereunder and under the Mortgage and the Note, and the predecessor Collateral Agent and/or Servicer, as the case may be, shall also promptly assign and deliver to the successor Collateral Agent and/or Servicer, as the case may be, any Collateral subject to the Liens of the Mortgage that may then be in its possession, as applicable.

**(c) Successors.**

Any entity into which a Collateral Agent or Servicer may be amalgamated or merged, or with which it may be consolidated, or any entity resulting from any amalgamation, merger or consolidation to which a Collateral Agent or Servicer shall be a party, as a whole or substantially as a whole, shall be the successor of such Collateral Agent or Servicer hereunder if legally bound hereby as such successor, without the necessity for execution or filing of any paper or any further act on the part of any of the parties hereto, anything to the contrary contained herein notwithstanding.

**12. FEES TO COLLATERAL AGENT; PAYMENTS; INDEMNITY.**

**(a) Fees.**

In addition to any other fees owed to Servicer or Collateral Agent from either (i) Borrower, and paid by Borrower to Servicer or Collateral Agent, or (ii) Lender, and paid by Borrower out of amounts otherwise due to Lender, the Lender shall pay to the Collateral Agent all fees required to be paid under the Fee Schedule attached hereto as Schedule I with respect to this Agreement at the times and in the amounts set forth therein. Any amounts owed by Lender may, at Collateral Agent's discretion, be paid by Borrower out of amounts otherwise payable from Borrower to Lender.

**(b) Payment by the Borrower.**

The Borrower agrees that it will pay all of the Collateral Agent's and the Servicer's fees, as applicable, including those owed by the Lender listed on Schedule I, which shall be paid by the Borrower on behalf of the Lender out of amounts otherwise due to the Borrower, for its respective services hereunder and will pay or reimburse the Collateral Agent and the Servicer upon its request for all of their respective expenses, disbursements and advances incurred or made in the administration of their respective duties hereunder and under the Note and the Mortgage, as applicable (including, without limitation, reasonable legal fees and expenses and the reasonable compensation of all Agent Professionals, Agent-Related Persons and other advisers, agents or experts employed or retained by the Collateral Agent or the Servicer pursuant to this Agreement). In addition to and without limiting any other protection of the Collateral Agent and/or the Servicer hereunder or otherwise by law, the Borrower shall indemnify the Agent-Related Persons for any and all liabilities, obligations, losses, damages, penalties, actions, claims, demands, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever that may be suffered by, imposed on, incurred by or asserted against any Agent-Related Person, whether groundless or otherwise, howsoever arising from or out



of, or in any way related to the subject matter of, this Agreement, the Note, the Mortgage or any of the Collateral or the performance or enforcement of any of the terms of any thereof, including fees and expenses of special counsel; *provided* that the Borrower shall not be liable for any such payment to any Agent-Related Person to the extent the obligation to make such payment has been caused by such Agent-Related Person's own gross negligence or willful misconduct, as finally determined by a court of competent jurisdiction. All statements from the Collateral Agent, the Servicer or any other Person for obligations owing by the Borrower pursuant to the preceding sentence shall be sent to the Borrower. Any amount due under this Section 12(b) and unpaid 10 Business Days after request for such payment will bear interest from the expiration of such 10 Business Days at a rate per annum equal to two percent (2%) above the rate of interest publicly announced by JPMorgan Chase Bank, N.A. from time to time in New York City as its prime rate, payable on demand. If not timely paid by the Borrower, at the Collateral Agent's or the Servicer's election, all amounts so payable and the interest thereon will be payable out of any assets in the possession of the Collateral Agent and/or the Servicer and any other Collateral in priority to amounts owing to any and all other parties to this Agreement.

**(c) Survival.**

The obligations of the Borrower and the Lenders under this Section 12 shall survive the payment in full of all of the other Obligations, the resignation or removal of the Collateral Agent and/or the Servicer and the termination of this Agreement.

**13. COLLATERAL AGENT'S AND SERVICER'S FUNDS NOT AT RISK.**

For purposes of clarity, no provision of this Agreement or the Mortgage, and no request of any Lender or other Person shall require either the Collateral Agent or the Servicer to expend or risk any of its own funds, or to take any legal or other action under this Agreement, the Note or the Mortgage which might, in its reasonable judgment, involve any expense or any financial or other liability unless the Collateral Agent or the Servicer shall be furnished with indemnification acceptable to it, acting reasonably, including the advance of funds sufficient in the judgment of the Collateral Agent or the Servicer, as applicable, to satisfy such liability, costs and expenses.

**14. INDEPENDENT CREDIT DECISIONS.**

Each Lender acknowledges that it has, independently and without reliance upon the Collateral Agent, the Servicer or any other Lender and based upon such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement. Each Lender also acknowledges that it will, independently and without reliance upon any of the Collateral Agent, the Servicer or any other Lender and based upon such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under this Agreement.

**15. DETERMINATION OF LENDERS; SUBSEQUENT LENDERS BOUND.**

The Collateral Agent and the Servicer may deem and treat the payee of any promissory note or other evidence of indebtedness or obligation relating to any Obligation as the owner thereof for all purposes hereof unless and until (i) a written notice of the assignment or transfer thereof signed by such payee and (ii) a written acknowledgment agreeing to be bound by the terms hereof and such other documents required by Section 16(d), each signed by the assignee or transferee, and in form reasonably satisfactory to the Collateral Agent and/or the Servicer, shall have been filed with the Collateral Agent and/or the Servicer, as applicable. Any request, authority or consent of any Person who at the time of making such request or giving such authority or consent is the holder of any such note or other evidence of indebtedness or obligation, shall be conclusive and binding on any subsequent holder, transferee or assignee of such note or other evidence of indebtedness or obligation and of any note or notes or other evidences of indebtedness or obligation issued in exchange therefor.

## **16. MISCELLANEOUS.**

### **(a) Notices.**

All notices, requests and other communications shall have been duly given and shall be effective (a) when delivered by hand, (b) when transmitted via telecopy or email (or other facsimile device) with receipt confirmed with respect to telecopy, (c) the Business Day next following the day on which the same has been delivered prepaid to a reputable national overnight air courier service, or (d) the third Business Day next following the day on which the same is sent by certified or registered mail, postage prepaid, in each case to the respective parties at the address, telecopy number or email address as provided in the immediately succeeding sentence; provided, however, that if any notice is delivered on a day other than a Business Day, or after 5:00 P.M. (Eastern time) on any Business Day, then such notice shall not be effective until the next Business Day. For purposes hereof, the address of each party hereto and its facsimile number or email address (until written notice of a change thereof is delivered to the Collateral Agent, the Servicer, the Borrower and each Lender) shall be as set forth in Schedule II hereto, or at such other address as such party may specify by written notice to the other parties hereto. Notices to any Person that becomes a holder of Obligations after the date hereof shall be given to such address or facsimile number or email address of which such Person shall have given written notice to the Collateral Agent, the Servicer and the Borrower.

### **(b) Amendments.**

No provision of this Agreement may be amended or waived except by a writing signed by the Required Lenders, the Collateral Agent and the Servicer; provided, however, that any amendment expanding the obligations or liabilities of the Borrower either hereunder or thereunder shall require the Borrower's consent.

### **(c) Conflicts with Collateral Documents and other Transaction Documents.**

The Collateral Agent, the Servicer and the Lenders agree that, if any provision of this Agreement is inconsistent with or contrary to any provisions in the Note or the

Mortgage, the provisions of this Agreement shall prevail as between and among the Collateral Agent, the Servicer and the Lenders.

**(d) Successors and Assigns.**

This Agreement shall be binding upon, and inure to the benefit of, the Collateral Agent, the Servicer and the Lenders and their respective successors and assigns. If any Lender shall assign or transfer the Obligations owing to it, it shall promptly so notify the Collateral Agent and the Servicer in writing. No Lender which assigns or transfers any Obligations owing to it shall assign or transfer its benefits under the Collateral Documents without obtaining from the assignee or transferee and delivering to the Collateral Agent, the Servicer and the Lenders a joinder agreement and an executed acknowledgment of the assignee or transferee agreeing to be bound by the terms hereof to the same extent as if it had been a Lender on the date hereof. Each assignee or transferee of any Obligations shall take such Obligations subject to the provisions of this Agreement and to any request made, waiver or consent given or other action taken or authorized hereunder by each previous holder of such Obligations prior to the receipt by the Collateral Agent and the Servicer of written notice of such assignment or transfer; and, except as expressly otherwise provided in such notice, the Collateral Agent and/or the Servicer shall be entitled to assume conclusively that the assignee or transferee named in such notice shall thereafter be vested with all rights and powers as a Lender under this Agreement (and the Collateral Agent and the Servicer may conclusively assume that no Obligations have been subject to any assignment or transfer other than transfers of which the Collateral Agent and the Servicer have received such a notice). Upon the written request of any Lender or the Borrower, the Collateral Agent and the Servicer will provide such Lender and the Borrower with copies of any written notices of transfer received pursuant hereto.

**(e) Continuing Effectiveness.**

This Agreement shall continue to be effective among the Collateral Agent, the Servicer and the Lenders even though a case or proceeding under any bankruptcy or insolvency law or any proceeding in the nature of a receivership, whether or not under any insolvency law, shall be instituted with respect to the Borrower or any portion of the property or assets of the Borrower, and all actions taken by the Collateral Agent with respect to the Collateral or by the Collateral Agent, the Servicer and the Lenders with regard to such proceeding shall be determined by the Required Lenders; provided, however, that nothing herein shall be interpreted to preclude any Lender from filing a proof of claim with respect to its Obligations or from casting its vote, or abstaining from voting, for or against confirmation of a plan of reorganization in a case of bankruptcy, insolvency or similar law in its sole discretion.

**(f) Further Assurances.**

Each party and the Borrower agrees to do such further acts and things and to execute and deliver such additional agreements, powers and instruments as necessary or as any Lender or the Collateral Agent or the Servicer may reasonably request to carry into effect

the terms, provisions and purposes of this Agreement or to better assure and confirm unto the Collateral Agent or the Servicer or any of the other Lenders their respective rights, powers and remedies hereunder.

**(g) Counterparts.**

This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same agreement, and any of the parties hereto may execute this Agreement by signing any such counterpart. Delivery of an executed counterpart of a signature page to this Agreement by fax or pdf shall be effective as delivery of a manually executed counterpart of this Agreement.

**(h) Effectiveness.**

This Agreement shall become effective immediately upon execution hereof by the Collateral Agent, the Servicer, the Required Lenders and the Borrower, and shall continue in full force and effect until 91 days following the date upon which all Obligations are irrevocably paid and satisfied in full; provided that, if the Obligations due and owing to a Lender have been paid and satisfied in full, then such Lender shall be deemed released from this Agreement without any further action being necessary. Any such released Lender shall give the Collateral Agent notice of such release but the failure to give such notice shall not affect such release.

**(i) Governing Law.**

**THIS AGREEMENT SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH, AND THE RIGHTS OF THE PARTIES SHALL BE GOVERNED BY, THE INTERNAL LAW OF THE STATE OF ILLINOIS, EXCLUDING CHOICE-OF-LAW PRINCIPLES OF THE LAW OF SUCH STATE THAT WOULD PERMIT THE APPLICATION OF THE LAWS OF A JURISDICTION OTHER THAN SUCH STATE.**

**(j) Jurisdiction.**

(i) Each party hereto irrevocably submits to the non-exclusive jurisdiction of any Illinois state or federal court sitting in Cook County, Illinois, over any suit, action or proceeding arising out of or relating to this Agreement or any of the agreements, documents or instruments delivered in connection herewith or therewith. To the fullest extent permitted by applicable law, the parties hereto irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise, any claim that it is not subject to the jurisdiction of any such court, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding brought in any such court and any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

(ii) Nothing in this Section 16(j) shall affect the right that the Collateral Agent, the Servicer or any of the Lenders to serve process in any manner permitted by law, or limit any right that any party hereto may have to bring proceedings against the Borrower

in the courts of any appropriate jurisdiction or to enforce in any lawful manner a judgment obtained in one jurisdiction in any other jurisdiction.

(iii) THE PARTIES HERETO IRREVOCABLY WAIVE ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER AGREEMENT, DOCUMENT OR INSTRUMENT DELIVERED IN CONNECTION HERewith OR THEREWITH OR THE ACTIONS OF THE LENDERS, THE COLLATERAL AGENT OR THE SERVICER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT HEREOF OR THEREOF.

**(k) Headings; Sections.**

Headings of Sections of this Agreement have been included herein for convenience only and should not be considered in interpreting this Agreement. Unless stated otherwise in this Agreement, references in this Agreement to Sections are references to Sections of this Agreement.

**(l) No Implied Beneficiaries.**

Nothing in this Agreement (except Section 16(b)), expressed or implied, is intended or shall be construed to confer upon or give to any Person, other than the Lenders, the Collateral Agent and the Servicer, any right, remedy or claim under or by reason of this Agreement or any covenant, condition or stipulation herein contained.

**(m) Severability.**

If any provision of this Agreement shall be held or deemed to be, or shall in fact be, inoperative or unenforceable as applied in any particular case in any jurisdiction, or because it conflicts with any other provision or provisions hereof or with any constitution or statute or rule of public policy, or for any other reason, such circumstance shall not have the effect of rendering the provision in question inoperative or unenforceable in any other case or circumstance, or rendering any other provision herein contained invalid, inoperative or unenforceable to any extent whatsoever. Upon the determination that any term or other provision of this Agreement is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to give effect to their original intention as closely as possible in an acceptable manner to the end that the transactions contemplated hereby are fulfilled to the maximum extent possible.

**(n) Obligations Individual.**

The obligations and representations and warranties of the Collateral Agent, the Servicer and each of the Lenders herein are made by each of them individually. Nothing herein contained shall be construed as creating among the Lenders, or among the Collateral Agent, the Servicer and the Lenders, a partnership, joint venture or other joint association.

**(o) No Obligation to Extend Credit.**

No provision of this Agreement shall be construed as obligating the Collateral Agent, the Servicer or any Lender to advance any monies or otherwise extend credit to the Borrower at any time.

**(p) Representations of Parties.**

Each of the Lenders, the Collateral Agent and the Servicer, severally and not jointly, represents and warrants to the other parties hereto that such party has all requisite power and capacity to execute, deliver and perform this Agreement and that the execution, delivery and performance of this Agreement has been duly authorized by all necessary action on the part of such party and that this Agreement constitutes the legal, valid and binding obligation of such party, enforceable against such party in accordance with its terms except as such enforceability may be limited by (i) bankruptcy, insolvency, reorganization or similar laws affecting the enforcement of creditors' rights generally and (ii) general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or law).

**(q) Limitation of Liability Due to Forces Beyond Collateral Agent's or Servicer's Control.**

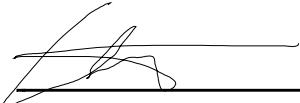
In no event shall the Collateral Agent or the Servicer be responsible or liable for any failure or delay in the performance of its obligations hereunder arising out of or caused by, directly or indirectly, forces beyond its control, including, without limitation, strikes, work stoppages, accidents, acts of war or terrorism, civil or military disturbances, nuclear or natural catastrophes or acts of God, and interruptions, loss or malfunctions of utilities, communications or computer (software and hardware) services; it being understood that the Collateral Agent and the Servicer shall use reasonable efforts which are consistent with accepted practices in the banking industry to resume performance as soon as practicable under the circumstances.

*[Remainder of page intentionally left blank; next page is signature page.]*

**IN WITNESS WHEREOF**, the Collateral Agent, the Servicer and the Lenders have executed or caused this Agreement to be duly executed and delivered by their respective officers thereunto duly authorized, all as of the date first above written.

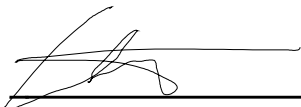
**COLLATERAL AGENT:**

**EQUITYBUILD FINANCE, LLC**, as Collateral Agent on behalf of the Lenders listed below

By:   
Name: \_\_\_\_\_  
Elizabeth Kammerer  
Title: Asset Manager

**SERVICER:**


**EQUITYBUILD FINANCE, LLC**, as Servicer

By:   
Name: \_\_\_\_\_  
Elizabeth Kammerer  
Title: Asset Manager

[Signature Page to Collateral Agency and Servicing Agreement]



**LENDERS:**

By:  \_\_\_\_\_  
Name: Steven Roche

Title:

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

Title:

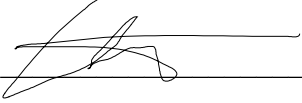
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[Signature Page to Collateral Agency Agreement]

ACKNOWLEDGED, CONSENTED AND AGREED TO:

**BORROWER:**

**EquityBuild, Inc.**

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

Name: Elizabeth Kammerer

Title: Closing Coordinator

[Signature Page to Collateral Agency Agreement]

SCHEDULE I

COLLATERAL AGENT FEE SCHEDULE

**Section 1: Payouts**

All payouts paid by check.

If Lender requests different method, fees are as follows:

- Wire funds: \$50
- Overnight check: \$50
- Direct deposit: No fee

**Section 2: Buyouts**

If Lender requests principal back prior to Loan's maturity date (and request granted), Lender must pay an early liquidation fee equal to: (i) 12% of the amount being returned if the request is made within one year of the date the Loan is funded (the "**Origination Date**"); and (ii) 10% of the amount being returned if the request is made between one and two years of the Origination Date. This fee is not intended to be a penalty but is an estimate, and indicative, of the actual cost and expenses EBF will incur in conjunction with such request.

EBF reserves the right to extend the maturity date on any Loan at the request of the Borrower. At that time, anyone who wishes to not participate in the extension may receive a return of their Investment and no fee will be charged in respect thereof .

SCHEDULE II

ADDRESSES FOR NOTICES

If to EquityBuild Finance, LLC, as either Collateral Agent or Servicer:

EquityBuild Finance, LLC  
[Address] 5068 West Plano Pkwy. #300  
Plano, TX 75093  
Attention: [Elizabeth Kammerer]  
Facsimile: [\_\_\_\_\_]   
E-mail: [elizabeth@equitybuildfinance.com]

If to the Lenders:

[Name] Steven Roche  
[Address] 185 Sylvan Street  
Rutherford, NJ 07070  
Attention: [\_\_\_\_\_]   
Facsimile: [\_\_\_\_\_]   
E-mail: [steve939@yahoo.com]

[Name]  
[Address]  
Attention: [\_\_\_\_\_]   
Facsimile: [\_\_\_\_\_]   
E-mail: [\_\_\_\_\_]

[Name]  
[Address]  
Attention: [\_\_\_\_\_]   
Facsimile: [\_\_\_\_\_]   
E-mail: [\_\_\_\_\_]

If to the Borrower:

EquityBuild, Inc.  
[Address] 1083 N Collier Blvd. #132  
Marco Island, FL 34145  
Attention: [Elizabeth Kammerer]  
Facsimile: [\_\_\_\_\_]   
E-mail: [elizabeth@equitybuild.com]



# EQUITY BUILD

F I N A N C E

Phone: (877) 978-1916 X 1814 Email: docs@equitybuild.com

## Wire Transfer Instructions

Bank:

**Wells Fargo Bank, N.A.**

Address:

**420 Montgomery  
San Francisco, CA 94104**

Beneficiary:

**EquityBuild, Inc.**

ABA:

**121000248**

Account:



Property/Investment Address: 6160-6260 MLK

Amount To Wire: \$ 50,000.00

Lender Initial: <sup>DS</sup> SP

Date Wire Will Be Initiated: Sept. 14th




**Certificate Of Completion**

Envelope Id: 02C17A33EFF24EFCB3710E5B6EA712F9	Status: Completed
Subject: 6160-6260 MLK - Steven Roche - Investment Packet	
Source Envelope:	
Document Pages: 42	Signatures: 3
Certificate Pages: 5	Initials: 1
AutoNav: Enabled	Envelope Originator:
Envelopeld Stamping: Enabled	EquityBuild Documents Team
Time Zone: (UTC-06:00) Central Time (US & Canada)	1083 N collier Blvd #132
	Marco Island, FL 34145
	docs@equitybuild.com
	IP Address: 99.99.196.146

**Record Tracking**

Status: Original 9/8/2016 3:49:35 PM	Holder: EquityBuild Documents Team docs@equitybuild.com	Location: DocuSign
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**Signer Events**

Signature	Timestamp
<p><b>Completed</b></p> <p>Using IP Address: 99.99.196.146</p>	<p>Sent: 9/8/2016 3:51:33 PM Viewed: 9/8/2016 3:51:42 PM Signed: 9/8/2016 3:55:05 PM</p>
<p><b>Completed</b></p> <p>Using IP Address: 107.77.201.19 Signed using mobile</p>	<p>Sent: 9/8/2016 3:55:07 PM Viewed: 9/8/2016 8:56:04 PM Signed: 9/8/2016 8:56:27 PM</p>
<p><b>DocuSigned by:</b>  BASE83A7605A4D4...</p> <p>Using IP Address: 173.54.154.145 Signed using mobile</p>	<p>Sent: 9/8/2016 8:56:30 PM Resent: 9/9/2016 9:44:52 AM Viewed: 9/8/2016 9:02:05 PM Signed: 9/11/2016 12:29:46 PM</p>

**In Person Signer Events**

**Editor Delivery Events**

**Agent Delivery Events**

**Intermediary Delivery Events**

**Certified Delivery Events**

**Carbon Copy Events**

Signature	Timestamp
<b>Status</b>	<b>Timestamp</b>
<b>Status</b>	<b>Timestamp</b>
<b>Status</b>	<b>Timestamp</b>
<b>Status</b>	<b>Timestamp</b>
<b>Status</b>	<b>Timestamp</b>

Carbon Copy Events	Status	Timestamp
David Geldart dgeldart@equitybuildfinance.com Security Level: Email, Account Authentication (None) Electronic Record and Signature Disclosure: Not Offered via DocuSign ID:	<div style="border: 2px solid blue; padding: 5px; display: inline-block;"><b>COPIED</b></div>	Sent: 9/8/2016 8:56:29 PM
Tanna Dreiling tanna@equitybuild.com Security Level: Email, Account Authentication (None) Electronic Record and Signature Disclosure: Not Offered via DocuSign ID:	<div style="border: 2px solid blue; padding: 5px; display: inline-block;"><b>COPIED</b></div>	Sent: 9/11/2016 12:29:48 PM

**Notary Events** **Timestamp**

Envelope Summary Events	Status	Timestamps
Envelope Sent	Hashed/Encrypted	9/11/2016 12:29:48 PM
Certified Delivered	Security Checked	9/11/2016 12:29:48 PM
Signing Complete	Security Checked	9/11/2016 12:29:48 PM
Completed	Security Checked	9/11/2016 12:29:48 PM

**Electronic Record and Signature Disclosure**

## **ELECTRONIC RECORD AND SIGNATURE DISCLOSURE**

From time to time, [[Company Name]] (we, us or Company) may be required by law to provide to you certain written notices or disclosures. Described below are the terms and conditions for providing to you such notices and disclosures electronically through the DocuSign, Inc. (DocuSign) electronic signing system. Please read the information below carefully and thoroughly, and if you can access this information electronically to your satisfaction and agree to these terms and conditions, please confirm your agreement by clicking the 'I agree' button at the bottom of this document.

### **Getting paper copies**

At any time, you may request from us a paper copy of any record provided or made available electronically to you by us. You will have the ability to download and print documents we send to you through the DocuSign system during and immediately after signing session and, if you elect to create a DocuSign signer account, you may access them for a limited period of time (usually 30 days) after such documents are first sent to you. After such time, if you wish for us to send you paper copies of any such documents from our office to you, you will be charged a \$0.00 per-page fee. You may request delivery of such paper copies from us by following the procedure described below.

### **Withdrawing your consent**

If you decide to receive notices and disclosures from us electronically, you may at any time change your mind and tell us that thereafter you want to receive required notices and disclosures only in paper format. How you must inform us of your decision to receive future notices and disclosure in paper format and withdraw your consent to receive notices and disclosures electronically is described below.

### **Consequences of changing your mind**

If you elect to receive required notices and disclosures only in paper format, it will slow the speed at which we can complete certain steps in transactions with you and delivering services to you because we will need first to send the required notices or disclosures to you in paper format, and then wait until we receive back from you your acknowledgment of your receipt of such paper notices or disclosures. To indicate to us that you are changing your mind, you must withdraw your consent using the DocuSign 'Withdraw Consent' form on the signing page of a DocuSign envelope instead of signing it. This will indicate to us that you have withdrawn your consent to receive required notices and disclosures electronically from us and you will no longer be able to use the DocuSign system to receive required notices and consents electronically from us or to sign electronically documents from us.

### **All notices and disclosures will be sent to you electronically**

Unless you tell us otherwise in accordance with the procedures described herein, we will provide electronically to you through the DocuSign system all required notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to you during the course of our relationship with you. To reduce the chance of you inadvertently not receiving any notice or disclosure, we prefer to provide all of the required notices and disclosures to you by the same method and to the same address that you have given us. Thus, you can receive all the disclosures and notices electronically or in paper format through the paper mail delivery system. If you do not agree with this process, please let us know as described below. Please also see the paragraph immediately above that describes the consequences of your electing not to receive delivery of the notices and disclosures



electronically from us.

**How to contact EquityBuild Finance, LLC:**

You may contact us to let us know of your changes as to how we may contact you electronically, to request paper copies of certain information from us, and to withdraw your prior consent to receive notices and disclosures electronically as follows:

To contact us by email send messages to: docs@equitybuild.com

**To advise EquityBuild Finance, LLC of your new e-mail address**

To let us know of a change in your e-mail address where we should send notices and disclosures electronically to you, you must send an email message to us at docs@equitybuild.com and in the body of such request you must state: your previous e-mail address, your new e-mail address. We do not require any other information from you to change your email address..

In addition, you must notify DocuSign, Inc. to arrange for your new email address to be reflected in your DocuSign account by following the process for changing e-mail in the DocuSign system.

**To request paper copies from EquityBuild Finance, LLC**

To request delivery from us of paper copies of the notices and disclosures previously provided by us to you electronically, you must send us an e-mail to docs@equitybuild.com and in the body of such request you must state your e-mail address, full name, US Postal address, and telephone number. We will bill you for any fees at that time, if any.

**To withdraw your consent with EquityBuild Finance, LLC**

To inform us that you no longer want to receive future notices and disclosures in electronic format you may:

- i. decline to sign a document from within your DocuSign session, and on the subsequent page, select the check-box indicating you wish to withdraw your consent, or you may;
- ii. send us an e-mail to docs@equitybuild.com and in the body of such request you must state your e-mail, full name, US Postal Address, and telephone number. We do not need any other information from you to withdraw consent.. The consequences of your withdrawing consent for online documents will be that transactions may take a longer time to process..

**Required hardware and software**

Operating Systems:	Windows® 2000, Windows® XP, Windows Vista®; Mac OS® X
Browsers:	Final release versions of Internet Explorer® 6.0 or above (Windows only); Mozilla Firefox 2.0 or above (Windows and Mac); Safari™ 3.0 or above (Mac only)
PDF Reader:	Acrobat® or similar software may be required to view and print PDF files
Screen Resolution:	800 x 600 minimum
Enabled Security Settings:	Allow per session cookies

\*\* These minimum requirements are subject to change. If these requirements change, you will be asked to re-accept the disclosure. Pre-release (e.g. beta) versions of operating systems and browsers are not supported.

**Acknowledging your access and consent to receive materials electronically**

To confirm to us that you can access this information electronically, which will be similar to other electronic notices and disclosures that we will provide to you, please verify that you were able to read this electronic disclosure and that you also were able to print on paper or electronically save this page for your future reference and access or that you were able to e-mail this disclosure and consent to an address where you will be able to print on paper or save it for your future reference and access. Further, if you consent to receiving notices and disclosures exclusively in electronic format on the terms and conditions described above, please let us know by clicking the 'I agree' button below.

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- I can access and read this Electronic CONSENT TO ELECTRONIC RECEIPT OF ELECTRONIC RECORD AND SIGNATURE DISCLOSURES document; and
- I can print on paper the disclosure or save or send the disclosure to a place where I can print it, for future reference and access; and
- Until or unless I notify EquityBuild Finance, LLC as described above, I consent to receive from exclusively through electronic means all notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to me by EquityBuild Finance, LLC during the course of my relationship with you.

# EXHIBIT 2

**CONSTRUCTION LOAN AGREEMENT**

Dated as of June 7, 2018

between

**SSDF6 6160 S MLK LLC, and  
SSDF6 6244 S MLK LLC,**  
collectively, as Borrowers

and

**ARENA DLP LENDER, LLC,**  
as Lender

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**EXHIBITS**

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## CONSTRUCTION LOAN AGREEMENT

This CONSTRUCTION LOAN AGREEMENT, dated as of June 7, 2018 (as amended, restated, replaced, supplemented or otherwise modified from time to time, this "**Agreement**"), between ARENA DLP LENDER, LLC, a Delaware limited liability company ("**Lender**"), having an address at 405 Lexington Avenue, 59th Floor, New York, New York 10174, on the one hand, and SSDF6 6160 S MLK LLC, an Illinois limited liability company ("**6160 Borrower**") and SSDF6 6244 S MLK LLC, an Illinois limited liability company ("**6244 Borrower**" and together with 6160 Borrower, each a "**Borrower**" and collectively, "**Borrowers**"), each having its principal place of business at 1414 E. 62<sup>nd</sup> Place, Chicago, Illinois 60637, on the other hand.

### WITNESSETH:

WHEREAS, Borrowers desire to obtain a loan in the original principal amount of up to Nine Million Three Hundred Seventy-Five Thousand and No/100 Dollars (\$9,375,000.00) from Lender pursuant to this Agreement (the "**Loan**"); and

WHEREAS, Lender is willing to make the Loan to Borrowers, subject to and in accordance with the terms of this Agreement and the other Loan Documents (as hereinafter defined).

NOW THEREFORE, in consideration of the making of the Loan by Lender to Borrowers and the covenants, agreements, representations and warranties set forth in this Agreement, the parties hereto hereby covenant, agree, represent and warrant as follows:

### ARTICLE I

#### DEFINITIONS; PRINCIPLES OF CONSTRUCTION

Section 1.1 Definitions. For all purposes of this Agreement, except as otherwise expressly required or unless the context clearly indicates a contrary intent:

"**6160 Assignment of Architect Agreement**" shall mean that certain Assignment of Architect Agreement, to be entered into among Lender, 6160 Borrower and Architect, relating to the 6160 Property, in form as required by Lender as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

"**6160 Assignment of Contractor Agreement**" shall mean an Assignment of Contractor Agreement and Subordination of Management Fees, relating to the 6160 Property, in form as required by Lender in its sole and absolute discretion among Lender, 6160 Borrower and Contractor, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

"**6160 Completion Date**" shall mean the date that is six (6) months after the date of this Agreement.

"**6160 Construction Budget**" shall mean a budget for construction of the 6160 Project, to be approved in writing by Lender in its sole and absolute discretion, and any modifications thereof approved by Lender in writing, such approval not to be required, however, if the aggregate change is less than five percent (5%) of the total 6160 Construction Budget and less than ten percent (10%) of any line item.

"**6160 Plans and Specifications**" means the plans, drawings, specifications and scope of work to complete the 6160 Project to be approved in writing by Lender in its sole and absolute discretion, and any amendments thereto approved by Lender in writing in its sole discretion (except as may otherwise be provided herein).

**"6160 Project"** shall mean and refer to the rehabilitation of a multifamily apartment complex located at 6160 S. King Drive and work that is to be performed by 6160 Borrower that will be funded, in whole or in part, with disbursements of Construction Reserve Funds, all pursuant to the terms and conditions of this Agreement.

**"6160 Property"** shall mean each parcel of real property, the Improvements thereon and all personal property owned by 6160 Borrower and encumbered by the 6160 Security Instrument, together with all rights pertaining to such property and Improvements, as more particularly described in the granting clause of the 6160 Security Instrument and referred to therein as the "6160 Property".

**"6160 Security Instrument"** shall mean that certain first priority Construction Mortgage and Security Agreement, of even date herewith, made by 6160 Borrower, for the benefit of Lender as security for the Obligations and encumbering the 6160 Property, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**"6160 Survey"** shall mean a survey of the 6160 Property prepared by a surveyor licensed in the State and satisfactory to Lender and the company or companies issuing the 6160 Title Insurance Policy, and containing a certification of such surveyor satisfactory to Lender.

