

MODEL AMENDMENT OF LOAN AGREEMENT (FOR WORKOUT)

Joshua Stein¹

This Model Document consists of an Amendment of Loan Agreement for a loan workout, written from a Lender's point of view. Brackets indicate blanks to fill, options, and issues. This document includes: (a) provisions that apply to almost every workout; (b) model language for some common and typical substantive changes and other terms that Lenders and Borrowers often agree to in a workout (this menu doesn't contain all that many options); and (c) reminders of documents and deliveries that a Lender may require, depending on circumstances.

For any particular workout transaction, this document will always need to be edited, and shortened by deleting the many provisions that will not apply. Many measures offered here may already be in place, or may be irrelevant or undesired, for any particular workout. The user must identify and delete all such measures and all implementing language throughout the document (rarely in just one obvious and easy location). The user should also review the existing loan documents to determine whether the Lender should try to improve them in other ways.

Other Documents. Depending on circumstances and the business deal, this document may need exhibits, related documents or deliveries, additional information, conforming provisions, etc. These could include the following, in addition to deliveries and exhibits this letter agreement already mentions:

- *Preworkout Agreement.* As soon as workout discussions begin, obtain a "pre-workout" letter, where the Borrower acknowledges that no agreement binds the Lender until reduced to final documents and signed.
- *Defined Terms.* This document uses definitions from the Loan Agreement. Check defined terms here against the Loan Agreement and modify as appropriate. This document assumes the "Loan Documents" include the Loan Agreement itself.
- *Closing Documents.* For any workout, the Lender can "re-close" the original Loan to whatever degree the Lender wants, and would require additional deliverables accordingly (updated appraisal, engineering and environmental reports, financial statements, estoppels, etc.). This document mentions a few but not all such items. Typically a Lender would not engage in this process, except to the extent the Lender fears particular issues (e.g., problems with a tenant because of delayed delivery of the space or other possible landlord defaults).

¹ This article is based on a chapter in LENDER'S GUIDE TO STRUCTURING AND CLOSING COMMERCIAL MORTGAGE LOANS (Mortgage Bankers Association 2004). Copyright (C) 2009 Joshua Stein (www.joshuastein.com).

- *Section Headings and Numbering.* Wherever this letter agreement modifies the Loan Agreement, section headings and numbering should track the Loan Agreement.

Deed in Escrow and Marketing Arrangements. Exhibits to this letter agreement contain provisions to place a deed in escrow with the Lender as escrowee and/or to allow the Lender to market the Mortgaged Property and require a sale. These provisions are usually unenforceable. They may conceivably be worth the paper they are written on, but only if: (a) adopted through a bankruptcy plan of reorganization (or perhaps (x) a judicially blessed settlement of a pending foreclosure action; and/or (y) appointment of a receiver on suitable terms in a friendly foreclosure); or (b) backed by a “warm body” guaranty.

Administration. This document creates these and other issues and concerns for post-closing administration and follow-through.

- *Additional Documents.* The Borrower may need to sign more documents to implement the lockbox and escrow arrangements.
- *UCC Filing.* The Lender may need to file UCC financing statements to perfect security interests in personal property.
- *Tenant Notices.* Mail the Payment Direction Letters to all Tenants in accordance with the “Notices” provisions of their Leases and at the Mortgaged Property.

Any post-closing deliveries that require Borrower cooperation will almost certainly never be performed unless the Lender gives the Borrower a meaningful incentive to perform. This could consist of an Interest Rate adjustment, withholding some delivery that the Borrower wants (e.g., a release of a recorded “notice of pendency”), withholding funds, or creating a possibility of personal liability. Absent serious measures, a Borrower will typically ignore all post-closing deliveries for any workout closing.

NAME OF LENDER

Address of Lender

As of _____
(the "Amendment Date")

_____ (the "Borrower")
[Borrower Address]

_____ (the "Mezzanine Lender")
[Mezzanine Lender Address]

Loan Agreement Amendment for Mortgaged Property Located at _____

To Whom It May Concern:

Please refer to Loan and Security Agreement dated _____ (as amended in writing from time to time, and including all its exhibits and schedules, the "Loan Agreement") between Borrower and the undersigned (formerly known as _____) (the "Lender"). All definitions in the Loan Agreement apply in this letter agreement (the "Letter Agreement"), except where this Letter Agreement modifies a definition. The Loan Documents have not previously been modified [except by: (a) _____ (the "First Amendment"), and (b) _____ (the "Second Amendment")]. [This Letter Agreement supersedes and replaces the First Amendment and the Second Amendment in their entirety]. Unless otherwise stated, when this Letter Agreement refers to an Exhibit, that means an exhibit to this Letter Agreement.

On the Amendment Date [or, to the extent Lender permits, promptly after the Amendment Date²], Borrower is delivering to Lender (or, where indicated, Lender is obtaining) the following documents and other deliveries, in form and substance satisfactory to Lender (all, collectively, the "Additional Deliveries"):

- *Building Loan Agreement Modification.* A notice of modification of the Building Loan Agreement, which shall have been filed with the appropriate filing office;³
- *Control Agreements.* To the extent not already in force, control agreements for all Accounts;

² See cover notes regarding advisability of post-closing deliveries from the Borrower.

³ Required for New York building loans.

- *Deed in Escrow.* Undated deeds of the Mortgaged Property and undated assignments of all equity interests in Borrower (and transfer tax returns and other documents necessary for recording and an assignment of contracts, bill of sale, and any and all other documents necessary to transfer all Collateral) to a grantee or grantees in blank (collectively, the “Deed in Escrow”), which Deed in Escrow is not being delivered and shall not be deemed delivered except as the Deed in Escrow Arrangements provide;
- *Existing Liens.* A current list of all mechanics’ and other liens (other than Permitted Exceptions) against the Mortgaged Property, attached as **Exhibit EL** (the “Existing Liens”);
- *Guarantor Financials.* Current financial statements of the Guarantor;
- *Guaranty of Carveouts.* A guaranty of all obligations under the Loan Documents for which Borrower is personally liable, executed and delivered by _____ (the “Guarantor”) in substantially the form of **Exhibit GC**;
- *Leasing Guidelines.* The Leasing Guidelines;
- *Legal Fees.* Payment of Lender’s legal fees accrued to date (and a reasonable allowance for post-closing activities) relating to the Loan Documents, all defaults that Lender has asserted under the Loan Documents, this Letter Agreement, and all related matters;
- *Local Counsel.* Written advice from Lender’s local counsel about the Deed in Escrow Arrangements and the Marketing Arrangements;
- *Lockbox Agreement.* A Lockbox Agreement among Borrower, Lender, and _____, a _____ (the “Lockbox Administrator”) consistent with the Lockbox Arrangements, and all documents and deliveries the Lockbox Arrangements require;
- *Mortgage Amendment.* A recordable modification of the Mortgage to give notice of this Letter Agreement and the related changes in the Loan;
- *Notice Recipients.* A list of Borrower’s and each Guarantor’s notice recipients, with addresses and fax numbers, all attached as **Exhibit NR**, for any notice to (or service of process on) Borrower or any Guarantor;
- *Opinion Reaffirmation.* Reaffirmation letter(s) for all Borrower’s opinions of counsel previously delivered under the Loan Agreement;

- *Payment Direction Letters.* Payment direction letters in the form of **Exhibit PD**, directed to all Tenants, for mailing by Lender or its counsel (the “Payment Direction Letters”);
- *Rent Roll.* A current rent roll for the Mortgaged Property (including arrearages and security deposits), attached as **Exhibit RR** (the “Rent Roll”);
- *Reserve Accounts.* Current bank statements showing the location and amount on deposit in the _____ Account and the _____ Reserve Account (together, the “Reserve Accounts”) and evidence that such Reserve Accounts remain under Lender’s sole dominion and control;
- *Tenant Estoppels.* Estoppel certificates, in the form of **Exhibit TE** and signed by the Tenant(s) identified in **Exhibit TE**;
- *Title Coverage.* An updated title search and an update and modification endorsement to the Title Insurance Policy; and
- *UCC Search.* An updated UCC search.

The parties now wish to amend the Loan Agreement, and therefore enter into this Letter Agreement to confirm their amendment of the Loan Agreement, and their further agreements, as follows:

I. Definitions.

1. *Current Pay Interest.* A definition of “Current Pay Interest” is added as follows:

“Current Pay Interest” shall have the meaning set forth in the Lockbox Arrangements.

2. *Deed in Escrow Arrangements.* A definition of “Deed in Escrow Arrangements” is added as follows:

“Deed in Escrow Arrangements” means the covenants, agreements, and other provisions attached as **Exhibit DE**.

