

# UNOFFICIAL COPY

THIS INSTRUMENT PREPARED BY  
AND WHEN RECORDED RETURN TO:

Cadwalader, Wickersham & Taft LLP  
227 West Trade Street  
Suite 2400  
Charlotte, NC 28202  
Attention: James Hassan, Esq.



Doc#: 0625734036 Fee: \$188.00  
Eugene "Gene" Moore RHSP Fee: \$10.00  
Cook County Recorder of Deeds  
Date: 09/14/2006 03:08 PM Pg: 1 of 83

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

**SCHILLER HOTEL HOLDINGS, LLC, as mortgagor**  
(Mortgagor)

to

**MORGAN STANLEY MORTGAGE CAPITAL INC., as mortgagee**  
(Lender)

**MORTGAGE, ASSIGNMENT OF LEASES AND RENTS,  
SECURITY AGREEMENT AND FINANCING STATEMENT**

Dated: As of September 12, 2006  
Location: 10249 West Irving Park Road  
Schiller Park, Illinois 60176

Full Legal Description: See Exhibit A attached hereto

Tax Parcel Numbers: 12-16-307-004-0000  
12-16-307-005-0000  
12-16-307-027-0000  
12-16-307-032-0000

Case No.: 10855168

THIS INSTRUMENT IS EFFECTIVE AND SHALL REMAIN EFFECTIVE AS A FINANCING STATEMENT FILED AS A FIXTURE FILING WITH RESPECT TO ALL GOODS WHICH ARE OR ARE TO BECOME FIXTURES ON THE REAL ESTATE HEREIN DESCRIBED AND IS TO BE FILED FOR RECORD OR REGISTERED IN THE REAL ESTATE RECORDS OF COOK COUNTY, ILLINOIS. THE MAILING ADDRESS OF LENDER AND THE ADDRESS OF BORROWER ARE SET FORTH WITHIN. A PHOTOGRAPHIC OR OTHER REPRODUCTION OF THIS INSTRUMENT OR ANY FINANCING STATEMENT RELATING TO THIS INSTRUMENT SHALL BE SUFFICIENT AS A FINANCING STATEMENT.

10855168/mm

# UNOFFICIAL COPY

## TABLE OF CONTENTS

Page

### ARTICLE 1

#### GRANTS OF SECURITY

Section 1.1	Property Mortgaged .....	1
Section 1.2	Assignment of Leases and Rents .....	4
Section 1.3	Security Agreement .....	4
Section 1.4	Pledge of Monies Held .....	5

### ARTICLE 2

#### DEBT AND OBLIGATIONS SECURED

Section 2.1	Debt .....	5
Section 2.2	Other Obligations .....	6
Section 2.3	Debt and Other Obligations .....	6
Section 2.4	Payments .....	6

### ARTICLE 3

#### BORROWER COVENANTS

Section 3.1	Payment of Debt .....	7
Section 3.2	Incorporation by Reference .....	7
Section 3.3	Insurance .....	7
Section 3.4	Payment of Taxes, etc. ....	12
Section 3.5	Escrow Fund .....	13
Section 3.6	Condemnation .....	13
Section 3.7	Leases and Rents .....	14
Section 3.8	Maintenance and Use of Property .....	16
Section 3.9	Waste .....	17
Section 3.10	Compliance with Laws .....	18
Section 3.11	Books and Records .....	19
Section 3.12	Payment for Labor and Materials .....	20
Section 3.13	Performance of Other Agreements .....	21
Section 3.14	Change of Name, Identity or Structure .....	21
Section 3.15	Existence .....	21
Section 3.16	Management Agreement .....	21
Section 3.17	Non-Consolidation Opinion .....	23
Section 3.18	Principal Place of Business .....	23
Section 3.19	Certain Hotel Covenants .....	23

# UNOFFICIAL COPY

Section 3.20	OFAC.....	25
Section 3.21	Property Improvement Plan.....	26

## ARTICLE 4

### SPECIAL COVENANTS

Section 4.1	Property Use .....	26
Section 4.2	Single Purpose Entity .....	26
Section 4.3	Restoration.....	30
Section 4.4	ERISA.....	36

## ARTICLE 5

### REPRESENTATIONS AND WARRANTIES

Section 5.1	Warranty of Title .....	37
Section 5.2	Legal Status and Authority .....	37
Section 5.3	Validity of Documents .....	38
Section 5.4	Litigation .....	38
Section 5.5	Status of Property .....	38
Section 5.6	No Foreign Person .....	39
Section 5.7	Separate Tax Lot.....	39
Section 5.8	Leases .....	39
Section 5.9	ERISA Compliance .....	40
Section 5.10	Solvency .....	40
Section 5.11	Business Purposes.....	41
Section 5.12	Taxes.....	41
Section 5.13	Mailing Address .....	41
Section 5.14	No Change in Facts or Circumstances; Misstatement of Facts .....	41
Section 5.15	Disclosure .....	41
Section 5.16	Third Party Representations .....	42
Section 5.17	Illegal Activity .....	42
Section 5.18	Contracts.....	42
Section 5.19	Non-Consolidation Opinion .....	42
Section 5.20	Federal Reserve Regulations .....	42
Section 5.21	Forfeiture .....	42
Section 5.22	Investment Company Act.....	42
Section 5.23	Contingent Liabilities .....	43
Section 5.24	Special Assessments .....	43
Section 5.25	Principal Place of Business; State of Formation .....	43
Section 5.26	OFAC.....	43
Section 5.27	Franchise Agreement.....	43

# UNOFFICIAL COPY

## ARTICLE 6

### OBLIGATIONS AND RELIANCES

Section 6.1	Relationship of Borrower and Lender .....	43
Section 6.2	No Reliance on Lender .....	43
Section 6.3	No Lender Obligations .....	43
Section 6.4	Reliance .....	44

## ARTICLE 7

### FURTHER ASSURANCES

Section 7.1	Recording of Security Instrument, etc .....	44
Section 7.2	Further Acts, etc .....	45
Section 7.3	Changes in Tax, Debt Credit and Documentary Stamp Laws .....	45
Section 7.4	Estoppel Certificates .....	45
Section 7.5	Flood Insurance .....	47
Section 7.6	Intentionally Omitted .....	47
Section 7.7	Replacement Documents .....	47