**"6160 Title Insurance Policy"** shall mean an ALTA mortgagee title insurance policy in a form acceptable to Lender in its sole and absolute discretion (or, if the State does not permit the issuance of such ALTA policy, such form as shall be permitted in the State and acceptable to Lender) with respect to the 6160 Property and insuring the lien of the 6160 Security Instrument encumbering the 6160 Property.

**"6244 Acquisition Reserve"** shall mean a reserve of funds in the amount of Six Million Six Hundred Twenty-Five Thousand and No/100 Dollars (\$6,625,000.00) not funded at Closing.

**"6244 Assignment of Architect Agreement"** shall mean that certain Assignment of Architect Agreement, to be entered into among Lender, 6244 Borrower and Architect, relating to the 6244 Property, in form as required by Lender as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**"6244 Assignment of Contractor Agreement"** shall mean an Assignment of Contractor Agreement and Subordination of Management Fees, relating to the 6244 Property, in form as required by Lender in its sole and absolute discretion among Lender, 6244 Borrower and Contractor, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**"6244 Completion Date"** shall mean the date that is six (6) months after the date of 6244 Borrower's acquisition of the 6244 Property.

**"6244 Construction Budget"** shall mean a budget for construction of the 6244 Project, to be approved in writing by Lender in its sole and absolute discretion, and any modifications thereof approved by Lender in writing, such approval not to be required, however, if the aggregate change is less than five percent (5%) of the total 6244 Construction Budget and less than ten percent (10%) of any line item.

**"6244 Loan Documents"** shall mean the 6244 Assignment of Architect Agreement, the 6244 Assignment of Contractor Agreement, the 6244 Security Instrument.

**"6244 Plans and Specifications"** means the plans, drawings, specifications and scope of work to complete the 6244 Project to be provided by 6244 Borrower, and any amendments thereto approved by Lender in writing in its sole discretion (except as may otherwise be provided herein).

**"6244 Project"** shall mean and refer to the rehabilitation of a multifamily apartment complex located at 6244 S. King Drive and work that is to be performed by 6244 Borrower that will be funded, in

whole or in part, with disbursements of Construction Reserve Funds, all pursuant to the terms and conditions of this Agreement.

**"6244 Property"** shall mean each parcel of real property, the Improvements thereon and all personal property owned by 6244 Borrower and encumbered by the 6244 Security Instrument, together with all rights pertaining to such property and Improvements, as more particularly described in the granting clause of the 6244 Security Instrument and referred to therein as the "6244 Property".

**"6244 Security Instrument"** shall mean that certain first priority Construction Mortgage and Security Agreement, in form as required by Lender, to be made by 6244 Borrower, for the benefit of Lender as security for the Obligations and encumbering the 6244 Property, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**"6244 Survey"** shall mean a survey of the 6244 Property prepared by a surveyor licensed in the State and satisfactory to Lender and the company or companies issuing the 6244 Title Insurance Policy, and containing a certification of such surveyor satisfactory to Lender.

**"6244 Title Insurance Policy"** shall mean an ALTA mortgagee title insurance policy in a form acceptable to Lender in its sole and absolute discretion (or, if the State does not permit the issuance of such ALTA policy, such form as shall be permitted in the State and acceptable to Lender) with respect to the 6244 Property and insuring the lien of the 6244 Security Instrument encumbering the 6244 Property.

**"Accrued Interest"** shall mean all accrued and unpaid interest on the outstanding principal balance of the Loan from time to time.

**"Advances"** shall mean advances of any Loan proceeds.

**"Affiliate"** shall mean, as to any Person, any other Person that, directly or indirectly, is in Control of, is Controlled by or is under common Control with such Person or is a director or officer of such Person or of an Affiliate of such Person.

**"Agreement"** shall mean this Loan Agreement, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**"ALTA"** shall mean American Land Title Association or any successor thereto.

**"Architect"** shall mean Bauer Latoza Studio.

**"Architect's Agreements"** shall mean shall mean agreements with Architect relating to each of the 6160 Project and the 6244 Project.

**"Award"** shall mean any compensation paid by any Governmental Authority in connection with a Condemnation in respect of all or part of the Properties.

**"Bankruptcy Action"** shall mean with respect to any Person (a) such Person filing a voluntary petition under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law; (b) the filing of an involuntary petition against such Person under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law, or soliciting or causing to be solicited petitioning creditors for any involuntary petition against such Person; (c) such Person filing an answer consenting to or otherwise acquiescing in or joining in any involuntary petition filed against it, by any other Person under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law, or soliciting or causing to be solicited petitioning creditors for any involuntary petition from any Person; (d) such Person consenting to or acquiescing in or joining in an application for the appointment of a custodian, receiver, trustee, assignee, sequestrator (or similar official), liquidator, or examiner for such Person or any portion of either Property; (e) the filing of a petition against a Person seeking reorganization, arrangement, composition,

readjustment, liquidation, dissolution or similar relief under the Bankruptcy Code or any other applicable law, (f) under the provisions of any other law for the relief or aid of debtors, an action taken by any court of competent jurisdiction that allows such court to assume custody or Control of a Person or of the whole or any substantial part of its property or assets or (g) such Person making an assignment for the benefit of creditors, or admitting, in writing or in any legal proceeding, its insolvency or inability to pay its debts as they become due.

“**Bankruptcy Code**” shall mean Title 11 of the United States Code, 11 U.S.C. § 101, *et seq.*, as the same may be amended from time to time, and any successor statute or statutes and all rules and regulations from time to time promulgated thereunder, and any comparable foreign laws relating to bankruptcy, insolvency or creditors’ rights or any other Federal or state bankruptcy or insolvency law.

“**Basic Carrying Costs**” shall mean, for any period, the sum of the following costs: (a) Taxes, (b) Other Charges and (c) Insurance Premiums.

“**Borrower**” and “**Borrowers**” shall have the meanings set forth in the introductory paragraph hereto, together with each Borrower’s permitted successors and assigns.

“**Borrowers’ Funds**” shall mean any payments made by Borrowers to cure a Deficiency.

“**Business Day**” shall mean any day other than a Saturday, Sunday or any other day on which any of the following institutions is not open for business: (i) banks and savings and loan institutions in New York, New York, (ii) the financial institution that maintains any collection account for or on behalf of any Reserve Funds, (iii) the New York Stock Exchange or (iv) the Federal Reserve Bank of New York.

“**Casualty**” shall have the meaning set forth in Section 6.2 hereof.

“**Casualty Consultant**” shall have the meaning set forth in Section 6.4(b)(iii) hereof.

“**Change Order**” shall mean any modification, addition or other change either to any Project Document after it has been approved by Lender, or to the scope or specifications of the Project after the same have been approved by Lender.

“**Closing Date**” shall mean the date of this Agreement.

“**Code**” shall mean the Internal Revenue Code of 1986, as amended, as it may be further amended from time to time, and any successor statutes thereto, and applicable U.S. Department of Treasury regulations issued pursuant thereto in temporary or final form.

“**Collateral**” shall have the meaning ascribed to such term in the 6160 Security Instrument and, if delivered, the 6244 Security Instrument.

“**Completion**” or “**Complete**” shall mean one hundred percent (100%) completion of construction of the Projects, subject to usual and customary punch list items, in a good and workmanlike manner and in compliance with all Legal Requirements, and in a manner consistent and compliant in all material respects with the applicable Project Documents as approved by Lender, and free and clear of all liens, claims, encumbrances and rights of others, other than Permitted Encumbrances, as evidenced by the issuance of certificates of completion by Lender’s consultant or inspecting architect or engineer, if any, in each case in form and substance acceptable to Lender and, if available or required under applicable Legal Requirements, a final or partial certificate of occupancy and, as applicable, acceptance of completion by the applicable tenant.

“**Completion Dates**” means, collectively, the 6160 Completion Date and the 6244 Completion Date.

**"Completion Schedule"** shall mean the time-line schedule to be approved in writing by Lender (in its sole and absolute discretion) for Completion of the Projects, as the same may be amended and supplemented pursuant to the terms of this Agreement upon the written approval of Lender.

**"Condemnation"** shall mean a temporary or permanent taking by any Governmental Authority as the result or in lieu or in anticipation of the exercise of the right of condemnation or eminent domain, of all or any part of the Properties, or any interest therein or right accruing thereto, including any right of access thereto or any change of grade affecting the Properties or any part thereof.

**"Condemnation Proceeds"** shall have the meaning set forth in Section 6.4(b) hereof.

**"Construction Budgets"** means, collectively, the 6160 Construction Budget and the 6244 Construction Budget.

**"Construction Contracts"** shall mean each contract or agreement to which any Borrower or any agent of a Borrower is a party, providing for the provision of construction services (including architect's or engineering services), labor or material in connection with any of the Projects.

**"Construction Costs"** shall mean all costs and expenses of every kind and nature whatsoever to be incurred by Borrowers in connection with the Completion of the Projects, including such reserves and contingencies as Lender shall require.

**"Construction Draw Fee"** shall have the meaning set forth in Section 7.5.1(d)(ii).

**"Construction Reserve"** shall mean a reserve of funds in the amount of Two Million One Hundred Thousand and No/100 Dollars (\$2,100,000.00).

**"Control"** shall mean, with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management, policies or activities of such Person, whether through ownership of voting securities, by contract or otherwise. **"Controlled"** and **"Controlling"** shall have correlative meanings.

**"Debt"** shall mean the Outstanding Principal Balance together with all interest accrued and unpaid thereon and all other sums due to Lender in respect of the Loan under the Note, this Agreement, the 6160 Security Instrument and the 6244 Security Instrument if delivered or any other Loan Document.

**"Debt Service"** shall mean, with respect to any particular period of time, scheduled principal and interest payments due under this Agreement and the Note.

**"Debt Service Reserve"** shall mean a reserve of funds from the proceeds of the Loan in the amount of Two Hundred Forty Thousand and No/100 Dollars (\$240,000.00) (less amounts funded on the Closing Date for interest to accrue in June, 2018) for the purpose of funding monthly Accrued Interest.

**"Debt Yield"** means, as of a particular date, the ratio calculated by Lender of (i) the Net Operating Income for the twelve (12) month period ending with the most recently completed calendar month, to (ii) the Outstanding Principal Balance of the Loan.

**"Debt Service Reserve Account"** shall have the meaning set forth in Section 7.2 hereof.

**"Default"** shall mean the occurrence of any event hereunder or under any other Loan Document which, but for the giving of notice or passage of time, or both, would be an Event of Default.

**"Default Rate"** shall mean fourteen percent (14%) per annum.

**"Deficiency"** means the amount, if any, to bring the Loan In-Balance, all as determined by Lender.

**"Distribution"** means (i) any dividend, distribution or other payment of any kind on any shares of capital stock or other securities or partnership, membership, economic or other interests, or (ii) any fee, payment, bonus or other remuneration of any kind, or (iii) any repayment of or debt service on loans or other indebtedness other than the Loan

**"Dollars"** and the sign "\$" shall mean lawful money of the United States of America.

**"Embargoed Person"** shall mean any person, entity or government subject to trade restrictions under U.S. law, including, but not limited to, The USA Patriot Act (including the anti-terrorism provisions thereof), the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, et seq., The Trading with the Enemy Act, 50 U.S.C. App. 1 et seq., and any Executive Orders or regulations promulgated thereunder including those related to Specially Designated Nationals and Specially Designated Global Terrorists, with the result that the investment in Borrower or any Guarantor, as applicable (whether directly or indirectly), is prohibited by law or the Loan made by Lender is in violation of law.

**"Environmental Indemnity"** shall mean that certain Environmental Indemnity Agreement (Unsecured), dated as of the date hereof, executed by Borrowers and each Guarantor in connection with the Loan for the benefit of Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**"Environmental Statutes"** shall mean any present and future Federal, state and local laws, statutes, ordinances, rules, regulations and the like, as well as common law, relating to protection of human health or the environment, relating to Hazardous Substances, and/or relating to liability for or costs of other actual or threatened danger to human health or the environment. The term "Environmental Statutes" includes, but is not limited to, the following statutes, as amended, any successor thereto, and any regulations promulgated pursuant thereto, and any state or local statutes, ordinances, rules, regulations and the like addressing similar issues: the Comprehensive Environmental Response, Compensation and Liability Act; the Emergency Planning and Community Right-to-Know Act; the Hazardous Substances Transportation Act; the Resource Conservation and Recovery Act (including but not limited to Subtitle I relating to underground storage tanks); the Solid Waste Disposal Act; the Clean Water Act; the Clean Air Act; the Toxic Substances Control Act; the Safe Drinking Water Act; the Occupational Safety and Health Act; the Federal Water Pollution Control Act; the Federal Insecticide, Fungicide and Rodenticide Act; the Endangered Species Act; the National Environmental Policy Act; and the River and Harbors Appropriation Act. The term "Environmental Statutes" also includes, but is not limited to, any present and future Federal, state and local laws, statutes ordinances, rules, regulations, permits or authorizations and the like, as well as common law, that (a) condition transfer of property upon a negative declaration or other approval of a Governmental Authority of the environmental condition of the Properties; (b) require notification or disclosure of releases of Hazardous Substances or other environmental condition of a property to any Governmental Authority or other Person, whether or not in connection with any transfer of title to or interest in such property; (c) impose conditions or requirements in connection with permits or other authorization for lawful activity relating to Hazardous Substances; (d) relate to nuisance, trespass or other causes of action relating to Hazardous Substances in connection with the Properties and ; or (e) relate to wrongful death, personal injury, or property or other damage in connection with any physical condition or use relating to Hazardous Substances in connection with the Properties.

**"ERISA"** shall mean the Employee Retirement Income Security Act of 1974, as amended from time to time, and the regulations promulgated and the ruling issued thereunder.

**"ERISA Affiliate"** shall mean each person (as defined in section 3(9) of ERISA) that together with any Borrower would be deemed to be a "single employer" within the meaning of Section 414(b), (c), (m) or (o) of the Code.



**“Event of Default”** shall have the meaning set forth in Section 8.1.1(a) hereof.

**“Exchange Act”** shall mean the Securities Exchange Act of 1934, as the same may be amended, modified or replaced, from time to time.

**“Exchange Act Filing”** shall have the meaning set forth in Section 5.1.11(f) hereof.

**“Extended Maturity Date”** shall have the meaning set forth in Section 2.5.1 hereof.

**“Extension Fee”** shall mean a non-refundable fee equal to one percent (1%) of the Outstanding Principal Balance in connection with Borrower’s exercise of each Extension Option and payable one (1) Business Day prior to the first day of the term of the Loan as extended.

**“Extension Notice”** shall have the meaning set forth in Section 2.5.1 hereof.

**“First Extension Option”** shall have the meaning set forth in Section 2.5.1 hereof.

**“First Payment Date”** shall have the meaning set forth in Section 2.3.2 hereof.

**“Fiscal Year”** shall mean each twelve (12) month period commencing on January 1 and ending on December 31 during each year of the term of the Loan.

**“Force Majeure”** means a cause or causes beyond such party’s control, but not beyond the reasonable control of other parties in the same general vicinity, which shall include, without limitation, all labor disputes, riots, civil commotion, war, terrorism, bioterrorism, war-like operations, invasion, rebellion, hostilities, military or usurped power, sabotage, governmental regulations or controls, fire or other casualty, inability to obtain any material, services or financing or through acts of God, or hurricanes; provided, however, that Borrowers shall furnish Lender with written notice satisfactory to Lender evidencing any such delay within ten (10) days from the occurrence of any such delay. In no event shall the time for Completion of the Projects be extended beyond the Maturity Date or more than sixty (60) days beyond the Completion Date.

**“Full Replacement Cost”** shall have the meaning set forth in Section 6.1(a)(i).

**“GAAP”** shall mean generally accepted accounting principles in the United States of America as of the date of the applicable financial report.

**“Governmental Authority”** shall mean any court, board, agency, commission, office or other authority of any nature whatsoever for any governmental unit (Federal, state, county, district, municipal, city or otherwise) whether now or hereafter in existence.

**“Guarantor”** shall mean, jointly and severally, and, as the context requires, individually and collectively, Jerry Cohen.

**“Guaranties”** shall mean, collectively, that certain Completion Guaranty dated as of the date hereof, from Guarantor in favor of Lender, and that certain Payment Guaranty dated as of the date hereof from Guarantor in favor of Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**“Hazardous Substances”** shall include, but is not limited to, (a) any and all substances (whether solid, liquid or gas) defined, listed, or otherwise classified as pollutants, hazardous wastes, hazardous substances, hazardous materials, extremely hazardous wastes, or words of similar meaning or regulatory effect under any present or future Environmental Statutes or that may have a negative impact on human health or the environment, including, but not limited to, petroleum and petroleum products, asbestos and asbestos-containing materials, polychlorinated biphenyls, lead, radon, radioactive materials, flammables

and explosives, but excluding substances of kinds and in amounts ordinarily and customarily used or stored in properties similar to the Properties for the purposes of cleaning or other maintenance or operations and otherwise in compliance with all Environmental Statutes, and (b) mold, mycotoxins, microbial matter, and/or airborne pathogens (naturally occurring or otherwise) which pose a threat (imminent or otherwise) to human health or the environment or adversely affect the Properties.

**"Improvements"** shall have the meaning set forth in the granting clause of the 6160 Security Instrument and, if delivered, the 6244 Security Instrument.

**"In-Balance"** means, with respect to the Loan, Lender's determination from time to time that any undisbursed Loan funds together with all sums, if any, to be provided by Borrowers as shown in the Construction Budget, shall be at all times equal to or greater than the amount which Lender from time to time reasonably determines necessary to: (i) pay, through Completion, all costs of development and construction of the Improvements in accordance with the Loan Documents; (ii) pay all sums which may accrue under the Loan Documents prior to repayment of the Loan; and (iii) enable Borrowers to perform and satisfy all of the covenants of Borrowers contained in the Loan Documents.

**"Indemnified Liabilities"** shall have the meaning set forth in Section 10.13(b) hereof.

**"Indemnified Parties"** shall mean Lender and any of its Affiliates and any of their officers, directors, members, partners, employees, representatives and consultants.

**"Indemnifying Person"** shall mean Borrowers and each Guarantor, on a joint and several basis.

**"Initial Insurance Premiums Deposit"** shall mean \$0.00.

**"Initial Tax Deposit"** shall mean \$0.00.

**"Insurance Premiums"** shall have the meaning set forth in Section 6.1(b) hereof.

**"Insurance Proceeds"** shall have the meaning set forth in Section 6.4(b) hereof.

**"Interest Rate"** shall mean a fixed rate of nine percent (9%) per annum.

**"Lease"** shall mean any lease, sublease or subsublease, letting, license, concession or other agreement (whether written or oral and whether now or hereafter in effect) pursuant to which any Person is granted a possessory interest in, or right to use or occupy all or any portion of any space in the Properties by or on behalf of any Borrower, and (a) every modification, amendment or other agreement relating to such lease, sublease, subsublease, or other agreement entered into in connection with such lease, sublease, subsublease, or other agreement, and (b) every guarantee of the performance and observance of the covenants, conditions and agreements to be performed and observed by the other party thereto.

**"Legal Requirements"** shall mean all Federal, state, county, municipal and other governmental statutes, laws, rules, orders, regulations, ordinances, judgments, decrees and injunctions of Governmental Authorities affecting the Properties or any part thereof, or the construction, use, alteration or operation thereof, or any part thereof, whether now or hereafter enacted and in force, including, without limitation, any Environmental Statutes, the Americans with Disabilities Act of 1990, as amended, and all permits, licenses and authorizations and regulations relating thereto, and all covenants, agreements, restrictions and encumbrances contained in any instruments, either of record or known to Borrowers, at any time in force affecting Borrowers, the Properties or any part thereof, including, without limitation, any which may (a) require repairs, modifications or alterations in or to the Properties or any part thereof, or (b) in any way limit the use and enjoyment thereof.

“**Lender**” shall have the meaning set forth in the introductory paragraph hereto, together with its successors and assigns.

“**Lien**” shall mean any mortgage, deed of trust, deed to secure debt, indemnity deed of trust, lien (statutory or otherwise), pledge, hypothecation, easement, restrictive covenant, preference, assignment, security interest, or any other encumbrance, charge or transfer of, or any agreement to enter into or create any of the foregoing, on or affecting Borrowers, the Properties, or any portion thereof or any interest therein, or any direct or indirect interest in Borrowers, including, without limitation, any conditional sale or other title retention agreement, any financing lease having substantially the same economic effect as any of the foregoing, the filing of any financing statement, and mechanic’s, materialmen’s and other similar liens and encumbrances.

“**Loan**” shall have the meaning set forth in the recitals hereof.

“**Loan Documents**” shall mean, collectively, this Agreement, the Note, the Pledge, the 6160 Security Instrument, the Environmental Indemnity, the Guaranties, the 6160 Assignment of Architect Agreement, the 6160 Assignment of Contractor Agreement, and all other documents executed and/or delivered in connection with the Loan, including the 6244 Loan Documents if and when delivered.

“**Loan to Value Ratio**” shall mean, with respect to each Property, as of the date of its calculation, the ratio of (i) the sum of the Outstanding Principal Balance as of the date of such calculation to (ii) the as-is fair market value of the Properties subject to the Security Instruments, as determined, in Lender’s sole discretion.

“**Material Adverse Change**” or “**Materially Adverse Effect**” shall mean that the business, operations, property, assets, liabilities or financial condition of any applicable Person and each of their subsidiaries, taken as a whole, or the ability of any such Person to perform its obligations under the Loan Documents, has changed in a manner which could materially impair the value of Lender’s security for the Loan or prevent timely repayment of the Loan or otherwise prevent the applicable person or entity from timely performing any of its material obligations under the Loan Documents or any Lease, as the case may be, as determined by Lender.

“**Material Agreements**” shall have the meaning set forth in Section 5.1.20 hereof.

“**Maturity Date**” shall mean the Stated Maturity Date, provided that (a) in the event of the exercise by Borrower of the First Extension Option pursuant to Section 2.5, the Maturity Date shall be the First Extended Maturity Date, and (b) in the event of the exercise by Borrower of the Second Extension Option pursuant to Section 2.5, the Maturity Date shall be the Second Extended Maturity Date, or such earlier date on which the final payment of principal of the Note becomes due and payable as herein or therein provided, whether at the Stated Maturity Date, by declaration of acceleration, or otherwise.

“**Maximum Legal Rate**” shall mean the maximum non-usurious interest rate, if any, that at any time or from time to time may be contracted for, taken, reserved, charged or received on the indebtedness evidenced by the Note and as provided for herein or the other Loan Documents, under the laws of such state or states whose laws are held by any court of competent jurisdiction to govern the interest rate provisions of the Loan.

“**Multiemployer Plan**” shall mean a multiemployer plan, as defined in Section 4001(a)(3) of ERISA to which Borrower or any ERISA Affiliate is making or accruing an obligation to make contributions or has within any of the preceding three plan years made or accrued an obligation to make contributions.

“**Multiple Employer Plan**” shall mean an employee benefit plan, other than a Multiemployer Plan, to which Borrower or any ERISA Affiliate, and one or more employers other than Borrowers or an ERISA Affiliate, is making or accruing an obligation to make contributions or, in the event that any such plan has

been terminated, to which Borrowers or an ERISA Affiliate made or accrued an obligation to make contributions during any of the five plan years preceding the date of termination of such plan.

**"Net Operating Income"** shall mean, for any period, the amount obtained by subtracting Operating Expenses for such period from Operating Revenue.

**"Net Proceeds"** shall have the meaning set forth in Section 6.4(b) hereof.

**"Net Proceeds Account"** shall have the meaning set forth in Section 6.4(b)(ii) hereof.

**"Net Proceeds Deficiency"** shall have the meaning set forth in Section 6.4(b)(vi) hereof.

**"Note"** shall mean that certain Promissory Note of even date herewith in the principal amount of Nine Million Three Hundred Seventy-Five Thousand and No/100 Dollars (\$9,375,000.00), made by Borrowers in favor of Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**"Obligations"** shall mean, collectively, Borrowers' obligations for the payment of the Debt and the performance of the Other Obligations.

**"OFAC"** shall mean the Office of Foreign Asset Control of the Department of the Treasury of the United States of America.

**"Officer's Certificate"** shall mean a certificate delivered to Lender by Borrowers which is signed by an authorized officer of (i) Borrowers, or (ii) any direct or indirect general partner or member of Borrowers with authority to act on behalf of and bind Borrowers.

**"Operating Expenses"** shall mean the total of all expenditures, computed in accordance with GAAP, of whatever kind relating to the operation, maintenance and management of the Property, which expenditures are incurred on a regular monthly or other periodic basis, including without limitation, utilities, ordinary repairs and maintenance, insurance, license fees, Taxes, Other Charges, advertising expenses, management fees, payroll and related taxes, computer processing charges, tenant improvements and leasing commissions, operational equipment or other lease payments as approved by Lender, and other similar costs, but excluding depreciation, Debt Service, capital expenditures, and contributions to any of the Reserve Funds. Operating Expenses may be adjusted by Lender using its standard underwriting criteria.

**"Operating Revenues"** means with respect to the period being measured all ordinary monthly rents paid to Borrower (by tenants of the Property that are in occupancy and paying full contractual rent without offset or defense and that are not affiliates of Borrower) which are properly allocable to the Property for the applicable period (but, without limitation, excluding extraordinary revenues, receipts from affiliates, receipts from parking agreements, concession fees and charges and other miscellaneous operating revenues, proceeds from rental or business interruption insurance (fairly allocable to the Property for the applicable period), and further excluding security deposits and earnest money deposits and advance rentals until they are earned, and proceeds from a sale or financing).

**"Operations Agreements"** shall mean any covenants, restrictions, easements, declarations or agreements of record relating to the construction, operation or use of the Properties or any part thereof, together with all amendments, modifications or supplements thereto.

**"Other Charges"** shall mean all ground rents, maintenance charges, impositions other than Taxes, any "common expenses" or expenses allocated to and required to be paid by any Borrower under any Operations Agreements and any other charges, including, without limitation, vault charges and license fees for the use of vaults, chutes and similar areas adjoining the Properties or any part thereof, now or hereafter levied or assessed or imposed against the Properties or any part thereof.

**"Other Obligations"** shall mean (a) the performance of all obligations of Borrowers contained herein; (b) the performance of each obligation of Borrowers or any Guarantor contained in any other Loan Document; (c) the payment of all costs, expenses, legal fees and liabilities incurred by Lender in connection with the enforcement of any of Lender's rights or remedies under the Loan Documents, or any other instrument, agreement or document which evidences or secures any other Obligations or collateral therefor, whether now in effect or hereafter executed; and (d) the payment, performance, discharge and satisfaction of all other liabilities and obligations of Borrowers and/or Guarantor to Lender, whether now existing or hereafter arising, direct or indirect, absolute or contingent, and including, without limitation, each liability and obligation of Borrowers and each Guarantor under any one or more of the Loan Documents and any amendment, extension, modification, replacement or recasting of any one or more of the instruments, agreements and documents referred to herein or therein or executed in connection with the transactions contemplated hereby or thereby.

**"Outstanding Principal Balance"** shall mean, as of any date, the outstanding principal balance of the Loan.

**"Payment Account"** shall have the meaning set forth in Section 2.6 hereof.

**"Payment Date"** shall mean, commencing with the First Payment Date, the first (1<sup>st</sup>) day of each calendar month during the term of the Loan until and including the Maturity Date or, for purposes of making payments hereunder, but not for purposes of calculating Interest Periods, if such day is not a Business Day, the immediately preceding Business Day.

**"Permitted Encumbrances"** shall mean, collectively (a) the Liens and security interests created by the Loan Documents, (b) all Liens, encumbrances and other matters disclosed in "Schedule B" of the 6160 Title Insurance Policy and, upon issuance, "Schedule B" of the 6244 Title Insurance Policy, (c) Liens, if any, for Taxes imposed by any Governmental Authority which are not yet due or delinquent, and (d) such other title and survey exceptions as Lender has approved or may approve in writing in Lender's sole discretion, which Permitted Encumbrances in the aggregate do not materially adversely affect the value or use of the Properties or Borrowers' ability to repay the Loan.

**"Permitted Transfer"** means any of the following: (a) any Transfer, directly as a result of the death of a natural person, of stock, membership interests, partnership interests or other ownership interests previously held by the decedent in question to the Person or Persons lawfully entitled thereto; (b) any Transfer, directly as a result of the legal incapacity of a natural person, of stock, membership interests, partnership interests or other ownership interests previously held by such natural person to the Person or Persons lawfully entitled thereto; and (c) any Transfer expressly permitted by and completed strictly in accordance with Section 5.2.10.

**"Person"** shall mean any individual, corporation, partnership, joint venture, limited liability company, estate, trust, unincorporated association, any Governmental Authority, and any fiduciary acting in such capacity on behalf of any of the foregoing.

**"Personal Property"** shall mean, collectively, that meaning set forth in the granting clause of each of the Security Instruments.

**"Plans and Specifications"** means, collectively, the 6160 Plans and Specifications and the 6244 Plans and Specifications.

**"Pledge"** shall mean that certain Pledge and Security Agreement of even date herewith by the member of Borrowers in favor of Lender.

**"Policies"** shall have the meaning specified in Section 6.1(b) hereof.

**"Prohibited Transaction"** shall mean any action or transaction which would cause any obligation, or action taken or to be taken, hereunder (or the exercise by Lender of any of its rights under the Note, this Agreement or the other Loan Documents) to be a non-exempt (under a statutory or administrative class exemption) prohibited transaction under the ERISA or Section 4975 of the Code.

**"Project"** shall mean individually, the 6160 Project or the 6244 Project, and **"Projects"** shall mean, collectively, the 6160 Project and the 6244 Project; provided, however, that prior to acquisition of the 6244 Property by 6244 Borrower, Project and Projects shall refer only to the 6160 Project.

**"Project Documents"** shall mean each of the following as approved by Lender with respect to the Projects: the Plans and Specifications, the Completion Schedule, the Construction Budgets and the applicable Construction Contracts.

**"Property"** shall mean individually, the 6160 Property or the 6244 Property, and **"Properties"** shall mean, collectively, the 6160 Property and the 6244 Property; provided, however, that prior to acquisition of the 6244 Property by 6244 Borrower, Property and Properties shall refer only to the 6160 Property.

**"Release"** has the meaning provided in Section 2.7.

**"Rents"** shall mean all rents (including additional rents of any kind and percentage rents), rent equivalents, moneys payable as damages (including payments by reason of the rejection of a Lease in a Bankruptcy Action) or in lieu of rent or rent equivalents, royalties (including, without limitation, all oil and gas or other mineral royalties and bonuses), income, receivables, receipts, revenues, deposits (including security, utility and other deposits), accounts, cash, issues, profits, charges for services rendered, and other payments and consideration of whatever form or nature received by or paid to or for the account of or benefit of each Borrower or any of their agents or employees from any and all sources arising from or attributable to the Properties or any part thereof, and the Improvements, including charges for oil, gas, water, steam, heat, ventilation, air-conditioning, electricity, license fees, maintenance fees, charges for Taxes, operating expenses or other amounts payable to each Borrower (or for the account of each Borrower), revenues from telephone services, vending and all receivables, customer obligations now existing or hereafter arising or created out of the sale, lease, sublease, license, concession or other grant of the right of the use and occupancy of the Properties or any part thereof or rendering of services by each Borrower, or any of its agents or employees and proceeds, if any, from business interruption or other loss of income insurance.

**"Required Records"** shall have the meaning set forth in Section 5.1.11(k) hereof.

**"Reserve Accounts"** shall mean, collectively, the Debt Service Reserve Account, the Tax and Insurance Escrow Account, the Construction Reserve Account, the Net Proceeds Account, and any other escrow or reserve account established pursuant to the Loan Documents

**"Reserve Funds"** shall mean, collectively, the Debt Service Reserve Funds, the Tax and Insurance Escrow Funds, the Construction Reserve Funds, and any other escrow or reserve funds established pursuant to the Loan Documents.