3. *Deferred Interest.* A definition of “Deferred Interest” is added as follows:

“Deferred Interest” means an amount equal to the sum of: (a) interest payable from time to time on account of the Loan, as calculated at the Interest

Rate, less the amount of the Current Pay Interest; plus (b) interest on “a,” compounded monthly, at the Interest Rate.⁴

4. *Leasing Guidelines.* The definition of “Leasing Guidelines” is modified in its entirety to read as follows:

“Leasing Guidelines” means, for any Lease, the requirements in **Exhibit LG**.

5. *Lockbox Arrangements.* A definition of “Lockbox Arrangements” is added as follows:

“Lockbox Arrangements” means the terms and provisions of **Exhibit LA**.

6. *Management Decision.* A definition of “Management Decision” is added as follows:

“Management Decision” means any decision from time to time about the Mortgaged Property or its operations, maintenance, leasing, sale, or management, including decisions about the following for the Mortgaged Property: (i) maintenance of trust and bank accounts, security deposits, reserves, and interest thereon; (ii) collection of rents, deposits, and special charges; (iii) payment of any and all expenses, whether capital or operating; (iv) advertising, marketing, and promotion; (v) leasing and rental and modifying and renegotiating any leases and evicting tenants; (v) entering into and modifying service and other contracts of all kinds; (vi) performing any repairs or alterations; (vii) hiring, paying, supervising, and discharging any contractors, personnel, or employees; (viii) payment of taxes and insurance and filing tax protests and insurance claims; (ix) any and all actions that the Management Agreement authorizes or permits Manager to take, including any such actions for which the Management Agreement requires Manager to obtain Borrower’s approval as owner of the Mortgaged Property; (x) replacement of the Manager and the Management Agreement; and (xi) any sale or other transfer. Notwithstanding this definition of Management Decision, any decision to sell the Mortgaged Property shall be subject to the Marketing Arrangements.

7. *Marketing Arrangements.* A definition of “Marketing Arrangements” is added as follows:

⁴ Interest compounding may incur mortgage recording tax in New York. If the Deferred Interest is unlikely to be paid in any case, the Lender might not want to compound, or might treat as “unsecured” the incremental interest that results from compounding. Yet again, spurious considerations of the mortgage recording tax drive business negotiations and legal complexity.

“Marketing Arrangements” means the terms and provisions of **Exhibit MA**.

8. *Maturity Date.* The definition of “Maturity Date” is modified to read as follows:

“Maturity Date” means the earlier of (a) the Scheduled Maturity Date; or (b) such earlier date on which the entire Loan is required to be paid in full, by acceleration or otherwise, under any Loan Document.

9. *Obligations.* The definition of “Obligations” is modified by adding the following language at the end of such definition:

The Obligations shall include all Deferred Interest and the Repayment Fee.

10. *Repayment Fee.* A definition of “Repayment Fee” is added as follows:

“Repayment Fee” means a fee, immediately due and payable on the first to occur of the Maturity Date, each repayment or prepayment of the Loan (in whole or in part), an Event of Default, or any acceleration of the Loan, in an amount equal to the product of (a) _____ per cent; times (b) the principal amount of the Loan being repaid or prepaid, or that Borrower is obligated to repay.

11. *Scheduled Maturity Date.* The definition of “Scheduled Maturity Date” is modified to read as follows:

“Scheduled Maturity Date” means _____, 200_. Borrower may extend the Scheduled Maturity Date to _____, 200_, provided that, as of _____, 200_: (a) Borrower has delivered all Additional Deliveries to Lender; (b) no uncured Event of Default exists; (c) Borrower has given Lender at least 10 (but no more than 20) days written notice of such extension (the “Extension Notice”); (d) with the Extension Notice, Borrower has paid Lender an extension fee equal to the product of (x) _____ percent; times (y) the outstanding principal balance of the Loan as of the date of the Extension Notice; (e) Borrower has paid all interest at the Interest Rate through the Maturity Date (before giving effect to the extension); and (f) Borrower has confirmed, by documentation satisfactory in form and substance to Lender, and subject to no new exceptions, all estoppels, representations, and warranties in this Letter Agreement.⁵ In no event may Borrower extend the Maturity Date beyond _____, 200_.

12. *Servicer.* The definition of “Servicer” is modified by replacing “[name of old servicer]” with: “[name of new servicer].”

⁵ Edit to add any extension conditions unique to this Loan.

13. *Spread.* The definition of “Spread” is modified to read as follows:

“Spread” means ___% per annum _____. The Spread shall increase as follows: _____.

II. Monetary Covenants.

1. *Interest Deferral.* Section ___ of the Loan Agreement is modified by adding the following language at the end of such Section:

Notwithstanding the foregoing, Borrower need not pay Deferred Interest on a current basis. Borrower shall pay all Deferred Interest in full upon any repayment or prepayment of the Obligations, including any payment made or required to be made on, before, or after the Maturity Date or upon any acceleration of the Obligations.

2. *Repayment Fee.* Section ___ of the Loan Agreement is added, as follows:

___ *Repayment Fee.* At the time of any payment, repayment, or prepayment of the Loan (including any resulting from an Event of Default, whether or not Lender has accelerated the Loan or exercised any other right or remedy), Borrower shall pay Lender: (a) all Obligations; and (b) in addition, under any and all circumstances, regardless of when or under what circumstances Borrower pays, prepays, or repays the Loan, as additional consideration for Lender’s having made the Loan, the Repayment Fee. The Mortgage secures, among other things, Borrower’s obligation to pay the Repayment Fee. The Repayment Fee is in addition to all other sums payable under the Loan Documents.

3. *No Extension Right.* Section _____ is deleted in its entirety.

III. Affirmative Covenants.

The following Sections _____ are added to the Loan Agreement after Section _____:

___ *Additional Agreements.* Borrower shall comply with and perform all its obligations under (a) the Deed in Escrow Arrangements; (b) the Lockbox Arrangements; and (c) the Marketing Arrangements.

___ *Bifurcation of Loan.* If at any time Lender so requests, Borrower shall sign such documents as Lender requires to bifurcate this Loan into two separate and independent loans (the “Bifurcated Loans”), on such terms as Lender requires consistent with the Loan Agreement, provided that Borrower’s aggregate obligations under the Bifurcated Loans shall be no greater and no less than Borrower’s obligations under the Loan Documents, except that: (a) Borrower shall provide all financial reports, statements, and other information the Loan Documents require, separately to the holder or servicer of each Bifurcated Loan;

and (b) the holder of only one Bifurcated Loan (as designated from time to time by joint written notice to Borrower from both such holders), or its servicer, may exercise any and all rights of consent, approval, or control under the Loan Documents. Subject to the foregoing, each Bifurcated Loan may be separately transferred, assigned, serviced, administered, and enforced. If either Bifurcated Loan is the subject of a securitization, then Borrower shall cooperate with each such securitization as the Loan Documents otherwise require. Each Bifurcated Loan shall have its own set of loan documents, in substantially the form of the Loan Documents (including severed Mortgages), modified as Lender determines necessary to reflect the Loan bifurcation. Lender shall prepare all documents for the Bifurcated Loans at the expense (including reasonable attorneys' fees) of: (a) Borrower, if an Event of Default exists and has not been cured (but this shall not limit any other rights or remedies of Lender for such an Event of Default); and (b) otherwise, by Lender.⁶ Borrower shall promptly execute such documents on request.⁷

___ *Change of Management.* Notwithstanding anything to the contrary in this Letter Agreement, Lender may, at any time, replace Manager with a replacement Manager Lender selects. Borrower shall promptly cooperate with such replacement, all as Lender reasonably requests. [Borrower may not otherwise replace or direct Manager].

___ *Existing Liens.* Borrower shall bond all unbonded Existing Liens within ___ days after the Amendment Date. On the Amendment Date, Borrower is delivering to Lender copies of all documents relating to the Existing Liens and their status. Borrower shall promptly give Lender's counsel copies of any future documents on such matters. Lender has not waived any of Lender's rights or Borrower's obligations regarding the Existing Liens, even though Lender entered into this Letter Agreement with knowledge of the Existing Liens.

___ *Financing Statements.* Borrower authorizes Lender to file financing statements for the Collateral (including amendments and continuations), in such form and in such offices as Lender determines appropriate to perfect or maintain perfection of Lender's security interest in the Collateral. Borrower is not authorized to, and shall not, file financing statements or other filing or recording documents for any Collateral (including any amendment, continuation, termination, or release statement), without Lender's express prior written approval. Borrower approves, authorizes, and ratifies any filings or recordings Lender makes to perfect its security interest in the Collateral.

⁶ Consider having Borrower agree to pay in all cases, as part of the cost of the workout.

⁷ Considering obtaining a separate power of attorney (in proper form) to execute and acknowledge any such documents on Borrower's behalf.

___ *Lender's Consultant.* Borrower acknowledges that Lender has engaged _____ (the "Consultant") as Lender's consultant, to seek to locate potential purchasers for the Mortgaged Property. Borrower shall give Consultant and its potential purchasers access and keys to the Mortgaged Property, and such information about the Mortgaged Property, as Consultant or Lender reasonably requests. Such access and keys does not: (a) constitute Consultant's or Lender's taking possession or control of the Mortgaged Property or limiting Borrower's independent exercise of business judgment for the Mortgaged Property; or (b) limit Borrower's or expand Lender's obligations under the Loan Documents in any way.