## ARTICLE 8

### DUE ON SALE/ENCUMBRANCE

Section 8.1	Transfer Definitions .....	47
Section 8.2	No Sale/Encumbrance .....	47
Section 8.3	Permitted Transfers .....	48
Section 8.4	Lender's Rights .....	48
Section 8.5	Qualified Transferee .....	49

## ARTICLE 9

### PREPAYMENT

Section 9.1	Prepayment .....	51
-------------	------------------	----

## ARTICLE 10

### DEFAULT

Section 10.1	Events of Default .....	51
--------------	-------------------------	----

# UNOFFICIAL COPY

## ARTICLE 11

### RIGHTS AND REMEDIES

Section 11.1	Remedies .....	54
Section 11.2	Application of Proceeds.....	56
Section 11.3	Right to Cure Defaults.....	56
Section 11.4	Actions and Proceedings .....	57
Section 11.5	Recovery of Sums Required to Be Paid .....	57
Section 11.6	Examination of Books and Records .....	57
Section 11.7	Other Rights, etc .....	57
Section 11.8	Right to Release Any Portion of the Property .....	58
Section 11.9	Intentionally Omitted.....	58
Section 11.10	Right of Entry .....	58
Section 11.11	Subrogation.....	58

## ARTICLE 12

### ENVIRONMENTAL MATTERS

Section 12.1	Environmental Representations and Warranties.....	58
Section 12.2	Environmental Covenants.....	59
Section 12.3	Lender's Rights.....	60

## ARTICLE 13

### INDEMNIFICATIONS

Section 13.1	General Indemnification .....	60
Section 13.2	Mortgage and/or Intangible Tax .....	61
Section 13.3	Duty to Defend; Attorneys' Fees and Other Fees and Expenses.....	61
Section 13.4	Environmental Indemnity .....	61
Section 13.5	ERISA Indemnity .....	62

## ARTICLE 14

### WAIVERS

Section 14.1	Waiver of Counterclaim .....	62
Section 14.2	Marshalling and Other Matters.....	62
Section 14.3	Waiver of Notice .....	62
Section 14.4	Waiver of Statute of Limitations .....	62
Section 14.5	Sole Discretion of Lender.....	62
Section 14.6	Waiver of Trial by Jury .....	63

# UNOFFICIAL COPY

## ARTICLE 15

### EXCULPATION

Section 15.1	Exculpation.....	63
--------------	------------------	----

## ARTICLE 16

### NOTICES

Section 16.1	Notices.....	63
--------------	--------------	----

## ARTICLE 17

### SUBMISSION TO JURISDICTION

Section 17.1	Submission to Jurisdiction.....	64
--------------	---------------------------------	----

## ARTICLE 18

### APPLICABLE LAW

Section 18.1	Choice of Law .....	64
Section 18.2	Provisions Subject to Applicable Law.....	65

## ARTICLE 19

### SECONDARY MARKET

Section 19.1	Transfer of Loan .....	65
Section 19.2	Cooperation .....	65

## ARTICLE 20

### COSTS

Section 20.1	Performance at Borrower's Expense .....	66
Section 20.2	Legal Fees for Enforcement .....	66

## ARTICLE 21

### DEFINITIONS

Section 21.1	General Definitions.....	66
Section 21.2	Headings, etc .....	67

# UNOFFICIAL COPY

## ARTICLE 22

### MISCELLANEOUS PROVISIONS

Section 22.1	No Oral Change .....	67
Section 22.2	Liability .....	67
Section 22.3	Inapplicable Provisions.....	67
Section 22.4	Duplicate Originals; Counterparts .....	67
Section 22.5	Number and Gender.....	67

## ARTICLE 23

### LOCAL LAW PROVISIONS

Section 23.1	Principals of Construction .....	67
Section 23.2	Maturity Date.....	67
Section 23.3	Maximum Amount Secured Hereby .....	68
Section 23.4	Waiver of Statutory Rights .....	68
Section 23.5	Compliance With Illinois Mortgage Foreclosure Law .....	68
Section 23.6	Illinois Responsible Property Transfer Act .....	68
Section 23.7	Financing Statement .....	68
Section 23.8	Use of Loan Proceeds .....	69
Section 23.9	Usury .....	69
Section 23.10	Lender's Right to Purchase Insurance on Behalf of Borrower.....	69
Section 23.11	Lender's Right To Foreclose .....	70

# UNOFFICIAL COPY

THIS MORTGAGE, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FINANCING STATEMENT (this "Security Instrument") is made as of the 12th day of September, 2006 by SCHILLER HOTEL HOLDINGS, LLC, a Delaware limited liability company having its principal place of business at c/o Investcorp International, 280 Park Avenue, 37th floor, New York, New York 10017, as mortgagee ("Borrower") to MORGAN STANLEY MORTGAGE CAPITAL INC., a New York corporation, as payee, having an address at 1221 Avenue of the Americas, New York, New York 10020, as mortgagee ("Lender").

## RECITALS:

Borrower by one or more promissory notes of even date herewith given to Lender is indebted to Lender in the principal sum of TWENTY-TWO MILLION FIVE HUNDRED THOUSAND AND 00/100 DOLLARS (\$22,500,000.00) in lawful money of the United States of America (the promissory notes, together with all extensions, restatements, renewals, modifications, substitutions and amendments thereof shall collectively be referred to as the "Note"), with interest from the date thereof at the rates set forth in the Note, principal and interest to be payable in accordance with the terms and conditions provided in the Note.

Borrower desires to secure the payment of the Debt (as defined in Article 2) and the performance of all of its obligations under the Note and the Other Obligations (as defined in Article 2).