**"Restoration"** shall mean the repair and restoration of each Property after a Casualty or Condemnation as nearly as possible to the condition such Property was in immediately prior to such Casualty or Condemnation, with such alterations as may be reasonably approved by Lender.

**"Retention Amount"** shall have the meaning set forth in Section 6.4(b)(iv) hereof.

**"Second Extension Option"** shall have the meaning set forth in Section 2.5.1 hereof.

**"Securities"** shall have the meaning set forth in Section 9.1 hereof.

“**Security Instruments**” means, collectively, the 6160 Security Instrument and the 6244 Security Instrument.

“**Servicer**” shall have the meaning set forth in Section 9.3 hereof.

“**Servicing Agreement**” shall have the meaning set forth in Section 9.3 hereof.

“**Severed Loan Documents**” shall have the meaning set forth in Section 9.2 hereof.

“**Special Purpose Entity**” shall mean a corporation, limited partnership or limited liability company which, at all times since its formation and thereafter: (a) has not and will not engage in any business or activity other than the ownership, operation and maintenance of the applicable Property and activities incidental thereto; (b) has not and will not acquire or own any assets other than the applicable Property; (c) has not and will not merge or consolidate with any other entity or person; (d) has not and will not own any subsidiary or make any investment in, any other entity or person; (e) has not and will not commingle its assets with the assets of any other entity or person; (f) has not and will not incur any debt, secured or unsecured, direct or contingent (including, without limitation, guaranteeing any obligation), other than the Loan and customary unsecured trade payables incurred in the ordinary course of owning and operating the applicable Property; (g) has and will maintain its records, books of account, bank accounts, financial statements, accounting records and other entity documents separate from those of any other entity or person; (h) has not and will not maintain its assets in a manner that will be costly or difficult to segregate, ascertain or identify its individual assets from those of any other entity or person; (i) has not and will not assume or guarantee the debts of any other entity or person, hold itself out to be responsible for the debts of another entity or person, otherwise pledge its assets for the benefit of any other entity or person, or hold out its credit as being available to satisfy the obligations of any other entity or person; (j) has not and will not make any loans or advances to any other entity or person; (k) has and will file its own tax returns as required under federal and state law; (l) has and will hold itself out to the public as a legal entity separate and distinct from any other entity or person and conduct its business solely in its own name and will correct any known misunderstanding regarding its separate identity; and (m) has and will remain solvent and has paid and shall pay its debts and liabilities from its then available assets (including a fairly-allocated portion of any personnel and overhead expenses that it shares with any Affiliate) as the same shall become due, and has maintained and shall maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business.

“**State**” shall mean the State or Commonwealth in which the Property or any part thereof is located.

“**Stated Maturity Date**” shall mean June 7, 2019.

“**Survey**” shall mean individually, the 6160 Survey or the 6244 Survey, and “**Surveys**” shall mean, collectively, the 6160 Survey and the 6244 Survey.

“**Tax and Insurance Escrow Account**” shall have the meaning set forth in Section 7.1.1 hereof.

“**Tax and Insurance Escrow Funds**” shall have the meaning set forth in Section 7.1.1 hereof.

“**Taxes**” shall mean all taxes, assessments, water rates or sewer rents, now or hereafter levied or assessed or imposed against (a) the Properties or part thereof, together with all interest and penalties thereon and (b) against the rents, issues, income or profits thereof or upon the lien or estate hereby created, whether any or all of said taxes, assessments or charges be levied directly or indirectly or as excise taxes or ad valorem real estate or personal property taxes or as income taxes.

“**Tenant**” shall mean the lessee of all or any portion of the Properties under a Lease.

**"Title Company"** shall mean the title insurance company which issued either of the Title Insurance Policies.

**"Title Insurance Policies"** means, collectively, 6160 Title Insurance Policy and the 6244 Title Insurance Policy; **"Title Insurance Policy"** means any one of the Title Insurance Policies.

**"Transfer"** shall mean means the sale, transfer, hypothecation, pledge, encumbrance, mortgage, conveyance, lease, alienation, assignment, disposition, divestment, or leasing with option to purchase, or assignment of the Properties, or any portion thereof or interest therein or in any Borrower (whether direct or indirect, legal or equitable including the issuance, sale, assignment, alienation, conveyance, divestment, transfer, disposition, hypothecation, pledge, mortgage or encumbrance of any ownership interest in such Borrower or in any entity having an ownership interest in such Borrower, whether direct or indirect); or any change in Control of any Borrower, whether direct or indirect; or entering into any agreement or contract to do any of the foregoing which is not conditioned on compliance with the terms of the Loan Documents with respect to Transfers, or undertaking, suffering or causing any of the foregoing to occur voluntarily, involuntarily or by operation of law.

**"UCC"** shall mean the Uniform Commercial Code as in effect on the date hereof in the State in which the Properties are located, as the same may be amended from time to time; *provided, however*, that if by reason of mandatory provisions of law, the perfection or the effect of perfection or non-perfection or priority of the security interest in any item or portion of the collateral is governed by the Uniform Commercial Code as in effect in a jurisdiction other than the State in which the Properties are located ("**Other UCC State**"), "**UCC**" means the Uniform Commercial Code as in effect in such Other UCC State, as the same may be amended from time to time for purposes of the provisions hereof relating to such perfection or effect of perfection or non-perfection or priority.

**"U.S. Obligations"** shall mean non-redeemable securities evidencing an obligation to timely pay principal and/or interest in a full and timely manner that are (a) direct obligations of the United States of America for the payment of which its full faith and credit is pledged, or (b) to the extent acceptable to the Lender, in its sole discretion, other "government securities" within the meaning of Section 2(a)(16) of the Investment Company Act of 1940, as amended.

Section 1.2 Principles of Construction. All references to sections and schedules are to sections and schedules in or to this Agreement unless otherwise specified. All uses of the word "including" shall mean "including, without limitation" unless the context shall indicate otherwise. Unless otherwise specified, the words "hereof," "herein" and "hereunder" and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement. Unless otherwise specified, all meanings attributed to defined terms herein shall be equally applicable to both the singular and plural forms of the terms so defined.

## ARTICLE II

### GENERAL TERMS

#### Section 2.1 Loan Commitment; Disbursement to Borrowers.

2.1.1 Agreement to Lend and Borrow. Subject to and upon the terms and conditions set forth herein, Lender hereby agrees to make, and Borrowers hereby agree to borrow, the Loan on the Closing Date.

2.1.2 The Note, Security Instrument and Loan Documents. The Loan shall be evidenced by the Note and secured by the 6160 Security Instrument and shall be further secured, upon delivery, by the 6244 Security Instrument, and the other Loan Documents.



2.1.3 Use of Proceeds. Borrowers shall use the proceeds of the Loan, subject to the terms and conditions of this Agreement, to (a) acquire a portion of and refinance the existing lien(s) on the 6160 Property, (b) acquire the 6244 Property, (c) make deposits of Reserve Funds into the Reserve Accounts on the Closing Date in the amounts provided herein, (d) pay costs and expenses incurred in connection with the closing of the Loan, as approved by Lender, (e) fund certain working capital requirements of the Properties, and (f) pay for Construction Costs.

2.1.4 Upfront Payment. At Closing, Borrowers shall pay to Lender an upfront payment (the "**Upfront Payment**") in an amount equal to two and one half percent (2.5%) of the maximum principal amount of the Loan. The Upfront Payment is fully earned and non-refundable.

2.1.5 Interest Calculation. With respect to any applicable period, interest on the Outstanding Principal Balance shall be calculated by multiplying (a) the actual number of days elapsed in the period for which the calculation is being made by (b) a daily rate based on the Interest Rate and a three hundred sixty (360) day year by (c) the average Outstanding Principal Balance in effect for the applicable period as calculated by Lender.

2.1.6 Default Rate. In the event that, and for so long as, any Event of Default shall have occurred and be continuing, the Outstanding Principal Balance and, to the extent permitted by law, all accrued and unpaid interest in respect thereof and any other amounts due pursuant to the Loan Documents, shall accrue interest at the Default Rate, calculated from the date such payment was due without regard to any grace or cure periods contained herein.

2.1.7 Usury Savings. This Agreement, the Note and the other Loan Documents are subject to the express condition that at no time shall Borrowers be obligated or required to pay interest on the principal balance of the Loan at a rate which could subject Lender to either civil or criminal liability as a result of being in excess of the Maximum Legal Rate. If, by the terms of this Agreement or the other Loan Documents, Borrowers are at any time required or obligated to pay interest on the principal balance due hereunder at a rate in excess of the Maximum Legal Rate, the Interest Rate or the Default Rate, as the case may be, shall be deemed to be immediately reduced to the Maximum Legal Rate and all previous payments in excess of the Maximum Legal Rate shall be deemed to have been payments in reduction of principal and not on account of the interest due hereunder. All sums paid or agreed to be paid to Lender for the use, forbearance, or detention of the sums due under the Loan, shall, to the extent permitted by applicable law, be amortized, prorated, allocated, and spread throughout the full stated term of the Loan until payment in full so that the rate or amount of interest on account of the Loan does not exceed the Maximum Legal Rate of interest from time to time in effect and applicable to the Loan for so long as the Loan is outstanding.

## Section 2.2 Debt Service Payments.

2.2.1 Payments Generally. For purposes of making payments hereunder, but not for purposes of calculating Interest Periods, if the day on which such payment is due is not a Business Day, then amounts due on such date shall be due on the immediately succeeding Business Day. All amounts due pursuant to this Agreement and the other Loan Documents shall be payable without setoff, counterclaim, defense or any other deduction whatsoever.

2.2.2 Monthly Debt Service Payment. On the Closing Date, Borrowers shall make a payment of interest only for the period commencing on and including the date of the funding of the Loan through and including May 31, 2018. Beginning on July 1, 2018 (the "**First Payment Date**") and each subsequent Payment Date up to and including the Maturity Date, subject to the terms of Section 7.2 hereof, Borrowers shall make a payment to Lender of principal (if any) and interest in an amount equal to the Monthly Debt Service Payment Amount, which payments shall be applied first to accrued and unpaid interest and the balance to principal. In addition to other rights and remedies, amounts not timely paid shall be added to the Outstanding Principal Balance and thereafter shall accrue interest as provided herein.

2.2.3 Payment on Maturity Date. Borrowers shall pay to Lender not later than 2:00 P.M., New York City time, on the Maturity Date the Outstanding Principal Balance, all accrued and unpaid interest, and all other amounts due hereunder and under the Note, and under the Security Instrument and the other Loan Documents.

2.2.4 Late Payment Charge. If any principal, interest or any other sums due under the Loan Documents, including the payment of principal due on the Maturity Date, is not paid by Borrowers on or prior to the date on which it is due, Borrowers shall pay to Lender upon demand an amount equal to the lesser of (a) five percent (5%) of such unpaid sum, and (b) the Maximum Legal Rate, in order to defray the expense incurred by Lender in handling and processing such delinquent payment and to compensate Lender for the loss of the use of such delinquent payment. Any such amount shall be secured by the Security Instrument and the other Loan Documents to the extent permitted by applicable law.

2.2.5 Method and Place of Payment. Except as otherwise specifically provided herein, all payments and prepayments under this Agreement and the Note shall be made to Lender not later than 2:00 P.M., New York City time, on the date when due and shall be made in Dollars in immediately available funds at Lender's office or as otherwise directed by Lender, and any funds received by Lender after such time shall, for all purposes hereof, be deemed to have been paid on the next succeeding Business Day. Any prepayments required to be made hereunder shall be deemed to have been timely made for purposes of this Section 2.3.5.

## Section 2.3 Prepayments.

### 2.3.1 Voluntary Prepayments.

(a) Except as otherwise provided in this Section 2.4, Borrowers shall not have the right to prepay the Loan in whole or in part. Provided no Event of Default has occurred and is continuing, Borrowers may prepay the Loan in whole upon the satisfaction of the following conditions:

(b) Borrowers shall provide a written notice to Lender of such prepayment no less than thirty (30) days, and no more than sixty (60) days, prior to the date of such prepayment, specifying the proposed Business Day on which a prepayment of the Debt is to be made; and

(c) Borrowers shall pay to Lender on the date of such prepayment, together with any portion of the Outstanding Principal Balance being repaid:

(i) all accrued and unpaid interest on the amount of the Outstanding Principal Balance being prepaid, which, for the avoidance of doubt, shall include interest on such amount calculated at the applicable Interest Rate through the end of the Interest Period in which such prepayment occurs; and

(ii) without duplication of any of the foregoing, all other sums, then due under the Note, this Agreement, the Security Instrument, and the other Loan Documents.

(d) If for any reason Borrowers fail to prepay the Loan on the date specified in its prepayment notice (including if such notice is revoked), Borrowers shall pay to Lender any actual out-of-pocket losses, costs, damages or expenses (including reasonable attorneys' fees and expenses) incurred by Lender in connection therewith.

2.3.2 Mandatory Prepayments. On the Payment Date immediately succeeding the date on which Lender actually receives any Net Proceeds, and if Lender is not required to make such Net Proceeds available to Borrowers for a Restoration in accordance with the terms of this Agreement, Borrowers shall prepay or authorize Lender to apply the Net Proceeds as a prepayment of the Outstanding Principal Balance in an amount equal to one hundred percent (100%) of such Net Proceeds; provided that Borrowers shall simultaneously therewith pay to Lender all accrued and unpaid interest on

the principal amount being repaid (which, for the avoidance of doubt, shall include interest accruing on such amounts through the last day of the Interest Period in which such repayment occurs). Notwithstanding anything herein to the contrary, so long as no Event of Default has then occurred and is continuing, no or any other prepayment premium, penalty or fee shall be due in connection with any prepayment made pursuant to this Section 2.4.2.

2.3.3 Prepayments After Default. If, during the continuance of an Event of Default, payment of all or any part of the Debt is tendered by Borrowers and accepted by Lender or is otherwise recovered by Lender (including through application of any Reserve Funds), such tender or recovery shall be deemed to be a voluntary prepayment by Borrowers in violation of the prohibition against prepayment set forth in Section 2.4.1 hereof, and Borrowers shall pay, as part of the Debt, all of interest calculated at the Interest Rate on the amount of principal being prepaid through and including the end of the Interest Period in which such prepayment occurs.

Section 2.4 Release of Property. Except as set forth in Section 2.7 below, no repayment, prepayment of all or any portion of the Note shall cause, give rise to a right to require, or otherwise result in, the release of the Lien of either of the Security Instruments. Lender shall, upon the written request and at the expense of Borrowers, upon payment in full of the Debt in accordance with the terms of this Agreement and the other Loan Documents, release the Lien of the Security Instruments.

Section 2.5 Extension.

2.5.1 Extension Options. Subject to the provisions of this Section 2.5.1, Borrowers shall have the option (the "**First Extension Option**"), by irrevocable written notice (the "**First Extension Notice**") delivered to Lender no later than thirty (30) days prior to the Stated Maturity Date, to extend the Maturity Date to December 7, 2019 (the "**First Extended Maturity Date**"). In the event Borrowers shall have exercised the First Extension Option, Borrowers shall have the option (the "**Second Extension Option**"), by irrevocable written notice (the "**Second Extension Notice**", and together with the First Extension Notice, each an "**Extension Notice**") delivered to Lender no later than thirty (30) days prior to the First Extended Maturity Date, to extend the Maturity Date to June 7, 2020 (the "**Second Extended Maturity Date**"). Borrowers' right to so extend the Maturity Date shall be subject to the satisfaction of the following conditions precedent prior to the effectiveness of any such extension:

(a) (i) no Event of Default shall have occurred and be continuing on the date Borrowers deliver the First Extension Notice or the Second Extension Notice, as applicable, and (ii) no Default or Event of Default shall have occurred and be continuing on the Stated Maturity Date and the First Extended Maturity Date, as applicable;

(b) Borrowers shall pay to Lender the applicable Extension Fee, which shall be paid concurrently with delivery of each Extension Notice;

(c) All amounts due and payable by Borrowers and any other Person pursuant to this Agreement or the other Loan Documents as of the Stated Maturity Date or the First Maturity Date, as applicable, and all costs and expenses of Lender, including fees and expenses of Lender's counsel, in connection with the Loan and/or the extension shall have been paid in full;

(d) Borrowers shall have deposited into the Debt Service Reserve Account an amount estimated by Lender to be equal to six (6) months' Debt Service on the Loan, all of which such amounts shall increase the Debt Service Reserve Account and be a part of the Debt Service Reserve Account;

(e) Lender shall have determined that the Loan to Value Ratio is at least seventy percent (70%) (and Lender may require a new appraisal, at Borrowers' cost and expense, from an appraiser designated by Lender to assist Lender in making such determination);

(f) Lender shall have determined that the Debt Yield is at least eight percent (8%) (and Lender may require, in its sole and absolute discretion, a new appraisal, at Borrower's cost and expense, from an appraiser designated by Lender to assist Lender in making such determination);

(g) Borrowers shall have deposited into the Tax and Insurance Escrow Account such amounts as are required by Lender to assure payment of amounts that will due during the term of the Loan (as extended); and

(h) Borrowers shall deliver an Officer's Certificate to Lender (i) certifying that all representations and warranties set forth in this Agreement remain true, correct and complete in all material respects as of the commencement of the applicable Extension Option, and (ii) waiving any claims, counterclaims, rights of rescission, set-offs or defenses, known or unknown, against Lender as of the commencement of the applicable Extension Option.

If Borrowers are unable to satisfy all of the foregoing conditions within the applicable time frames for each, Lender shall have no obligation to extend the Stated Maturity Date hereunder.

2.5.2 Extension Documentation. If requested by Lender, Borrowers shall execute and deliver an agreement in form and substance reasonably acceptable to Lender commemorating the extension of the Maturity Date upon the exercise of an Extension Option and satisfaction of all applicable conditions to such extension as provided in Section 2.5.1; provided that no such agreement shall materially increase or alter the obligations of Borrowers pursuant to the Loan Documents (it being acknowledged that a ratification by Borrowers or any Guarantor of its respective obligations under the Loan Documents to which it is a party or a certification by Borrowers and/or any Guarantor that its respective representations and warranties set forth in the Loan Documents to which it is a party remain true and correct in all material respects as of the first day of any extension term shall not constitute an increase in Borrowers' obligations for such purpose).

Section 2.6 Payment Account. Upon receipt of written notice from Lender, Borrowers shall cause all rents and other amounts due and payable under the Leases including any reimbursements from any Leases and all other revenue to be paid directly to an account (the "**Payment Account**") with a bank satisfactory to Lender in its sole and absolute discretion. Without limitation, (i) each Borrower shall deposit, or shall cause its property manager to deposit, all rents and other amounts due and payable from each residential Tenant at the applicable Property directly into the Payment Account, (ii) each Borrower shall notify each commercial Tenant at the applicable Property that all rents and other amounts due and payable under its Lease must be wired or deposited directly into the Payment Account (and Lender may notify each such Tenant in its own writing or by copying the direction letter form executed by the applicable Borrower and completing such form and sending such form from such Borrower to each such Tenant), and (iii) if a Borrower nevertheless receives any such amounts, such Borrower agrees that it shall have received them in trust for the benefit of Lender and deposit or cause to be deposited into the Payment Account, immediately upon receipt, any and all rents or other amounts received by such Borrower. The Payment Account shall be in Lender's name (or the name of its designee). The Payment Account will be a segregated account (although Lender may cause funds in the Payment Account to be forwarded to other accounts of Lender, in which event, funds may be commingled thereafter). Upon the occurrence of an Event of Default, in addition to all other rights and remedies of Lender, Lender may apply such amounts to the Loan in such order and amounts as Lender may designate in its sole and absolute discretion. No Borrower shall have access to funds deposited in the Payment Account, but Lender shall, on the first day of each calendar month, apply funds originally deposited therein to Debt Service and any other amounts hereunder then due and payable and provided no Event of Default exists, return any excess funds originally deposited therein to Borrowers by no later than the fifteenth day of each calendar month. Borrowers shall request that any bank holding the Payment Account provide Borrowers, at their cost and expense, with copies of any monthly statements and with internet access to view amounts deposited into the Payment Account (but Lender offers no assurances that any such requests will be granted).

Section 2.7 Release of Collateral. Borrowers may request that Lender release a Property from the Lien of the Security Instruments (the "**Release**"), which request will be granted by Lender after it determines, in its sole and absolute discretion, that all of the following terms and conditions are satisfied by Borrowers:

2.7.1 Lender must have received from Borrowers, at least thirty (30) but not more than sixty (60) days' prior written notice requesting the Release on the date specified in such written notice;

2.7.2 The Release must occur contemporaneously with the transfer of fee title to the Property being released (the "**Release Parcel**") to a Person that is not a Borrower or an Affiliate of Borrowers under a purchase agreement approved in writing by Lender;

2.7.3 No Event of Default has occurred and no Default or Event of Default is continuing as of the date such notice is received by Lender or as of the specified Release Date;

2.7.4 Lender must have received from Borrowers reimbursement or payment of all costs and expenses incurred by Lender (including appraisal and title costs, reasonable attorneys' fees and disbursements, servicing fees and rating agency fees) in connection with the Release;

2.7.5 The Release Parcel must be subject to existing restrictions of record, if any, affecting the Property of which it is a part;

2.7.6 Borrowers shall pay to Lender the greater of (a) "**Minimum Release Price**" (which shall mean, as to the 6160 Property, \$2,887,000, and as to the 6244 Property, \$6,956,000 and (b) the gross sales of the Released Parcel price less only ordinary and necessary closing costs paid by any Borrower to third parties (and not to any Guarantor or Affiliate of any Guarantor or any Borrower);

2.7.7 If required by Lender, the applicable Borrower and the transferee of the Release Parcel will have entered into a recorded easement agreement or declaration binding upon the owner of the Release Parcel and its successors and assigns granting to such Borrower and any successor owner of the "Remaining Property" (as defined below) such easements and rights, and imposing such restrictions, as Lender may require, including rights of access and use and restrictions relating to the use, development and maintenance of the Release Parcel;

2.7.8 Borrowers, at their sole cost and expense, must have delivered to Lender one or more endorsements, satisfactory to Lender, to the Title Insurance Policy for the Remaining Property insuring that, after giving effect to the Release, (i) the Lien created by the Security Instrument for the Remaining Property and insured under such Title Insurance Policy is a first priority lien on the remaining portion of the Properties (the "**Remaining Property**"), subject only to the Permitted Encumbrances, (ii) such Title Insurance Policy is in full force and effect showing no new encumbrances that were not otherwise approved by Lender, and (iii) the Lien created by the applicable Security Instrument and insured under such Title Insurance Policy is a first priority lien on any appurtenant easements, rights and/or agreements encumbering the Properties;

2.7.9 Lender shall have determined, in its sole and absolute discretion, that the Remaining Property will have a Loan to Value Ratio less than or equal to sixty-five percent (65%);

2.7.10 Borrowers must provide Lender with evidence acceptable to Lender, that (i) the Release Parcel has been formally designated as a distinct tax lot separate from the Remaining Property, (ii) after giving effect to the Release, the Remaining Property, including the location, existence, use, occupancy and operation thereof, is in compliance with the terms of this Agreement and all applicable Legal Requirements, including all applicable building and zoning codes, ordinances and laws of the jurisdiction in which the Remaining Property is situated, and all easements, declarations, covenants, Leases, agreements and restrictions affecting the Remaining Property, and (iii) all consents and approvals

required for the transfer of fee title to the Release Parcel or otherwise in connection with the Release have been obtained from the applicable Governmental Authorities and third parties;

2.7.11 The Release Parcel and the Remaining Property must each be designated by a metes and bounds or other legal description reasonably acceptable to Lender and also plotted on an ALTA survey satisfactory to Lender and, if required under applicable Legal Requirements, such survey must be in recordable form;

2.7.12 No default or breach of any Lease or any Operations Agreement will occur as a result of the Release;

2.7.13 Borrowers must provide Lender with evidence that the Release Parcel and the Remaining Property have been legally subdivided in accordance with a final, approved subdivision plan, and (ii) after the Release, the Remaining Property shall continue to have full access to a public roadway suitable for the purposes of such Remaining Property;

2.7.14 Borrowers must, at their sole cost and expense, prepare any and all documents and instruments necessary to consummate the Release;

2.7.15 Lender must have received from Borrowers on the Release Date an Officer's Certificate certifying that all conditions precedent to the Release have been complied with;

2.7.16 Upon the satisfaction of the conditions set forth in this Section 2.7, the Lien of Lender under the Security Instrument and the other Loan Documents will be released with respect to the Release Parcel, and Lender will execute and deliver any agreements reasonably requested by Borrowers to release and terminate the Lien of the Security Instrument as to the applicable Release Parcel; provided, however, that such agreements will be made without recourse to Lender and made without any representation or warranty. Upon the consummation of the Release, all references in this Agreement and the other Loan Documents relating to such Release Parcel will be deemed deleted, except with respect to indemnities or guaranties relating to such Release Parcel (which will expressly survive such Release) and except as otherwise expressly provided in any of the other Loan Documents. All agreements, instruments and other documentation to be delivered to Lender pursuant to this Section 2.7 must be in form and substance reasonably satisfactory to Lender.

### ARTICLE III

#### ADDITIONAL CONSTRUCTION PROVISIONS

Section 3.1 Commencement and Completion. Borrowers shall commence construction of the Projects in accordance with Completion Schedule and shall Complete construction of the Projects, free and clean of any mechanics' and materialmen's liens and stop payment notices, as applicable, in accordance with the Plans and Specifications and other provisions of the Loan Documents, with all construction costs having been paid on or before the Completion Date and in compliance with the Completion Schedule.

Section 3.2 Force Majeure. Provided that all covenants and conditions contained in the Loan Documents and the Project Documents remain satisfied, including Borrowers' required funding of any Deficiency, the time within which construction of the Projects must be Completed (and any other item on the Completion Schedule) shall be extended for a period of time equal to the period of any delay directly affecting construction that is caused by Force Majeure.

Section 3.3 Construction Agreement Contracts. Borrowers have entered into or will enter into the Construction Contracts, pursuant to which each Borrower is to construct the applicable Project. Borrowers shall require each contractor under a Construction Contract to perform in accordance with the terms of the Construction Contracts and shall not amend, modify or alter the responsibilities of any

contractor under any Construction Contract in an amount over \$50,000 (or \$100,000 in the aggregate) without Lender's prior written consent. Borrowers shall execute an assignment of Borrowers' rights under the Construction Contracts to Lender as security for Borrowers' obligations under this Agreement and the other Loan Documents and shall cause the Contractor to consent to any such assignment.

Section 3.4 Architect's Agreements. Borrowers and Architect have entered into or will enter into the Architect's Agreements, pursuant to which Architect is to design each Project. Borrowers shall require Architect to perform (and Borrowers shall perform) in accordance with the terms of the Architect's Agreements and shall not amend, modify or alter the responsibilities of Architect under the Architect's Agreements without Lender's prior written consent. Borrowers shall execute an assignment of the Architect's Agreements and the Plans and Specifications to Lender as additional security for Borrowers' performance under this Agreement and the other Loan Documents and shall cause the Architect to consent to any such assignment.

Section 3.5 Plans and Specifications.

(a) Changes, Lender Consent. Except as otherwise provided in this Agreement, no Borrower shall make or permit any changes in any Plans and Specifications without Lender's prior written consent if such change: (i) constitutes a material change in the building material or equipment specifications, or in the architectural or structural design, value or quality of either of the Projects; (ii) would result in an increase of construction costs in excess of \$50,000 for any single change or in excess of \$200,000 for all such changes; (iii) would affect the structural integrity, quality of building materials, or overall efficiency of operating systems of either of the Projects; or (iv) requires the approval of any other Person. Without limiting the above, Lender agrees that Borrowers may make minor changes in the Plans and Specifications without Lender's prior written consent, provided that such changes do not violate any of the conditions specified herein. Borrowers shall at all times maintain, for inspection by Lender, a full set of working drawings of the Projects.

(b) Changes; Submission Requirements. Borrowers shall submit (or cause to be submitted by Lender) any proposed change in the Plans and Specifications to Lender at least ten (10) days prior to the commencement of construction relating to such proposed change whether or not such change is subject to Lender's consent. Requests for any change which requires consent shall be accompanied by working drawings and a written description of the proposed change, submitted on a change order form acceptable to Lender, signed by Borrowers and, if required by Lender, also by the Architect and the applicable contractor. At its option, Lender may require Borrowers to provide: (i) evidence satisfactory to Lender of the cost and time necessary to Complete the proposed change; (ii) a deposit in the amount of any increased costs; and (iii) a complete set of "as built" Plans and Specifications for the Completed Project.

(c) Consent Process. Borrowers acknowledge that Lender's review of any changes and required consent may result in delays in construction and hereby consents to any such delays.

(d) Final Plans and Specifications. Upon Completion of each Project, Borrower shall deliver to Lender within ten (10) days a set of final as-built Plans and Specifications.

Section 3.6 Contractor/Construction Information. Within ten (10) days of Lender's written request, Borrowers shall deliver to Lender, or cause to be delivered to Lender, from time to time in a form acceptable to Lender: (a) a list detailing the name, address and phone number of each contractor, subcontractor and material supplier to be employed or used for construction of each Project together with the dollar amount, including changes, if any, of each contract and subcontract, and the portion thereof, if any, paid through the date of such list; (b) copies of each contract and subcontract identified in such list, including any changes thereto; (c) a cost breakdown of the projected total cost of constructing each Project, and that portion, if any, of each cost item which has been incurred; and (d) a construction progress schedule detailing the progress of construction and the projected sequencing and completion time for uncompleted work, all as of the date of such schedule. Borrowers agree that Lender may disapprove any contractor, subcontractor or material supplier which, in Lender's good faith determination,

is deemed financially or otherwise unqualified; provided, however, that the absence of any such disapproval shall not constitute a warranty or representation of qualification by Lender. Lender may contact any such contractor, subcontractor or material supplier to discuss the course of construction.

Section 3.7 Prohibited Contracts. Except to the extent approved in writing by Lender, no materials, equipment or other personal property or fixture constituting part of the Projects shall be purchased or installed under any security agreement, lease or other arrangement whereby any third party has a retained any security interest, lien or right to remove or repossess any such item or to claim or assert a lien upon any such property, or to consider such property to constitute personal property after its incorporation into the Projects.

Section 3.8 Liens and Stop Payment Notices. If a claim of lien is recorded which affects any Property or Project or a stop payment notice is served upon Lender, Borrowers shall, within twenty (20) calendar days of such recording or service or within five (5) calendar days of Lender's demand, whichever occurs first: (a) pay and discharge the claim of lien or stop payment notice; (b) effect the release thereof by recording or delivering a surety bond approved by Lender in its sole and absolute discretion in sufficient form and amount; or (c) if permitted by Lender, in its sole and absolute discretion (and, without limitation, Lender may require (a) or (b) rather than permit any cure under this clause (c)), provide Lender with other assurances which Lender deems, in its sole and absolute discretion, to be satisfactory for the payment of such claim of lien or stop payment notice and for the full and continuous protection of Lender from the effect of such lien or stop payment notice, including the use of title insurance to insure over such lien.

Section 3.9 Construction Responsibilities. Borrowers shall construct the Projects in a good and workmanlike manner according to the Plans and Specifications and the recommendations of any soils or engineering report approved by Lender. Borrowers shall comply or cause compliance with the Completion Schedule and all applicable laws, ordinances, rules, regulations, building restrictions, recorded covenants and restrictions, and requirements of all regulatory authorities having jurisdiction over the Properties or Projects. Borrowers shall cause each portion and all of the Projects, except for approved off-site improvements, to be constructed within building restriction and set-back lines, and shall not encroach upon, overhang or interfere with any easement, right-of-way, floodplain or other property. No Borrower shall commence (or permit commencement of) the construction of any improvements on any Property, except for those set forth in the Plans and Specifications, without Lender's prior written consent in its sole and absolute discretion. Borrowers shall be solely responsible for all aspects of Borrowers' business and conduct in connection with the Properties and Projects, including, without limitation, for the quality and suitability of the Plans and Specifications and their compliance with all governmental requirements, the supervision of the work of construction, the qualifications, financial condition and performance of all architects, engineers, contractors, material suppliers, consultants and property managers, and the accuracy of all applications for payment and the proper application of all disbursements. Lender is not obligated to supervise, inspect or inform Borrowers or any third party of any aspect of the construction of the Projects or any other matter referred to above.