___ *Management of Mortgaged Property.*⁸ From and after the Amendment Date, Lender shall have the right, to the exclusion of Borrower, to make all Management Decisions and exercise all power and authority that Borrower could otherwise exercise for the Mortgaged Property. Borrower shall not interfere in any way with Lender's dealings with Manager or any Management Decision. Any such management or dealings with Manager shall not: (a) constitute Lender's taking possession or control of the Mortgaged Property; (b) make Lender a mortgagee in possession; (c) entitle Borrower to any claim, defense, or offset against the Obligations, even if Borrower disagrees with any Management Decision Lender makes or believes that Lender's management of the Mortgaged Property is unwise, inappropriate, or ill advised; or (d) limit Borrower's obligations or expand Lender's obligations or liabilities under the Loan Documents in any way. Borrower shall take such actions as Lender reasonably requests from time to time to enable Lender to exercise its authority under this paragraph.

___ *Monthly Reporting.* In addition to any reports the Loan Documents otherwise require, Borrower shall give Lender, within ___ days after each month, reports of the following, all in form and substance satisfactory to Lender: (i) a current Rent Roll; (ii) a report of all leasing activity in the Mortgaged Property, Leases proposed since the last such report (with true and complete copies of such proposed new Leases), and Leases that will expire within 90 days; (iii) receipts and disbursements (to the extent not otherwise reported to Lender under the Lockbox Arrangements); (iv) Reserve Account balances and leasing activities; and (v) such other information about the Mortgaged Property as Lender requires.

IV. *Negative Covenants.*

The following Sections ___ are added to the Loan Agreement after Section _____:

___ *Leasing Guidelines.* Borrower shall not enter into any Lease unless it complies with the Leasing Guidelines. Any change in, or deviation from, the

⁸ Provisions of this type are risky.

Leasing Guidelines shall require Lender's approval in its sole and absolute discretion.

___ *Partner Loans.* Notwithstanding anything to the contrary in Section _____ of the Loan Agreement, Borrower shall not obtain any loan from any partner or member of Borrower unless Lender has approved all documentation for such loan and each lender has entered into a subordination, standstill, and intercreditor agreement and other documentation satisfactory to Lender in Lender's sole and absolute discretion. The aggregate amount of all such loans, including unpaid interest, repayment fees, and all other obligations, shall never exceed \$_____.

___ *Status Changes.* Borrower shall not change Borrower's name. Borrower shall not change the state or commonwealth in which Borrower is incorporated, formed, or organized without giving Lender at least 90 days prior written notice thereof.

V. *Representations and Warranties.*

The following additional representations and warranties are added to Article ____ of the Loan Agreement as Sections _____, and are made effective as of the Amendment Date and as of each date thereafter when, under the Loan Agreement, Borrower's representations and warranties are deemed made or remade:

___ *Certain Numbers.* Borrower's correct federal employer identification number appears below Borrower's signature. Borrower's correct organizational identification number under _____⁹ law appears below Borrower's signature. Borrower has never operated or been formed or existed under any other name. Borrower has at all times since its formation been a _____ formed under the laws of _____. Borrower is not a successor to any other entity.¹⁰

___ *Delivery of Documents.* Borrower has delivered to Lender true, correct, and complete copies of all communications between Borrower and _____ relating to _____.¹¹

___ *Equity Ownership.* All equity interests of Borrower are, as of the Amendment Date, owned and held as follows:

⁹ Delaware and New York do not require these numbers.

¹⁰ Add this provisions only if not already in the Loan Documents.

¹¹ For example, if issues have arisen about the terms of the condominium plan, Lender may ask for copies of all communications between Borrower and condominium counsel relating to the law governing the plan and the options available to Borrower.

_____.

___ *Guarantor.* Guarantor's financial statements as delivered to Lender on the Amendment Date are true and complete.¹²

___ *Liens.* **Exhibit EL** correctly describes all Existing Liens. Except for the Existing Liens, the Mortgaged Property is subject to no liens or encumbrance except Permitted Exceptions. For each Existing Lien, Borrower has either: (a) where indicated in **Exhibit EL**, bonded such Existing Lien; or (b) obtained a court order fixing the amount of the undertaking required to bond such Existing Lien, and **Exhibit EL** accurately specifies the amount of such undertaking.

___ *Loan Documents.* All representations and warranties in the Loan Documents are true and correct in all material respects as of (and as if remade on) the Amendment Date, except facts, circumstances, and events occurring or arising after the Closing Date but in full compliance with the terms and conditions of the Loan Documents and as follows: _____.

___ *No Default.* Except as this Letter Agreement discloses, no Default exists under any Loan Document.

___ *No Equity Transfer.* No partner, member, or other investor in Borrower, directly or indirectly, at any level of ownership, has transferred or assigned any of its direct or indirect interest in Borrower since the Closing Date.

___ *No Mortgaged Property Transfer.* Borrower has not transferred or assigned any of its interest in the Mortgaged Property, and no other transfer has occurred in violation of the Loan Documents.

___ *Rent Roll.* The Rent Roll is accurate and complete.

___ *Reserve Accounts.* The Reserve Accounts contain all funds the Loan Documents require. Neither Borrower nor anyone acting for Borrower has withdrawn any funds from any Reserve Account except in full compliance with the Loan Documents. The Reserve Accounts remain subject to Lender's sole dominion, control, and security interest.

¹² Consider adding other representations and warranties about Guarantor and its execution of this Letter Agreement. Consider requiring quarterly and annual financial statements. Are there any consequences for failure to deliver? And what if Guarantor's financial condition deteriorates?

VI. Additional Changes.

1. *Indemnification.* Section ____, entitled “Indemnification,” is modified as follows. At the end of the paragraph, the following language is added:

Borrower shall Indemnify¹³ Lender against any: (a) claim made by any direct or indirect partner, member, investor, or principal of Borrower against Lender in any litigation between or among Borrower and/or any of Borrower’s direct or indirect partners, members, principals, or investors; and (b) transfer or sales taxes payable on any foreclosure deed or deed in lieu of foreclosure or other transfer or instrument of transfer (or its recording), as the result of Lender’s exercise of its rights and remedies under any Loan Document or applicable law.

2. *Events of Default.* Section ____, entitled “Events of Default,” is modified by deleting the word “or” at the end of the paragraph. Section ____ is modified by adding the word “or” at the end of the paragraph. Sections ____ and ____ are added as follows:

__. If Borrower fails to comply with the Deed in Escrow Arrangements, Lockbox Arrangements, or Management Arrangements, and such failure continues for two (2) Business Days [after notice to Borrower or Guarantor]; or

__. If, as of _____, 200_, Borrower has not yet delivered to Lender all the Additional Deliveries.¹⁴

3. *Remedies.* Sections ____ and ____ are added as follows:

__ *Additional Agreements.* Notwithstanding anything to the contrary in Section ____, the parties further agree as follows. Lender shall have no obligation to clean-up or otherwise prepare the Collateral for sale. Lender may comply with any applicable state or federal law requirements on disposition of the Collateral. Such compliance shall not be considered adversely to affect the commercial reasonableness of any sale of the Collateral. Lender may specifically disclaim any warranties of title or the like. If Lender sells any Collateral on credit, Borrower shall be credited only with payments actually made by the purchaser, received by Lender, and applied to the indebtedness of the purchaser.

¹³ Define “Indemnify” in the Loan Agreement, once, to avoid the need to include all the usual verbiage every time the Borrower agrees to Indemnify the Lender.

¹⁴ The concept of “Additional Deliveries” is a bad idea in any workout. Also, review entire agreement for any workout-specific Events of Default to add.

If the purchaser fails to pay for the Collateral, Lender may resell the Collateral and Borrower shall be credited with the proceeds of the sale.¹⁵

____ *Reserve Accounts*. To the extent that Lender holds any Reserve Account at the time of any payment or prepayment of the Loan or Event of Default, Borrower authorizes Lender to retain such Reserve Account and apply it to pay any or all Obligations.