## ARTICLE 1

### GRANTS OF SECURITY

Section 1.1 Property Mortgaged. Borrower does hereby irrevocably mortgage, grant, bargain, sell, pledge, assign, warrant, transfer and convey to Lender, and grant a security interest to Lender in, the following property, rights, interests and estates now owned, or hereafter acquired by Borrower (collectively, the "Property"):

(a) Land. The real property described in Exhibit A attached hereto and made a part hereof (the "Land");

(b) Additional Land. All additional lands, estates and development rights hereafter acquired by Borrower for use in connection with the Land and the development of the Land and all additional lands and estates therein which may, from time to time, by supplemental mortgage or otherwise be expressly made subject to the lien of this Security Instrument;

(c) Improvements. The buildings, structures, fixtures, additions, enlargements, extensions, modifications, repairs, replacements and improvements now or hereafter erected or located on the Land (the "Improvements");

(d) Easements. All easements, rights-of-way or use, rights, strips and gores of land, streets, ways, alleys, passages, sewer rights, water, water courses, water rights and powers, air rights and development rights, and all estates, rights, titles, interests, privileges, liberties,



# UNOFFICIAL COPY

servitudes, tenements, hereditaments and appurtenances of any nature whatsoever, in any way now or hereafter belonging, relating or pertaining to the Land and the Improvements and the reversion and reversions, remainder and remainders, and all land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the Land, to the center line thereof and all the estates, rights, titles, interests, dower and rights of dower, curtesy and rights of curtesy, property, possession, claim and demand whatsoever, both at law and in equity, of Borrower of, in and to the Land and the Improvements and every part and parcel thereof, with the appurtenances thereto;

(e) Fixtures and Personal Property. All machinery, equipment, fixtures (including, but not limited to, all heating, air conditioning, plumbing, lighting, communications, and elevator fixtures, beds, bureaus, chiffoniers, chests, chairs, desks, lamps, mirrors, bookcases, tables, rugs, carpeting, drapes, draperies, curtains, shades, venetian blinds, screens, paintings, hangings, pictures, divans, couches, luggage carts, luggage racks, stools, sofas, chinaware, linens, pillows, blankets, glassware, foodcarts, cookware, dry cleaning facilities, dining room wagons, keys or other entry systems, bars, bar fixtures, liquor and other drink dispensers, icemakers, radios, television sets, intercom and paging equipment, potted plants, stoves, ranges, refrigerators, laundry machines, dishwashers, garbage disposals, washers and dryers and other customary hotel equipment) and other property of every kind and nature whatsoever owned by Borrower, or in which Borrower has or shall have an interest, now or hereafter located upon the Land and the Improvements, or appurtenant thereto, and usable in connection with the present or future operation and occupancy of the Land and the Improvements and all building equipment, materials and supplies of any nature whatsoever owned by Borrower, or in which Borrower has or shall have an interest, now or hereafter located upon the Land and the Improvements, or appurtenant thereto, or usable in connection with the present or future operation and occupancy of the Land and the Improvements (collectively, the "Personal Property"), and the right, title and interest of Borrower in and to any of the Personal Property which may be subject to any security interests, as defined in the Uniform Commercial Code, as adopted and enacted by the state or states where any of the Property is located (the "Uniform Commercial Code"), and all proceeds and products of the above;

(f) Leases and Rents. All leases, subleases and other agreements affecting the use, enjoyment or occupancy of the Land and/or the Improvements heretofore or hereafter entered into and all extensions, amendments and modifications thereto, whether before or after the filing by or against Borrower of any petition for relief under the Bankruptcy Reform Act of 1978, 11 U.S.C. §101 *et seq.*, as the same may be amended from time to time (the "Bankruptcy Code") (the "Leases") and all right, title and interest of Borrower, its successors and assigns therein and thereunder, including, without limitation, any guaranties of the lessees' obligations thereunder, cash or securities deposited thereunder to secure the performance by the lessees of their obligations thereunder and all rents, additional rents, early termination fees and payments and other termination fees and payments (any such early termination fees, payments and other termination fees and payments, the "Lease Termination Fees"), revenues, issues and profits (including all oil and gas or other mineral royalties and bonuses) from the Land and the Improvements, including, without limitation, all Hotel Revenues (as defined below) and all other revenues and credit card receipts collected from guest rooms, restaurants, bars, meeting rooms, banquet rooms and recreational facilities, all receivables, customer obligations, installment payment obligations and other obligations now existing or hereafter arising or created out of the

# UNOFFICIAL COPY

sale, lease, sublease, license, concession or other grant of the right of the use and occupancy of property or rendering of services by Borrower or any operator or manager of the hotel or the commercial space located in the Improvements or acquired from others (including, without limitation, from the rental of any office space, retail space, guest rooms or other space, halls, stores, and offices, and deposits securing reservations of such space), license, lease, sublease and concession fees and rentals, health club membership fees, food and beverage wholesale and retail sales, service charges and vending machine sales, whether paid or accruing before or after the filing by or against Borrower of any petition for relief under the Bankruptcy Code (collectively, the "Rents") and all proceeds from the sale or other disposition of the Leases and the right to receive and apply the Rents to the payment of the Debt;

(g) Condemnation Awards. All awards or payments, including interest thereon, which may heretofore and hereafter be made with respect to the Property, whether from the exercise of the right of eminent domain (including but not limited to any transfer made in lieu of or in anticipation of the exercise of the right), or for a change of grade, or for any other injury to or decrease in the value of the Property;

(h) Insurance Proceeds. All proceeds of and any unearned premiums on any insurance policies covering the Property, including, without limitation, the right to receive and apply the proceeds of any insurance, judgments, or settlements made in lieu thereof, for damage to the Property;

(i) Tax Certiorari. All refunds, rebates or credits in connection with a reduction in real estate taxes and assessments charged against the Property as a result of tax certiorari or any applications or proceedings for reduction;

(j) Conversion. All proceeds of the conversion, voluntary or involuntary, of any of the foregoing including, without limitation, proceeds of insurance and condemnation awards, into cash or liquidation claims;

(k) Rights. The right, in the name and on behalf of Borrower, to appear in and defend any action or proceeding brought with respect to the Property and to commence any action or proceeding to protect the interest of Lender in the Property;

(l) Agreements. All agreements, contracts, certificates, instruments, franchises, permits, licenses, plans, specifications and other documents now or hereafter entered into, and all rights therein and thereto, respecting or pertaining to the use, occupation, construction, management or operation of the Land and any part thereof and any Improvements or respecting any business or activity conducted on the Land and any part thereof and all right, title and interest of Borrower therein and thereunder, including, without limitation, the right, upon the happening of any default hereunder, to receive and collect any sums payable to Borrower thereunder;

(m) Franchise Agreement. To the extent assignable, that certain Four Points by Sheraton Hotel Change of Ownership License Agreement dated the date hereof between The Sheraton LLC ("Franchisor"), as franchisor, and Borrower, as franchisee (hereinafter the "Franchise Agreement");