Section 3.10 Assessments and Improvement Districts. Without Lender's prior written consent, in its sole and absolute discretion, no Borrower shall cause or otherwise consent to the formation of any assessment district, improvement district, community facilities district, special district, special improvement district, governmental district or other similar district (any of the foregoing hereinafter referred to as a "**District**"); nor shall any Borrower cause or otherwise consent to the levying of special taxes or assessments against a Property or Project by any such District. Borrowers shall immediately give notice to Lender of any notification or advice that Borrowers may receive from any municipality or other third party of any intent or proposal to include any Property or Project in any District or to levy any such special taxes or assessments. Lender shall have the right to file a written objection to the inclusion of all or any part of the Properties and Projects in any District, or to the levy of any such special taxes or assessments, either in its own name or in the name of any Borrower, and to appear at, and participate in, any hearing with respect to the formation of any such District or the levy or such special taxes or assessments.



Section 3.11 Delay. Borrowers shall promptly notify Lender in writing of any event causing delay or interruption of construction, or the timely completion of construction. The notice shall specify the particular work delayed, and the cause and period of each delay.

Section 3.12 Inspections.

(a) Lender or its agents shall have the right, at Borrowers' sole cost and expense, to enter upon the Properties at all reasonable times to inspect the Projects and the construction work to verify information disclosed or required pursuant to this Agreement. Any inspection or review of the Projects by Lender or its agents is solely to determine whether Borrowers are properly discharging their obligations to Lender and may not be relied upon by Borrowers or by any third party as a representation or warranty of compliance with this Agreement or any other agreement. Lender owes no duty of care to Borrowers or any third party to protect against, or to inform Borrowers or any third party of, any negligent, faulty, inadequate or defective design or construction of the Projects as determined by Lender.

(b) If Lender determines that work or materials fail to conform to applicable laws, the approved Plans and Specifications or sound building practices, or that they otherwise depart from any of the requirements of this Agreement, in addition to all other rights and remedies, Lender may give Borrowers written notice thereof specifying such matters, and Borrowers shall immediately commence to correct the condition so disapproved, and thereafter will diligently complete such correction. In addition, Lender may withhold Advances until the matter is corrected. No such action by Lender shall affect Borrowers' obligation to complete each element of the Projects within the times required by this Agreement.

(c) Lender is under no duty to visit the construction site, or to supervise or observe construction or to examine any books or records. Any site visit, observation or examination by Lender shall be solely for the purpose of protecting Lender's rights and interests. No site visit, observation or examination by Lender or review of any documents or other information shall impose any liability on Lender or result in a waiver of any default of Borrowers. In no event shall any site visit, observation or examination by Lender or review of any documents or other information be a representation that there has been or shall be compliance with the Plans and Specifications, that the construction is free from defective materials or workmanship, or that the construction complies with any applicable laws. No Borrower, nor any other party, is entitled to rely on any site visit, observation or examination by Lender or review of any documents or other information. Lender owes no duty of care to protect Borrowers or any other party against, or to inform Borrowers or any other party of, any negligent or defective design or construction of the Projects, or any other adverse condition affecting the Properties. Without limitation, any such site visit, observation or examination by Lender or review of any documents or other information is solely for Lender's benefit and Borrowers may not rely thereon.

Section 3.13 In-Balance Payments. If at any time Lender determines that the Loan is not In-Balance, Borrowers shall deposit in an account designated by Lender within five (5) Business Days of Demand by Lender the amount (the "**In-Balance Payment**") determined by Lender such that the Loan will be In-Balance. As additional security for Borrowers' performance under the Loan Documents, Borrowers hereby irrevocably pledge and assign to Lender all In-Balance Payments (or accounts in which deposited) to secure the payment and performance of all Obligations. No Borrower shall, without obtaining the prior written consent of Lender in its sole and absolute discretion, further pledge, assign or grant any security interest in any In-Balance Payments (or accounts in which deposited), or permit any lien to attach thereto, or any levy to be made thereon, or any UCC Financing Statements to be filed thereon, except those naming Lender as the secured party, to be filed with respect thereto. This Agreement is, among other things, intended by the parties to be a security agreement for purposes of the UCC. Following the occurrence and during the continuance of an Event of Default, Lender may apply all or any part of In-Balance Payments (or accounts in which deposited), against the amounts outstanding under the Loan in any order and in any manner as Lender shall elect in Lender's sole discretion without seeking the appointment of a receiver and without adversely affecting the rights of Lender to foreclose the liens and security interests securing the Loan or exercise its other rights under the Loan Documents. In-Balance Payments (or accounts in which deposited) shall not constitute trust funds and may be commingled with

other monies held by Lender. All interest which accrues on any In-Balance Payments (or accounts in which deposited), if any, deposited in the Accounts, and in any Controlled Accounts, shall be at a rate established by Lender, which may or may not be the highest rate then available, shall accrue for the benefit of Lender.

Section 3.14 Offsite Materials. No materials may be stored at a location other than the applicable Property ("**Offsite Materials**") without Lender's prior written consent, in its reasonable discretion, and subject to such conditions and security and other agreements as Lender shall require in its sole and absolute discretion. Without limitation, materials stored off site shall be stored either in a bonded warehouse or in a subcontractor's warehouse, segregated from the balance of the subcontractor's stored materials and designated specifically for the Projects. Without further limitation, any disbursement request relating to such materials must be accompanied by bill(s) of sale and evidence of insurance.

## **REPRESENTATIONS AND WARRANTIES**

Section 4.1 Borrower Representations. Each Borrower represents and warrants as of the date hereof and as of the date of any Advance that:

4.1.1 Organization. Each Borrower has been duly organized and is validly existing and in good standing with requisite power and authority to own its properties and to transact the business in which it is now engaged and as contemplated by this Agreement, including, without limitation, the power and authority to do business in the State. Each Borrower is duly qualified to do business and is in good standing in each jurisdiction where it is required to be so qualified in connection with its properties, businesses and operations. Each Borrower possesses all rights, licenses, permits and authorizations, governmental or otherwise, necessary to entitle it to own its properties and to transact the businesses in which it is now engaged. The sole business of each Borrower is the ownership, management and operation of its Property. The ownership interests of each Borrower are as set forth on the organizational chart attached hereto as Exhibit A. Each Borrower (a) has complied in all respects with its articles of organization or limited liability company agreement; (b) has maintained complete books and records and bank accounts separate from those of its Affiliates; and (c) has obeyed all formalities required to maintain its status as, and at all times has held itself out to the public as, a legal entity separate and distinct from any other entity (including, but not limited to, any Affiliate thereof). The signatory hereto has all necessary power, authority and legal right to execute this Agreement, the Note and the other Loan Documents on each Borrower's behalf to which each Borrower is a party. Guarantor has the necessary power, authority and legal right to execute, deliver and perform its obligations under the Guaranties to which it is a party.

4.1.2 Proceedings. Borrowers have taken all necessary action to authorize the execution, delivery and performance of this Agreement and the other Loan Documents. This Agreement and the other Loan Documents have been duly executed and delivered by or on behalf of Borrowers and constitute the legal, valid and binding obligations of Borrowers enforceable against Borrowers in accordance with their respective terms, subject only to applicable bankruptcy, insolvency and similar laws affecting rights of creditors generally, and subject, as to enforceability, to general principles of equity (regardless of whether enforcement is sought in a proceeding in equity or at law).

4.1.3 No Conflicts. The execution, delivery and performance of this Agreement and the other Loan Documents by Borrowers and/or Guarantor, as applicable, will not conflict with or result in a breach of any of the terms or provisions of, or constitute a default under, or result in the creation or imposition of any Lien, charge or encumbrance (other than pursuant to the Loan Documents) upon any of the property or assets of Borrowers pursuant to the terms of any indenture, mortgage, deed of trust, loan agreement, partnership agreement, management agreement or other agreement or instrument to which any Borrower is a party or by which any of each Borrower's property or assets is subject, nor will such action result in any violation of the provisions of any Legal Requirements of any Governmental Authority having jurisdiction over each Borrower or any of each Borrower's properties or assets, and any consent, approval, authorization, order, registration or qualification of or with any court or any such Governmental Authority required for the execution, delivery and performance by Borrowers and/or any Guarantor, as

applicable, of this Agreement or any other Loan Documents has been obtained and is in full force and effect.

4.1.4 Litigation. There are no actions, suits or proceedings at law or in equity by or before any Governmental Authority or other agency now pending or threatened against or affecting any Borrower, any Guarantor, or any Property, which actions, suits or proceedings, if determined against any Borrower, any Guarantor, or any Property, might materially adversely affect the condition (financial or otherwise) or business of any Borrower, any Guarantor, or the condition or ownership of any Property.

4.1.5 Agreements. No Borrower is a party to any agreement or instrument or subject to any restriction which might materially and adversely affect any Borrower or any Property, or any Borrower's business, properties or assets, operations or condition, financial or otherwise. No Borrower is in default in any material respect in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any agreement or instrument to which it is a party or by which any Borrower or any Property is bound. No Borrower has any material financial obligation under any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which any Borrower is a party or by which any Borrower or any Property is otherwise bound, other than as permitted by this Agreement.

4.1.6 Title. Each Borrower has good, marketable and insurable fee simple title to the real property comprising part of its Property and good title to the balance of its Property, free and clear of all Liens whatsoever except the Permitted Encumbrances, such other Liens as are permitted pursuant to the Loan Documents and the Liens created by the Loan Documents. Each Security Instrument, when properly recorded in the appropriate records, together with any UCC-1 financing statements required to be filed in connection therewith, will create (a) a valid, perfected first priority lien on each applicable Property, subject only to Permitted Encumbrances and the Liens created by the Loan Documents, and (b) perfected security interests in and to, and perfected collateral assignments of, all personalty, solely to the extent such security interests can be perfected by the filing of a UCC-1 financing statement, all in accordance with the terms thereof, in each case subject only to any applicable Permitted Encumbrances, such other Liens as are permitted pursuant to the Loan Documents and the Liens created by the Loan Documents. There are no claims for payment for work, labor or materials affecting any Property which are or may become a Lien prior to, or of equal priority with, the Liens created by the Loan Documents.

4.1.7 Solvency. Each Borrower has (a) not entered into the transaction contemplated by this Agreement or executed the Note, this Agreement or any other Loan Documents with the actual intent to hinder, delay or defraud any creditor and (b) received reasonably equivalent value in exchange for its obligations under such Loan Documents. After giving effect to the Loan, the fair saleable value of each Borrower's assets exceeds and will, immediately following the making of the Loan, exceed such Borrower's total liabilities, including, without limitation, subordinated, unliquidated, disputed and contingent liabilities. The fair saleable value of each Borrower's assets is and will, immediately following the making of the Loan, be greater than such Borrower's liabilities (including contingent liabilities, if any), including the maximum amount of its contingent liabilities on its debts as such debts become absolute and matured. Each Borrower's assets do not and, immediately following the making of the Loan will not, constitute unreasonably small capital to carry out its business as conducted or as proposed to be conducted. Each Borrower does not intend to incur debts and liabilities (including contingent liabilities and other commitments) beyond its ability to pay such debts and liabilities as they mature (taking into account the timing and amounts of cash to be received by such Borrower and the amounts to be payable on or in respect of the obligations of such Borrower). No Bankruptcy Action exists against any Borrower and no Borrower has ever been a debtor party in a Bankruptcy Action. No Bankruptcy Action exists against any Guarantor, and no Borrower or Guarantor has ever been a debtor party in a Bankruptcy Action. No Borrower or Guarantor is contemplating either a Bankruptcy Action or the liquidation of all or a major portion of any Borrower's or Guarantor's respective assets or properties, and no Borrower has knowledge of any Person contemplating the filing of any petition against any Borrower or any Guarantor.

4.1.8 Full and Accurate Disclosure. No statement of fact made by or on behalf of any Borrower in this Agreement or in any of the other Loan Documents contains any untrue statement of a material fact or omits to state any material fact necessary to make statements contained herein or therein not

misleading. There is no material information that has not been disclosed to Lender which adversely affects, nor as far as any Borrower can reasonably foresee, might materially adversely affect, any Property or the business, operations or condition (financial or otherwise) of any Borrower or any Guarantor.

4.1.9 No Plan Assets. No Borrower is an “employee benefit plan,” as defined in Section 3(3) of ERISA, subject to Title I of ERISA or Section 4975 of the Code, and none of the assets of any Borrower constitutes or will constitute “plan assets” of one or more such plans within the meaning of 29 C.F.R. Section 2510.3-101. Compliance by Borrowers and each Guarantor with the provisions hereof will not involve any Prohibited Transaction. Neither Guarantor nor any Borrower has any pension, profit sharing, stock option, insurance or other arrangement or plan for employees covered by Title IV of ERISA, and no “Reportable Event” as defined in ERISA has occurred and is now continuing with respect to any such plan. The performance by each Borrower of its obligations under the Loan Documents and each Borrower’s conducting of its operations do not violate any provisions of ERISA. In addition, (a) no Borrower is a “governmental plan” within the meaning of Section 3(32) of ERISA, (b) transactions by or with each Borrower are not subject to any state statute or regulation regulating investments of, or fiduciary obligations with respect to, governmental plans within the meaning of Section 2(32) of ERISA which is similar to the provisions of Section 406 of ERISA or Section 4975 of the Code currently in effect, which prohibit or otherwise restrict the transactions contemplated by this Agreement, and (c) none of any Borrower, Guarantor or ERISA Affiliate is at the date hereof, or has been at any time within the two years preceding the date hereof, an employer required to contribute to any Multiemployer Plan or Multiple Employer Plan, or a “contributing sponsor” (as such term is defined in Section 4001 of ERISA) in any Multiemployer Plan or Multiple Employer Plan; and none of any Borrower, Guarantor or any ERISA Affiliate has any contingent liability with respect to any post-retirement “welfare benefit plan” (as such term is defined in ERISA) except as disclosed to Lender in writing.

4.1.10 Compliance. Each Borrower and each Property (including the use thereof) comply in all material respects with all applicable Legal Requirements, including, without limitation, building and zoning ordinances and codes. No Borrower is in default or violation of any order, writ, injunction, decree or demand of any Governmental Authority, including, without limitation, any order of a bankruptcy court or plan approved thereby. There has not been committed by any Borrower (or any other Person), any act or omission affording any Governmental Authority the right of forfeiture as against the Properties or any part thereof or any monies paid in performance of any Borrower’s obligations under any of the Loan Documents. Neither the Projects, if any, as constructed, nor the use of the Properties or the Projects contemplated accessory uses, will violate (a) any Legal Requirements (including subdivision, zoning, building, environmental protection and wetland protection Legal Requirements), or (b) any building permits, restrictions or records, or agreements affecting the Properties or any part thereof. Neither the zoning authorizations, approvals or variances nor any other right to construct or to use the Properties is to any extent dependent upon or related to any real estate other than the Properties.

4.1.11 Financial Information. All financial data with respect to the Properties and Guarantor, including, without limitation, the statements of cash flow and income and operating expense, that have been delivered to Lender in connection with the Loan (a) are true, complete and correct in all material respects, (b) fairly and accurately represent the financial condition of each Property and each Guarantor as of the date of such reports, and (c) to the extent prepared or audited by an independent certified public accounting firm, have been prepared in accordance with GAAP (or such other accounting basis acceptable to Lender) throughout the periods covered, except as disclosed therein. Except for Permitted Encumbrances, no Borrower has any contingent liabilities, liabilities for taxes, unusual forward or long-term commitments or unrealized or anticipated losses from any unfavorable commitments that are known to Borrowers and reasonably likely to have a Materially Adverse Effect on any Property or Project. Since the date of such financial statements, there has been no Material Adverse Change (or any other material change) in the financial condition, operation or business of Borrowers or any Guarantor from that set forth in said financial statements. The Construction Budgets shall represent a good faith estimate of all Construction Costs.

4.1.12 Condemnation. No Condemnation or other similar proceeding has been commenced or, to Borrowers' best knowledge, is threatened with respect to all or any portion of the Properties or for the relocation of any roadway providing access to any Property.

4.1.13 Federal Reserve Regulations. No part of the proceeds of the Loan will be used for the purpose of purchasing or acquiring any "margin stock" within the meaning of Regulation U of the Board of Governors of the Federal Reserve System or for any other purpose which would be inconsistent with such Regulation U or any other Regulations of such Board of Governors, or for any purposes prohibited by any Legal Requirements or by the terms and conditions of this Agreement or the other Loan Documents.

4.1.14 Public Access. Each Property has rights of access to public ways and, upon construction thereon, will be served by water, sewer, sanitary sewer and storm drain facilities adequate to service such Property for its intended uses. All public utilities necessary or convenient to the full use and enjoyment of each Property are located either in the public right-of-way abutting such Property (which will be connected so as to serve such Property without passing over other property) or in recorded easements serving such Property and such easements are set forth in and insured (or will be set forth in and insured) by the Title Insurance Policies. All roads necessary for the use of each Property for its current purpose have been completed and dedicated to public use and accepted by all Governmental Authorities. There is no on-site sewage disposal system and, upon construction thereon, each Property will be served by a sewer system maintained by a Governmental Authority or property owners association.

4.1.15 Not a Foreign Person. No Borrower is a "foreign person" within the meaning of §1445(f)(3) of the Code.

4.1.16 Separate Lots. Each Property is comprised of one or more parcel(s) which each constitute(s) a separate tax lot or lots and does not constitute a portion of any other tax lot not a part of such Property.

4.1.17 Assessments. There are no pending or proposed special or other assessments for public improvements or otherwise affecting any Property, nor are there any contemplated improvements to any Property that may result in such special or other assessments.

4.1.18 Enforceability. The Loan Documents are enforceable by Lender (or any subsequent holder thereof) in accordance with their respective terms, subject to principles of equity and bankruptcy, insolvency and other laws generally applicable to creditors' rights and the enforcement of debtors' obligations. The Loan Documents are not subject to any right of rescission, set-off, counterclaim or defense by Borrowers or Guarantor, including the defense of usury, nor would the operation of any of the terms of the Loan Documents, or the exercise of any right thereunder, render the Loan Documents unenforceable (subject to principles of equity and bankruptcy, insolvency and other laws generally affecting creditors' rights and the enforcement of debtors' obligations), and neither any Borrower nor any Guarantor have asserted any right of rescission, set-off, counterclaim or defense with respect thereto.

4.1.19 No Prior Assignment. There are no prior assignments of any Leases or any portion of the Rents due and payable or to become due and payable which are presently outstanding.

4.1.20 Insurance. Each Borrower has obtained and has delivered to Lender evidence of all Policies, with all premiums paid thereunder, reflecting the insurance coverages, amounts and other requirements set forth in this Agreement. No claims have been made or are currently pending, outstanding or otherwise remain unsatisfied under any such Policies, and neither Borrowers nor any other Person, has done, by act or omission, anything which would impair the coverage of any such Policies.

4.1.21 Flood Zone. None of the Improvements on the Properties are located in an area as identified by the Federal Emergency Management Agency as an area having special flood hazards or, if

so located, the flood insurance required pursuant to Section 6.1(a)(i) hereof is in full force and effect with respect to the Properties.

4.1.22 Leases. No Property is subject to any Leases other than Leases with residential tenants. No Person has any possessory interest in any Property or right to occupy the same other than the tenants under the residential Leases.

4.1.23 Survey. Each Survey delivered to Lender is accurate.

4.1.24 Principal Place of Business; State of Organization. Each Borrower's principal place of business as of the date hereof is the address set forth in the introductory paragraph of this Agreement. Each Borrower is organized under the laws of the State of Illinois and is qualified to do business in the State of Illinois.

4.1.25 Filing and Recording Taxes. All transfer taxes, deed stamps, intangible taxes or other amounts in the nature of transfer taxes required to be paid by any Person under applicable Legal Requirements currently in effect in connection with the transfer of each Property to the applicable Borrower have been paid. All mortgage, mortgage recording, stamp, intangible or other similar tax required to be paid by any Person under applicable Legal Requirements currently in effect in connection with the execution, delivery, recordation, filing, registration, perfection or enforcement of any of the Loan Documents, including, without limitation, the Security Instrument, have been paid or are being paid simultaneously with the disbursement of the proceeds of the Loan to Borrowers.

4.1.26 Special Purpose Entity/Separateness.

(a) Until the Debt has been paid in full, each Borrower hereby represents, warrants and covenants that each Borrower is, shall be and shall continue to be a Special Purpose Entity.

(b) The representations, warranties and covenants set forth in Section 4.1.26(a) shall survive for so long as any amount remains payable to Lender under this Agreement or any other Loan Document.

4.1.27 Illegal Activity. No portion of any Property has been or will be purchased with proceeds of any illegal activity.

4.1.28 No Change in Facts or Circumstances; Disclosure. All information submitted by any Borrower or any Guarantor to Lender including, but not limited to, all financial statements, rent rolls, reports, certificates and other documents submitted in connection with the Loan or in satisfaction of the terms thereof and all statements of fact made by any or any Guarantor in this Agreement or in any other Loan Document, are accurate, complete and correct in all material respects. There has been no Material Adverse Change in any condition, fact, circumstance or event that would make any such information inaccurate, incomplete or otherwise misleading in any material respect or that otherwise materially and adversely affects or might materially and adversely affect the use, operation or value of the Properties or the business operations and/or the financial condition of any Borrower or any Guarantor. Each Borrower and each Guarantor have disclosed to Lender all material facts and have not failed to disclose any material fact that could cause any information provided to Lender or representation or warranty made herein to be materially misleading.

4.1.29 Investment Company Act. No Borrower is (a) an "investment company" or a company "controlled" by an "investment company," within the meaning of the Investment Company Act of 1940, as amended; (b) a "holding company" or a "subsidiary company" of a "holding company" or an "affiliate" of either a "holding company" or a "subsidiary company" within the meaning of the Public Utility Holding Company Act of 2005, as amended; or (c) subject to any other Federal or state law or regulation which purports to restrict or regulate its ability to borrow money.

4.1.30 Embargoed Person. As of the date hereof and at all times throughout the term of the Loan, including after giving effect to any Transfers permitted pursuant to the Loan Documents, (a) none of the funds or other assets of any Borrower and any Guarantor constitute property of, or are beneficially owned, directly or indirectly, by any Embargoed Person; (b) no Embargoed Person has any interest of any nature whatsoever in any Borrower or any Guarantor, as applicable, with the result that the investment in any Borrower or any Guarantor, as applicable (whether directly or indirectly), is prohibited by law or the Loan is in violation of law; and (c) none of the funds of any Borrower or any Guarantor, as applicable, have been derived from any unlawful activity with the result that the investment in any Borrower or any Guarantor, as applicable (whether directly or indirectly), is prohibited by law or the Loan is in violation of law.

4.1.31 Filing of Returns. Each Borrower and each Guarantor have filed all Federal income tax returns and all other material tax returns, domestic and foreign, or extensions, as the case may be, required to be filed by it and have paid all material taxes and assessments payable by it that have become due, other than those not yet delinquent and except for those being contested in good faith. Each Borrower and each Guarantor have each established on its books such charges, accruals and reserves in respect of taxes, assessments, fees and other governmental charges for all fiscal periods as are required by sound accounting principles consistently applied. No Borrower, nor any Guarantor knows of any proposed assessment for additional Federal, foreign or state taxes for any period, or of any basis therefor, that, individually or in the aggregate, taking into account such charges, accruals and reserves in respect thereof as such Person has made, could reasonably be expected to cause a Material Adverse Change with respect to any Borrower, Guarantor or any Property.

4.1.32 Operations Agreements. Each Operations Agreement is in full force and effect and no Borrower nor, to the best of Borrowers' knowledge, any other party to any such Operations Agreement, is in default thereunder, and to the best of Borrowers' knowledge, there are no conditions which, with the passage of time or the giving of notice, or both, would constitute a default thereunder.

4.1.33 Additional Construction Representations.

(a) This Agreement and all financial statements, budgets, schedules, opinions, certificates, confirmations, sworn statements, applications, rent rolls, affidavits, agreements, construction contracts (including the Construction Agreements upon execution), and other materials submitted to Lender in connection with or in furtherance of this Agreement by or on behalf of Borrowers fully and fairly state the matters with which they purport to deal, and neither misstate any material fact nor, separately or in the aggregate, fail to state any material fact necessary to make the statements made not misleading.

(b) Subject only to payment of fees and costs specified or to be specified in the Construction Budgets, all utility and municipal services required for the construction of the Projects and the occupancy and operation of the Properties, including water supply, storm and sanitary sewage disposal systems, cable services, gas, electric and telephone facilities are available for use and tap on at the boundaries of the Properties, or will be by each of the applicable Completion Dates, and upon installation and inspection of the required project infrastructure pursuant to the Plans and Specifications, the applicable utility companies or municipalities will allow connections from the Properties to each applicable service.

(c) The Projects (including the storm and sanitary sewage disposal system, water system, drainage system and all mechanical systems of the Projects) do (or when constructed will) and all other aspects of the Projects comply with all applicable laws, statutes, ordinances, rules and regulations of any governmental authority. The applicable environmental protection agency, pollution control board and/or other governmental agency having jurisdiction over the Properties have issued their permits for the construction, or will issue their permits prior to the start of construction, for tap on and operation of those systems.

(d) All utility services, parking, access (including curb cuts and highway access), construction and other permits and easements required for the construction and use of the Properties have been granted and issued, other than grading, design and building permits, as disclosed to Lender.

(e) When completed in accordance with the Plans and Specifications, no Project will encroach upon any building line, set back line, sideyard line, or any easement that exists with respect to the applicable Property.

(f) The Plans and Specifications have been designed (or, if not previously delivered, will be designed) using generally accepted trade practices, are complete in all respects, including provision for all onsite or offsite improvements, and contain all other details requisite for construction of the Projects which, when built and equipped in accordance therewith, shall be ready for the intended use thereof.

(g) In the aggregate, the Construction Contracts cover or will cover all labor, material and equipment required by the Plans and Specifications or necessary to complete the Projects, excepting only the labor, material and equipment to be provided pursuant to Construction Contracts. Borrowers represent and warrant that they have delivered to Lender a true, complete and correct copy of each Construction Contract currently in existence and will deliver a copy of any additional Construction Contract. Each Construction Contract is in full force and effect, all persons that are a party to the Construction Contract are in full compliance with all obligations therein, and there exists no default or breach by any Borrower or any other person that is a party to any Construction Contract nor does there exist any event, fact or circumstance that, with the giving of notice, the passage of time, or both, would constitute a default or breach under any Construction Contract.

(h) All roads necessary for the full utilization of each Project for its intended purposes have either been completed or the necessary rights of way therefor have either been acquired by a Borrower or the appropriate governmental agency or have been dedicated to public use and accepted by such governmental agency, and all necessary steps have been taken by a Borrower and such governmental agency to assure the complete construction and installation thereof in accordance with law and all applicable governmental or quasi-governmental requirements.

(i) Each of the Construction Budgets will be complete and accurate and will reflect all costs necessary to complete the Project. Without limitation, the amounts set forth in each of the Construction Budgets will present a full and complete itemization by category of all costs, expenses and fees necessary to complete construction pursuant to the Plans and Specifications.

(j) Borrowers provide to Lender true, correct and complete copies of the Construction Contracts, the Architect's Agreements and any other contracts entered into by each Borrower or such Borrower's predecessor and otherwise relating to the Projects or otherwise binding on any Borrower (or will deliver, immediately upon execution). All such contracts are unamended and in full force and effect, and no default exists by any party thereunder.

Section 4.2 Survival of Representations. Borrowers agree that all of the representations and warranties of each Borrower set forth in Section 4.1 and elsewhere in this Agreement and in the other Loan Documents shall survive for so long as any amount remains owing to Lender under this Agreement or any of the other Loan Documents by any Borrower. All representations, warranties, covenants and agreements made in this Agreement or in the other Loan Documents by each Borrower shall be deemed to have been relied upon by Lender notwithstanding any investigation heretofore or hereafter made by Lender or on its behalf.

## ARTICLE V

### BORROWER COVENANTS



Section 5.1 Affirmative Covenants. From the date hereof and until payment and performance in full of all Obligations, each Borrower hereby covenants and agrees with Lender that:

5.1.1 Existence; Compliance with Legal Requirements. Each Borrower shall do or cause to be done all things necessary to preserve, renew and keep in full force and effect its existence, rights, licenses, permits and franchises and comply with all Legal Requirements applicable to each of Borrowers and the Properties. There shall never be committed by any Borrower, and no Borrower shall permit any other Person in occupancy of or involved with the operation or use of any Property to commit, any act or omission affording any Governmental Authority the right of forfeiture against such Property or any part thereof or any monies paid in performance of Borrowers' obligations under any of the Loan Documents. No Borrower shall commit, permit or suffer to exist any act or omission affording such right of forfeiture. Each Borrower shall at all times maintain, preserve and protect all franchises and trade names, preserve all the remainder of its property used or useful in the conduct of its business, and shall keep the Properties in good working order and repair, and from time to time make, or cause to be made, all reasonably necessary repairs, renewals, replacements, betterments and improvements thereto, all as more fully provided in the Security Instrument. Borrowers shall keep the Properties insured at all times by financially sound and reputable insurers, to such extent and against such risks, and maintain liability and such other insurance, as is more fully provided in this Agreement. After prior notice to Lender, Borrowers, at their own expense, may contest by appropriate legal proceeding promptly initiated and conducted in good faith and with due diligence, the validity of any Legal Requirement, the applicability of any Legal Requirement to Borrowers or the Properties or any alleged violation of any Legal Requirement, provided, that: (a) no Default or Event of Default has occurred and is continuing; (b) such proceeding shall be permitted under, and be conducted in accordance with, the provisions of any instrument to which Borrowers are subject and shall not constitute a default thereunder and such proceeding shall be conducted in accordance with all applicable statutes, laws and ordinances; (c) neither the Properties nor any part thereof or interest therein will be in danger of being sold, forfeited, terminated, cancelled or lost; (d) Borrowers shall, upon final determination thereof, promptly comply with any such Legal Requirement determined to be valid or applicable or cure any violation of any Legal Requirement; (e) such proceeding shall suspend the enforcement of the contested Legal Requirement against Borrowers and the Properties; and (f) Borrowers shall furnish such security as may be required in the proceeding, or as may be requested by Lender, to insure compliance with such Legal Requirement, together with all interest and penalties payable in connection therewith. Lender may apply any such security, as necessary to cause compliance with such Legal Requirement at any time when, in the judgment of Lender, the validity, applicability or violation of such Legal Requirement is finally established or the Properties (or any part thereof or interest therein) shall be in danger of being sold, forfeited, terminated, cancelled or lost.

5.1.2 Taxes and Other Charges. Each Borrower shall pay all Taxes and Other Charges now or hereafter levied or assessed or imposed against its Property, or any part thereof, as the same become due and payable; *provided, however*, each Borrower's obligation to directly pay Taxes shall be suspended for so long as each Borrower complies with the terms and provisions of Section 7.1 hereof. Each Borrower will deliver or cause to be delivered to Lender receipts for payment or other evidence satisfactory to Lender that the Taxes and Other Charges have been so paid or are not then delinquent no later than ten (10) days prior to the date on which the Taxes and/or Other Charges would otherwise be delinquent if not paid; *provided, however*, no Borrower is required to furnish such receipts for payment of Taxes in the event that such Taxes have been paid by Lender pursuant to Section 7.1 hereof. No Borrower shall suffer and Borrowers shall promptly pay or cause to be paid and discharged any Lien or charge whatsoever which may be or become a Lien or charge against any Property, and shall promptly pay or cause to be paid all utility services provided to each Property. After prior notice to Lender, Borrowers, at their own expense, may contest by appropriate legal proceeding, promptly initiated and conducted in good faith and with due diligence, the amount or validity or application in whole or in part of any Taxes or Other Charges, provided that (a) no Default or Event of Default has occurred and remains uncured; (b) such proceeding shall be permitted under, and be conducted in accordance with, the provisions of any other instrument to which Borrowers are subject and shall not constitute a default thereunder and such proceeding shall be conducted in accordance with all applicable statutes, laws and ordinances; (c) neither the Properties nor any part thereof or interest therein will be in danger of being sold, forfeited, terminated, cancelled or lost; (d) Borrowers shall promptly upon final determination thereof

pay or cause to be paid the amount of any such Taxes or Other Charges, together with all costs, interest and penalties which may be payable in connection therewith; (e) such proceeding shall suspend the collection of such contested Taxes or Other Charges from the Properties (except that if such Taxes or Other Charges must be paid sooner in order to avoid being delinquent, then Borrowers shall pay or cause the same to be paid prior to delinquency, and upon making such payment or causing such payment to be made prior to delinquency Borrowers may continue such contest); and (f) Borrowers shall furnish such security as may be required in the proceeding, or as may be requested by Lender, to insure the payment of any such Taxes or Other Charges, together with all interest and penalties thereon. Lender may pay over any such cash deposit or part thereof held by Lender to the claimant entitled thereto at any time when, in the judgment of Lender, the entitlement of such claimant is established or the Properties (or part thereof or interest therein) shall be in danger of being sold, forfeited, terminated, cancelled or lost or there shall be any danger of the Lien of the Security Instrument being primed by any related Lien.