4. *Recourse Carveouts*. Section _____ is added as follows:¹⁶

____ *Certain Personal Liability*. Nothing in Section ____ shall prevent recourse to Borrower and Guarantor and their assets for repayment of the Indebtedness, and the Indebtedness shall become fully recourse to Borrower and Guarantor, and Borrower and Guarantor shall be fully liable for the entire Indebtedness, if any of the following occurs: (i) Borrower or any Guarantor interferes with the management of the Mortgaged Property (or the making or implementation of any Management Decision) by Lender, or interferes with the Lockbox Arrangements, and fails to cure any such interference within three Business Days after notice; (ii) Borrower or any Guarantor asserts, in writing, that Lender is a mortgagee in possession; (iii) Borrower or any Guarantor asserts any Management Decision as the basis for any claim or defense against Lender or the Indebtedness; (iv) Borrower fails to perform any obligation regarding any Contract of Sale; (v) Borrower fails to perform any obligation arising under any Contract of Sale (but only if Borrower can reasonably perform without contribution of additional funds to Borrower by any partner or member of Borrower), which failure is not cured within five Business Days after notice; (vi) Borrower or any Guarantor fails to perform any obligation under the Deed in Escrow Arrangements, which failure is not cured within five Business Days after notice; or (vii) Borrower or any Guarantor takes any action to prevent, delay, or defer any release or recording of any Deed in Escrow or any resulting conveyance of the Mortgaged Property when and as this Letter Agreement contemplates (such release, recording, and conveyance, the “Deed Delivery”), including the giving of any notice that would attempt to delay or prevent a Deed Delivery, the filing of any action or proceeding to delay or prevent any Deed Delivery, the seeking of any injunction or order to delay or prevent any Deed Delivery, the recording or delivery of any notice or other document purporting to disclaim, limit, invalidate, or disavow any Deed in Escrow or Deed Delivery, or the asserting of any claim or defense against the validity of any Deed in Escrow or Deed Delivery.

¹⁵ This paragraph applies primarily to Loans closed before July 2001 or where the Loan Documents do not already cover these matters, motivated by UCC Revised Article 9.

¹⁶ These “carveouts” relate only to matters this Letter Agreement covers. At the time of any workout a Lender may also want to revisit and expand all carveouts in the Loan Agreement.

VII. Workout Discussions.

1. *Acknowledgment.* Borrower acknowledges that after the Amendment Date Borrower may discuss with Lender, and Lender may consider, proposals and possible courses of action for the Loan and the Mortgaged Property (the “Workout Discussions”).

2. *Certain Written Communications.* Nothing in this Letter Agreement limits the effectiveness or admissibility of any written: (a) notice, delivery of information, or other communication given by any party to any other party(ies) under the Loan Documents, which states that it is intended to constitute a notice for purposes of the Loan Documents or is given or delivered pursuant to the Loan Documents, or (b) agreement that the parties might execute and deliver regarding the Workout Discussions. Unless the parties agree otherwise in writing, no such written agreement shall bind anyone unless and until executed and delivered by all parties and all necessary consents have been obtained in writing.

3. *Inadmissibility.* All discussions, negotiations, and other communications, written or oral, including the distribution of any so-called “term sheets” or written proposals or memoranda, and including any statement that is or could be deemed an admission of any fact or an admission of the satisfaction of any condition, or otherwise relating to the Loan or the Mortgaged Property, between Borrower and Lender (or to or from counsel of either of them), relating to any or all of the Workout Discussions shall, except as this Letter Agreement expressly provides, be deemed to constitute settlement discussions, shall not be discoverable or disclosable, shall not be admissible in evidence for any purpose, shall not be deemed to constitute proof of an admission of liability or wrongful motivation or other evidence of any kind, and shall have no legal or other effect on the parties’ rights and obligations under the Loan Documents.

4. *No Modification.* Nothing in any Workout Discussions shall modify, amend, limit, or waive any right, remedy, covenant, condition, or obligation of any party under the Loan Documents. The Loan Documents all remain in full force and effect and shall continue to do so notwithstanding any Workout Discussions, except as this Letter Agreement expressly provides. The parties acknowledge and reconfirm that the Loan Documents cannot be and have not been modified, amended, or waived, in whole or in part, except by a written agreement signed by the party to be charged (including this Letter Agreement). Borrower acknowledges that Lender has not waived any right or remedy under the Loan Documents.

5. *No Obligations.* No party is under any obligation to agree to any modification or amendment pursuant to any Workout Discussions. Any party may terminate Workout Discussions at any time, for any reason or no reason, without liability. An oral agreement provisionally reached may ultimately not become effective because, for example, either party fails to obtain any necessary internal approvals or, for any reason or no reason, changes its mind about the contemplated agreement.

6. *No Reliance; No Extension.* No party shall rely upon any statements or communications of any other party, whether written or oral, made in any Workout Discussions, except as this Letter Agreement otherwise expressly provides. The existence of any Workout

Discussions shall not modify or extend any time period in the Loan Documents or under applicable law.

VIII. Additional Workout Understandings.

1. *Acknowledgments.* Borrower acknowledges that Lender holds the Loan. In any action or proceeding relating to or arising from the Loan, Lender need not demonstrate or establish the fact that Lender holds the Loan or the original promissory note evidencing the Loan. Borrower acknowledges, represents, and warrants that all mortgage recording tax due on the recording of the Mortgage has been paid in full. As of the Amendment Date, Borrower confirms that the outstanding principal balance of the Loan is \$_____; interest has been prepaid (if at all) for no more than 30 days; Borrower has no claim, counterclaim, offset, defense, or setoff against Borrower's obligations under the Loan Documents; Lender is not in default under any Loan Document; no act or omission of Lender before the Amendment Date has caused or will hereafter cause Borrower to suffer any loss; the Loan has been fully funded; and Lender has no obligation to make any further advance of the Loan.

2. *Additional Deliveries.* Borrower shall at Borrower's expense deliver to Lender all remaining Additional Deliveries within __ days after the Amendment Date. At Lender's option, by notice to Borrower, any failure to make any such delivery in a timely manner shall constitute an immediate and incurable Event of Default. This Letter Agreement shall be fully effective between the parties whether or not any Additional Deliveries are delivered.

3. *AUTOMATIC STAY.* BORROWER SPECIFICALLY REAFFIRMS THE PROVISIONS OF SECTION ____ OF THE LOAN AGREEMENT (WAIVER OF AUTOMATIC STAY) AND ACKNOWLEDGES THAT THIS LETTER AGREEMENT HAS GIVEN BORROWER A REASONABLE OPPORTUNITY TO REORGANIZE AND RESTRUCTURE ITS AFFAIRS. IF BORROWER IS SUBSEQUENTLY UNABLE TO PERFORM ITS OBLIGATIONS UNDER THE LOAN DOCUMENTS, BORROWER ACKNOWLEDGES THAT THE WAIVER OF THE AUTOMATIC STAY SET FORTH IN THE LOAN AGREEMENT SHALL BE FULLY EFFECTIVE AND HAS INDUCED LENDER TO ENTER INTO THIS LETTER AGREEMENT AND GRANT BORROWER THE CONCESSIONS AND RELIEF SET FORTH IN THIS LETTER AGREEMENT. BORROWER ACKNOWLEDGES THAT BORROWER HAS NO EQUITY IN THE MORTGAGED PROPERTY. BORROWER ACKNOWLEDGES THAT THE TRANSACTION DESCRIBED IN THIS LETTER AGREEMENT HAS GIVEN BORROWER A FULL AND ADEQUATE OPPORTUNITY TO REORGANIZE ITS AFFAIRS. NO FURTHER OPPORTUNITY TO REORGANIZE IS NECESSARY OR APPROPRIATE.¹⁷

4. *Exclusivity.* If Borrower becomes the subject of any proceeding under Chapter 11 of Title 11 of the United States Code, then Borrower expressly waives the 120-day period of

¹⁷ This paragraph and the next seem like great ideas. A bankruptcy judge will almost certainly ignore both of them.

exclusivity provided for in 11 U.S.C. § 1121(b), and agrees that Lender may file a plan of reorganization at any time after such proceeding commences.

5. *Effect of Letter Agreement.* Nothing in this Letter Agreement shall: (a) constitute Lender's or Broker's taking possession or control of the Mortgaged Property; (b) make Lender a "mortgagee in possession"; (c) impose on Lender any liability for any Mortgaged Property; (d) entitle Borrower to any defense or offset against the Loan Documents; or (e) except as this Letter Agreement expressly states, limit Borrower's obligations or Lender's rights or remedies or expand Lender's obligations under the Loan Documents.

6. *Loan Documents.* This Letter Agreement constitutes a Loan Document within the meaning of the Loan Agreement. If Borrower fails to perform any obligation under this Letter Agreement, or if any representation or warranty in this Letter Agreement is not true and correct, then Lender may at its option: (a) exercise any rights and remedies under the Loan Documents; and/or (b) cancel and rescind this Letter Agreement, in whole or in part.

7. *No Novation.* This Letter Agreement represents a modification of the Loan Documents and not a new obligation, nor a cancellation of any pre-existing obligations. This Letter Agreement does not constitute a novation.

8. *Nonrecourse.* Section ____ of the Loan Agreement, "Nonrecourse," remains in full force and effect, subject to any modifications expressly provided for in this Letter Agreement, is otherwise not modified in any way by this Letter Agreement, and applies in full to this Letter Agreement as if repeated verbatim here.