# UNOFFICIAL COPY

(n) Hotel Revenues. All revenues, credit card receipts, income, accounts, accounts receivable and other receivables including, without limitation, revenues, credit card receipts, income, receivables and accounts relating to or arising from rentals, rent equivalent income, income and profits from guest rooms, meeting rooms, banquet rooms and recreational facilities, restaurants, bars, other food and beverage facilities, vending machines, telephone and television systems, guest laundry, the provision or sale of other goods and services, concession fees and rentals, health club membership fees, food and beverage wholesale and retail sales, and any other items of revenue, receipts or other income as identified in the Uniform System of Accounts for Hotels, 9th Edition as published by the Hotel Association of New York City, Inc. (1996), as from time to time amended (collectively "Hotel Revenues");

(o) Intangibles. All trade names, trademarks, servicemarks, logos, copyrights, goodwill, books and records and all other general intangibles relating to or used in connection with the operation of the Property;

(p) Accounts. All reserves, escrows and deposit accounts maintained by Borrower with respect to the Property including, without limitation, any lockbox account and cash management account, and all complete securities, investments, property and financial assets held therein from time to time and all proceeds, products, distributions or dividends or substitutions thereon and thereof; and

(q) Causes of Action. All causes of action and claims (including, without limitation, all causes of action or claims arising, in tort, by contract, by fraud or by concealment of material fact) against any Person (defined below) for damages or injury to the Property or in connection with any transactions financed in whole or in part by the proceeds of the Loan (hereinafter defined) ("Cause of Action"); and

(r) Other Rights. Any and all other rights of Borrower in and to the items set forth in Subsections (a) through (q) above.

Section 1.2 Assignment of Leases and Rents. Borrower hereby absolutely and unconditionally assigns to Lender Borrower's right, title and interest in and to all current and future Leases and Rents; it being intended by Borrower that this assignment constitutes a present, absolute assignment and not an assignment for additional security only. Nevertheless, subject to the terms of this Section 1.2 and Section 11.1(h), Lender grants to Borrower a revocable license to operate and manage the Property in order to enable Borrower to take any and all actions, including the collection of Rents and all other payments required under the Leases and under the Lease Guaranties subject, however, to the provisions of the Cash Management Agreement (hereinafter defined), necessary for the proper management and operation of the Property, it being agreed that any funds disbursed to Borrower pursuant to Section 3.3(a)(viii) of the Cash Management Agreement shall no longer be deemed to constitute Property subject to the terms of this Agreement.

Section 1.3 Security Agreement. This Security Instrument is both a mortgage and a "security agreement" within the meaning of the Uniform Commercial Code. The Property includes both real and personal property and all other rights and interests, whether tangible or intangible in nature, of Borrower in the Property. By executing and delivering this Security

# UNOFFICIAL COPY

Instrument, Borrower, as debtor, hereby grants to Lender, as secured party, as security for the Obligations (defined in Section 2.3), a security interest in the Personal Property to the full extent that the Personal Property may be subject to the Uniform Commercial Code. This Security Instrument also constitutes a financing statement filed as a fixture filing pursuant to Article 9 of the Uniform Commercial Code.

Section 1.4 Pledge of Monies Held. Borrower hereby pledges to Lender any and all monies now or hereafter held by Lender, including, without limitation, any sums deposited in the Escrow Fund (as defined in Section 3.5), Net Proceeds (as defined in Section 4.3) and condemnation awards or payments described in Section 3.6, and any accounts established pursuant to that certain Cash Management Agreement dated as of the date hereof made by Borrower and Lender (the "Cash Management Agreement") as additional security for the Obligations until expended or applied as provided in this Security Instrument and/or the Other Security Documents (hereinafter defined).

## CONDITIONS TO GRANT

TO HAVE AND TO HOLD the above granted and described Property unto and to the use and benefit of Lender, and for its successors and assigns, forever;

PROVIDED, HOWEVER, these presents are upon the express condition that, if Borrower shall well and truly pay to Lender the Debt at the time and in the manner provided in the Note and this Security Instrument, then these presents and the estate hereby granted shall cease, terminate and be void.

## ARTICLE 2

### DEBT AND OBLIGATIONS SECURED

Section 2.1 Debt. This Security Instrument and the grants, assignments and transfers made in Article 1 are given for the purpose of securing the following, in such order of priority as Lender may determine in its sole discretion (the "Debt"):

- (a) the payment of the indebtedness evidenced by the Note in lawful money of the United States of America;
- (b) the payment of interest, default interest, late charges and other sums, as provided in the Note, this Security Instrument or the Other Security Documents;
- (c) intentionally omitted;
- (d) the payment of all other moneys agreed or provided to be paid by Borrower in the Note, this Security Instrument or the Other Security Documents;
- (e) the payment of all sums advanced pursuant to this Security Instrument to protect and preserve the Property and the lien and the security interest created hereby; and



# UNOFFICIAL COPY

(f) the payment of all sums advanced and costs and expenses incurred by Lender in connection with the Debt or any part thereof, any modification, amendment, renewal, extension, or change of or substitution for the Debt or any part thereof, or the acquisition or perfection of the security therefor, whether made or incurred at the request of Borrower or Lender.

**Section 2.2 Other Obligations.** This Security Instrument and the grants, assignments and transfers made in Article 1 are also given for the purpose of securing the following (the "Other Obligations"):

- (a) the performance of all other obligations of Borrower contained herein;
- (b) the performance of each obligation of Borrower contained in any other agreement given by Borrower to Lender which is for the purpose of further securing the obligations secured hereby, and any renewals, extensions, substitutions, replacements, amendments, modifications and changes thereto; and
- (c) the performance of each obligation of Borrower contained in any renewal, extension, amendment, modification, consolidation, change of, or substitution or replacement for, all or any part of the Note, this Security Instrument or the Other Security Documents.

**Section 2.3 Debt and Other Obligations.** Borrower's obligations for the payment of the Debt and the performance of the Other Obligations shall be referred to collectively below as the "Obligations."

**Section 2.4 Payments.** Remittances in payment of all or any part of the Debt shall not, regardless of any receipt or credit issued therefor, constitute payment until the required amount is actually received by Lender in funds immediately available at the place where the Note is payable (or any other place as Lender, in Lender's sole discretion, may have established by delivery of written notice thereof to Borrower) and shall be made and accepted subject to the condition that any check or draft may be handled for collection in accordance with the practice of the collecting bank or banks. Acceptance by Lender of any payment in an amount less than the amount then due shall be deemed an acceptance on account only, and the failure to pay the entire amount then due after any applicable notice and cure periods shall be and continue to be an Event of Default (defined below).