5.1.3 Litigation. Borrowers shall give prompt notice to Lender of any litigation or proceedings by any Governmental Authority pending or threatened against any Borrower and/or any Guarantor which might have a Materially Adversely Effect on any Borrower's or any Guarantor's condition (financial or otherwise) or business or any Property.

5.1.4 Access to Property. Borrowers shall permit agents, representatives and employees of Lender to inspect the Properties or any part thereof at reasonable hours upon reasonable advance notice (which may be given verbally).

5.1.5 Notice of Default. Borrowers shall promptly advise Lender of any Material Adverse Change in any Borrower's or any Guarantor's condition, financial or otherwise, or of the occurrence of any Default or Event of Default of which any Borrower has knowledge.

5.1.6 Cooperate in Legal Proceedings. Borrowers shall cooperate fully with Lender with respect to any proceedings before any court, board or other Governmental Authority which may in any way affect the rights of Lender hereunder or any rights obtained by Lender under any of the other Loan Documents and, in connection therewith, permit Lender, at its election, to participate in any such proceedings.

5.1.7 Perform Loan Documents. Borrowers shall observe, perform and satisfy all the terms, provisions, covenants and conditions of, and shall pay when due all costs, fees and expenses to the extent required under the Loan Documents. Payment of the costs and expenses associated with any of the foregoing shall be in accordance with the terms and provisions of this Agreement, including, without limitation, the provisions of Section 10.13 hereof.

5.1.8 Award and Insurance Benefits. Borrowers shall cooperate with Lender in obtaining for Lender the benefits of any Awards or Insurance Proceeds lawfully or equitably payable in connection with any Property, and Lender shall be reimbursed for any expenses incurred in connection therewith (including attorneys' fees and disbursements, and the payment by Borrowers of the expense of an appraisal on behalf of Lender in case of Casualty or Condemnation affecting the Properties or any part thereof) out of such Insurance Proceeds.

5.1.9 Further Assurances. Each Borrower shall, at Borrowers' sole cost and expense:

(a) furnish to Lender all instruments, documents, boundary surveys, footing or foundation surveys, certificates, plans and specifications, appraisals, title and other insurance reports and agreements, and each and every other document, certificate, agreement and instrument required to be furnished by such Borrower pursuant to the terms of the Loan Documents or which are reasonably requested by Lender in connection therewith;

(b) authorize the filing or recording of or execute and deliver to Lender such documents, instruments, certificates, assignments, financing statements and other writings, and do such

other acts necessary or desirable, to evidence, preserve and/or protect the collateral at any time securing or intended to secure the Obligations under the Loan Documents, as Lender may reasonably require; and

(c) do and execute all and such further lawful and reasonable acts, conveyances and assurances for the better and more effective carrying out of the intents and purposes of this Agreement and the other Loan Documents, as Lender shall reasonably require from time to time. In furtherance hereof, each Borrower grants to Lender an irrevocable power of attorney coupled with an interest for the purpose of protecting, perfecting, preserving and realizing upon the interests granted pursuant to this Agreement and to effect the intent hereof, all as fully and effectually as each Borrower might or could do; and each Borrower hereby ratifies all that Lender shall lawfully do or cause to be done by virtue hereof. Upon receipt of an affidavit of an officer of Lender as to the loss, theft, destruction or mutilation of the Note or any other Loan Document which is not of public record, and, in the case of any such mutilation, upon surrender and cancellation of such Note or other applicable Loan Document, and in the case of the Note, receipt of an indemnity from Lender, each Borrower will issue, in lieu thereof, a replacement Note or other applicable Loan Document, dated the date of such lost, stolen, destroyed or mutilated Note or other Loan Document in the same principal amount thereof and otherwise of like tenor. Each Borrower hereby authorizes Lender to file an "all assets" financing statement with respect to the Collateral.

5.1.10 Mortgage Taxes. Borrowers shall, simultaneously with the recording of each of the Security Instrument, pay all state, county and municipal recording and all other taxes imposed upon the execution and recordation of each such Security Instrument.

5.1.11 Financial Reporting.

(a) Borrowers will keep and maintain or will cause to be kept and maintained on a Fiscal Year basis in accordance with GAAP (or such other accounting basis selected by Borrowers and reasonably acceptable to Lender), proper and accurate books, records and accounts reflecting all of the financial affairs of Borrowers and all items of income and expense in connection with the operation of the Properties. Lender shall have the right from time to time at all times during normal business hours upon reasonable notice (which may be verbal) to examine such books, records and accounts at the office of Borrowers or any other Person maintaining such books, records and accounts and to make such copies or extracts thereof as Lender shall desire. After the occurrence of an Event of Default, Borrowers shall pay any costs and expenses incurred by Lender to examine Borrowers' accounting records with respect to the Properties, as Lender shall reasonably determine to be necessary or appropriate in the protection of Lender's interest. Upon Lender's request, Borrowers shall furnish to Lender such other information reasonably necessary and sufficient to fairly represent the financial condition of Borrowers and the Properties.

(b) Borrowers will furnish to Lender annually, within one hundred twenty (120) days following the end of each Fiscal Year of Borrowers, and within thirty (30) days of the end of each calendar quarter, a complete copy of Borrowers' and each Guarantor's annual (or quarterly, as applicable) financial statements certified as true and correct by the party providing such statements (and, for the annual of statements of Borrowers prepared by an independent certified public accountant acceptable to Lender) in accordance with GAAP (or such other accounting basis acceptable to Lender, and, for Guarantors, Lender hereby approves sound and prudent cash based financial statements consistently applied) covering the Properties for such Fiscal Year (or calendar quarter) and containing statements of profit and loss for Borrowers, Guarantor and the Properties and a balance sheet for Borrowers and each Guarantor. Such statements of Borrowers shall set forth the financial condition and the results of operations for the Properties for such Fiscal Year (or calendar quarter), and an Officer's Certificate certifying that each annual financial statement of Borrowers fairly presents the financial condition and the results of operations of Borrowers and the Properties subject to such reporting, and that such financial statements have been prepared in accordance with GAAP and as of the date thereof whether there exists an event or circumstance which constitutes a Default or Event of Default by Borrowers under the Loan Documents, and if such Default or Event of Default exists, the nature thereof, the period of time it has existed and the action then being taken to remedy the same. Guarantor's annual financial statements shall be

accompanied by a certificate executed and delivered by Guarantor (if such Guarantor is a natural person) or an officer or other duly authorized representative of Guarantor (if such Guarantor is an entity) certifying that each annual financial statement presents fairly the financial condition and the results of operations of Guarantor being reported upon and that such financial statements have been prepared in accordance with GAAP (or such other accounting basis acceptable to Lender, and, for Guarantors, Lender hereby approves sound and prudent cash based financial statements consistently applied) and as of the date thereof whether there exists an event or circumstance which constitutes a Default or Event of Default by Guarantor under the Loan Documents, and if such Default or an Event of Default exists, the nature thereof, the period of time it has existed and the action then being taken to remedy the same.

(c) Borrowers shall also provide such monthly reports and statements as are reasonably required by Lender within twenty (20) days after the end of each calendar month. Without limitation, Borrowers shall provide a monthly report on the status of the construction of the Projects and a comparison of actual costs to the Construction Budgets in form and substance as required by Lender.

(d) Borrowers shall furnish to Lender, within twenty (20) days after request (or as soon thereafter as may be reasonably possible), such further detailed information with respect to the operation of the Properties and the financial affairs of Borrowers as may be reasonably requested by Lender.

(e) Any reports, statements or other information required to be delivered under this Agreement shall be delivered in electronic form (or such other form as required by Lender) and Borrowers agree that Lender may disclose information regarding the Properties and Borrowers that is provided to Lender pursuant to this Section 5.1.11 in connection with any Lender Assignment to such parties requesting such information in connection with such Lender Assignment.

5.1.12 Business and Operations. Each Borrower will continue to engage in the businesses presently conducted by it as and to the extent the same are necessary for the ownership, maintenance, management and operation of the Properties. Each Borrower will qualify to do business and will remain in good standing under the laws of each jurisdiction as and to the extent the same are required for the ownership, maintenance, management and operation of the Properties or ownership and management of an interest in each Borrower (as applicable).

5.1.13 Title to the Property. Each Borrower will warrant and defend (a) the title to the Properties and every part thereof, subject only to Permitted Encumbrances, and (b) the validity and priority of the Lien of the Security Instrument, subject only to Permitted Encumbrances, in each case against the claims of all Persons whomsoever. Borrowers shall reimburse Lender for any losses, costs, damages or expenses (including attorneys' fees and expenses, and court costs) incurred by Lender if an interest in any Property, other than as permitted hereunder, is claimed by another Person.

5.1.14 Costs of Enforcement. In the event (a) that the Security Instrument is foreclosed in whole or in part or that the Security Instrument is put into the hands of an attorney for collection, suit, action or foreclosure, (b) of the foreclosure of any mortgage prior to or subsequent to the Security Instrument in which proceeding Lender is made a party, or (c) of a Bankruptcy Action related to any Borrower or an assignment by any Borrower for the benefit of its creditors, each Borrower, on behalf of itself and its successors and assigns, agrees that it/they shall be chargeable with and shall pay all costs of collection and defense, including attorneys' fees and expenses, and court costs, incurred by Lender or Borrowers in connection therewith and in connection with any appellate proceeding or post-judgment action involved therein, together with all required service or use taxes.

5.1.15 Estoppel Statement.

(a) After request by Lender, Borrowers shall within ten (10) days furnish Lender with a statement, duly acknowledged and certified, setting forth (i) the original principal amount of the Loan, (ii) the Outstanding Principal Balance, (iii) the Interest Rate of the Loan, (iv) the date installments of interest and/or principal were last paid, (v) any offsets or defenses to the performance of the Obligations,

if any, and (vi) that the Note, this Agreement, the Security Instrument and the other Loan Documents are valid, legal and binding obligations of Borrowers and have not been modified or if modified, giving particulars of such modification.

(b) Borrowers shall use commercially reasonable efforts to deliver to Lender upon request, tenant estoppel certificates from each commercial Tenant, if any, in form and substance reasonably satisfactory to Lender provided that no Borrower shall be required to deliver such certificates more frequently than once in any calendar year.

5.1.16 Loan Proceeds. Borrowers shall use the proceeds of the Loan received by it on the Closing Date only for the purposes set forth in Section 2.1.3 or the Construction Budgets.

5.1.17 Performance by Borrowers. Borrowers shall in a timely manner observe, perform and fulfill each and every covenant, term and provision of each Loan Document executed and delivered by, or applicable to, Borrowers and shall not enter into or otherwise suffer or permit any amendment, waiver, supplement, termination or other modification of any Loan Document without the prior written consent of Lender.

5.1.18 No Joint Assessment. No Borrower shall suffer, permit or initiate the joint assessment of any Property (a) with any other real property constituting a tax lot separate from such Property, and (b) which constitutes real property with any portion of such Property which may be deemed to constitute personal property, or any other procedure whereby the lien of any taxes which may be levied against such personal property shall be assessed or levied or charged (or waived by Lender) to such real property portion of such Property.

5.1.19 Leasing Matters. Any commercial or retail Lease executed after the date hereof (and any amendment or termination thereof) shall require the prior written consent of Lender, which consent shall be in Lender's sole and absolute discretion. Borrowers shall furnish Lender with true, correct and complete executed copies of all Leases, amendments thereof and any related agreements. Borrowers may enter into or renew residential Leases the prior written consent of Lender so long as (i) all such residential Leases provide for rental rates comparable to existing local market rates, (ii) all such residential Leases shall be for a term lasting no more than twelve (12) months, (iii) the Tenant under any such residential Lease is not an Affiliate of Borrowers or Guarantor, (iv) each such Lease shall substantially conform to the form of residential lease approved by Lender, and (v) all such residential Leases shall be on commercially reasonable market rate terms and shall not contain any terms which would materially adversely affect Lender's rights under the Loan Documents. All Leases executed after the date hereof shall provide that they are subordinate to the Security Instrument and the Liens created thereby and that the Tenant thereunder agrees to attorn to Lender or any other purchaser of the Property at a sale by foreclosure (or deed in lieu thereof) or power of sale. Each Borrower (a) shall observe and perform the obligations imposed upon the lessor under the Leases in a commercially reasonable manner; (b) shall enforce the terms, covenants and conditions contained in the Leases upon the part of the Tenant thereunder to be observed or performed in a commercially reasonable manner and in a manner which does not impair the value of the Property involved, provided that in no event shall any Borrower terminate or accept the surrender of any Lease by a Tenant unless by reason of a Tenant default and then only in a commercially reasonable manner to preserve and protect the Property involved; *provided, however*, that no such termination or surrender of any Lease will be permitted without the prior written consent of Lender or unless such termination or surrender is specifically provided for in the Lease; (c) shall not collect any of the Rents more than one (1) month in advance (other than security deposits required pursuant to such Lease); (d) shall not execute any other assignment of the lessor's interest in the Leases or the Rents (except to Lender pursuant to the Loan Documents); (e) shall not alter, modify or change the terms of the Leases; and (f) shall execute and deliver at the request of Lender all such further assurances, confirmations and assignments in connection with the Leases as Lender shall from time to time reasonably require. Lender shall have the right to require each new commercial Tenant to execute and deliver to Lender a subordination, non-disturbance of possession and attornment agreement in form, content and manner of execution reasonably acceptable to Lender.

5.1.20 Operation of Property.

(a) Each Borrower shall: (i) promptly perform and/or observe in all material respects all of the covenants and agreements required to be performed and observed by it under any of the Operations Agreements and do all things necessary to preserve and to keep unimpaired its material rights thereunder; (ii) promptly notify Lender of any material default under any Operations Agreement of which it is aware; and (iii) enforce the performance and observance of all of the covenants and agreements required to be performed and/or observed by any party (other than such Borrower) under the Operations Agreements, in a commercially reasonable manner.

(b) All Material Agreements shall be subject to the prior review and approval, not to be unreasonably withheld, of Lender. As used herein, "**Material Agreements**" shall mean each contract and agreement relating to the ownership, management, development, use, operation, leasing, maintenance, repair or improvement of a Property, other than the Leases, as to which either (a) there is an obligation of Borrower to pay more than \$50,000 in the aggregate, or (b) the term thereof extends beyond one year (unless cancelable on thirty (30) days or less notice without requiring the payment of termination fees or payments of any kind).

5.1.21 Changes in the Legal Requirements Regarding Taxation. If any Legal Requirement or other law, order, requirement or regulation of any Governmental Authority is enacted or adopted or amended after the date the Loan is funded which imposes a tax, either directly or indirectly, on the Obligations or Lender's interest in the Properties, Borrowers must pay or cause to be paid such tax, with interest and penalties thereon, if any. If Lender is advised by counsel chosen by it that the payment of such tax or interest and penalties by Borrowers would be unlawful or taxable to Lender or unenforceable or provide the basis for a defense of usury, then in any such event, Lender may, by written notice to Borrowers of not less than ninety (90) days, declare the Obligations immediately due and payable.

5.1.22 No Credits on Account of the Obligations. No Borrower will claim or demand or be entitled to any credit or credits on account of the Obligations for any payment of Taxes assessed against any Property and no deduction shall otherwise be made or claimed from the assessed value of any Property for real estate tax purposes because of the Loan Documents or the Obligations. If Legal Requirements or other laws, orders, requirements or regulations require such claim, credit or deduction, Lender may, by written notice to Borrowers of not less than ninety (90) days, declare the Obligations immediately due and payable.

5.1.23 Personal Property. Each Borrower shall cause all of its personal property, fixtures, attachments and equipment delivered upon, attached to or used in connection with the operation of its Property to always be located at such Property and shall be kept free and clear of all Liens, encumbrances and security interests, except Permitted Encumbrances.

Section 5.2 Negative Covenants. From the date hereof until payment and performance in full of the Obligations, each Borrower covenants and agrees with Lender that it will not do, directly or indirectly, any of the following:

5.2.1 Operation of Property. No Borrower shall, without Lender's prior consent (which consent shall be in Lender's sole and absolute discretion): enter into, amend, surrender, terminate, waive any rights under or cancel any management agreement.

5.2.2 Liens. No Borrower shall create, incur, assume, permit or suffer to exist any Lien on any portion of the Properties or permit any such action to be taken, except for Permitted Encumbrances or as otherwise provided herein.

5.2.3 Dissolution. No Borrower shall (a) engage in any dissolution, liquidation, consolidation or merger with or into any other business entity, (b) engage in any business activity not related to the ownership and operation of the Properties, (c) transfer, lease or sell, in one transaction or any

combination of transactions, the assets or all or substantially all of the properties or assets of Borrowers except to the extent permitted by the Loan Documents, or (d) modify, amend, waive or terminate its organizational documents or its qualification and good standing in any jurisdiction.

5.2.4 Change in Business. No Borrower shall enter into any line of business other than the ownership and operation of the Properties, or make any material change in the scope or nature of its business objectives, purposes or operations, or undertake or participate in activities other than the continuance of its present business.

5.2.5 Debt Cancellation. No Borrower shall cancel or otherwise forgive or release any claim or debt (other than termination of Leases in accordance herewith) owed to any Borrower by any Person, except for adequate consideration and in the ordinary course of such Borrower's business.

5.2.6 Zoning. No Borrower shall initiate or consent to any zoning reclassification of any portion of the Properties or seek any variance under any existing zoning ordinance, or use or permit the use of any portion of the Properties in any manner that could result in such use becoming a non-conforming use under any zoning ordinance or any other applicable land use law, rule or regulation, in each case, without the prior written consent of Lender.

5.2.7 No Joint Assessment. No Borrower shall suffer, permit or initiate the joint assessment of all or any portion of the Properties with (a) any other real property constituting a tax lot separate from the Properties, or (b) any portion of the Properties which may be deemed to constitute personal property, or any other procedure whereby the Lien of any taxes which may be levied against such personal property shall be assessed or levied or charged to the Properties.

5.2.8 Principal Place of Business and Organization. No Borrower shall change its principal place of business set forth in the introductory paragraph of this Agreement without first giving Lender at least thirty (30) days prior notice. No Borrower shall change the place of its organization as set forth in Section 4.1.24 without the consent of Lender, which consent shall not be unreasonably withheld. Upon Lender's request, Borrowers shall execute and deliver additional financing statements, security agreements and other instruments which may be necessary to effectively evidence or perfect Lender's security interest in the Properties as a result of such change of principal place of business or place of organization.

5.2.9 ERISA.

(a) No Borrower shall engage in any transaction which would cause any obligation, or action taken or to be taken, hereunder (or the exercise by Lender of any of its rights under the Note, this Agreement or the other Loan Documents) to be a non-exempt (under a statutory or administrative class exemption) prohibited transaction under ERISA.

(b) Each Borrower further covenants and agrees to deliver to Lender such certifications or other evidence from time to time throughout the term of the Loan, as requested by Lender in its sole discretion, that (1) no Borrower is an "employee benefit plan" as defined in Section 3(3) of ERISA, which is subject to Title I of ERISA, or a "governmental plan" within the meaning of Section 3(32) of ERISA; (2) no Borrower is subject to any state statute regulating investments of, or fiduciary obligations with respect to, governmental plans; and (3) one or more of the following circumstances is true: (i) Equity interests in a Borrower are publicly offered securities, within the meaning of 29 C.F.R. §2510.3-101(b)(2); (ii) Less than twenty-five percent (25%) of each outstanding class of equity interests in a Borrower is held by "benefit plan investors" within the meaning of 29 C.F.R. §2510.3-101(f)(2); (iii) a Borrower qualifies as an "operating company" or a "real estate operating company" within the meaning of 29 C.F.R. §2510.3-101(c) or (e); or (iv) The Loan meets the requirements of PTE 95-60, 90-1, 84-14 or similar exemption.

5.2.10 Transfers; Assumptions.

(a) Without the prior written consent of Lender and except to the extent otherwise set forth in this Section 5.2.10, no Transfer may occur without the prior written consent of Lender in its sole and absolute discretion.

(b) Notwithstanding the provisions of this Section 5.2.10, Lender's consent shall not be required in connection with a Permitted Transfer; *provided, however*, that all of the following conditions are satisfied with respect to any such Transfers: (1) Borrowers shall provide Lender thirty (30) days' prior written notice thereof (other than a Permitted Transfer for which notice shall occur within thirty (30) days' after such Transfer), (2) such Transfer shall not result in a change in the day-to-day management and operations of the Properties, (3) each Borrower shall continue to be a Special Purpose Entity, and (4) such Transfer shall not result in a breach of Section 5.2.9 or 5.2.13. Notwithstanding anything set forth herein, and without limiting any restrictions on any Transfer set forth herein, if any proposed transfer of any direct or indirect interests in any Borrower would otherwise be a Permitted Transfer or not require Lender's consent but shall result in any Person owning more than twenty percent (20%) of the direct or indirect legal, beneficial or economic interest in any Borrower (other than Persons currently owning more than twenty percent (20%) of the direct or indirect legal, beneficial or economic interest in any Borrower), approval of such transferee is required so that Lender can confirm the transfer and transferee complies with all legal and regulatory requirements and Lender policies relating to such transfer and transferee, including, without limitation, the Patriot Act and federal regulations issued with respect thereto and to ensure compliance with the representations in Section 4.1.30 hereof.

(c) Lender shall not be required to demonstrate any actual impairment of its security or any increased risk of default hereunder in order to declare the Debt immediately due and payable upon a Transfer without Lender's consent. This provision shall apply to every Transfer regardless of whether voluntary or not, or whether or not Lender has consented to any previous Transfer.

5.2.11 Operations Agreements. No Borrower shall, without the prior written consent of Lender, modify or terminate any of the Operations Agreements or waive any rights thereunder.

5.2.12 Special Purpose Entity/Separateness. Each Borrower is and shall continue to be a Special Purpose Entity.

5.2.13 Embargoed Person; OFAC. As of the date hereof and at all times throughout the term of the Loan, including after giving effect to any Transfers permitted pursuant to the Loan Documents, (a) none of the funds or other assets of any Borrower and any Guarantor constitute property of, or are beneficially owned, directly or indirectly, by any Embargoed Person; (b) no Embargoed Person has any interest of any nature whatsoever in any Borrower or any Guarantor, as applicable, with the result that the investment in any Borrower or any Guarantor, as applicable (whether directly or indirectly), is prohibited by law or the Loan is in violation of law; and (c) none of the funds of any Borrower or any Guarantor, as applicable, have been derived from any unlawful activity with the result that the investment in any Borrower or any Guarantor, as applicable (whether directly or indirectly), is prohibited by law or the Loan is in violation of law. Neither any Borrower nor any Guarantor is (or will be) a Person with whom Lender is restricted from doing business under OFAC regulations (including those persons named on OFAC's Specially Designated and Blocked Persons list) or under any statute, executive order (including the September 24, 2001 #13224 Executive Order Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism), or other governmental action and is not and shall not engage in any dealings or transactions or otherwise be associated with such Persons. In addition, to help the US Government fight the funding of terrorism and money laundering activities, The USA Patriot Act (and the regulations thereunder) requires Lender to obtain, verify and record information that identifies its customers. Borrowers shall provide Lender with any additional information that Lender deems necessary from time to time in order to ensure compliance with The USA Patriot Act and any other applicable Legal Requirements concerning money laundering and similar activities.

5.2.14 Distributions. No Borrower shall make or permit any Distribution.



5.2.15 Affiliate Agreements. No Borrower shall enter into any agreement with an Affiliate without Lender's prior written consent, in its sole and absolute discretion.

## ARTICLE VI

### INSURANCE; CASUALTY; CONDEMNATION

#### Section 6.1 Insurance.

(a) Borrowers shall obtain and maintain, or cause to be maintained, insurance for Borrowers and the Properties providing at least the following coverages:

(i) course of construction/builder's risk on a completed value form (non-reporting basis) for "All Risk" or "Special Form" insurance (including coverage for windstorm and hail damage) during any period of construction, insuring all material used or to be used for construction of the Improvements regardless of its location, whether on-site or off-site or while in transit (A) in an amount equal to one hundred percent (100%) of the "**Full Replacement Cost**," which for purposes of this Agreement shall mean actual replacement value (exclusive of costs of excavations) with no depreciation; (B) containing an agreed amount endorsement waiving all co-insurance provisions, or confirmation that co-insurance does not apply; (C) including a permission to occupy endorsement; (D) including coverage for not less than fifteen percent (15%) of soft costs which may be incurred by an insured as a result of any property loss or destruction; (E) including coverage for twelve (12) months rental value if there are any rents for the Properties; and (F) providing for no deductible in excess of Twenty-Five Thousand and No/100 Dollars (\$25,000.00) for all such insurance coverage. In addition, coverage for Flood and Water Damage will be included during the period of construction, no matter what flood zone applies. Coverage for earthquake in amounts and in form and substance satisfactory to Lender will only be required if a Property is located in an area with a high degree of seismic activity;

(ii) Once construction is completed, "All Risk" or "Special Form" insurance (including coverage for boiler/equipment breakdown, windstorm and hail damage) in an amount at least equal to the "Full Replacement Cost" of the Improvements; (B) containing an agreed amount endorsement waiving all co-insurance provisions, or confirmation that co-insurance does not apply; (C) providing for no deductible in excess of Twenty-Five Thousand and No/100 Dollars (\$25,000.00) for all such insurance coverage; and (D) if a Property is or becomes a legal "non-conforming" use or structure, ordinance or law coverage to compensate for the value of the undamaged portion of the Properties, the cost of demolition and increased cost of construction in amounts as requested by Lender. In addition, coverage for Flood will be required if any portion of the Improvements is currently, or at any time in the future, located in a Federally designated "special flood hazard area", in an amount equal to the Outstanding Principal Balance or such other amount as Lender shall require. Coverage for earthquake in amounts and in form and substance satisfactory to Lender will only be required if a Property is located in an area with a high degree of seismic activity. Lender will named as Mortgagee and Loss Payee on all policies referred above, and shall contain a standard non-contributing mortgagee clause in favor of Lender providing that the loss thereunder shall be payable to Lender);

(iii) commercial general liability insurance, carried by the Borrowers, including a broad form comprehensive general liability endorsement and coverage against claims for personal injury, bodily injury, death or property damage occurring upon, in or about the Properties, such insurance (A) to be on the so-called "occurrence" form with a combined limit of not less than Two Million and No/100 Dollars (\$2,000,000.00) in the aggregate and One Million and No/100 Dollars (\$1,000,000.00) per occurrence (and, if on a blanket policy, containing an "Aggregate Per Location" endorsement); (B) to continue at not less than the aforesaid limit until required to be changed by Lender in writing by reason of changed economic conditions making such protection inadequate; (C) to cover at least the following hazards: (1) premises and operations; (2) products and completed operations on an "if any" basis; (3) independent contractors; (4) blanket contractual liability for all insured contracts; and (5) contractual liability covering the indemnities contained in Article VIII of the Security Instrument to the extent the same is available; and (D) such coverage will not include any development or vacant land

exclusions. The policy shall name each Borrower as the insured and Lender (and its successors and assigns) as Additional Insured;

(iv) during the period of construction, commercial general liability insurance, carried by the contractor, including a broad form comprehensive general liability endorsement and coverage against claims for personal injury, bodily injury, death or property damage occurring upon, in or about the Properties, such insurance (A) to be on the so-called "occurrence" form with a combined limit of not less than Two Million and No/100 Dollars (\$2,000,000.00) in the aggregate, Two Million and No/100 Dollars (\$2,000,000) in the products/completed operations aggregate and One Million and No/100 Dollars (\$1,000,000.00) per occurrence (and, if on a blanket policy, containing an "Aggregate Per Project" endorsement); and (B) to cover at least the following hazards: (1) premises and operations; (2) products and completed operations; (3) independent contractors; (4) blanket contractual liability for all insured contracts; and (5) contractual liability. The policy shall name Lender (and its successors and assigns) as Additional Insured in the form of the ISO Additional Insured Endorsement (CG2010 11 85) or a combination of both (CG2010 04 14) and (CG2037 04 13) or equivalent (covering both ongoing and completed operations arising out of the contractors work). A Waiver of Subrogation in favor of Lender will also be provided;

(v) during the period of construction, each contractor shall carry motor vehicle liability coverage for all owned and non-owned vehicles, including rented and leased vehicles containing minimum limits per occurrence of not less than One Million and No/100 Dollars (\$1,000,000.00);

(vi) during the period of construction, each contractor shall carry worker's compensation including employers liability insurance in the minimum amount of One Million and No/100 Dollars (\$1,000,000). A Waiver of Subrogation in favor of Lender will also be provided;

(vii) if applicable and at Lender's request, the commercial property and general liability insurance required above shall cover perils of terrorism and acts of terrorism and Borrowers shall maintain commercial property for loss resulting from perils and acts of terrorism on terms (including amounts) consistent with those required above at all times during the term of the Loan so long as Lender determines that either (I) prudent owners of real estate comparable to the Properties are maintaining same or (II) prudent institutional lenders (including, without limitation, investment banks) to such owners are requiring that such owners maintain such insurance; and

(viii) upon sixty (60) days' notice, such other insurance and in such amounts as Lender from time to time may request against such other insurable hazards which at the time are commonly insured against for properties similar to the Properties located in or around the region in which the Properties are located.

(b) All insurance provided for in Section 6.1(a) shall be obtained under valid and enforceable policies (collectively, the "**Policies**" or in the singular, the "**Policy**"), and shall be subject to the approval of Lender as to insurance companies, amounts, deductibles, loss payees and insureds. The Policies shall be issued by financially sound and responsible insurance companies authorized to do business in the State and having a claims paying ability rating of "A-" or better by S&P or "A-X" or better by AM Best or "A3" or better by Moody's Investor Service, Inc.. Prior to the expiration dates of the Policies theretofore furnished to Lender, certificates of insurance evidencing the renewal or successor Policies accompanied by evidence satisfactory to Lender of payment of the premiums due thereunder (the "**Insurance Premiums**"), shall be delivered by Borrowers to Lender. Borrowers shall supply an original or certified copy of the original policy within ten (10) days of request by Lender, provided that the policy is available.

(c) Any blanket insurance Policy shall specifically allocate to the Properties the amount of coverage from time to time required hereunder and shall otherwise provide the same protection as would a separate Policy insuring only the Properties in compliance with the provisions of Section 6.1(a).

(d) All Policies provided for in Section 6.1 shall contain clauses or endorsements to the effect that: (i) no act or negligence of Borrowers, or anyone acting for Borrowers, or of any tenant or other occupant, or failure to comply with the provisions of any Policy, which might otherwise result in a forfeiture of the insurance or any part thereof, shall in any way affect the validity or enforceability of the insurance insofar as Lender is concerned; (ii) the Policies on which Lender is listed as a Mortgagee shall not be canceled without at least thirty (30) days' notice to Lender; (iii) Lender shall not be liable for any Insurance Premiums thereon or subject to any assessments thereunder; and (iv) shall contain a waiver of subrogation in favor of Lender.