9. *Reaffirmation.* Except as set forth in this Letter Agreement, the parties ratify and reaffirm the Loan Documents and confirm they remain in full force and effect. Nothing in this Letter Agreement constitutes a waiver of any default under any Loan Document or a waiver of Lender's right to declare a default based on any facts and circumstance that otherwise constitute or constituted a default under the Loan Documents. This Letter Agreement supersedes all previous waivers, and any previous discussions, negotiations, or proposals, between the parties.

10. *Releases.* Borrower releases Lender from any and all liabilities of Lender to Borrower that exist or may exist on the Amendment Date. Borrower releases, terminates, surrenders, cancels, and rescinds all claims and liabilities that Borrower has asserted or could assert against Lender as of the Amendment Date.

11. *Representative.* Lender designates _____ as Lender's authorized representative with full authority to give any notice or confirm any waiver or extension under any Loan Document. Nothing in the preceding sentence obligates Lender to agree to any waiver or extension.

12. *Servicer Authority Terminated.* Lender has advised Borrower that Servicer has no further authority to bind or estop Lender in any way. Borrower acknowledges that any notice from Servicer does not bind or estop Lender. Notwithstanding the foregoing, if Servicer sends Borrower any monthly interest and escrow statements, then Borrower may rely on such statements as setting forth the correct amount of interest and escrow payment due for the month,

but only if (a) Lender has not accelerated the Loan and (b) the Loan has not otherwise become due and payable, for example because the Maturity Date has occurred. Lender has disclosed to Borrower that if the Maturity Date occurs or Lender accelerates the Loan, then: (1) Servicer may nevertheless erroneously continue to send regular monthly bills; and (2) any such regular monthly bills do not waive or limit Borrower's immediate obligation to repay the Loan and all amounts that the Loan Documents secure, pursuant to Lender's acceleration of the Loan. Such regular monthly bills after acceleration would constitute mere clerical errors and shall not bind Lender in any way. If, after Lender has accelerated the Loan or the Loan has otherwise become due and payable in full, Borrower pays Servicer any amount, then any such payment represents a payment on account of the Loan and does not vitiate or invalidate the acceleration of the Loan or Borrower's obligation to repay the entire Loan.

13. *Subordinate Liens.* This Letter Agreement is not intended to prejudice the interests of the holder of any lien that may be subordinate to the Mortgage (a "Subordinate Lien"). If the execution of this Letter Agreement prejudiced the interests of the holder of any Subordinate Lien, then Lender may enforce the Loan Documents in accordance with their original terms without regard to this Letter Agreement. [The parties acknowledge, however, that Lender has at this time validly accelerated the Loan, so the Loan would be immediately due and payable but for the parties' entering into this Letter Agreement. By entering into this Letter Agreement, Lender is waiving its right to immediate repayment of the Loan and is instead deferring payment to the new Maturity Date as provided for in this Letter Agreement. Therefore, this Letter Agreement cannot possibly prejudice any holder of any Subordinate Lien.] Borrower represents and warrants that no Subordinate Lien encumbers the Mortgaged Property, except the Existing Liens.

IX. Miscellaneous.

1. *Attorneys' Fees.* Borrower and the Guarantors shall reimburse all reasonable attorneys' fees that Lender incurs in enforcing this Letter Agreement.
2. *Conflicts.* To the extent that any provision of the Loan Documents is inconsistent with this Letter Agreement, the Loan Documents shall be deemed to be modified accordingly, as necessary to conform to this Letter Agreement.
3. *Counterparts.* This Letter Agreement may be executed in counterparts. Each is an original. All are a single agreement.
4. *Exhibits.* All exhibits to this Letter Agreement are incorporated by reference with the same force and effect as if fully set forth in the text of this Letter Agreement.
5. *Jury Trial Waiver.* THE PARTIES WAIVE JURY TRIAL IN ANY DISPUTE ARISING FROM THE ENFORCEMENT OR INTERPRETATION OF THIS LETTER AGREEMENT OR THE RELATIONSHIP OF THE PARTIES.
6. *Notices.* For all purposes of the Loan Documents, any notice to Borrower, and any service of process upon Borrower, shall be validly given or served if sent by Federal Express or hand delivery to the notice recipients identified in **Exhibit NR** at the address(es) and fax

number(s) in **Exhibit NR**. Notwithstanding anything to the contrary in the Loan Documents, Borrower shall not change or supplement any notice recipient or address listed in **Exhibit NR**. Borrower waives any right to designate any replacement notice recipient.

If the foregoing accurately reflects your understanding, please sign and return a copy of this Letter Agreement to us, whereupon it shall become legally binding between the parties as of the Amendment Date.

Thank you.

Very truly yours,

[LENDER SIGNATURE BLOCK]

Confirmed and agreed.

[BORROWER SIGNATURE BLOCK]

Borrower's Federal Employer Identification Number: _____

Borrower's Organizational Identification Number:¹⁸ _____

GUARANTOR ACKNOWLEDGMENT

Guarantor consents to and joins in the foregoing Letter Agreement. Guarantor joins in all of Borrower's acknowledgments, consents, representations, waivers, and warranties in the foregoing Letter Agreement. Guarantor specifically consents and agrees to the changes made in the above Letter Agreement to Section _____ of the Loan Agreement, specifically the addition of Section _____, under which EACH GUARANTOR SHALL BE PERSONALLY LIABLE FOR THE ENTIRE LOAN IF ANY EVENT DESCRIBED IN SECTION _____ OCCURS.

[GUARANTOR SIGNATURE BLOCK]

_____, an individual,
in his individual and personal capacity

¹⁸ Omit for Delaware or New York entities.

MANAGER ACKNOWLEDGMENT

Manager shall comply with, and shall be bound by, the Lockbox Arrangements and the foregoing Letter Agreement. Manager shall take all direction and instruction under the Management Agreement only from Lender, and shall comply with all such direction and instruction (as if directed and instructed by Borrower) to the extent the Management Agreement requires. Manager shall disregard any instructions from Borrower relating to the Management Agreement or any Management Decision. Manager acknowledges that Borrower has irrevocably authorized Lender to control all Management Decisions to the exclusion of Borrower.

[MANAGER SIGNATURE BLOCK]

MEZZANINE LENDER ACKNOWLEDGMENT

Mezzanine Lender consents to the foregoing Letter Agreement, and acknowledges, represents, and warrants that Mezzanine Lender: (a) has not transferred, assigned, or encumbered any interest in the Loan as defined in that certain [Mezzanine Loan Agreement] dated _____ between _____ and _____; (b) releases and covenants not to assert any and all claims Mezzanine Lender may otherwise have against Lender relating to the Loan, the Loan Agreement, the Mortgaged Property, or the foregoing Letter Agreement; and (c) acknowledges that the [Intercreditor Agreement] remains in full force and effect and has not been modified or waived, except that any reference to Lender's Loan Documents shall refer to such Loan Documents as modified by the above Letter Agreement.

[MEZZANINE LENDER SIGNATURE BLOCK]

Attached Exhibits:

- Exhibit DE – Deed in Escrow Arrangements
- Exhibit EL – Existing Liens
- Exhibit GC – Guaranty of Carveouts
- Exhibit LA – Lockbox Arrangements
- Exhibit LG – Leasing Guidelines
- Exhibit MA – Marketing Arrangements
- Exhibit NR – Notice Recipients for Borrower -- Names, Addresses, and Fax Numbers
- Exhibit PD – Payment Direction Letter, Form of
- Exhibit RR – Rent Roll
- Exhibit TE – Tenant Estoppel Certificate, Form of

EXHIBIT DE – DEED IN ESCROW ARRANGEMENTS¹⁹

Borrower has deposited the Deed in Escrow with Lender in Lender's capacity as an escrowee and not in Lender's capacity as a creditor or lender (the "Escrowee"). Lender and Borrower acknowledge that the Deed in Escrow has not been delivered. Instead, Escrowee holds the Deed in Escrow solely for the purposes and under the terms of these Deed in Escrow Arrangements.

Release from Escrow. If any Event of Default or Deed Release Date occurs, then Lender may, at any time thereafter (so long as both (a) such Event of Default has not been cured and (b) Lender has not yet exercised any rights or remedies on account of that Event of Default, including its rights under this paragraph), at its option and without prior notice to Borrower, cause or direct Escrowee to release from escrow the Deed in Escrow, fill in the date and grantee (the "Grantee") of the Deed in Escrow (which Grantee may but need not be Lender or Lender's designee, nominee, or foreclosure sale purchaser), and deem the Deed in Escrow delivered, notwithstanding any direction, instruction, or assertion by Borrower to the contrary. Borrower directs Escrowee to disregard any such direction, instruction, or assertion by Borrower. Lender may record the Deed in Escrow. Borrower shall pay all costs and expenses, including transfer taxes and recording fees, of such recordation.