**Section 2.5 Component Notes.** Lender shall have the right at any time to establish "component" notes evidencing the Loan (including senior and junior notes) provided that (i) the aggregate principal amount of such "component" notes shall equal the outstanding principal balance of the Loan immediately prior to the creation of such "component" notes, (ii) the weighted average interest rate of all such "component" notes on the date created shall equal the interest rate which was applicable to the Loan immediately prior to the creation of such "component" notes, and (iii) the other terms and provisions of each "component" note shall be substantially in the same form and substance as the Note. Provided an Event of Default does not exist and is continuing, any prepayments of principal made after the creation of such "component" notes pursuant to this Agreement shall be allocated on a pro-rata, pari passu basis such that the overall interest rate and debt service payments on the Loan do not increase after

# UNOFFICIAL COPY

such prepayments. Borrower shall cooperate with all reasonable requests of Lender in order to establish the "component" notes and shall execute and deliver such documents as shall reasonably be required by Lender and any Rating Agency in connection therewith; provided, however, that all reasonable costs actually incurred by Borrower in connection with the creation of such "component" notes shall be paid by Lender.

## ARTICLE 3

### BORROWER COVENANTS

Borrower covenants and agrees that:

**Section 3.1 Payment of Debt.** Borrower will pay the Debt at the time and in the manner provided in the Note and in this Security Instrument.

**Section 3.2 Incorporation by Reference.** All the covenants, conditions and agreements contained in (a) the Note and (b) all and any of the documents other than the Note or this Security Instrument now or hereafter executed by Borrower and/or others and by or in favor of Lender, which wholly or partially secure or guaranty payment of the Note, or are otherwise executed and delivered in connection with the Loan; such other documents, together with any of the extensions, renewals, substitutions, replacements, amendments, modifications, and/or restatements the "Other Security Documents"), are hereby made a part of this Security Instrument to the same extent and with the same force as if fully set forth herein.

**Section 3.3 Insurance.** (a) Borrower shall obtain and maintain, or cause to be maintained, insurance for Borrower and the Property providing at least the following coverages:

(i) comprehensive all risk insurance on the Improvements and the personal property at the Property, including contingent liability from Operation of Building Laws, Demolition Costs and Increased Cost of Construction Endorsements, in each case (A) in an amount equal to one hundred percent (100%) of the "Full Replacement Cost," which for purposes of this Security Instrument shall mean actual replacement value (exclusive of costs of excavations, foundations, underground utilities and footings) with a waiver of depreciation; (B) containing an agreed amount endorsement with respect to the Improvements and Personal Property at the Property waiving all co-insurance provisions; (C) providing for no deductible in excess of Fifty Thousand and No/100 Dollars (\$50,000) for all such insurance coverage; and (D) containing an "Ordinance or Law Coverage" or "Enforcement" endorsement if any of the Improvements or the use of the Property shall at any time constitute legal non-conforming structures or uses. In addition, Borrower shall obtain: (x) if any portion of the Improvements is currently or at any time in the future located in a federally designated "special flood hazard area," flood hazard insurance in an amount equal to the lesser of (1) the outstanding principal balance of the Note or (2) the maximum amount of such insurance available under the National Flood Insurance Act of 1968, the Flood Disaster Protection Act of 1973 or the National Flood Insurance Reform Act of 1994, as each may be amended or such greater amount as Lender shall require; (y) sinkhole and mine subsidence insurance, if such insurance is then regularly required by prudent institutional mortgage lenders for property similar in

# UNOFFICIAL COPY

size, location and quality as the Property, in amounts, form and substance reasonably satisfactory to Lender; and (z) earthquake insurance in amounts and in form and substance satisfactory to Lender in the event the Property is located in an area with a high degree of seismic activity, provided that the insurance pursuant to clauses (x), (y) and (z) hereof shall be on terms consistent with the comprehensive all risk insurance policy required under this subsection (i);

(ii) commercial general liability insurance against claims for personal injury, bodily injury, death or property damage occurring upon, in or about the Property, such insurance (A) to be on the so-called "occurrence" form with a limit, excluding umbrella coverage, of not less than One Million and No/100 Dollars (\$1,000,000) per occurrence and with a combined limit of not less than Ten Million and No/100 Dollars (\$10,000,000) in the aggregate; (B) to continue at not less than the aforesaid limit until required to be changed by Lender in its reasonable discretion in writing by reason of changed economic conditions making such protection inadequate; and (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 legal contracts; and (5) contractual liability covering the indemnities contained in Article 13 hereof to the extent the same is available;

(iii) business income insurance (A) with loss payable to Lender; (B) covering all risks required to be covered by the insurance provided for in subsection (i) above for a period commencing at the time of loss for such length of time as it takes to repair or replace with the exercise of due diligence and dispatch; (C) containing an extended period of indemnity endorsement which provides that after the physical loss to the Improvements and Personal Property has been repaired, the continued loss of income will be insured until such income either returns to the same level it was at prior to the loss, or the expiration of twenty-four (24) months from the date that the Property is repaired or replaced and operations are resumed, whichever first occurs, and notwithstanding that the policy may expire prior to the end of such period; and (D) in an amount equal to one hundred percent (100%) of the projected gross income from the Property for a period from the date of loss to a date (assuming total destruction) which is twenty-four (24) months from the date that the Property is repaired or replaced and operations are resumed. The amount of such business income insurance shall be determined prior to the date hereof and at least once each year thereafter based on Borrower's reasonable estimate of the gross income from the Property for the succeeding sixteen (16) month period. All proceeds payable to Lender pursuant to this subsection shall be held by Lender and shall be applied to the obligations secured by the Loan Documents from time to time due and payable hereunder and under the Note; provided, however, that nothing herein contained shall be deemed to relieve Borrower of its obligations to pay the obligations secured by the Loan Documents on the respective dates of payment provided for in the Note and the other Loan Documents except to the extent such amounts are actually paid out of the proceeds of such business income insurance;

(iv) at all times during which structural construction, repairs or alterations are being made with respect to the Improvements (A) owner's contingent or protective liability insurance covering claims not covered by or under the terms or provisions of the