(e) If at any time Lender is not in receipt of written evidence that all Policies are in full force and effect, Lender shall have the right, without notice to Borrowers, to take such action as Lender deems necessary to protect its interest in the Properties, including, without limitation, the obtaining of such insurance coverage as Lender in its sole discretion deems appropriate. All premiums incurred by Lender in connection with such action or in obtaining such insurance and keeping it in effect shall be paid by Borrowers to Lender upon demand and, until paid, shall be secured by the Security Instrument and shall bear interest at the Default Rate. Provided no Event of Default exists, Lender shall promptly provide Borrowers with notice of any such premiums incurred.

(f) Without limitation, Borrowers shall continue to maintain or cause to be maintained. all insurance that is in effect as of the date hereof.

Section 6.2 Casualty. If either of the Properties (or any portion thereof) shall be damaged or destroyed, in whole or in part, by fire or other casualty (a "**Casualty**"), Borrowers shall (a) give prompt notice of such damage to Lender, and (b) promptly commence and diligently prosecute the completion of Restoration so that the Properties resemble, as nearly as possible, the condition the Properties were in immediately prior to such Casualty, with such alterations as may be reasonably approved by Lender and otherwise in accordance with Section 6.4. Borrowers shall pay all costs of such Restoration whether or not such costs are covered by insurance. Lender may, but shall not be obligated to make proof of loss if not made promptly by Borrowers. In addition, Lender may participate in (and have approval rights over) any settlement discussions with any insurance companies with respect to any Casualty in which the Net Proceeds or the costs of completing Restoration are equal to or greater than five percent (5%) of the Outstanding Principal Balance and Borrowers shall deliver to Lender all instruments required by Lender to permit such participation.

Section 6.3 Condemnation. Borrowers shall promptly give Lender notice of the actual or threatened commencement of any proceeding in respect of Condemnation, and shall deliver to Lender copies of any and all papers served in connection with such proceedings. Lender may participate in any such proceedings, and Borrowers shall from time to time deliver to Lender all instruments requested by Lender to permit such participation. Borrowers shall, at its expense, diligently prosecute any such proceedings, and shall consult with Lender, its attorneys and experts, and cooperate with them in the carrying on or defense of any such proceedings. Notwithstanding any taking by any public or quasi-public authority through Condemnation or otherwise (including, but not limited to, any transfer made in lieu of or in anticipation of the exercise of such taking), Borrowers shall continue to perform the Obligations at the time and in the manner provided in this Agreement and the other Loan Documents and the Outstanding Principal Balance shall not be reduced until any Award shall have been actually received and applied by Lender, after the deduction of expenses of collection, to the reduction or discharge of the Obligations. Lender shall not be limited to the interest paid on the Award by the applicable Governmental Authority but shall be entitled to receive out of the Award interest at the rate or rates provided herein or in the Note. If the Properties or any portion thereof are taken by a Governmental Authority, Borrowers shall promptly commence and diligently prosecute Restoration and otherwise comply with the provisions of Section 6.4. If the Properties are sold, through foreclosure or otherwise, prior to the receipt by Lender of the Award, Lender shall have the right, whether or not a deficiency judgment on the Note shall have been sought, recovered or denied, to receive the Award, or a portion thereof sufficient to pay the Debt.

Section 6.4 Restoration. If there are any Improvements on either of the Properties, the following provisions shall apply:

(a) If the Net Proceeds and the costs of completing Restoration shall each be less than five percent (5%) of the Outstanding Principal Balance, then the Net Proceeds will be disbursed by Lender to Borrowers upon receipt, provided that all of the conditions set forth in Section 6.4(b)(i) are met and Borrowers deliver to Lender a written undertaking to expeditiously commence and to satisfactorily complete with due diligence Restoration in accordance with the terms of this Agreement.

(b) If the Net Proceeds are equal to or greater than five percent (5%) of the Outstanding Principal Balance, but less than twenty percent (20%) of the original principal balance of the Loan, or the costs of completing Restoration are equal to or greater than five percent (5%) of the Outstanding Principal Balance, but less than twenty percent (20%) of the original principal balance of the Loan, then, in either case, the Net Proceeds will be held by Lender and Lender shall make the Net Proceeds available for Restoration in accordance with the provisions of this Section 6.4. The term "**Net Proceeds**" for purposes of this Section 6.4 shall mean: (i) the net amount of all insurance proceeds received by Lender pursuant to Section 6.1(a)(i), (iv), (vi), (ix) and (x) as a result of such damage or destruction, after deduction of Lender's reasonable costs and expenses (including, but not limited to, reasonable counsel costs and fees), if any, in collecting same ("**Insurance Proceeds**"), or (ii) the net amount of the Award, after deduction of Lender's reasonable costs and expenses (including, but not limited to, reasonable counsel costs and fees), if any, in collecting same ("**Condemnation Proceeds**"), whichever the case may be.

(i) The Net Proceeds shall be made available to Borrowers for Restoration upon the determination of Lender in its sole discretion that the following conditions are met:

(A) no Event of Default shall have occurred and be continuing;

(B) in the event the Net Proceeds are Condemnation Proceeds, less than ten percent (10%) of the land constituting the Properties is taken, and such land is located along the perimeter or periphery of the Properties, and no portion of the Improvements is located on such land;

(C) if applicable, Leases demising in the aggregate a percentage amount equal to or greater than ninety percent (90%) of the total rentable space in the Properties which has been demised under executed and delivered Leases in effect as of the date of the occurrence of such Casualty or Condemnation, whichever the case may be, shall remain in full force and effect during and after the completion of Restoration, notwithstanding the occurrence of any such Casualty or Condemnation, whichever the case may be, and will make all necessary repairs and restorations thereto at their sole cost and expense;

(D) Borrowers shall commence Restoration as soon as reasonably practicable (but in no event later than sixty (60) days after such Casualty or Condemnation, whichever the case may be, occurs) and shall diligently pursue the same to satisfactory completion;

(E) Lender shall be satisfied that any operating deficits, including all scheduled payments of principal and interest under the Note, which will be incurred with respect to the Properties as a result of the occurrence of any such Casualty or Condemnation, whichever the case may be, will be covered out of (1) the Net Proceeds, (2) the insurance coverage referred to in Section 6.1(a)(iii), if applicable, or (3) by other funds of Borrowers;

(F) Lender shall be satisfied that Restoration will be completed on or before the earliest to occur of (i) four (4) months prior to the Maturity Date, (ii) the earliest date required for such completion under the terms of any Leases, (iii) such time as may be required under all applicable Legal Requirements in order to repair and restore each Property to the condition it was in immediately prior to such Casualty or to as nearly as possible the condition it was in immediately prior to such Condemnation, as applicable, or (iv) the expiration of the insurance coverage referred to in Section 6.1(a)(iii);

(G) each Property and the use thereof after Restoration will be in compliance with and permitted under all applicable Legal Requirements;

(H) Restoration shall be done and completed by Borrowers in an expeditious and diligent fashion and in compliance with all applicable Legal Requirements;

(I) such Casualty or Condemnation, as applicable, does not result in the loss of access to the Properties or the related Improvements;

(J) Borrowers shall deliver, or cause to be delivered, to Lender a signed detailed budget approved in writing by Borrowers' architect or engineer stating the entire cost of completing Restoration, which budget shall be acceptable to Lender; and

(K) the Net Proceeds together with any cash or cash equivalent deposited by Borrowers with Lender are sufficient in Lender's discretion to cover the cost of Restoration.

(ii) The Net Proceeds shall be paid directly to Lender for deposit in an interest-bearing account (the "**Net Proceeds Account**") and, until disbursed in accordance with the provisions of this Section 6.4(b), shall constitute additional security for the Debt and the Other Obligations. The Net Proceeds shall be disbursed by Lender to, or as directed by, Borrowers from time to time during the course of Restoration, upon receipt of evidence satisfactory to Lender that (A) all materials installed and work and labor performed (except to the extent that they are to be paid for out of the requested disbursement) in connection with Restoration have been paid for in full, and (B) there exist no notices of pendency, stop orders, mechanic's or materialman's liens or notices of intention to file same, or any other liens or encumbrances of any nature whatsoever on the Properties which have not either been fully bonded to the satisfaction of Lender and discharged of record or in the alternative fully insured to the satisfaction of Lender by the Title Company.

(iii) All plans and specifications required in connection with Restoration shall be subject to prior review and acceptance in all respects by Lender in its discretion and by an independent consulting engineer selected by Lender (the "**Casualty Consultant**"). Lender shall have the use of the plans and specifications and all permits, licenses and approvals required or obtained in connection with Restoration. The identity of the contractor engaged in Restoration, as well as the contracts under which it has been engaged, shall be subject to prior review and acceptance by Lender in its discretion and the Casualty Consultant. All costs and expenses incurred by Lender in connection with making the Net Proceeds available for Restoration including, without limitation, reasonable counsel fees and disbursements and the Casualty Consultant's fees, shall be paid by Borrowers.

(iv) In no event shall Lender be obligated to make disbursements of the Net Proceeds in excess of an amount equal to the costs actually incurred from time to time for work in place as part of Restoration, as certified by the Casualty Consultant, minus the Retention Amount. The term "**Retention Amount**" shall mean, as to each contractor, subcontractor or materialman engaged in Restoration, an amount equal to ten percent (10%) of the costs actually incurred for work in place as part of Restoration, as certified by the Casualty Consultant, until Restoration has been completed. The Retention Amount shall in no event, and notwithstanding anything to the contrary set forth above in this Section 6.4(b), be less than the amount actually held back by Borrowers from contractors, subcontractors and materialmen engaged in Restoration. The Retention Amount shall not be released until the Casualty Consultant certifies to Lender that Restoration has been completed in accordance with the provisions of this Section 6.4(b) and that all approvals necessary for the re-occupancy and use of the Property have been obtained from all appropriate Governmental Authorities, and Lender receives evidence satisfactory to Lender that the costs of Restoration have been paid in full or will be paid in full out of the Retention Amount; *provided, however*, that Lender will release the portion of the Retention Amount being held with respect to any contractor, subcontractor or materialman engaged in Restoration as of the date upon which the Casualty Consultant certifies to Lender that the contractor, subcontractor or materialman has satisfactorily completed all work and has supplied all materials in accordance with the provisions of the

contractor's, subcontractor's or materialman's contract, the contractor, subcontractor or materialman delivers the lien waivers and evidence of payment in full of all sums due to the contractor, subcontractor or materialman as may be requested by Lender or by the Title Company issuing the Title Insurance Policies, and Lender receives an endorsement to the Title Insurance Policies insuring the continued priority of the lien of the related Security Instrument and evidence of payment of any premium payable for such endorsement. If required by Lender, the release of any such portion of the Retention Amount shall be approved by the surety company, if any, which has issued a payment or performance bond with respect to the contractor, subcontractor or materialman.

(v) Lender shall not be obligated to make disbursements of the Net Proceeds more frequently than once every calendar month.

(vi) If at any time the Net Proceeds or the undisbursed balance thereof shall not, in the opinion of Lender in consultation with the Casualty Consultant, be sufficient to pay in full the balance of the costs which are estimated by the Casualty Consultant to be incurred in connection with the completion of Restoration, Borrowers shall deposit the deficiency (the "**Net Proceeds Deficiency**") with Lender before any further disbursement of the Net Proceeds shall be made. The Net Proceeds Deficiency deposited with Lender shall be held by Lender and shall be disbursed for costs actually incurred in connection with Restoration on the same conditions applicable to the disbursement of the Net Proceeds, and until so disbursed pursuant to this Section 6.4(b) shall constitute additional security for the Debt and the Other Obligations.

(vii) The excess, if any, of the Net Proceeds and the remaining balance, if any, of the Net Proceeds Deficiency deposited with Lender after the Casualty Consultant certifies to Lender that Restoration has been completed in accordance with the provisions of this Section 6.4(b), and the receipt by Lender of evidence satisfactory to Lender that all costs incurred in connection with Restoration have been paid in full, shall be remitted by Lender to Borrowers, provided no Event of Default shall have occurred and shall be continuing.

(c) If Net Proceeds are (i) equal to or greater than twenty percent (20%) of the original principal amount of the Loan, (ii) not required to be made available for Restoration (due to Borrowers' inability to satisfy the conditions set forth in Section 6.4(b)(i) or otherwise), or (iii) not to be returned to Borrowers as excess Net Proceeds pursuant to Section 6.4(b)(vii), then in any such event all Net Proceeds may be retained and applied by Lender in accordance with Section 2.4.2 hereof toward reduction of the Outstanding Principal Balance whether or not then due and payable in such order, priority and proportions as Lender in its sole discretion shall deem proper, or, in the sole discretion of Lender, the same may be paid, either in whole or in part, to Borrowers for such purposes as Lender shall approve, in its sole discretion. No prepayment charge shall be payable by Borrowers by reason of a Casualty or Condemnation.

(d) In the event of foreclosure of the Security Instrument, or other transfer of title to the Properties in extinguishment in whole or in part of the Debt all right, title and interest of Borrowers in and to the Policies that are not blanket Policies then in force concerning the Properties and all proceeds payable thereunder shall thereupon vest in the purchaser at such foreclosure or Lender or other transferee in the event of such other transfer of title.

## ARTICLE VII

### RESERVE FUNDS

#### Section 7.1 Tax and Insurance Escrow.

7.1.1 Tax and Insurance Escrow Funds. On the date hereof, Borrowers shall deposit with Lender the Initial Tax Deposit on account of the Taxes next coming due and the Initial Insurance Premiums Deposit on account of the Insurance Premiums next coming due. Additionally, Borrowers shall pay to Lender any additional amount that may be necessary to pay Taxes and Insurance Premiums next

coming due during the term of this Loan (the foregoing amounts so deposited with Lender are hereinafter called the "**Tax and Insurance Escrow Funds**" and the account in which such amounts are held shall hereinafter be referred to as the "**Tax and Insurance Escrow Account**").

7.1.2 Disbursements from Tax and Insurance Escrow Funds. Provided no Event of Default has occurred and is continuing, Lender will reimburse Borrowers from the Tax and Insurance Escrow Funds for payments of Taxes required to be made by Borrowers pursuant to Section 5.1.2 hereof and under the Security Instrument. In making any payment to Borrowers relating to the Tax and Insurance Escrow Funds, Lender may require evidence of payment satisfactory to Lender, including copies any cancelled checks, and any bill or statement from the appropriate public office (with respect to Taxes). Any amount remaining in the Tax and Insurance Escrow Funds after the Debt has been paid in full shall be returned to Borrowers. In allocating such excess, Lender may deal with the Person shown on the records of Lender to be the owner of the Properties. If at any time Lender reasonably determines that the Tax and Insurance Escrow Funds are not or will not be sufficient to pay Taxes by the due dates thereof, Lender shall notify Borrowers of such determination and Borrowers shall increase their monthly payments to Lender by the amount that Lender estimates is sufficient to make up the deficiency at least thirty (30) days prior to the due date of the Taxes.

Section 7.2 Debt Service Reserve. At Closing, Borrowers shall deposit with Lender an amount equal to the Debt Service Reserve, and the account in which such amounts are held shall hereinafter be referred to as Borrowers' "**Debt Service Reserve Account**". Provided that no Event of Default exists, Lender shall release funds to itself solely for the payment of Accrued Interest from the Debt Service Reserve in an amount equal to the Accrued Interest on each Payment Date. Amounts under this paragraph may also be funded or deemed funded by Lender out of the Loan proceeds at Closing and such amounts shall accrue interest (regardless as to whether actually deposited into the Deposit Service Reserve Account or book entries evidencing the commitment to make such advance).

Section 7.3 Acquisition of 6244 Property.

7.3.1 6244 Acquisition Reserve. The 6244 Acquisition Reserve will not be funded at Closing but will be disbursed, if at all, pursuant to the terms and conditions of this Section 7.3. Until funded or deemed funded, no interest shall accrue on the 6244 Acquisition Reserve.

7.3.2 Funding of 6244 Acquisition Reserve. Lender shall have no obligation to fund the 6244 Acquisition Reserve and any decision to fund the 6244 Acquisition Reserve shall be in its sole and absolute discretion. Without limitation, Lender does not currently intend to fund the 6244 Acquisition Reserve if any of the following conditions have not been satisfied:

- (a) No Default or Event of Default shall have occurred.
- (b) 6244 Borrower shall acquire the 6244 Property concurrently with release of the 6244 Acquisition Reserve. The 6244 Acquisition Reserve shall be used solely for the acquisition of the 6244 Property and for costs approved by Lender in connection therewith its sole discretion.
- (c) The 6244 Loan Documents, in form and substance satisfactory to Lender, shall have been duly executed and delivered by the parties thereto and shall be in full force and effect, and Lender shall have received the originals or fully executed counterparts thereof.
- (d) Borrower shall have paid all fees and expenses required by this Agreement, to the extent due and payable, including, without limitation, attorneys' fees and expenses of Lender's outside counsel, the title and appraisal, environmental and engineering evaluation fees. Such fees and expenses are payable regardless as to whether funds in the 6244 Acquisition Reserve are released.

(e) Lender shall have received an appraisal, commissioned by Lender at Borrower's cost and expense, which (i) is acceptable to Lender in its sole and absolute discretion, and (ii) shows an as-Is Loan to Value Ratio after full funding of the Loan of not greater than seventy-five percent (75%).

(f) Borrower shall have delivered to Lender the paid 6244 Title Insurance Policy in all respects satisfactory to Lender and Lender's outside counsel (together with true, correct and complete copies of all exceptions to the 6244 Title Insurance Policy), showing the 6244 Security Instrument as a valid first priority perfected mortgage lien on the 6244 Property in the full maximum amount of the Loan (with a tie-in endorsement to the existing 6160 Title Insurance Policy), subject only to the Permitted Encumbrances, together with all endorsements as required by Lender, along with co-insurance or reinsurance, if applicable, in such forms and amounts as may be required by Lender, together with an endorsement to the 6160 Title Insurance Policy in a form acceptable to Lender insuring current lien priority.

(g) Borrower shall have delivered to Lender the 6244 Survey prepared in accordance with Lender's survey requirements, certified by a land surveyor registered as such in the State, which Survey shall be in form and substance satisfactory to Lender.

(h) Borrower shall have delivered to Lender a Standard Flood Hazard Determination.

(i) Borrower shall have delivered to Lender a Phase I environmental assessment report or reports (and, if required by Lender, a Phase II environmental assessment report or reports) of the 6244 Property, each prepared by a qualified environmental engineering or similar inspection firm approved by Lender, and each in form, scope and substance satisfactory to Lender, which report or reports shall indicate a condition of the 6244 Property in all respects satisfactory to Lender for its intended use and upon which report or reports Lender is expressly entitled to rely.

(j) Borrower shall have delivered to Lender evidence satisfactory to Lender as to the current zoning for the 6244 Property and the current state of entitlements for the 6244 Property together with a Construction Contract approved by Lender in its sole discretion.

(k) Without limitation of Section 7.3.2(i), Borrower shall have delivered to Lender evidence satisfactory to Lender that all approvals by any Governmental Authority necessary for the ownership of the 6244 Property and the development and operation of the 6244 Project have been obtained and that Borrower shall have complied with all Legal Requirements, including, without limitation, all land use, building, subdivision, entitlement, zoning and similar ordinances and regulations promulgated by any Governmental Authority.

(l) Lender shall have reviewed and approved the 6244 Construction Budget.

(m) Lender's investment committee shall have approved the funding of the 6244 Acquisition Reserve.

(n) Borrower shall have delivered to Lender true, correct and complete certified copies of such organizational documents of each Borrower (including updated good-standing certificates) as Lender shall require, and the same shall be acceptable to Lender in all respects.

(o) Lender shall have received opinions, in form, substance and scope satisfactory to Lender and Lender's outside counsel, from counsel to Borrowers and Guarantor as to such matters as Lender may require including the due authorization, execution and delivery and enforceability of the 6244 Loan Documents and the balance of the Loan Documents.



(p) Borrower shall have delivered to Lender all financial statements, with respect to Borrower, Guarantor and/or the 6244 Property, required under this Agreement or any of the other Loan Documents.

(q) Borrower shall have delivered to Lender true, correct and complete copies of all service contracts and development agreements and all other Project Documents with respect to the 6244 Property, each in form and substance satisfactory to Lender.

(r) Upon request by Lender, Borrower shall have delivered to Lender geotechnical reports with respect to the 6244 Property, each in form and substance satisfactory to Lender.

(s) The representations and warranties made by Borrowers and Guarantor herein and in the other Loan Documents or otherwise made by or on behalf of any Borrower or Guarantor in connection therewith shall have been true and correct in all material respects on the date on which made and shall continue to be true and correct in all material respects on the date of release of funds as if remade on such date.

(t) All proceedings in connection with the transactions contemplated by this Agreement and the other Loan Documents shall be satisfactory to Lender and Lender's outside counsel in form and substance, and Lender shall have received all information and such counterpart originals are true, correct and complete certified copies of such documents and such other certificates, opinions or documents as Lender and Lender's outside counsel may require.

(u) Borrower shall have delivered to Lender such other reports, documents and certificates as Lender or Lender's outside counsel may require in their sole and absolute discretion.

(v) Borrower shall have delivered to Lender funds sufficient to increase the Reserve Funds other than the 6244 Acquisition Reserve as Lender may request in its sole and absolute discretion.

If the 6244 Acquisition Reserve is funded, Lender will fund it in its entirety into the applicable Reserves as determined by Lender. Amounts deposited into Reserves be actual amounts deposited into the Reserves or may be book entries evidencing the commitment to make such advance, but all such amounts shall accrue interest from the date of advance or deemed advance.

#### Section 7.4 Reserve Funds, Generally.

(a) Each Borrower (i) hereby grants to Lender a first priority security interest in all of the Reserve Funds and the Payment Account and any and all monies now or hereafter deposited in each Reserve Account or the Payment Account as additional security for payment and performance of the Obligations and (ii) will take all actions necessary to maintain in favor of Lender a perfected first priority security interest in the Reserve Funds and the Payment Account, including, without limitation, filing or authorizing Lender to file UCC-1 financing statements and continuations thereof. Until expended or applied in accordance herewith, the Reserve Funds and the Payment Account shall constitute additional security for the Obligations.

(b) Upon the occurrence of an Event of Default, Lender may, in addition to any and all other rights and remedies available to Lender, apply any sums then present in any or all of the Reserve Funds or the Payment Account to the reduction of the Outstanding Principal Balance or the payment of any other amounts then due and owing under this Agreement or any of the other Loan Documents in any order in its sole discretion.

(c) No Borrower shall further pledge, assign or grant any security interest in any Reserve Fund or the Payment Account or the monies deposited therein or permit any lien or encumbrance to attach thereto, or any levy to be made thereon, or any UCC-1 financing statements, except those naming Lender as the secured party, to be filed with respect thereto.

(d) Neither the Reserve Funds nor amounts in the Payment Account shall constitute trust funds and may be commingled with other monies held by Lender. No earnings or interest on the Reserve Funds shall be payable to Borrowers. Lender shall not have any obligation to keep or maintain such Reserve Funds or any funds deposited therein in interest bearing accounts.

(e) Each Borrower shall indemnify Lender and hold Lender harmless from and against any and all actions, suits, claims, demands, liabilities, losses, damages, obligations and costs and expenses (including litigation costs and reasonable attorneys' fees and expenses) (collectively, "**Claims**") arising from or in any way connected with the Reserve Funds or the Payment Account or the performance of the obligations for which the Reserve Funds or Payment Account were established; provided, however, no Borrower shall be obligated to indemnify Lender for any such Claims to the extent arising from Lender's gross negligence or willful misconduct. Borrowers shall assign to Lender all rights and claims any Borrower may have against all Persons supplying labor, materials or other services which are to be paid from or secured by the Reserve Funds; *provided, however*, that Lender may not pursue any such right or claim unless an Event of Default has occurred and remains uncured.

## Section 7.5 Construction Reserve Funds.

### 7.5.1 Disbursement of Construction Reserve Funds.

(a) Reserve. At Closing, Borrowers shall deposit with Lender an amount equal to the Construction Reserve, which will be released, if at all, pursuant to the terms and conditions of this Section 7.5. Amounts under this paragraph may also be funded or deemed funded by Lender out of the Loan proceeds at Closing and such amounts shall accrue interest (regardless as to whether actually deposited into the Construction Reserve or book entries evidencing the commitment to make such advance).

#### (b) General Terms.

(i) Subject to all conditions precedent set forth above, the proceeds of the Loan and any Borrowers' Funds shall be disbursed in accordance with the applicable Construction Budget (and, for the avoidance of doubt, Lender shall only be required to release funds for the 6160 Project unless the 6244 Acquisition Reserve is funded) to pay (or, at Lender's election, in its sole and absolute discretion, to require Borrowers to make such payments and then reimburse Borrowers) for costs of construction actually incurred, subject to a retention in accordance with the terms of this Agreement.

(ii) Without Lender's written approval, Lender shall not make disbursement (A) more frequently than monthly, or (B) in increments less than One Hundred Thousand and No/100 Dollars (\$100,000.00), or (C) in excess of the percentage of construction completed as certified by Lender's inspector.

(iii) The maximum amount of advances which Borrowers may request for the Improvements or for any component or phase thereof shall be as set forth in the Construction Budget.

(iv) Lender shall not be obligated to disburse Loan proceeds for the payment of any cost if the amount of such cost, together with the amounts of other costs included within the same "line-item" in the Construction Budget for which requests for advances have previously been submitted and approved, exceeds the amount set forth in the Construction Budget for such line-item, unless Borrowers furnish to Lender documentary evidence satisfactory to Lender that any such excess cost is offset by a reduction, in nature satisfactory to Lender, of at least an equal amount in another line-item in the Construction Budget, and Lender approves in writing a revision to the Construction Budget (provided, however, that if work for a line item has been completed and not all funds for such line item have been completed, then, upon the written request of Borrowers, Lender shall not unreasonably

withhold its consent to a reallocation of such cost savings to other line items within the Construction Budget). In addition, upon written request by Borrowers, Lender shall disburse proceeds with respect to the contingency line item to Borrowers so long as the proportion of contingency line item disbursed to or for the benefit of Borrowers to the original amount of the contingency line item must equal or exceed the percentage completion of the Projects. Notwithstanding the foregoing, if Borrowers have expended cash resources of Borrowers at a time when Lender was not obligated to disburse funds allocated to contingency (because the use of the contingency caused the use of contingency (as a percentage of the budgeted contingency) to exceed the then percentage completion of the work), then once additional amounts of the contingency line item become available for disbursement and use pursuant to the terms of this Agreement (because the percentage completion exceeds the percentage of used contingency relative to total budgeted contingency), Borrowers may request a disbursement for purposes of reimbursement of such expenditure of Borrowers.

(v) At its option, Lender may make disbursements to cover any expenses or charges which are to be borne by Borrowers, including, but not limited to, the cost of any required legal fees, appraisals, inspections, certifications or surveys. At its sole option, Lender may make any disbursements by payment to a Borrower or jointly to a Borrower and any contractor, subcontractor, supplier, or other person performing work or furnishing materials in connection with the construction of the Project. All disbursements shall be applied by Borrowers solely for the purposes for which the funds have been disbursed.

(vi) All disbursements shall be made first from Borrowers' Funds and then from available Loan funds.

(vii) If the outstanding principal balance of the Loan ever exceeds the maximum amount of the Loan, then all such amounts shall nonetheless be evidenced by the Note, however, Borrowers shall, within five (5) Business Days after Lender's demand or Borrowers' earlier discovery of such advance, pay to Lender an amount equal to such excess principal amount and accrued but unpaid interest thereon.

(viii) All requests for advances shall clearly identify any amounts requested for payment to an Affiliate of Borrowers or any Guarantor. Unless expressly set forth in the then effective Construction Budget or this Agreement, no developer's, management, consulting or brokerage fee or commission, developer profit or other payment to any Affiliate of Borrowers or any Guarantor will be paid directly or indirectly from any proceeds of the Loan without Lender's prior written approval.

(c) Withholding of Advances/Retention. Lender may withhold advances under the following circumstances, in addition to the circumstances described elsewhere in this Agreement:

(i) Lender may withhold any advance if the request therefor is not accompanied by (A) a standard bills paid affidavit executed by Borrowers, and (B) executed statutory lien waivers for all work done, equipment leased, and materials supplied, through the date of the immediately preceding request for an advance.

(ii) Ten percent (10%) of each advance for hard costs shall be retained by Lender until (A) Architect has certified, and the Lender's inspector has confirmed, on AIA Form G704 or other appropriate form, that the relevant portion of the Projects have been substantially completed in accordance with the Plans and Specifications in accordance with the terms and conditions hereof, and (B) each applicable governmental authority shall have duly inspected and approved the relevant portion of the Projects and issued the appropriate permit, license or certificate to evidence such approval. The retainage portion of each advance for labor, services and/or material will be disbursed following such timely completion of the Projects in question unless Lender, in its sole discretion, agrees to disbursements at an earlier stage.