Further Assurances. If Lender requires Escrowee to release the Deed in Escrow, then Borrower shall execute and deliver to Lender such further documents, deliveries, certificates, and forms as Lender shall require to transfer the entire Mortgaged Property and all Collateral (and the full management and control of the Mortgaged Property) to Grantee, including such affidavits, confirmations, and acknowledgments as any title insurance company shall require to insure title deriving from the Deed in Escrow.

Effect of Deed in Escrow. If Lender deems the Deed in Escrow delivered, Grantee shall automatically become the owner of all Collateral, including all revenue and proceeds from the Collateral and all funds in any bank accounts (including any Reserve Accounts) related to or constituting part of the Collateral or held by Lender under the Loan Documents.

Borrower's Acknowledgment. Borrower acknowledges and agrees that at the time the Deed in Escrow and all additional documents and actions contemplated by these Deed in Escrow Arrangements are released: (a) they are intended to effect a present and absolute conveyance and unconditional transfer, for adequate consideration, of the Mortgaged Property and the Collateral and, to the full extent assignable, all licenses, rights, and privileges associated therewith and are not given as security for the payment of the Loan or any part of it; (b) Borrower shall promptly after such transfer vacate the Mortgaged Property (subject to the rights of tenants, occupants, and licensees), and Grantee, or its nominee, designee, or assignee, shall thereafter have the immediate right to possess, occupy, operate, use, enjoy, sell, and transfer the same or any part of

¹⁹ With a few possible exceptions, these arrangements are not worth the paper they are printed on, or the legal fees they may incur to negotiate. See cover notes.

it for its own account, at its sole and absolute discretion; (c) title to the Mortgaged Property shall remain subject to the Mortgage and other Security Documents to the full extent of the Obligations; and (d) recording of the Deed in Escrow shall not result in a merger of Lender's interest as mortgagee under the Mortgage with Grantee's interest as fee title holder. Borrower absolutely and unconditionally and with the advice of, and after consultation with, Borrower's counsel expressly waives any right to assert any common law or statutory right of redemption or reinstatement regarding the transfer of the Mortgaged Property to Grantee under the Deed in Escrow or by foreclosure of the Mortgage or otherwise as the Loan Documents may allow.

Cumulative Remedies. Nothing in these Deed in Escrow Arrangements precludes Lender from pursuing foreclosure of the Mortgage or any other right or remedy under the Mortgage or the other Loan Documents, upon an Event of Default, instead of or in addition to releasing the Deed in Escrow. Upon any Event of Default, Borrower shall within five Business Days after demand by Lender, deliver to Lender, in form and content reasonably acceptable to Lender: (i) a stipulation of the facts necessary to obtain a judgment of foreclosure uncontested by Borrower; and (ii) a quit claim deed or release and waiver of Borrower's redemption and other rights, and Lender shall have the absolute right (at its option) to file the same and complete a foreclosure of the Mortgage and to thereby effect a sale and transfer of the Mortgaged Property.

Specific Performance. These Deed in Escrow Arrangements may be enforced by specific performance. Lender is agreeing to substantial modifications of the Loan in reliance on these Deed in Escrow Arrangements, and the Collateral is unique. Accordingly, these Deed in Escrow Arrangements should be fully enforced in accordance with their terms.

No Escrowee Liability. Borrower waives, releases, and covenants not to assert any claim of any kind against Escrowee, including any claim for equitable relief. In the event of any dispute about these Deed in Escrow Arrangements, any claims of Borrower shall be resolved solely between Borrower and Lender.

Duties of Escrowee. Escrowee shall have no duties or responsibilities except as expressly set forth herein. Escrowee shall have no duty to enforce any obligation of any person to make any delivery or perform any other act. Escrowee shall be under no liability to the parties or to anyone else by reason of any failure on the part of any party hereto or any maker, guarantor, endorser, or other signatory of any document or any other person to perform such person's obligations under any such document.

No Responsibility. In its capacity as Escrowee, Escrowee shall not be responsible for the genuineness or validity of any security, instrument, document, or item deposited with it and shall have no responsibility except to faithfully follow the instructions contained herein, and shall not be responsible for the validity or enforceability of any security interest of any party. Escrowee is fully protected in acting in accordance with any written instrument given to it hereunder by any of the parties hereto and reasonably believed by Escrowee to have been signed by the proper person. Escrowee may (unless actually aware of contrary facts) assume that any person purporting to give any notice hereunder has been duly authorized to do so. If for any reason any dispute or uncertainty arises about any action to be taken hereunder, Escrowee shall have the right to take no action until it shall have received instructions in writing concurred to by Borrower and Lender and any other person or entity having an interest in the Collateral or until

directed by a judgment or decree of a court of competent jurisdiction in the State of [New York] or the state or commonwealth where the Mortgaged Property is located or in a Federal court in such State, whereupon Escrowee shall take such action in accordance with such instructions or such order.

No Liability. Escrowee's duties are purely ministerial. Escrowee shall not be liable to the other parties hereto or to anyone else for any action taken or omitted by it, or any action suffered by it to be taken or omitted, in good faith and in the exercise of reasonable judgment, except for acts of willful misconduct or gross negligence or for a breach by Escrowee of its obligations under these Deed in Escrow Arrangements. Escrowee may (unless Escrowee is actually aware of contrary facts) rely conclusively and shall be protected in acting upon any order, notice, demand, certificate, opinion or advice of Escrowee's counsel, statement, instrument, report or other paper or document (not only as to its due execution and the validity and effectiveness of its provisions, but also as to the truth and acceptability of any information therein contained) which is reasonably believed by Escrowee to be genuine and to be signed or presented by the proper person or persons. At the option of Escrowee, Escrowee shall not be bound by any notice or demand, or any waiver, modification, termination or rescission of these Deed in Escrow Arrangements or any of the terms hereof, unless evidenced by a final judgment or decree of a court of competent jurisdiction in the State of [New York] or a Federal court in such State, or a writing delivered to Escrowee signed by the proper party or parties and, if the duties or rights of Escrowee are affected, unless it shall give its prior written consent thereto.

Determination of Facts. Escrowee shall have the right (unless actually aware of contrary facts) to assume absent written notice to the contrary from the proper person or persons that a fact or an event by reason of which an action would or might be taken by Escrowee does not exist or has not occurred, without incurring liability to the other parties hereto or to anyone else for any action taken or omitted, or any action suffered by it to be taken or omitted, in good faith and in the exercise of reasonable judgment, in reliance upon such assumption.

Indemnification. Except regarding Escrowee's willful misconduct, gross negligence, or breach of its obligations under these Deed in Escrow Arrangements, Escrowee shall be indemnified and held harmless jointly and severally by Borrower and Lender from and against any and all expenses or loss suffered by Escrowee, including reasonable attorneys' fees (or the fair value of legal services rendered by Escrowee on behalf of itself), in connection with any action, suit or other proceeding involving any claim, which arises out of or relates to these Deed in Escrow Arrangements (including any claim made by either party against Escrowee), the services of Escrowee hereunder or the documents and instruments held by it hereunder. As between Borrower and Lender, the prevailing party in any such action, suit or proceeding shall cover all such expenses and losses suffered by Escrowee. Promptly after the receipt by Escrowee of notice of any demand or claim or the commencement of any action, suit or proceeding, Escrowee shall, if a claim in respect thereof is to be made against any of the other parties hereto, notify such other parties hereto in writing; but the failure by Escrowee to give such notice shall not relieve any party from any liability which such party may have to Escrowee hereunder.

Additional Documents. From and after the Amendment Date, the other parties hereto shall from time to time deliver or cause to be delivered to Escrowee such further documents and

instruments and shall do and cause to be done such further acts as Escrowee shall reasonably request (it being understood that Escrowee shall have no obligation to make any such request and the parties hereto shall have no obligation to incur any cost or expense or any additional liability with respect to any such request) to carry out more effectively the provisions and purposes of these Deed in Escrow Arrangements, to evidence compliance herewith or to assure itself that it is protected in acting hereunder.

Resignation. Escrowee may resign as Escrowee by giving five days' prior written notice to each party. In such event, the successor Escrowee shall be a reputable law firm or a nationally recognized title insurance company, selected by Lender and reasonably acceptable to Borrower. The resigning Escrowee shall deliver, against receipt, to such successor Escrowee, the Deed in Escrow held by such party, to be held by such successor Escrowee pursuant to the terms and provisions of these Deed in Escrow Arrangements. If no such successor has been designated on or before the effective date of such party's resignation, its obligations as Escrowee shall continue until such successor is appointed; provided, however, its sole obligation thereafter shall be to safely keep all documents and instruments then held by it and to deliver the same to the person, firm or corporation designated as its successor or until directed by a final order or judgment of a court of competent jurisdiction in the State of [New York (or the state or commonwealth where the Mortgaged Property is located)] or a Federal Court in such State, whereupon Escrowee shall make disposition thereof in accordance with such order or judgment. If no successor Escrowee is designated and qualified within five (5) days after Escrowee's resignation is effective, such party that will no longer be serving as Escrowee may apply to any court of competent jurisdiction for the appointment of a successor Escrowee. Escrowee may at any time resign by depositing the Deed in Escrow with any court of competent jurisdiction.