# UNOFFICIAL COPY

above mentioned commercial general liability insurance policy; and (B) the insurance provided for in Section 3.3(a)(i) written in a so-called builder's risk completed value form (1) on a non-reporting basis, (2) against all risks insured against pursuant to Section 3.3(a)(i), (3) including permission to occupy the Property, and (4) with an agreed amount endorsement waiving co-insurance provisions;

(v) to the extent Borrower has any employees, workers' compensation, subject to the statutory limits of the state in which the Property is located, and employer's liability insurance with a limit of at least \$1,000,000 per accident and per disease per employee, and \$1,000,000 for disease aggregate in respect of any work or operations on or about the Property, or in connection with the Property or its operation (if applicable);

(vi) comprehensive boiler and machinery insurance, if applicable, in amounts as shall be reasonably required by Lender on terms consistent with the commercial property insurance policy required under subsection (i) above;

(vii) umbrella liability insurance in addition to primary coverage in an amount not less than Fifteen Million and No/100 Dollars (\$15,000,000) per occurrence on terms consistent with the commercial general liability insurance policy required under subsection (ii) above and (viii);

(viii) motor vehicle liability coverage for all owned and non-owned vehicles, including rented and leased vehicles containing minimum limits per occurrence, including umbrella coverage, of One Million and No/100 Dollars (\$1,000,000);

(ix) to the extent applicable, so-called "dramshop" insurance or other liability insurance required in connection with the sale of alcoholic beverages; and

(x) insurance against employee dishonesty in an amount no greater than \$100,000 and with a deductible not greater than Twenty-Five Thousand and No/100 Dollars (\$25,000);

(xi) if "acts of terrorism" or other similar acts or events or "fire following" are hereafter excluded from Borrower's comprehensive all risk insurance policy or policies required under subsections (i) and (iii) above, Borrower shall obtain an endorsement to such policy or policies, or a separate policy from an insurance provider which maintains at least an investment grade rating from S&P (that is, "BBB-") and, if they are rating the Securities and if they rate the insurer from Fitch (that is, "BBB-") and from Moody's (that is, "Baa3"), insuring against all such excluded acts or events and "fire following", to the extent such policy or endorsement is available, in an amount determined by Lender in its sole discretion (but in no event more than an amount equal to the sum of 100% of the "Full Replacement Cost" and twelve (12) months business interruption insurance), provided, however, Borrower shall not be required to pay annual premiums in excess of \$125,000 for the coverage required under this subsection (xi) for the Property, it being agreed that the endorsement or policy shall be in form and substance reasonably satisfactory to Lender. Notwithstanding the foregoing, for so long as the Terrorism Risk Insurance Act of 2002 ("TRIA") is in effect (including any extensions or if another



# UNOFFICIAL COPY

federal governmental program is in effect which provides substantially similar protections as TRIA), Lender shall accept terrorism insurance which covers against "covered acts" as defined by TRIA (or such other program) as full compliance with this subsection (xi) as it relates to the risks that are required to be covered; and

(xii) any other insurance as may be reasonably required by Lender, and in such amounts as Lender from time to time may reasonably request against such other insurable hazards which at the time are commonly insured against and commercially available for property similar to the Property located in or around the region in which the Property is located

(b) All insurance provided for in Section 3.3(a) hereof shall be obtained under valid and enforceable policies (the "Policies" or in the singular, the "Policy"), in such forms and, from time to time after the date hereof, in such amounts as may be reasonably satisfactory to Lender, issued by financially sound and responsible insurance companies authorized to do business in the state in which the Property is located and approved by Lender. The Policies shall be issued by financially sound and responsible insurance companies authorized to do business in the state in which the Property is located and having a claims paying ability rating of "A" or better by Standard & Poor's Rating Services, a division of The McGraw-Hill Companies, Inc. ("S&P") and Fitch, Inc. ("Fitch") and an insurance financial strength rating of "A2" by Moody's Investors Service, Inc. ("Moody's"; S&P, Fitch and Moody's are collectively referred to as the "Rating Agencies" and individually as a "Rating Agency"). If a Securitization occurs, (i) the foregoing required insurance company rating by a Rating Agency not rating any Securities shall be disregarded and (ii) if the insurance company complies with the aforesaid S&P required rating (and S&P is rating the Securities) and the other Rating Agencies rating the Securities do not rate the insurance company, such insurance company shall be deemed acceptable with respect to such Rating Agency not rating such insurance company. Notwithstanding the foregoing, Borrower shall be permitted to maintain the Policies with insurance companies which do not meet the foregoing requirements (an "Otherwise Rated Insurer"), provided Borrower obtains a "cut-through" endorsement (that is, an endorsement which permits recovery against the provider of such endorsement) with respect to any Otherwise Rated Insurer from an insurance company which meets the claims paying ability ratings required above. Moreover, if Borrower desires to maintain insurance required hereunder from an insurance company which does not meet the claims paying ability ratings set forth herein but the parent of such insurance company, which owns at least fifty-one percent (51%) of such insurance company, maintains such ratings, Borrower may use such insurance companies if approved by the Rating Agencies (such approval may be conditioned on items required by the Rating Agencies including a requirement that the parent guarantee the obligations of such insurance company). Not less than thirty (30) days prior to the expiration dates of the Policies theretofore furnished to Lender pursuant to Section 3.3(a), Borrower shall deliver certified copies of the Policies marked "premium paid" or accompanied by evidence satisfactory to Lender of payment of the premiums due thereunder (the "Insurance Premiums"), provided, however, that in the case of renewal Policies, Borrower may furnish Lender with binders therefor to be followed by the original Policies when issued.

(c) Except to the extent required pursuant to Section 3.3(a) hereof, Borrower shall not obtain separate insurance concurrent in form or contributing in the event of loss with that required in Section 3.3(a) to be furnished by, or which may be reasonably required to be

# UNOFFICIAL COPY

furnished by, Borrower. In the Event Borrower obtains separate insurance or an umbrella or blanket policy, Borrower shall notify Lender of the same and shall cause certified copies of each Policy to be delivered as required in Section 3.3(a). Any blanket insurance Policy (which may include coverage required under Section 3.3(a)(xi)) shall specifically allocate to the Property 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 Property in compliance with the provisions of Section 3.3(a).