(d) Disbursements Prior to Final Disbursement. Each disbursement of Construction Reserve Funds shall be released subject to satisfaction of the following conditions, any of which may be waived by Lender in Lender's sole discretion:

(i) All items required to be delivered under Section 7.3 shall have been delivered, and Guarantor's tax returns for 2016 and 2017 shall have been delivered to Lender's satisfaction;

(ii) Lender shall have approved the Plans and Specifications in its sole and absolute discretion;

(iii) Lender shall have approved the Construction Contracts and Construction Budgets in its sole and absolute discretion;

(iv) Any request for a disbursement of Construction Reserve Funds shall be submitted to Lender on Lender's form of request, not less than ten (10) Business Days prior to the anticipated date for the disbursement of Construction Reserve Funds and shall be accompanied by all evidence required to be approved by Lender as a condition to such disbursement, including an Officer's Certificate stating that said conditions are then satisfied;

(v) Borrowers shall have paid a fee of One Thousand Dollars and No/100 (\$1,000.00) (the "**Construction Draw Fee**") in connection with each disbursement request;

(vi) Lender shall have approved all Project Documents and any modifications to the Project Documents (including the Construction Budget and the Completion Schedule), and all such Project Documents shall be in full force and effect;

(vii) If required by Lender, Construction Contracts designated by Lender (including subcontracts if the general contractor is an Affiliate of Borrowers or Guarantor) shall have been collaterally assigned to Lender on Lender's form and acknowledged by the applicable contractor;

(viii) Disbursement of Construction Reserve Funds shall only be used for the purposes noted in the Construction Budget and shall not exceed the lesser of (i) the amount of the Construction Reserve Funds, and (ii) the amount of the applicable Construction Costs actually incurred by Borrower in accordance with the applicable Construction Budget;

(ix) Borrowers shall be in compliance with the terms and conditions of Article III;

(x) Lender's consultant, if applicable, shall have issued a report dated within ten (10) days' prior to any requested disbursement of Construction Reserve Funds to the effect that the Projects are in substantial compliance with the Plans and Specifications and other Project Documents and that the Projects are In-Balance;

(xi) Lender shall not be required to make more than one disbursement of Construction Reserve Funds in any calendar month; each monthly disbursement shall be in a minimum amount of \$50,000 or, if less, the remaining undisbursed amount of the Construction Reserve Funds;

(xii) Disbursement of Construction Reserve Funds made in connection with any Project shall be subject to contractor retainages of ten percent (10%) of the value of work performed, as determined by Lender;

(xiii) All materials for the Projects for which a disbursement of Construction Reserve Funds has been requested shall have been installed at the Properties;

(xiv) Contractors, subcontractors and materialmen shall have submitted such sworn statements, affidavits, lien waivers and invoices (evidencing payment in full if amounts are being paid as reimbursement; provided, however, at Lender's election payment) as Lender or the Title Company may require;

(xv) Lender shall have received notices of title continuation showing that since the date of the last disbursement of Construction Reserve Funds there has been no adverse change in the state of title to the Properties not approved by Lender, and, to the extent that any new improvements have been constructed at the Properties outside their footprint on the date of the most recent survey, no adverse survey exceptions with respect to the Properties not theretofore approved by Lender, and Lender may, in its discretion, require an endorsement to the Title Insurance Policies, in form and content satisfactory to Lender, insuring, in effect, that such disbursement has the same priority as the initial disbursement of the Loan and that there has been no Material Adverse Change in the condition of title to the Properties since the issuance of each of the Title Insurance Policies;

(xvi) No actions, suits or proceedings shall then be pending nor have any been threatened against or which affect any Borrower, any Guarantor or any Property that could have a Material Adverse Change on Borrowers, Guarantor or the Properties;

(xvii) No Default or Event of Default shall have occurred and be continuing and all representations and warranties set forth in this Agreement and in any other Loan Document shall be materially true and correct as of the date of Borrowers' request for the disbursement, the date the disbursement is made, and immediately following the making of the disbursement;

(xviii) All permits, licenses and approvals, including, without limitation, all environmental approvals, necessary for Completion of the Projects (or for the current stage of construction) in compliance with the Construction Contracts shall have been issued in form and substance satisfactory to Lender;

(xix) To the extent that additional permits, approvals or licenses for construction have been issued since the last disbursement, copies of such additional permits shall have been delivered to Lender;

(xx) The Projects, when completed in accordance with applicable Project Documents, will be in compliance with all applicable Legal Requirements and all consents or approvals required from third parties or any Governmental Authority have been obtained or will be obtained prior to the time that such approvals are required;

(xxi) There shall be no substantial unrepaired damage to the Properties by fire or other casualty which is not in Lender's judgment adequately covered by collectible proceeds of insurance;

(xxii) Borrowers shall have paid all of the costs and expenses incurred by Lender, including reasonable attorneys' fees and expenses, all title premiums and other title and survey charges in connection with the proposed disbursement;

(xxiii) Borrowers shall have provided evidence satisfactory to Lender in its sole and absolute discretion that Borrowers have invested at least \$4,600,000 in the Properties;

(xxiv) The Loan shall be In-Balance;

(xxv) Lender shall have received and approved copies of all subcontracts (or other contracts) in an amount in excess of \$100,000;

(xxvi) Borrowers shall have delivered to Lender (A) a request for the advance in a form acceptable to Lender, (B) a copy of each contractor's application for payment to Borrowers, signed by Architect and confirmed by Lender's inspector, on AIA Forms G702 and G703/G703A or other forms acceptable to Lender, (C) if requested by Lender, paid invoices or receipts and unconditional statutory lien waivers for all construction work and costs included in the previous request for advance, and evidence reasonably satisfactory to Lender that all prior advances have been used for purposes described in this Agreement and the Construction Budget; (D) if requested by Lender, evidence that any inspection required by any governmental authority has been completed with results satisfactory to that governmental authority and a detailed itemization of the Construction Agreement and allocated costs of any work to be performed thereunder on AIA Form G702 or such other forms as may be acceptable to Lender, (E) if requested by Lender, a true and correct current statement of all obligations incurred for labor performed and materials ordered or delivered, and (F) such certifications of job progress, in form satisfactory to Lender, as Lender may request. Lender shall have the right to inspect all books, records and accounts relating to such work, and may, at its option, require execution by Borrower and any contractors, subcontractors, laborers and materialmen of such affidavits, endorsements and releases as Lender deems necessary;

(xxvii) The representations and warranties contained in this Agreement shall be true and correct and complete, and not misleading in any respect on the date of Advance; and

(xxviii) In addition to, and not in lieu of any condition set forth in this Section above, Lender shall have the right to condition any disbursement upon Lender's receipt and approval of the following: (i) bills, invoices, documents of title, vouchers, statements, payroll records, receipts and any other documents evidencing the total amount expended, incurred or due for any requested line-item in the Construction Budget; (ii) evidence of Borrowers' use of a lien release, joint check and voucher system acceptable to Lender for payments or disbursements to any contractor, subcontractor, materialman, supplier or lien claimant; (iii) architect's, independent supervising architect's and/or engineer's periodic certifications of the percentage and/or stage of construction that has been completed and its conformance to the Plans and Specifications and governmental requirements based upon any such architect's, independent supervising architect's and/or engineer's periodic physical inspections of the Properties and Projects; waivers and releases of any mechanics' lien, stop payment notice claim, equitable lien claim or other lien claim rights; and (iv) any other document, requirement, update, evidence, endorsement, certification or information that Lender may request under any provision of the Loan Documents.

(e) Final Disbursement. In addition to the other requirements herein, Lender shall not be obligated to make the final disbursement until Lender has received the following in form and substance satisfactory to Lender in its sole and absolute discretion:

(i) Completion. Evidence that the Projects have been Completed prior to the Completion Date and in accordance with the Plans and Specifications;

(ii) As-Built Survey. A copy of one or more as-built surveys prepared by a registered surveyor showing all of the Projects in place, including striping of parking areas and a statement as to the number of parking spaces and that they satisfy local statutory ordinances or regulatory requirements. The survey or surveys shall be certified to Lender, Borrowers, and the title company and shall also include a narrative metes and bounds description of the boundary of the land, the areas of the land and of the Projects, the location and dimensions of any easements, the location of any setback lines, and the dimensions of the Projects. The surveyor must include on the survey a signed narrative statement in certification form of the existence or non-existence of any encroachments from, or onto, the Properties and must include the date of the survey, the surveyor's registration number and seal;

(iii) Certificate(s) of Occupancy; Licenses and Permits. A temporary certificate of occupancy or, if available, a final certificate of occupancy, in each case issued by the appropriate authority and any licenses and permits necessary for the operation and occupancy of each Property;

(iv) Architect's Certification. A certification from the Architect that all on-site and off-site improvements required to be constructed have been completed in accordance with the approved Plans and Specifications;

(v) Permanent Insurance. Evidence satisfactory to Lender that all permanent insurance is in full force and effect, such insurance to be in form and substance and with companies as provided in the Security Instrument;

(vi) Liens. Final lien waivers (conditional only upon receipt of final payment) to be delivered to Lender at least ten (10) days prior to the final advance; provided, however, if any liens (or stop payment notices) are filed, Borrowers shall have caused such liens (or stop payment notices) to be bonded over or shall have provided other security to the title insurer in either case that is sufficient to cause the title insurer to insure Lender against loss due to any such liens;

(vii) Owner's Affidavit. An Owner's affidavit in form required by Lender affirming, among other things (A) that all costs for labor and material for the construction of the Projects have been paid in full (or will be paid in full upon any final disbursement); (B) that each Borrower has paid for and is the owner of all tangible Personal Property located on and used or intended to be used in the management, maintenance or operation of its Property (and all other property owned by such Borrower) free of any security interests, liens, or encumbrances; provided, however, if any liens are filed, Borrowers shall have caused such liens to be bonded over or shall have provided other security to the title insurer in either case that is sufficient to cause the title insurer to insure Lender against loss due to any such liens; (C) that, to Borrowers' actual knowledge, no bankruptcy or insolvency proceedings have been threatened or instituted against any Borrower, any guarantor or any of any Borrower's managers; and (D) that, the Properties comply with all building, zoning, land use and EPA requirements and ADA; and

(viii) Lender's Inspection. Lender's inspector shall have certified to Lender, solely for Lender's benefit, that the Projects have been properly completed, are in good physical condition, contain no items of deferred maintenance, and conform in all respects to the Plans and Specifications; provided, however, that Borrowers shall receive no comfort or rights with respect to such inspections or Lender's evaluations thereof.

(f) Disbursement by Wire Transfer. Disbursement of Construction Reserve Funds shall be made at Lender's election by wire transfer, at Borrowers' cost and expense, or by check. Lender may, in its election, make payments of the Construction Reserve Funds directly to the contractor, subcontractor, or material supplier. Lender may also require, at Lender's election, in its sole discretion, at Borrowers' sole cost and expense, that disbursements of Construction Reserve Funds be made through (x) the Title Company pursuant to a construction loan disbursement escrow agreement or (y) a vending control company. Any such arrangement with the Title Company or a vending control company shall be in Lender's sole discretion.

(g) Waiver of Conditions. Lender may from time to time, in its sole discretion, waive any condition or conditions to any disbursement of Construction Reserve Funds without such waiver or series of waivers constituting a course of dealing or any amendment to this Agreement or a prohibition against subsequent imposition of such condition or conditions or a waiver of a default.

(h) Modifications of Construction Budget. The Construction Budget (including, any line items in the Loan Budget and any "budgets" for such line items) shall not be amended without Lender's written consent.

## ARTICLE VIII

### DEFAULTS

#### Section 8.1 Event of Default.

##### 8.1.1 Generally.

(a) Each of the following events shall constitute an event of default hereunder (an "***Event of Default***"):

(i) if any portion of the Debt is not paid when due (including, without limitation, the failure of Borrowers to repay the entire outstanding principal balance of the Note in full on the Maturity Date);

(ii) if any of the Taxes or Other Charges are not paid when the same are due and payable without payment of a penalty;

(iii) if the Policies are not kept in full force and effect, or if copies of the certificates evidencing the Policies (or certified copies of the Policies if requested by Lender) are not delivered to Lender within thirty (30) days after written request therefor, which period may be extended upon request of Borrowers, provided Borrowers are diligently pursuing such certificates (or certified copies of the Policies, as the case may be), such additional period not to exceed ninety (90) days;

(iv) the occurrence of any Transfer or other encumbrance with respect to any portion of the Properties or the Collateral in violation of the provisions of this Agreement or Article VI of the Security Instrument, or the occurrence of any Transfer in violation of the provisions of Section 5.2.10 hereof;

(v) if any representation or warranty made by any Borrower herein or in any other Loan Document, or in any report, certificate, financial statement or other instrument, agreement or document furnished to Lender shall have been false or misleading in any material respect as of the date the representation or warranty was made or deemed remade;

(vi) if any Borrower or any Guarantor shall (i) make an assignment for the benefit of creditors or (ii) generally not be paying its debts as they become due;

(vii) if a receiver, liquidator or trustee shall be appointed for any Borrower, or if any Borrower shall be adjudicated bankrupt or insolvent, or if any petition for bankruptcy, reorganization or arrangement pursuant to Federal bankruptcy law, or any similar Federal or state law, shall be filed by or against, consented to, or acquiesced in by, any Borrower, or if any proceeding for the dissolution or liquidation of any Borrower shall be instituted; *provided, however*, if such appointment, adjudication, petition or proceeding was involuntary and not consented to by any Borrower, upon the same not being discharged, stayed or dismissed within ninety (90) days;

(viii) if a receiver, liquidator or trustee shall be appointed for any Guarantor or if any Guarantor shall be adjudicated a bankrupt or insolvent, or if any petition for bankruptcy, reorganization or arrangement pursuant to Federal bankruptcy law, or any similar Federal or state law, shall be filed by or against, consented to, or acquiesced in by, any Guarantor, or if any proceeding for the dissolution or liquidation of any Guarantor shall be instituted; *provided, however*, if such appointment, adjudication, petition or proceeding was involuntary and not consented to by the applicable Guarantor, upon the same not being discharged, stayed or dismissed within ninety (90) days; provided, further, however, it shall be at Lender's option to determine whether any of the foregoing shall be an Event of Default;



(ix) if any Borrower attempts to assign its rights under this Agreement or any of the other Loan Documents or any interest herein or therein in contravention of the Loan Documents;

(x) if any Borrower breaches any representation, warranty or covenant contained in Section 4.1.26 or any of its respective negative covenants contained in Section 5.2;

(xi) with respect to any term, covenant or provision set forth herein which specifically contains a notice requirement or grace period, if any Borrower shall be in default under such term, covenant or condition after the giving of such notice or the expiration of such grace period;

(xii) any Borrower breaches any covenant contained in Section 5.1.11 and such breach continues for ten (10) days after notice from Lender;

(xiii) There is any deviation in the construction of the Projects from the Plans and Specifications or governmental requirements (other than immaterial deviations) or the appearance or use of defective workmanship or materials in constructing the Projects, and Borrowers fail to remedy the same to Lender's satisfaction within ten (10) days of Lender's written demand to do so; or (ii) there is a cessation of construction of the Projects prior to completion for a continuous period of more than fifteen (15) days (except as caused by an event of Force Majeure for which a longer delay may be permitted under Article IV hereof); or (iii) the use, sale or leasing of any of the Projects in accordance with the Loan Documents is prohibited, enjoined or delayed for a continuous period of more than thirty (30) days; or (iv) utilities or other public services necessary for the full occupancy and utilization of the Properties and Projects are curtailed for a continuous period of more than thirty (30) days;

(xiv) any failure to meet any requirements under the Completion Schedule provided such failure continues for ten (10) Business Days;

(xv) if Borrowers shall continue to be in Default under any of the other terms, covenants or conditions of this Agreement not specified in subsections (i) to (xiv) above, for ten (10) days after notice to Borrowers from Lender, in the case of any Default which can be cured by the payment of a sum of money, or for thirty (30) days after notice from Lender in the case of any other Default; *provided, however*, that if such non-monetary Default is susceptible of cure but cannot reasonably be cured within such thirty (30) day period and provided further that Borrowers shall have commenced to cure such Default within such thirty (30) day period and thereafter diligently and expeditiously proceeds to cure the same, such thirty (30) day period shall be extended for such time as is reasonably necessary for Borrowers in the exercise of due diligence to cure such Default, such additional period not to exceed ninety (90) days; or

(xvi) if there shall be a Default under any of the other Loan Documents beyond any applicable cure periods contained in such documents, whether as to any Borrower, any Guarantor or any Property.

(b) Upon the occurrence of an Event of Default (other than an Event of Default described in clauses (vi), (vii) or (viii) above) and at any time thereafter, in addition to any other rights or remedies available to it pursuant to this Agreement and the other Loan Documents or at law or in equity, Lender may take such action, without notice or demand, that Lender deems advisable to protect and enforce its rights against Borrowers and in and to the Properties, including, without limitation, declaring the Obligations to be immediately due and payable, and Lender may enforce or avail itself of any or all rights or remedies provided in the Loan Documents against Borrowers and the Properties, including, without limitation, all rights or remedies available at law or in equity; and upon any Event of Default described in clauses (vi), (vii) or (viii) above, the Debt and all Other Obligations of Borrowers hereunder and under the other Loan Documents shall immediately and automatically become due and payable, without notice or demand, and Borrowers hereby expressly waive any such notice or demand, anything contained herein or in any other Loan Document to the contrary notwithstanding.

8.1.2 Remedies.

(a) Upon the occurrence of an Event of Default, all or any one or more of the rights, powers, privileges and other remedies available to Lender against Borrowers under this Agreement or any of the other Loan Documents executed and delivered by, or applicable to, Borrowers or at law or in equity may be exercised by Lender at any time and from time to time (including, without limitation, Lender may accelerate the Loan and declare the Outstanding Principal Balance and all other amounts under the Loan Documents due and payable and institute foreclosure proceedings), whether or not all or any of the Debt shall be declared due and payable, and whether or not Lender shall have commenced any foreclosure proceeding or other action for the enforcement of its rights and remedies under any of the Loan Documents. Any such actions taken by Lender shall be cumulative and concurrent and may be pursued independently, singularly, successively, together or otherwise, at such time and in such order as Lender may determine in its sole discretion, to the fullest extent permitted by law, without impairing or otherwise affecting the other rights and remedies of Lender permitted by law, equity or contract or as set forth herein or in the other Loan Documents. To the fullest extent permitted by law or equity, without limiting the generality of the foregoing, Borrowers agree that if an Event of Default is continuing (i) Lender shall not be subject to any "one action" or "election of remedies" law or rule, and (ii) all liens and other rights, remedies or privileges provided to Lender shall remain in full force and effect until Lender has exhausted all of its remedies against the Properties and the Security Instrument has been foreclosed, sold and/or otherwise realized upon in satisfaction of the Debt or the Obligations have been paid in full.

(b) With respect to Borrowers and the Properties, nothing contained herein or in any other Loan Document shall be construed as requiring Lender to resort to the Properties for the satisfaction of any of the Debt in any preference or priority, and Lender may seek satisfaction out of the Properties, or any part thereof, in its absolute discretion in respect of the Debt. In addition, Lender shall have the right from time to time to partially foreclose the Security Instrument in any manner and for any amounts secured by the Security Instrument then due and payable as determined by Lender in its sole discretion, including, without limitation, the following circumstances: (i) in the event Borrowers default beyond any applicable grace period in the payment of one or more scheduled payments of principal and interest, Lender may foreclose the Security Instrument to recover such delinquent payments or (ii) in the event Lender elects to accelerate less than the entire Outstanding Principal Balance, Lender may foreclose the Security Instrument to recover so much of the principal balance of the Loan as Lender may accelerate and such other sums secured by the Security Instrument as Lender may elect. Notwithstanding one or more partial foreclosures, the Properties shall remain subject to the Security Instrument to secure payment of sums secured by the Security Instrument and not previously recovered.

(c) Lender shall have the right from time to time to partially foreclose the Security Instrument in any manner and for any amounts secured by the Security Instrument then due and payable as determined by Lender in its sole discretion, including the following circumstances: (i) in the event Borrowers default beyond any applicable grace period in the payment of one or more scheduled payments of principal and/or interest, Lender may foreclose the Security Instrument to recover such delinquent payments, or (ii) in the event Lender elects to accelerate less than the entire Outstanding Principal Balance, Lender may foreclose the Security Instrument to recover so much of the Debt as Lender may accelerate and such other sums secured by the Security Instrument as Lender may elect. Notwithstanding one or more partial foreclosures, the Properties shall remain subject to the Security Instrument to secure payment of sums secured by the Security Instrument and not previously recovered.

(d) To the fullest possible extent permitted by applicable law or equity, any amounts recovered from the Properties or any other collateral for the Loan after an Event of Default may be applied by Lender toward the payment of any interest and/or principal of the Loan and/or any other amounts due under the Loan Documents in such order, priority and proportions as Lender in its sole discretion shall determine.

(e) If an Event of Default exists, Lender may (directly or by its agents, employees, contractors, engineers, architects, nominees, attorneys or other representatives), but without any obligation to do so and without notice to Borrowers and without releasing Borrowers from any obligation

hereunder, cure the Event of Default in such manner and to such extent as Lender may deem necessary to protect the security hereof. Subject to Tenants' rights under the Leases, Lender (and its agents, employees, contractors, engineers, architects, nominees, attorneys or other representatives) are authorized to enter upon the Properties to cure such Event of Default, and Lender is authorized to appear in, defend, or bring any action or proceeding reasonably necessary to maintain, secure or otherwise protect the Properties or the priority of the Lien granted by the Security Instrument.

(f) Lender may appear in and defend any action or proceeding brought with respect to the Property and may bring any action or proceeding, in the name and on behalf of each Borrower, which Lender, in its sole discretion, decides should be brought to protect its interest in the Properties. Lender shall, at its option, be subrogated to the Lien of any mortgage or other security instrument discharged in whole or in part by the Obligations, and any such subrogation rights shall constitute additional security for the payment of the Obligations.

(g) Upon the occurrence of an Event of Default Lender may but shall not be obligated to make such payment from the Loan proceeds, other funds of Lender or any amounts in deposit accounts maintained by Borrowers with Lender. If such payment is made from proceeds of the Loan or from any Reserve Accounts, Borrowers shall immediately deposit with Lender, upon written demand, an amount equal to such payment. If such payment is made from funds of Lender, Borrowers shall immediately repay such funds upon written demand of Lender. In either case, the Default with respect to which any such payment has been made by Lender shall not be deemed cured until such deposit or repayment (as the case may be) has been made by Borrowers to Lender.

(h) Upon the occurrence of an Event of Default, Lender may, upon five (5) days prior written notice to Borrowers, and with or without legal process, take possession of the Properties and Improvements, remove Borrowers and all agents, employees and contractors of Borrowers from the Properties and Improvements, complete the work of construction and market, operate and sell or lease the Properties and/or Improvements. For this purpose, each Borrower irrevocably appoints Lender as its attorney-in-fact, which agency is coupled with an interest. As attorney-in-fact, Lender may, in each Borrower's name, take or omit to take any action Lender may deem appropriate, including, without limitation, exercising each Borrower's rights under the Loan Documents and all contracts concerning the Properties and/or Improvements.

(i) If Lender determines at any time that either of the Projects is not being constructed in accordance with the Plans and Specifications and all governmental requirements, Lender may immediately cause all construction to cease on any of the Improvements affected by the condition of nonconformance and withhold further disbursements under the Loan. Borrowers shall thereafter not allow any construction work, other than corrective work, to be performed on any of the Improvements affected by the condition of nonconformance until such time as Lender notifies Borrowers in writing that the nonconforming condition has been corrected. Borrowers shall notify Lender and Lender's inspector immediately upon receipt of "red tag" or "stop order" notices from any federal, state, county or municipal building inspector or of unsatisfactory compliance with any applicable building code, and in such event Borrowers shall provide Lender and Lender's inspector with a full and complete written explanation of the nature of such noncompliance.

(j) All of Lender's rights and remedies provided in this Agreement, the Other Related Documents and the other Loan Documents, together with those granted by law or at equity, are cumulative and may be exercised by Lender at any time. Lender's exercise of any right or remedy shall not constitute a cure of any Default unless all sums then due and payable to Lender under the Loan Documents are repaid and Borrowers have cured all other Defaults. No waiver shall be implied from any failure of Lender to take, or any delay by Lender in taking, action concerning any Default or failure of condition under the Loan Documents, or from any previous waiver of any similar or unrelated Default or failure of condition. Any waiver or approval under any of the Loan Documents must be in writing and shall be limited to its specific terms.

(k) As used in this Section 8.1.2, a “foreclosure” shall include, without limitation, a power of sale.

8.1.3 Remedies Cumulative; Waivers. The rights, powers and remedies of Lender under this Agreement shall be cumulative and not exclusive of any other right, power or remedy which Lender may have against Borrowers pursuant to this Agreement or the other Loan Documents, or existing at law or in equity or otherwise. Lender’s rights, powers and remedies may be pursued singularly, concurrently or otherwise, at such time and in such order as Lender may determine in Lender’s sole discretion. No delay or omission to exercise any remedy, right or power accruing upon an Event of Default shall impair any such remedy, right or power or shall be construed as a waiver thereof, but any such remedy, right or power may be exercised from time to time and as often as may be deemed expedient. A waiver of one Default or Event of Default with respect to Borrowers shall not be construed to be a waiver of any subsequent Default or Event of Default by Borrowers or to impair any remedy, right or power consequent thereon.

## ARTICLE IX

### SPECIAL PROVISIONS

Section 9.1 Transfer of Loan. Lender may, at any time, sell, transfer or assign this Agreement, the Note, the Security Instrument and the other Loan Documents, and any or all servicing rights with respect thereto, or grant participations therein or issue mortgage pass-through certificates or other securities (the “**Securities**”) evidencing a beneficial interest in a rated or unrated public offering or private placement (such sales, participation, offering and/or placement, collectively, a “**Lender Assignment**”). Lender may forward to each purchaser, transferee, assignee, servicer, participant or investor in such participations or Securities (collectively, the “**Investor**”), each prospective Investor, and any organization maintaining databases on the underwriting and performance of commercial mortgage loans, all documents and information which Lender now has or may hereafter acquire relating to the Loan or to Borrowers, any Guarantor or the Properties, whether furnished by Borrowers, any Guarantor or otherwise, as Lender determines necessary or desirable, including, without limitation, financial statements relating to Borrowers, Guarantor, the Properties and any Tenant at the Properties. Borrowers irrevocably waive any and all rights it may have under law or in equity to prohibit such disclosure, including but not limited to any right of privacy.

Section 9.2 Severed Loan Documents. Lender shall have the right from time to time to sever the Note and the other Loan Documents into one or more separate notes, mortgages and other security documents (the “**Severed Loan Documents**”) in such denominations as Lender shall determine in its sole discretion for purposes of evidencing and enforcing its rights and remedies provided hereunder. Borrowers shall execute and deliver (and cause other parties who executed any of the Loan Documents to execute and deliver) to Lender from time to time, promptly after the request of Lender, a severance agreement and such other documents as Lender may reasonably request in order to effect the severance described in the preceding sentence, all in form and substance reasonably satisfactory to Lender and Borrowers. The Severed Loan Documents shall not contain any representations, warranties or covenants not contained in the Loan Documents and any such representations and warranties contained in the Severed Loan Documents will be given by the parties thereto only as of the Closing Date.

Section 9.3 Servicer. At the option of Lender, the Loan may be serviced by a master servicer, primary servicer, special servicer and/or trustee (any such master servicer, primary servicer, special servicer, and trustee, together with its agents, nominees or designees, are collectively referred to as “**Servicer**”) selected by Lender and Lender may delegate all or any portion of its responsibilities under this Agreement and the other Loan Documents to Servicer pursuant to a pooling and servicing agreement, servicing agreement, special servicing agreement or other agreement providing for the servicing of one or more mortgage loans (collectively, the “**Servicing Agreement**”) between Lender and Servicer. Without limitation, Borrowers shall promptly reimburse Lender on demand for (a) interest payable on advances made by Servicer with respect to delinquent debt service payments (to the extent interest at the Default Rate actually paid by Borrowers in respect of such payments are insufficient to pay

the same) or expenses paid by Servicer or trustee in respect of the protection and preservation of the Properties (including, without limitation, on account of Basic Carrying Costs), (b) all costs and expenses, liquidation fees, workout fees, special servicing fees, operating advisor fees or any other similar fees payable by Lender to Servicer which may be due and payable under the Servicing Agreement (whether on a periodic or a continuing basis) as a result of an Event of Default under the Loan, the Loan becoming specially serviced, the commencement or continuance of any enforcement action of any kind with respect to the Loan or any of the Loan Documents, a refinancing or a restructuring of the credit arrangements provided under this Agreement in the nature of a “work-out” of the Loan Documents, or any Bankruptcy Action involving Borrowers, Principal, Guarantor or any of their respective principals or Affiliates, (c) all costs and expenses of any Property inspections and/or appraisals (or any updates to any existing inspection or appraisal) that Servicer or the trustee may be required to obtain (but not more than one appraisal in any twelve months unless an Event of Default exists), (d) ordinary servicing fees and costs (including inspection fees and costs), and (e) all costs and expenses relating to or arising from any special requests made by Borrowers or Guarantor during the term of the Loan including, without limitation, in connection with a prepayment, defeasance, assumption or modification of the Loan.

Section 9.4 Cooperation. Borrowers and Guarantor agree to reasonably cooperate with Lender (and agree to cause their respective officers and representatives to cooperate) in connection with any Lender Assignment or potential Lender Assignment.

## ARTICLE X

### MISCELLANEOUS

Section 10.1 Survival. This Agreement and all covenants, agreements, representations and warranties made herein and in the certificates delivered pursuant hereto shall survive the making by Lender of the Loan and the execution and delivery to Lender of the Note, and shall continue in full force and effect so long as all or any of the Obligations are outstanding and unpaid unless a longer period is expressly set forth herein or in the other Loan Documents. Whenever in this Agreement any of the parties hereto is referred to, such reference shall be deemed to include the legal representatives, successors and assigns of such party. All covenants, promises and agreements in this Agreement, by or on behalf of Borrowers, shall inure to the benefit of the legal representatives, successors and assigns of Lender.

Section 10.2 Lender's Discretion. Whenever pursuant to this Agreement, Lender exercises any right given to it to approve or disapprove, or any arrangement or term is to be satisfactory to Lender, the decision of Lender to approve or disapprove or to decide whether arrangements or terms are satisfactory or not satisfactory shall (except as is otherwise specifically herein provided) be in the sole and absolute discretion of Lender and shall be final and conclusive.

Section 10.3 Governing Law. **THIS AGREEMENT WAS NEGOTIATED IN THE STATE OF NEW YORK, THE LOAN WAS MADE BY LENDER AND ACCEPTED BY BORROWERS IN THE STATE OF NEW YORK, AND THE PROCEEDS OF THE LOAN DELIVERED PURSUANT HERETO WERE DISBURSED FROM THE STATE OF NEW YORK, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS AGREEMENT, THE NOTE AND THE OTHER LOAN DOCUMENTS AND THE OBLIGATIONS ARISING HEREUNDER AND THEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE (WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAWS) AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES THE PROVISIONS FOR THE CREATION, PERFECTION, AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED PURSUANT TO THE SECURITY INSTRUMENT AND PURSUANT TO THE OTHER LOAN DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE IN WHICH THE PROPERTY IS LOCATED,**

IT BEING UNDERSTOOD THAT, TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH STATE, THE LAW OF THE STATE OF NEW YORK SHALL GOVERN THE CONSTRUCTION, VALIDITY AND ENFORCEABILITY OF ALL LOAN DOCUMENTS AND ALL OF THE OBLIGATIONS ARISING HEREUNDER OR THEREUNDER. TO THE FULLEST EXTENT PERMITTED BY LAW, EACH BORROWER HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS AGREEMENT, THE NOTE AND/OR THE OTHER LOAN DOCUMENTS, AND THIS AGREEMENT, THE NOTE AND THE OTHER LOAN DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW.

(a) **EXCEPTIONS.** NOTWITHSTANDING THE FOREGOING CHOICE OF LAW:

(i) THE PROCEDURES GOVERNING THE ENFORCEMENT BY LENDER OF ITS FORECLOSURE AND OTHER REMEDIES AGAINST BORROWERS AND GUARANTOR UNDER THE SECURITY INSTRUMENT AND UNDER THE OTHER LOAN DOCUMENTS WITH RESPECT TO THE PROPERTIES OR OTHER ASSETS OF BORROWERS, INCLUDING BY WAY OF ILLUSTRATION, BUT NOT IN LIMITATION, ACTIONS FOR FORECLOSURE, FOR INJUNCTIVE RELIEF OR FOR THE APPOINTMENT OF A RECEIVER SHALL BE GOVERNED BY THE LAWS OF THE STATE WHERE SUCH PROPERTY OR OTHER ASSETS ARE LOCATED;

(ii) LENDER SHALL COMPLY WITH APPLICABLE LAW IN THE STATE WHERE THE PROPERTIES OR OTHER ASSETS ARE LOCATED TO THE EXTENT REQUIRED BY THE LAW OF SUCH JURISDICTION IN CONNECTION WITH THE FORECLOSURE OF THE SECURITY INTERESTS AND LIENS CREATED UNDER THE SECURITY INSTRUMENT AND THE OTHER LOAN DOCUMENTS WITH RESPECT TO THE PROPERTIES OR OTHER ASSETS;

(iii) PROVISIONS OF FEDERAL LAW AND THE LAW OF THE STATE WHERE THE PROPERTIES ARE LOCATED SHALL APPLY IN DEFINING THE TERMS HAZARDOUS SUBSTANCES, ENVIRONMENTAL STATUTES, AND LEGAL REQUIREMENTS AS SUCH TERMS ARE USED IN THIS LOAN AGREEMENT, AND THE OTHER LOAN DOCUMENTS, WITH RESPECT TO THE PROPERTIES, BORROWERS AND GUARANTOR; AND

(iv) MATTERS OF REAL ESTATE, LANDLORD-TENANT AND PROPERTY LAW SHALL BE GOVERNED BY THE LAWS OF THE STATE WHERE THE PROPERTIES ARE SITUATED.

Section 10.4 Modification, Waiver in Writing. No modification, amendment, extension, discharge, termination or waiver of any provision of this Agreement, or of the Note, or of any other Loan Document, nor consent to any departure by Borrowers therefrom, shall in any event be effective unless the same shall be in a writing signed by the party against whom enforcement is sought, and then such waiver or consent shall be effective only in the specific instance, and for the purpose, for which given. Except as otherwise expressly provided herein, no notice to, or demand on Borrowers, shall entitle Borrowers to any other or future notice or demand in the same, similar or other circumstances.

Section 10.5 Delay Not a Waiver. Neither any failure nor any delay on the part of Lender in insisting upon strict performance of any term, condition, covenant or agreement, or exercising any right, power, remedy or privilege hereunder, or under the Note or under any other Loan Document, or any other instrument given as security therefor, shall operate as or constitute a waiver thereof, nor shall a single or partial exercise thereof preclude any other future exercise, or the exercise of any other right, power, remedy or privilege. In particular, and not by way of limitation, by accepting payment after the due date of any amount payable under this Agreement, the Note or any other Loan Document, Lender shall not be deemed to have waived any right either to require prompt payment when due of all other amounts due under this Agreement, the Note or the other Loan Documents, or to declare a default for failure to effect prompt payment of any such other amount.