Representation of Parties. If Escrowee is counsel for any party, Escrowee may represent such party in any matter, including any litigation about the Loan or this Letter Agreement.

Multiple Properties. Lender may apply and enforce these Deed in Escrow Arrangements for all Mortgaged Property simultaneously or, at Lender's option, separately on multiple occasions for any individual (or group of) Mortgaged Property(ies) or any part thereof.

EXHIBIT EL – EXISTING LIENS

| Lien Claimant | Amount Claimed | Bonding Status |
|---------------|----------------|----------------|
| | | |
| | | |
| | | |
| | | |
| | | |

EXHIBIT GC – GUARANTY OF CARVEOUTS

EXHIBIT LA – LOCKBOX ARRANGEMENTS

From and after the Amendment Date, Borrower and Lender shall manage all income, rents, and other payments of any kind whatsoever receivable from time to time on account of the Mortgaged Property (including any reimbursements Tenants may owe to Borrower), including all Rents (all, collectively, the “Rents”) as follows.

Clearing Account. Under the Payment Direction Letters, Borrower is directing all Tenants to pay all Rents to the bank account the Payment Direction Letter designates (the “Clearing Account”), maintained by or for the benefit of Lender, solely for Lender’s benefit. Borrower shall have no right to withdraw or direct disbursements from the Clearing Account, which shall at all times be under Lender’s sole dominion, control, discretion, and “control” within the meaning of UCC § 9-104. Any interest on the Clearing Account shall be added to the Clearing Account and reported as Borrower’s income. Borrower certifies under penalty of perjury that: (a) Borrower’s federal employer identification number is as set forth below Borrower’s signature to the Letter Agreement; and (b) Borrower has not been notified that Borrower is subject to back-up withholding. Borrower may deposit funds in the Clearing Account, which shall be treated the same as Rents. Lender may designate some other bank (the “Clearing Bank”) to receive the Rents (and perform any or all actions that these Lockbox Arrangements would allow Lender to perform), hold the Clearing Account, and sweep the Rents (except any required minimum balance) periodically to an account Lender designates (which recipient account shall also be deemed part of the Clearing Account). Borrower shall execute such additional documents as Clearing Bank or Lender requires to effectuate these Lockbox Arrangements.

Relations With Tenants. If Borrower or Manager receives any Rents, it shall: (a) hold such Rents in trust for Lender; (b) cause such Rents, in the form received, to be deposited in the Clearing Account within one Business Day; and (c) promptly direct the sender, in writing, to send future Rents to the Clearing Account. All future Leases shall require the Tenant to send future Rents to the Clearing Account unless and until Lender authorizes otherwise in writing. Neither Borrower nor Manager shall send any Tenant any notice, or authorize any payment of Rents, inconsistent with the Payment Direction Letters.

Rent Receipts. Whenever Lender receives Rents in any form, Lender is authorized to deposit them into the Clearing Account. Lender is authorized to open any envelope received at the address set forth in the Payment Direction Letters or any replacement address. Borrower authorizes and directs Lender to endorse Borrower’s name on any check or other instrument evidencing Rents, even if payable to the name or address of the Mortgaged Property, any variant of Borrower’s name, or any abbreviation of any of these. Borrower shall cooperate as Lender requests to facilitate any endorsement and deposit of checks for Rents.

Waterfall. If any Event of Default occurs, then Lender may apply all funds in the Clearing Account, and all Rents thereafter received, to pay any Obligations, in whatever order Lender sees fit. So long as no uncured Event of Default exists, on every Payment Date Lender shall apply the funds in the Clearing Account as follows and in the following order of priority

until exhausted (or in such other order of priority as Lender shall designate from time to time in its sole and absolute discretion) (the “Waterfall”).

1. *Tax Escrows.* To make any deposits to the Tax and Insurance Escrow Account the Loan Documents then require.

2. *Replacement Reserve.* To make any deposits to the Replacement Reserve Account the Loan Documents then require.

3. *Operating Expenses.* To disburse to Borrower’s operating account as Borrower designates from time to time in writing (the “Operating Account”) an amount equal to the current month’s Property Expenses (other than (a) items listed above and (b) management fees), as approved by Lender and based on such budgeting procedures as Lender shall require from time to time²⁰ (the “Operating Account Disbursement”).

4. *Interest.* To Lender or Servicer, an amount (the “Current-Pay Interest”) equal to the lesser of: (a) all remaining funds; and (b) all interest (including Deferred Interest) then due Lender under the Loan Documents.

5. *Other Obligations.* To Lender or Servicer, an amount equal to any other Obligations then due Lender under the Loan Documents and presently payable.

6. *Management Fee.* To the Operating Account, the current month’s management fee under the Management Agreement.

7. *Residue.* All remaining funds shall remain in the Clearing Account as additional Collateral and not be released except in accordance with the Waterfall or with Lender’s written approval in its sole and absolute discretion.

Use of Operating Account Disbursements. Borrower shall receive all Operating Account Disbursements in trust, to be applied only to the expenses for which such disbursements were made. Borrower shall not use Operating Account Disbursements for any other purpose. Upon Lender’s request, Borrower shall demonstrate to Lender’s reasonable satisfaction that previous Operating Account Disbursements were properly applied. Until Borrower has made such demonstration, Lender may suspend Operating Account Disbursements, in whole or in part. Lender may disburse any Operating Account Disbursement directly to any property manager or to pay any Property Expenses, without using the Operating Account.

Budget Compliance. To the extent that Lender has approved any budget for the Mortgaged Property, Borrower shall diligently seek to comply with such budget. Borrower shall

²⁰ Lockbox procedures often go into great detail about budgeting procedures. Those provisions do not necessarily bear any relation to the practical reality of the lockbox, as the parties administer it once the lawyers are no longer involved. Therefore these Lockbox Arrangements leave the budgeting process to be resolved later.

promptly notify Lender if at any time Borrower projects any discrepancy in any budget line item in an amount greater than the greater of (a) ___% of such line item or (b) \$_____.

Security Deposits. Borrower represents and warrants that the security deposits listed in the Rent Roll, all of which Borrower is delivering to Lender on the Amendment Date, constitute all security deposits, prepaid rent, and similar sums paid or prepaid by Tenants and under the possession or control of Borrower or Manager. Whenever a Tenant delivers a security deposit under a future Lease, Borrower or Manager shall immediately deliver such security deposit to Lender. Lender shall hold all security deposits in a separate Eligible Account satisfactory to Lender (the "Security Deposit Account"), to be applied in a manner consistent with the Leases. To the extent that Borrower is at any time entitled to retain or apply any security deposit, Lender shall disburse it to the Clearing Account as Rent. To the extent that Borrower must at any time return any security deposit to a Tenant, Lender shall so apply the security deposit.

Records and Reporting. Lender shall keep reasonable records of Rents and give Borrower a report once a month. Lender shall give Borrower other information about the Clearing Account (such as current balances) in accordance with Borrower's reasonable requests. Promptly after each Payment Date, Lender shall forward Borrower a written statement of Lender's application of funds in the Clearing Account on such Payment Date.

Administration. To the extent reasonably possible under Lender's normal operating procedures, the Clearing Account shall be invested in Permitted Investments. Borrower shall pay Lender's reasonable bank fees to operate and administer the Lockbox Arrangements and shall sign such account documentation as Lender requires from time to time. Lender may designate two or more bank accounts to serve the functions of any one bank account referred to in these Lockbox Arrangements. Lender shall notify Borrower of the location and account number of such accounts and any other accounts referred to in these Lockbox Arrangements.

Borrower Protection. If on any Payment Date: (a) under the Waterfall, the Clearing Account contains (or would have contained, but for Lender's or Lockbox Administrator's failure to comply with the Lockbox Arrangements) sufficient funds to pay all amounts Borrower is then required to pay, whether to Lender or to third parties, under the Loan Documents (including all disbursements to be made prior to each such required payment); (b) Lender does not disburse such funds to make such payments; and (c) no uncured Event of Default otherwise exists, then Borrower's failure to make such payments shall not constitute a default or entitle Lender to collect a late charge.

Employees. Notwithstanding anything to the contrary in the Lockbox Arrangements, even if an Event of Default exists, Lender shall continue (to the extent of funds otherwise available under the Waterfall) to make Operating Account Disbursements to pay payroll and benefits (and Borrower shall receive such funds in trust to use only to pay payroll and benefits) for employees of Borrower or Manager employed at the Mortgaged Property in accordance with Borrower's and Manager's prior standard operating procedures and prior budgets, all until: (a) Lender has determined that Lender no longer desires that Borrower or Manager continue the employment of such employees; and (b) Borrower or Manager can legally terminate them. Lender shall have no right to direct such employees and shall not be deemed their employer. Borrower and Manager shall continue to utilize the services of such employees in accordance

with prior practice. At Lender's option, any disbursements under this paragraph may be made not to the Operating Account but instead to a third-party payroll service or any other payroll and benefits disbursement mechanism that Lender approves.