(d) All Policies of insurance provided for or contemplated by Section 3.3(a) shall be primary coverage and, except for the Policy referenced in Section 3.3(a)(v), shall name Borrower as the insured and Lender and its successors and/or assigns as the additional insured, as their interests may appear. Borrower shall not procure or permit any of its constituent entities to procure any other insurance coverage which would be on the same level of payment as the Policies or would adversely impact in any way the ability of Lender or Borrower to collect any proceeds under any of the Policies.

(e) All Policies of insurance provided for in Section 3.3(a), except for the Policies referenced in Section 3.3(a)(v) and (a)(viii) shall contain clauses or endorsements to the effect that:

(i) no act or negligence of Borrower, or anyone acting for Borrower, or of any tenant under any Lease 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 Policy shall not be materially changed (other than to increase the coverage provided thereby) or cancelled without at least 30 days' written notice to Lender and any other party named therein as an insured; and

(iii) each Policy shall provide that the issuers thereof shall give written notice to Lender if the Policy has not been renewed thirty (30) days prior to its expiration; and

(iv) Lender shall not be liable for any Insurance Premiums hereon or subject to any assessments thereunder.

(f) Upon the written request of Lender, Borrower shall furnish to Lender, on or before thirty (30) days after the close of each of Borrower's fiscal years, a statement certified by Borrower or a duly authorized officer of Borrower of the amounts of insurance maintained in compliance herewith, of the risks covered by such insurance and of the insurance company or companies which carry such insurance.

(g) If at any time Lender is not in receipt of written evidence that all insurance required hereunder is in full force and effect, then Lender shall have the right, without notice to Borrower, to take such action as Lender deems necessary to protect its interest in the Property, including, without limitation, the obtaining of such insurance coverage as Lender in its sole discretion deems appropriate, but no greater than the limits required under this Security Instrument and/or the Other Security Documents and all expenses incurred by Lender in

# UNOFFICIAL COPY

connection with such action or in obtaining such insurance and keeping it in effect shall be paid by Borrower to Lender upon demand and until paid shall be secured by this Security Instrument and shall bear interest in accordance with Article 4 of the Note; provided, however, Lender shall endeavor to send Borrower notice prior to obtaining any such insurance, but the failure to give such notice shall in no way limit Lender's right to obtain such insurance.

(h) If the Property shall be damaged or destroyed, in whole or in part, by fire or other casualty, Borrower shall give prompt notice of such damage to Lender and, provided that Net Proceeds are made available to Borrower in accordance with Section 4.3 hereof, shall promptly commence and diligently prosecute the completion of the repair and restoration of the Property as nearly as possible to the condition the Property was in immediately prior to such fire or other casualty with such alterations as may be approved by Lender in its reasonable discretion (the "Casualty Restoration") and otherwise in accordance with Section 4.3 of this Security Instrument. Borrower shall pay all costs of such Restoration whether or not such costs are covered by insurance.

(i) In the event of foreclosure of this Security Instrument, or other transfer of title to the Property in extinguishment in whole or in part of the Debt all right, title and interest of Borrower in and to such policies then in force concerning the Property 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.

**Section 3.4 Payment of Taxes etc.** (a) Borrower shall promptly pay, or cause to be paid, all taxes, assessments, water rates, sewer rents, governmental impositions, and other charges, including without limitation vault charges and license fees for the use of vaults, chutes and similar areas adjoining the Land, now or hereafter levied or assessed or imposed against the Property or any part thereof (the "Taxes"), all ground rents, maintenance charges and similar charges, now or hereafter levied or assessed or imposed against the Property or any part thereof (the "Other Charges"), and all charges for utility services provided to the Property prior to the delinquency date thereof. Borrower will deliver to Lender, promptly upon Lender's request, evidence satisfactory to Lender that the Taxes, Other Charges and utility service charges have been so paid or are not then delinquent. Borrower shall not suffer and shall promptly cause to be paid and discharged any Tax, Other Charge or other lien or charge whatsoever which may be or become a lien or charge against the Property. Except to the extent sums sufficient to pay all Taxes and Other Charges have been deposited with Lender in accordance with the terms of this Security Instrument, Borrower shall furnish to Lender paid receipts for the payment of the Taxes and Other Charges prior to the date the same shall become delinquent.

(b) After prior written notice to Lender, Borrower, at its 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 of the Taxes or Other Charges, provided that (i) no Event of Default has occurred and is continuing under the Note, this Security Instrument or any of the Other Security Documents, (ii) Borrower is permitted to do so under the provisions of any other mortgage, deed of trust or deed to secure debt affecting the Property, (iii) such proceeding shall suspend the collection of the Taxes or Other Charges from Borrower and from the Property or Borrower shall have paid all of the Taxes or Other Charges under protest, (iv) such proceeding shall be permitted under and be conducted

# UNOFFICIAL COPY

in accordance with the provisions of any other instrument to which Borrower is subject and shall not constitute a default thereunder, (v) neither the Property nor any part thereof or interest therein will be in danger of being sold, forfeited, terminated, cancelled or lost, (vi) Borrower shall have deposited with Lender adequate reserves for the payment of the Taxes or Other Charges, together with all interest and penalties thereon, unless Borrower has paid all of the Taxes or Other Charges under protest, and (vii) Borrower shall have furnished the security as may be required in the proceeding, or as may be requested by Lender to insure the payment of any contested Taxes or Other Charges, together with all interest and penalties thereon.

**Section 3.5 Escrow Fund.** Borrower shall pay to Lender on each Payment Date (as defined in the Note) (a) one-twelfth of an amount which would be sufficient to pay the Taxes payable, or estimated by Lender to be payable, during the next ensuing twelve (12) months and (b) one-twelfth of an amount which would be sufficient to pay the Insurance Premiums due for the renewal of the coverage afforded by the Policies upon the expiration thereof (the amounts in (a) and (b) above shall be called the "Escrow Fund"). Borrower agrees to notify Lender immediately of any changes to the amounts, schedules and instructions for payment of any Taxes and Insurance Premiums of which it has or obtains knowledge and authorizes Lender or its agent to obtain the bills for Taxes directly from the appropriate taxing authority. The Escrow Fund and the payments of interest or principal or both, payable pursuant to the Note shall be added together and shall be paid as an aggregate sum by Borrower to Lender. Lender will apply the Escrow Fund to payments of Taxes and Insurance Premiums required to be made by Borrower pursuant to Section 3.3 and Section 3.4 hereof. If the amount of the Escrow Fund shall exceed the amounts due for Taxes and Insurance Premiums pursuant to Section 3.3 and Section 3.4 hereof, then Lender shall, in its discretion, return any excess to Borrower or credit such excess against the next payment to be made to the Escrow Fund. In allocating such excess, Lender may deal with the person shown on the records of Lender to be the owner of the Property. If the Escrow Fund is not sufficient to pay the items set forth in (a) and (b) above, Borrower shall promptly pay to Lender, upon demand, an amount which Lender shall reasonably estimate as sufficient to make up the deficiency. The Escrow Fund shall not constitute a trust fund and may be commingled with other monies held by Lender. The Escrow Fund shall be held and maintained in an escrow account pursuant to the terms of the Cash Management Agreement.