Section 10.6 Notices. All notices, consents, approvals and requests required or permitted hereunder or under any other Loan Document shall be given in writing and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, return receipt requested, (b) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, or (c) facsimile (with answer back acknowledged) or as a PDF or similar attachment to an e-mail, provided that such facsimile or email attachment shall be followed within one (1) business day by delivery of such notice pursuant to clause (a) or (b) above, in each case addressed as follows (or at such other address and Person as shall be designated from time to time by any party hereto, as the case may be, in a notice to the other parties hereto in the manner provided for in this Section 10.6):

If to Lender: Arena DLP Lender, LLC  
405 Lexington Avenue  
59th Floor  
New York, New York 10174  
Attention: Real Estate Notices (DLP S King Drive Chicago Loan LN 3093)  
Email: jfelletter@arenaco.com, eanchipolovsky@arenaco.com and reporting@arenaco.com

with a copy to: Pircher, Nichols & Meeks LLP  
1901 Avenue of the Stars, Suite 1200  
Los Angeles, CA 90067  
Attention: Real Estate Notices (DLP: 5772.26)  
Email: realestatenotices@pircher.com

If to Borrower: c/o SSDF6 Holdco 1 LLC  
1414 E. 62<sup>nd</sup> Place  
Chicago, Illinois 60637

A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery; in the case of registered or certified mail, when delivered or the first attempted delivery on a Business Day; in the case of expedited prepaid delivery, upon the first attempted delivery on a Business Day; or in the case of facsimile or PDF or similar attachment to an e-mail, upon sender's receipt of a machine-generated confirmation of successful transmission after advice by telephone to recipient that a facsimile or e-mail notice is forthcoming. Any failure to deliver a notice by reason of a change of address not given in accordance with this Section 10.6, or any refusal to accept a notice, shall be deemed to have been given when delivery was attempted. Any notice required or permitted to be given by any party hereunder or under any other Loan Document may be given by its respective counsel.

Section 10.7 Waiver of Trial by Jury. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, BORROWERS HEREBY AGREE NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVE ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THE LOAN DOCUMENTS, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY BORROWERS, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. LENDER IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY BORROWERS.

Section 10.8 Headings. The Article and/or Section headings and the Table of Contents in this Agreement are included herein for convenience of reference only and shall not constitute a part of this Agreement for any other purpose.

Section 10.9 Severability. Wherever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

Section 10.10 Preferences. Lender shall have the continuing and exclusive right to apply or reverse and reapply any and all payments by Borrowers to any portion of the Debt. To the extent Borrowers make a payment or payments to Lender, which payment or proceeds or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside or required to be repaid to a trustee, receiver or any other party under any bankruptcy law, state or Federal law, common law or equitable cause, then, to the extent of such payment or proceeds received, the Obligations hereunder or part thereof intended to be satisfied shall be revived and continue in full force and effect, as if such payment or proceeds had not been received by Lender.

Section 10.11 Waiver of Notice. Borrowers hereby expressly waive, and shall not be entitled to any notices of any nature whatsoever from Lender except with respect to matters for which this Agreement or the other Loan Documents specifically and expressly provide for the giving of notice by Lender to Borrowers and except with respect to matters for which no Borrower is, pursuant to applicable Legal Requirements, permitted to waive the giving of notice.

Section 10.12 Remedies of Borrowers. In the event that a claim or adjudication is made that Lender or its agents have acted unreasonably or unreasonably delayed acting in any case where by law or under this Agreement or the other Loan Documents, Lender or such agent, as the case may be, has an obligation to act reasonably or promptly, Borrowers agree that neither Lender nor its agents shall be liable for any monetary damages, and Borrowers' sole remedies shall be limited to commencing an action seeking injunctive relief or declaratory judgment. The parties hereto agree that any action or proceeding to determine whether Lender has acted reasonably shall be determined by an action seeking declaratory judgment. Further, it is agreed Lender shall not be in default under this Agreement, or under any other Loan Document, unless a written notice specifically setting forth the claim of Borrowers shall have been given to Lender within thirty (30) days after Borrowers first had knowledge of the occurrence of the event which Borrowers allege gave rise to such claim and Lender does not remedy or cure the default, if any there be, promptly thereafter. Failure to give such notice shall constitute a waiver of such claim.

Section 10.13 Expenses; Indemnity.

(a) Borrowers covenant and agree to pay or, if Borrowers fail to pay, to reimburse, Lender upon receipt of notice from Lender for all costs and expenses (including reasonable attorneys' fees and disbursements) incurred by Lender in connection with (i) the preparation, negotiation, execution and delivery of this Agreement and the other Loan Documents and the consummation of the transactions contemplated hereby and thereby and all the costs of furnishing all opinions by counsel for Borrowers (including without limitation any opinions requested by Lender as to any legal matters arising under this Agreement or the other Loan Documents with respect to the Properties); (ii) Borrowers' ongoing performance of and compliance with Borrowers' respective agreements and covenants contained in this Agreement and the other Loan Documents on its part to be performed or complied with after the Closing Date, including, without limitation, confirming compliance with environmental and insurance requirements; (iii) Lender's ongoing performance and compliance with all agreements and conditions contained in this Agreement and the other Loan Documents on its part to be performed or complied with after the Closing Date; (iv) the negotiation, preparation, execution, delivery and administration of any consents, amendments, waivers or other modifications to this Agreement and the other Loan Documents and any other documents or matters requested by Lender; (v) securing Borrowers' compliance with any requests made pursuant to the provisions of this Agreement; (vi) the filing and recording fees and expenses, title insurance and reasonable fees and expenses of counsel for providing to Lender all required legal opinions, and other similar expenses incurred in creating and perfecting the Liens in favor of Lender pursuant to this Agreement and the other Loan Documents; (vii) enforcing or preserving any rights, either in response to third party claims or in prosecuting or defending any action or proceeding or other



litigation, in each case against, under or affecting Borrowers, this Agreement, the other Loan Documents, the Properties, or any other security given for the Loan; and (viii) enforcing any obligations of or collecting any payments due from Borrowers under this Agreement, the other Loan Documents or with respect to the Properties, or in connection with any refinancing or restructuring of the credit arrangements provided under this Agreement in the nature of a "work-out" or of any insolvency or bankruptcy proceedings or any other amounts required under Section 9.3; *provided, however*, that no Borrower shall be liable for the payment of any such costs and expenses to the extent the same arise by reason of the gross negligence, illegal acts, fraud or willful misconduct of Lender. Any cost and expenses due and payable to Lender may be paid by Lender from any Reserve Account.

(b) Borrowers shall indemnify, defend and hold harmless the Indemnified Parties from and against any and all other liabilities, obligations, losses, damages, penalties, actions, judgments, suits, claims, costs, expenses and disbursements of any kind or nature whatsoever (including, without limitation, the reasonable fees and disbursements of counsel for Lender in connection with any investigative, administrative or judicial proceeding commenced or threatened, whether or not Lender shall be designated a party thereto), that may be imposed on, incurred by, or asserted against any Indemnified Party in any manner relating to or arising out of (i) any breach by any Borrower of its Obligations under, or any material misrepresentation by any Borrower contained in, this Agreement or the other Loan Documents, or (ii) the use or intended use of the proceeds of the Loan (the liabilities, losses, costs, expenses and other matters described in this subparagraph (b), collectively, the "**Indemnified Liabilities**"); *provided, however*, that no Borrower shall have any obligation to an Indemnified Party hereunder to the extent that such Indemnified Liabilities arise from the gross negligence, illegal acts, fraud or willful misconduct of such Indemnified Party. To the extent that the undertaking to indemnify, defend and hold harmless set forth in the preceding sentence may be unenforceable because it violates any law or public policy, Borrowers shall pay the maximum portion that it is permitted to pay and satisfy under applicable law to the payment and satisfaction of all Indemnified Liabilities incurred by the Indemnified Parties.

Section 10.14 Exhibits and Schedules Incorporated. Any Exhibits and Schedules annexed hereto are hereby incorporated herein as a part of this Agreement with the same effect as if set forth in the body hereof.

Section 10.15 Offsets, Counterclaims and Defenses. Any assignee of Lender's interest in and to this Agreement, the Note and the other Loan Documents shall take the same free and clear of all offsets, counterclaims or defenses solely to the extent such offsets, counterclaims or defenses are unrelated to such documents which Borrowers may otherwise have against any assignor of such documents, and no such unrelated counterclaim or defense shall be interposed or asserted by Borrowers in any action or proceeding brought by any such assignee upon such documents and any such right to interpose or assert any such unrelated offset, counterclaim or defense in any such action or proceeding is hereby expressly waived by Borrowers.

Section 10.16 No Joint Venture or Partnership; No Third Party Beneficiaries.

(a) Borrowers and Lender intend that the relationships created hereunder and under the other Loan Documents be solely that of borrower and lender. Nothing herein or therein is intended to create a joint venture, partnership, tenancy-in-common, or joint tenancy relationship between Borrowers and Lender nor to grant Lender any interest in the Properties other than that of mortgagee, beneficiary or lender.

(b) This Agreement and the other Loan Documents are solely for the benefit of Lender and Borrowers and nothing contained in this Agreement or the other Loan Documents shall be deemed to confer upon anyone other than Lender and Borrowers any right to insist upon or to enforce the performance or observance of any of the Obligations contained herein or therein. All conditions to the obligations of Lender to make the Loan hereunder are imposed solely and exclusively for the benefit of Lender and no other Person shall have standing to require satisfaction of such conditions in accordance with their terms or be entitled to assume that Lender will refuse to make the Loan in the absence of strict

compliance with any or all thereof and no other Person shall under any circumstances be deemed to be a beneficiary of such conditions, any or all of which may be freely waived in whole or in part by Lender if, in Lender's sole discretion, Lender deems it advisable or desirable to do so.

Section 10.17 Publicity. All news releases, publicity or advertising by Borrowers or its Affiliates through any media intended to reach the general public which refers to the Loan Documents or the financing evidenced by the Loan Documents, to Lender or any of its Affiliates shall be subject to the prior approval of Lender.

Section 10.18 Waiver of Marshalling of Assets. To the fullest extent permitted by law, each Borrower, for itself and its successors and assigns, waives all rights to a marshalling of the assets of such Borrower, such Borrower's partners and others with interests in such Borrower, and of the Properties, or to a sale in inverse order of alienation in the event of foreclosure of the Security Instrument, and agrees not to assert any right under any laws pertaining to the marshalling of assets, the sale in inverse order of alienation, homestead exemption, the administration of estates of decedents, or any other matters whatsoever to defeat, reduce or affect the right of Lender under the Loan Documents to a sale of the Properties for the collection of the Debt without any prior or different resort for collection or of the right of Lender to the payment of the Debt out of the net proceeds of the Properties in preference to every other claimant whatsoever.

Section 10.19 Waiver of Counterclaim. Borrowers hereby waive the right to assert a counterclaim, other than a compulsory counterclaim, in any action or proceeding brought against it by Lender or its agents.

Section 10.20 Conflict; Construction of Documents; Reliance. In the event of any conflict between the provisions of this Agreement and any of the other Loan Documents, the provisions of this Agreement shall control. The parties hereto acknowledge that they were represented by competent counsel in connection with the negotiation, drafting and execution of the Loan Documents and that such Loan Documents shall not be subject to the principle of construing their meaning against the party which drafted same. Borrowers acknowledge that, with respect to the Loan, Borrowers shall rely solely on their own judgment and advisors in entering into the Loan without relying in any manner on any statements, representations or recommendations of Lender or any Affiliate of Lender. Lender shall not be subject to any limitation whatsoever in the exercise of any rights or remedies available to it under any of the Loan Documents or any other agreements or instruments which govern the Loan by virtue of the ownership by it or any parent, subsidiary or Affiliate of Lender of any equity interest any of them may acquire in Borrowers, and Borrowers hereby irrevocably waive the right to raise any defense or take any action on the basis of the foregoing with respect to Lender's exercise of any such rights or remedies. Borrowers acknowledge that Lender engages in the business of real estate financings and other real estate transactions and investments which may be viewed as adverse to or competitive with the business of Borrowers or their Affiliates.

Section 10.21 Brokers and Financial Advisors. Borrowers hereby represent that they have dealt with no financial advisors, brokers, underwriters, placement agents, agents or finders in connection with the transactions contemplated by this Agreement. Borrowers are solely responsible for all fees and costs and other amounts payable to any broker (although Lender may advance proceeds of the Loan to pay such amounts). Borrowers hereby agree to indemnify, defend and hold Lender harmless from and against any and all claims, liabilities, costs and expenses of any kind (including Lender's attorneys' fees and expenses) in any way relating to or arising from a claim by any Person that such Person acted on behalf of Borrowers or Lender in connection with the transactions contemplated herein. The provisions of this Section 10.21 shall survive the expiration and termination of this Agreement and the payment of the Debt.

Section 10.22 Prior Agreements. This Agreement and the other Loan Documents contain the entire agreement of the parties hereto and thereto in respect of the transactions contemplated hereby and thereby, and all prior agreements among or between such parties, whether oral or written, including, without limitation, the Loan Application and Term Sheet dated April 11, 2018 between Borrowers (or an

agent or representative of Borrowers) and Lender, are superseded by the terms of this Agreement and the other Loan Documents.

Section 10.23 Cumulative Rights. All of the rights of Lender under this Agreement hereunder and under each of the other Loan Documents and any other agreement now or hereafter executed in connection herewith or therewith, shall be cumulative and may be exercised singly, together, or in such combination as Lender may determine in its sole judgment.

Section 10.24 Counterparts; Electronic Delivery. This Agreement and all of the other Loan Documents may be executed in several counterparts, each of which when executed and delivered is an original, but all of which together shall constitute one instrument. In making proof of this Agreement, it shall not be necessary to produce or account for more than one such counterpart which is executed by the party against whom enforcement of this Agreement is sought. The delivery of an executed counterpart of this Agreement or any other Loan Document (other than Note) by facsimile or as a PDF or similar attachment to an email shall constitute effective delivery of such counterpart for all purposes with the same force and effect as the delivery of an original, executed counterpart.

Section 10.25 Time is of the Essence. Time is of the essence of each provision of this Agreement and the other Loan Documents.

Section 10.26 Consent of Holder. Wherever this Agreement refers to Lender's consent or discretion or other rights, such references to Lender shall be deemed to refer to any holder of the Loan. The holder of the Loan may from time to time appoint a trustee or servicer, and Borrowers shall be entitled to rely upon written instructions executed by a purported officer of the holder of the Loan as to the extent of authority delegated to any such trustee or from time to time and determinations made by such trustee or servicer to the extent identified as within the delegated authority of such trustee or servicer, unless and until such instructions are superseded by further written instructions from the holder of the Loan.

Section 10.27 Successor Laws. Any reference in this Agreement to any statute or regulation shall be deemed to include any successor statute or regulation.

Section 10.28 Reliance on Third Parties. Lender may perform any of its responsibilities hereunder through one or more agents, attorneys or independent contractors. In addition, Lender may conclusively rely upon the advice or determinations of any such agents, attorneys or independent contractors in performing any discretionary function under the terms of this Agreement.

Section 10.29 Borrower's Waiver. Each Borrower hereby waives all of its rights under any applicable law which substantially provides as follows: "(a) The acceptance, by a creditor, of anything in partial satisfaction of an obligation, reduces the obligation of a surety thereof, in the same measure as that of the principal, but does not otherwise affect it. However, if the surety is liable upon only a portion of an obligation and the principal provides partial satisfaction of the obligation, the principal may designate the portion of the obligation that is to be satisfied; and (b) an agreement by a creditor to accept from the principal debtor a sum less than the balance owed on the original obligation, without the prior consent of the surety and without any other change to the underlying agreement between the creditor and principal debtor, shall not exonerate the surety for the lesser sum agreed upon by the creditor and principal debtor."

Section 10.30 Joint and Several Liability. If more than one Person has executed this Agreement as "Borrower," the representations, covenants, warranties and obligations of all such Persons hereunder shall be joint and several. Each entity that constitutes Borrower (for purposes of this Section 10.30 only, each a "Borrower" and collectively, "Borrowers") acknowledges and agrees that it shall be jointly and severally liable for the Loan and all other Obligations arising under this Agreement and/or any of the other Loan Documents. In furtherance thereof, each Borrower acknowledges and agrees as follows:

10.30.1 For the purpose of implementing the joint borrower provisions of the Loan Documents, each Borrower hereby irrevocably appoints each other Borrower as its agent and attorney-in-fact for all purposes of the Loan Documents, including the giving and receiving of notices and other communications.

10.30.2 To induce Lender to make the Loan, and in consideration thereof, each Borrower hereby agrees to indemnify Lender against, and hold Lender harmless from, any and all liabilities, expenses, losses, damages and/or claims of damage or injury asserted against Lender by any Borrower or by any other Person arising from or incurred by reason of (i) reliance by Lender on any requests or instructions from any Borrower, or (ii) any other action taken by Lender in good faith with respect to this Agreement or the other Loan Documents.

10.30.3 Each Borrower acknowledges that the liens and security interests created or granted herein and by the other Loan Documents will secure the Obligations of all Borrowers under the Loan Documents and, in full recognition of that fact, each Borrower consents and agrees that Lender may, at any time and from time to time, without notice or demand, and without affecting the enforceability or security hereof or of any other Loan Document:

(a) agree with any Borrower to supplement, modify, amend, extend, renew, accelerate, or otherwise change the time for payment or the terms of the Obligations or any part thereof, including any increase or decrease of the rate(s) of interest thereon;

(b) agree with any Borrower to supplement, modify, amend or waive, or enter into or give any agreement, approval or consent with respect to, the Obligations or any part thereof or any of the Loan Documents or any additional security or guaranties, or any condition, covenant, default, remedy, right, representation or term thereof or thereunder;

(c) accept new or additional instruments, documents or agreements in exchange for or relative to any of the Loan Documents or the Obligations or any part thereof;

(d) accept partial payments on the Obligations;

(e) receive and hold additional security or guaranties for the Obligations or any part thereof;

(f) release, reconvey, terminate, waive, abandon, subordinate, exchange, substitute, transfer and enforce any security for or guaranties of the Obligations, and apply any security and direct the order or manner of sale thereof as Lender, in its sole and absolute discretion may determine;

(g) release any Person or any guarantor from any personal liability with respect to the Obligations or any part thereof; or

(h) settle, release on terms satisfactory to Lender or by operation of applicable laws or otherwise liquidate or enforce any Obligations and any security therefor or guaranty thereof in any manner, consent to the transfer of any such security and bid and purchase at any sale; and consent to the merger, change or any other restructuring or termination of the corporate existence of any Borrower or any other Person, and correspondingly restructure the obligations of such Borrower or other Person, and any such merger, change, restructuring or termination shall not affect the liability of any Borrower or the continuing existence of any lien or security interest hereunder, under any other Loan Document to which any Borrower is a party or the enforceability hereof or thereof with respect to all or any part of the Obligations.

10.30.4 Upon the occurrence of and during the continuance of any Event of Default, Lender may enforce this Agreement and the other Loan Documents independently as to each Borrower and independently of any other remedy or security Lender at any time may have or hold in connection with the

Obligations, and in collecting on the Loan it shall not be necessary for Lender to marshal assets in favor of any Borrower or any other Person or to proceed upon or against and/or exhaust any other security or remedy before proceeding to enforce this Agreement and the other Loan Documents. Each Borrower expressly waives any right to require Lender, in connection with Lender's efforts to obtain repayment of the Loan and Other Obligations, to marshal assets in favor of any Borrower or any other Person or to proceed against any other Person or any collateral provided by any other Person, and agrees that Lender may proceed against any Persons and/or collateral in such order as it shall determine in its sole and absolute discretion in connection with Lender's efforts to obtain repayment of the Loan and other Obligations. Lender may file a separate action or actions against each Borrower to enforce the Obligations, whether action is brought or prosecuted with respect to any other security or against any other Person, or whether any other Person is joined in any such action or actions. Each Borrower agrees that Lender, each Borrower and/or any other Person may deal with each other in connection with the Obligations or otherwise, or alter any contracts or agreements now or hereafter existing between any of them, in any manner whatsoever, all without in any way altering or affecting the security of this Agreement or the other Loan Documents. The rights of Lender hereunder and under the other Loan Documents shall be reinstated and revived, and the enforceability of this Agreement and the other Loan Documents shall continue, with respect to any amount at any time paid on account of the Obligations which thereafter shall be required to be restored or returned by Lender as a result of the bankruptcy, insolvency or reorganization of any Borrower or any other Person, or otherwise, all as though such amount had not been paid. The enforceability of this Agreement and the other Loan Documents at all times shall remain effective even though any or all Obligations, or any other security or guaranty therefor, may be or hereafter may become invalid or otherwise unenforceable as against any Borrower or any other Person and whether or not any Borrower or any other Person shall have any personal liability with respect thereto. Each Borrower expressly waives any and all defenses to the enforcement of its Obligations under the Loan Documents now or hereafter arising or asserted by reason of (i) any disability or other defense of any Borrower or any other Person with respect to the Obligations, (ii) the unenforceability or invalidity of any security or guaranty for the Obligations or the lack of perfection or continuing perfection or failure of priority of any security for the Obligations, (iii) the cessation for any cause whatsoever of the liability of any Borrower or any other Person (other than by reason of the full and final payment and performance of all Obligations), (iv) any failure of Lender to marshal assets in favor of any of the Borrowers or any other Person, (v) any failure of Lender to give notice of sale or other disposition of any Collateral for the Obligations to any Borrower or to any other Person or any defect in any notice that may be given in connection with any such sale or disposition, (vi) any failure of Lender to comply in any non-material respect with applicable laws in connection with the sale or other disposition of any collateral or other security for any Obligation, (vii) any act or omission of Lender or others that directly or indirectly results in or aids the discharge or release of any Borrower or of any other Person or of any of the Obligations or any other security or guaranty therefor by operation of law or otherwise, (viii) any law which provides that the obligation of a surety or guarantor must neither be larger in amount nor in other respects more burdensome than that of the principal or which reduces a surety's or guarantor's obligation in proportion to the principal obligation, (ix) any failure of Lender to file or enforce a claim in any bankruptcy or similar proceeding with respect to any Person, (x) the election by Lender, in any bankruptcy or similar proceeding of any Person, of the application or non-application of Section 1111(b)(2) of the Bankruptcy Code, (xi) any extension of credit or the grant of any lien under Section 364 of the Bankruptcy Code except to the extent otherwise provided in this Agreement, (xii) any use of cash collateral under Section 363 of the Bankruptcy Code, (xiii) any agreement or stipulation with respect to the provision of adequate protection in any bankruptcy or similar proceeding of any Person, (xiv) the avoidance of any lien or security interest in favor of Lender securing the Obligations for any reason, or (xv) any bankruptcy or similar proceeding commenced by or against any Person, including any discharge of, or bar or stay against collecting, all or any of the Obligations (or any interest thereon) in or as a result of any such proceeding. Without in any way limiting the foregoing, with respect to the Loan Documents and the Obligations, Borrower: (A) waives all rights and defenses arising out of an election of remedies by Lender even though that election of remedies, such as non-judicial foreclosure with respect to security for Borrowers' obligations, has destroyed each of their rights of subrogation and reimbursement against the other; and (B) waives any right to a fair value hearing or similar proceeding following a non-judicial foreclosure of the Obligations.

10.30.5 Borrowers represent and warrant to Lender that they have established adequate means of obtaining from each other, on a continuing basis, financial and other information pertaining to their respective businesses, operations and condition (financial and otherwise) and their respective properties, and each now is and hereafter will be completely familiar with the businesses, operations and condition (financial and otherwise) of the other and their respective properties. Each Borrower hereby expressly waives and relinquishes any duty on the part of Lender to disclose to such Borrower any matter, fact or thing related to the businesses, operations or condition (financial or otherwise) of the other Borrowers or the other Borrowers' properties, whether now known or hereafter known by Lender during the life of this Agreement. With respect to any of the Obligations, Lender need not inquire into the powers of any Borrower or the officers, employees or other Persons acting or purporting to act on such Borrower's behalf.

10.30.6 Without limiting the foregoing, or anything else contained in this Agreement, each Borrower waives all rights and defenses that it may have because the Obligations are secured by real property. This means, among other things:

(a) Lender may collect on the Obligations from any Borrower without first foreclosing on any real or personal property collateral pledged by the other Borrowers; and

(b) If Lender forecloses on any real property collateral pledged by any Borrower for the Obligations: (i) the amount of the indebtedness owed by the other Borrowers may be reduced only by the price for which that collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price; and (ii) Lender may collect from any Borrower even if Lender, by foreclosing on the real property collateral, has destroyed any right any Borrower may have to collect from the other Borrowers.

(c) This is an unconditional and irrevocable waiver of any rights and defenses each Borrower may have because the Obligations are secured by real property. Each Borrower expressly waives any right to receive notice of any judicial or nonjudicial foreclosure or sale of any real property collateral provided by the other Borrowers to secure the Obligations and failure to receive any such notice shall not impair or affect such Borrower's obligations hereunder or the enforceability of this Agreement or the other Loan Documents or any liens created or granted hereby or thereby.

(d) Notwithstanding anything to the contrary elsewhere contained herein or in any other Loan Document to which any Borrower is a party, with respect to the Loan and all other Obligations, each Borrower hereby waives with respect to the other Borrowers and their successors and assigns (including any surety) and any other Person any and all rights at law or in equity, to subrogation, to reimbursement, to exoneration, to contribution, to set-off, to any other rights and defenses available to it or to any other rights that could accrue to a surety against a principal, to a guarantor against a maker or obligor, to an accommodation party against the party accommodated, or to a holder or transferee against a maker and which each of them may have or hereafter acquire against the other or any other Person in connection with or as a result of such Borrower's execution, delivery and/or performance of this Agreement or any other Loan Document to which it is a party until the Obligations are paid and performed in full. Each Borrower agrees that it shall not have or assert any such rights against any other Borrower or any other Borrower's successors and assigns or any other Person (including any surety), either directly or as an attempted set-off to any action commenced against such Borrower by any other Borrower (as borrower or in any other capacity) or any other Person until all the Obligations are paid and performed in full. Each Borrower hereby acknowledges and agrees that this waiver is intended to benefit Lender and shall not limit or otherwise affect any Borrower's liability under this Agreement or any other Loan Document to which it is a party, or the enforceability hereof or thereof.

10.30.7 EACH BORROWER WARRANTS AND AGREES THAT EACH OF THE WAIVERS AND CONSENTS SET FORTH HEREIN IS MADE WITH FULL KNOWLEDGE OF ITS SIGNIFICANCE AND CONSEQUENCES, WITH THE UNDERSTANDING THAT EVENTS GIVING RISE TO ANY DEFENSE WAIVED MAY DIMINISH, DESTROY OR OTHERWISE ADVERSELY AFFECT RIGHTS WHICH EACH OTHERWISE MAY HAVE AGAINST THE OTHER, AGAINST LENDER OR OTHERS, OR AGAINST ANY COLLATERAL. IF ANY OF THE WAIVERS OR CONSENTS HEREIN IS DETERMINED TO BE

CONTRARY TO ANY APPLICABLE LAW OR PUBLIC POLICY, SUCH WAIVERS AND CONSENTS SHALL BE EFFECTIVE TO THE MAXIMUM EXTENT PERMITTED BY LAW.

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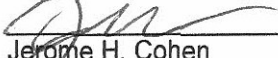
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their duly authorized representatives, all as of the day and year first above written.

**BORROWERS:**

SSDF6 6160 S MLK LLC,  
an Illinois limited liability company

By: SSDF6 Holdco 1 LLC,  
a Delaware limited liability company,  
its Managing Member


By: South Shore Property Holdings LLC,  
a Delaware limited liability company,  
its Managing Manager

By:   
Name: Jerome H. Cohen  
Title: Managing Member

SSDF6 6244 S MLK LLC,  
an Illinois limited liability company

By: SSDF6 Holdco 1 LLC,  
a Delaware limited liability company,  
its Managing Member

By: South Shore Property Holdings LLC,  
a Delaware limited liability company,  
its Managing Manager


By:   
Name: Jerome H. Cohen  
Title: Managing Member

(SIGNATURES CONTINUE ON FOLLOWING PAGE)



**LENDER:**

ARENA DLP LENDER, LLC,  
a Delaware limited liability company

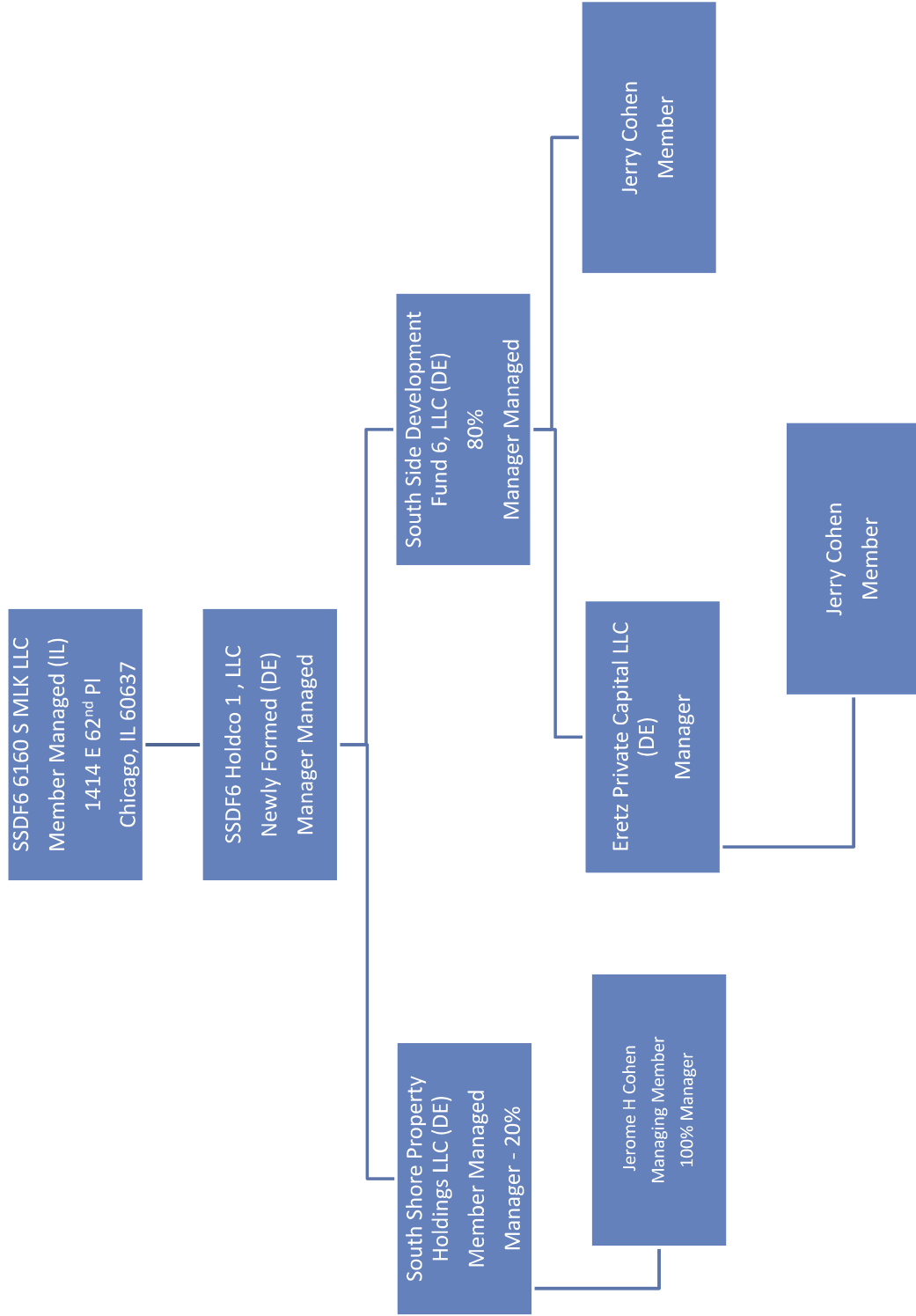
By:   
Name: Lawrence Cutler  
Title: Authorized Signer

**EXHIBIT A**

**Organizational Chart**

[see attached]

**Organization Chart For SSDF6 6160 S MLK LLC - Draft**



**Organization Chart For SSDF6 6244 S MLK LLC - Draft**