Security Interest. Although Borrower has no ownership interest in the Clearing Account, Operating Account, Security Deposit Account, or any other bank account under these Lockbox Arrangements, all such bank accounts are part of the Collateral and part of the Account Collateral under the Loan Documents. To the extent of Borrower's interest, if any, in such bank accounts, Borrower grants to Lender a security interest in such bank accounts and the proceeds thereof and all funds in such bank accounts to secure Borrower's payment and performance of the Obligations. Borrower shall sign any control agreements and other documents Lender reasonably requires to evidence and perfect such security interest. Borrower appoints Lender as Borrower's attorney in fact for such purpose and authorizes Lender to sign such documents on Borrower's behalf.

Lockbox Administrator. Lender may from time to time have Servicer or any other Person(s) Lender designates (each, a "Lockbox Administrator") perform any or all of Lender's and/or Clearing Bank's functions under these Lockbox Arrangements and may enter into any servicing or lockbox administration agreements for such purpose, all as Lender sees fit. Lockbox Administrators may include, for example, a depository or sweep bank, a bank to administer the Waterfall, and a servicer to direct either or both such banks. Wherever the Lockbox Arrangements refer to Lender, each such reference shall also refer to Lockbox Administrator as appropriate. Borrower shall execute such additional documents to evidence and implement the Lockbox Arrangements (including any transition of Lender's responsibilities, or any bank account(s)), to some other Lockbox Administrator or bank account as Lender or Servicer requests from time to time. To the extent that any Lockbox Administrator (a) is a bank, other institutional lender, or nationally recognized mortgage loan servicer, and (b) has agreed with Borrower to perform Lender's obligations under the Lockbox Arrangements, Borrower shall look only to such Lockbox Administrator for proper administration of the Lockbox Arrangements, and Lender shall have no liability for acts or omissions of such Lockbox Administrator.

No Cash Collateral. Borrower acknowledges that given the Lockbox Arrangements, Borrower has no interest in the Rents. Hence they would not constitute cash collateral under 11 U.S.C. § 363(a).

EXHIBIT LG – LEASING GUIDELINES

EXHIBIT MA – MARKETING ARRANGEMENTS²¹

Commencing on the Amendment Date and continuing for a period of _____, Lender may, at Lender’s option, market all or any part of the Mortgaged Property. Borrower shall, promptly upon Lender’s request, sign a listing agreement (the “Listing Agreement”) with a real estate broker Lender selects in its sole and absolute discretion (the “Broker”). The Listing Agreement shall be in customary form and shall be for a term no longer than _____. Borrower shall cooperate with Lender and Broker, as they reasonably request, in all efforts to market the Mortgaged Property. Borrower shall be entitled to no commission, fee, or other compensation. Within __ Business Days after request, Borrower shall give Lender or Broker: (a) any information and documents relating to the Mortgaged Property and reasonably available to Borrower; and (b) keys and access to the Mortgaged Property. Lender and Broker shall have access to the Mortgaged Property at any time without notice to Borrower. The parties further agree as follows regarding sale of the Mortgaged Property:

Designation of Purchaser During Sale Approval Period. Lender may designate any Person to purchase any Mortgaged Property (the “Purchaser”) by written notice to Borrower and Mezzanine Lender (the “Lender Sale Notice”). Such Lender Sale Notice shall identify the Purchaser and describe the basic economic terms of the proposed sale. If Borrower or Mezzanine Lender receives a Lender Sale Notice on or before _____ (the “Sale Approval Period”), then either may disapprove it by actually delivering to Lender a rejection notice (the “Rejection Notice”) within ____ Business Days after such receipt by Borrower or Mezzanine Lender (the “Rejection Deadline”). If Lender actually receives a Rejection Notice on or before the Rejection Deadline, then Lender shall not proceed with the proposed sale to Purchaser, but may continue to market the Mortgaged Property.

After Sale Approval Period. After the Sale Approval Period, Lender may, with or without notice to or approval by Borrower or Mezzanine Lender, designate any Purchaser satisfactory to Lender and determine that the Mortgaged Property shall be sold on such terms as Lender sees fit in its sole and absolute discretion (a “Discretionary Sale”). Any Discretionary Sale shall be at arm’s length, in Lender’s reasonable judgment, and shall provide for: (i) no payment of any brokerage fee or commission to or for the benefit of Lender; (ii) a purchaser unrelated to Lender; (iii) a sale of only the Mortgaged Property and no other property; and (iv) no additional consideration to Lender beyond application of any resulting sales proceeds against the Obligations. Subject to the preceding sentence: (a) the selling price under a Discretionary Sale may be less than, equal to, or more than the Loan Amount, as Lender sees fit; (b) neither Borrower nor Mezzanine Lender may object to any terms of any Discretionary Sale, including the sale price; and (c) Lender is under no obligation to achieve any particular selling

²¹ The suggested provisions on management and marketing are risky and unproven, as described in the cover notes. As another approach, the parties could modify these Marketing Arrangements to create a contractual alternative to a foreclosure sale auction, with recitals to try to persuade a Court that the contractual alternative will achieve a better price for the borrower than a traditional foreclosure sale.

price in a Discretionary Sale and has made no assurances about such matters. If Borrower desires to procure a possible Purchaser, Borrower may do so. Lender shall not unreasonably refuse to consider or to negotiate with any such Purchaser. Borrower and its Affiliates shall receive any commission, fee, or other compensation for any such Purchaser.

Contract and Closing. Borrower shall promptly upon request execute (and Mezzanine Lender consents to Borrower's execution of) any contract of sale for any Mortgaged Property consistent with a Lender Sale Notice (unless Borrower or Mezzanine Lender delivered a valid and timely Rejection Notice for that Lender Sale Notice during the Sale Approval Period) or for any Discretionary Sale consistent with this Letter Agreement (a "Contract of Sale"). The terms of any Contract of Sale shall otherwise be as Lender shall see fit, provided that Mezzanine Lender shall have no liability under any Contract of Sale and Borrower's liability shall be limited to its interest in the Mortgaged Property. Borrower shall promptly and at Borrower's own expense (to the extent of funds available to Borrower from the Mortgaged Property or its proceeds) perform its obligations under any Contract of Sale. Any proceeds from any Contract of Sale, net of actual transaction costs consistent with the Contract of Sale or approved or incurred by Lender, shall be applied first to the Obligations and then in the same manner as the Loan Documents provide for proceeds of any sale of Mortgaged Property. If Lender from time to time determines that any Contract of Sale requires any amendment, then Borrower shall promptly execute it provided that the Contract of Sale, as amended, complies with this Letter Agreement.

Use of Deeds in Escrow. On or after the date _____ days after the Amendment Date (or at any closing under a Contract of Sale, to facilitate such closing) (the "Deed Release Date"), Lender may release, fill in the blanks in, and record any Deed in Escrow, without consent from either Mezzanine Lender or Borrower. Borrower and Mezzanine Lender shall cooperate with Lender in all respects to complete any such transaction, all as Lender reasonably requires and consistent with the Deed in Escrow Arrangements.

**EXHIBIT NR – NOTICE RECIPIENTS FOR BORROWER(S) AND GUARANTOR --
NAMES, ADDRESSES, AND FAX NUMBERS**

| NAME | ADDRESS | FAX NUMBER |
|-------------|----------------|-------------------|
| | | |
| | | |
| | | |
| | | |

EXHIBIT PD – PAYMENT DIRECTION LETTER

Dear Tenant:

To facilitate processing of income and expenses for the property commonly known as _____, located at _____ (the “Mortgaged Property”), you are directed to remit all payments, as and when they become due under your lease, solely to the following bank account at the following address:

_____ BANK

Payment of rent in accordance with this letter shall constitute payment as your Lease requires. To assure proper credit, checks should be made payable to “[NAME OF PROPERTY] - [NAME OF LENDER] as Mortgagee” and should be mailed to the address stated above, in time to be received on or before the due dates in your lease. Any payments made to any other address will not be credited against your obligations under your Lease.

You are authorized and directed to respond to any inquiries from _____ (the “Lender”) about your Lease, the Mortgaged Property, your rent, any claims against your landlord, and any related matters. We release you from any claims or liability as a result of your responding to any inquiry from Lender or providing any information to Lender. Nothing in this letter may be modified, revoked, or withdrawn without Lender’s written confirmation.

Thank you for your cooperation.

BORROWER

[SIGNATURE BLOCK]

EXHIBIT RR – RENT ROLL

EXHIBIT TE – TENANT ESTOPPEL CERTIFICATE

[ATTACH FORM OF TENANT ESTOPPEL CERTIFICATE AND
LIST OF TENANTS THAT MUST SIGN]