Notwithstanding the provisions of this Section 3.5 to the contrary and provided (x) Borrower is in compliance with Section 3.4 hereof and (y) no Event of Default has occurred and is continuing, Borrower shall not be required to escrow for Taxes. Additionally, so long as (i) no Event of Default has occurred and is continuing, (ii) Borrower delivers to Lender evidence reasonably satisfactory to Lender that all Insurance Premiums have been paid prior the date such Insurance Premiums are due and (iii) the insurance that Borrower is required to maintain hereunder continues to be maintained pursuant to blanket Policies in accordance with Section 3.3 hereof, then Borrower shall not be required to make monthly payments of the Insurance Premiums into the Escrow Fund.

**Section 3.6 Condemnation.** Borrower shall promptly give Lender notice of the actual or threatened commencement of any condemnation or eminent domain proceeding 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 Borrower shall from time to time deliver to Lender all instruments requested by it to permit such participation. Borrower shall, at its



# UNOFFICIAL COPY

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 eminent domain or otherwise (including but not limited to any transfer made in lieu of or in anticipation of the exercise of such taking), and whether or not any Award (defined below) is made available to Borrower for Restoration in accordance with Section 4.3, Borrower shall continue to pay the Debt at the time and in the manner provided for its payment in the Note and in this Security Instrument and the Debt shall not be reduced until any award or payment therefor (an "Award") shall have been actually received and applied by Lender, after the deduction of expenses of collection, to the reduction or discharge of the Debt. Lender shall not be limited to the interest paid on the award by the condemning authority but shall be entitled to receive out of the award interest at the rate or rates provided herein or in the Note. Lender may apply any Award to the reduction or discharge of the Debt whether or not then due and payable. Borrower shall cause any Award in any condemnation or eminent domain proceeding, which is payable to Borrower, to be paid directly to Lender. In the event that the Property or any portion thereof is taken by any condemning authority, Borrower shall, provided that the Net Proceeds are made available to Borrower by Lender pursuant to the terms of Section 4.3 hereof, promptly proceed to restore, repair, replace or rebuild the Property in a workmanlike manner to the extent practicable to be of at least equal value and substantially the same character as prior to such condemnation or eminent domain proceeding (the "Condemnation Restoration"; the Condemnation Restoration and the Casualty Restoration collectively hereinafter referred to as the "Restoration"). If the Property is 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 payment, or a portion thereof sufficient to pay the Debt.

**Section 3.7 Leases and Rents.** (a) Borrower may enter into a proposed Lease (including the renewal or extension of an existing Lease (a "Renewal Lease")) without the prior written consent of Lender, provided such proposed Lease or Renewal Lease (i) provides for rental rates and terms comparable to existing local market rates and terms (taking into account the type and quality of the tenant and the type of property) as of the date such Lease is executed by Borrower (or, in the case of a Renewal Lease, the rent payable during such renewal, or a formula or other method to compute such rent, is as may be provided for in the original Lease), (ii) is an arms-length transaction with a bona fide, independent third party tenant, (iii) does not, in Borrower's commercially reasonable judgment, have a materially adverse effect on the value or quality of the Property, (iv) is subject and subordinate to the Security Instrument and the lessee thereunder agrees to attorn to Lender, (v) is written on the standard form of lease approved by Lender (other than factual information with respect to the tenant and other commercially reasonable modifications, provided that in no event shall such modifications alter in any material adverse respect the standard lease provisions relating to subordination and attornment), and (vi) is not a Major Lease (defined below). All proposed Leases which do not satisfy the requirements set forth in this Subsection 3.7(a) shall be subject to the prior approval of Lender and its counsel, at Borrower's reasonable expense, which approval shall not be unreasonably withheld, conditioned or delayed. Upon Lender's reasonable request, Borrower shall deliver to Lender copies of any Leases which are entered into pursuant to this Subsection together with Borrower's certification that it has satisfied all of the conditions of this Subsection.

# UNOFFICIAL COPY

(b) Borrower shall (i) observe and perform all the material obligations imposed upon the lessor under the Leases and shall not do or permit to be done anything to impair the value of any of the Leases as security for the Debt; (ii) promptly send copies to Lender of all notices of default which Borrower shall send or receive thereunder; (iii) enforce all of the material terms, covenants and conditions contained in the Leases upon the part of the Tenant thereunder to be observed or performed; (iv) shall not collect any of the Rents more than one (1) month in advance (except security deposits shall not be deemed Rents collected in advance) without Lender's prior written consent; (v) shall not execute any other assignment of the lessor's interest in any of the Leases or the Rents; and (vi) not consent to any assignment of or subletting under any Leases not in accordance with their terms, without the prior written consent of Lender, which consent shall not be unreasonably withheld or delayed.

(c) Borrower may, without the consent of Lender, amend, modify or waive the provisions of any Lease or terminate, reduce rents under, accept a surrender of space under, or shorten the term of, any Lease (including any guaranty, letter of credit or other credit support with respect thereto) provided that such Lease is not a Major Lease, and that such action (taking into account, in the case of a termination, reduction in rent, surrender of space or shortening of term, the planned alternative use of the affected space) does not, in Borrower's commercially reasonable judgment, have a materially adverse effect on the value of the Property taken as a whole, and provided that such Lease, as amended, modified or waived, is otherwise in compliance with the requirements of this Security Instrument and any lease subordination agreement binding upon Lender with respect to such Lease. A termination of a Lease (other than a Major Lease) with a tenant who is in default beyond applicable notice and grace periods shall not be considered an action which has a materially adverse effect on the value of the Property taken as a whole. Any amendment, modification, waiver, termination, rent reduction, space surrender or term shortening which does not satisfy the requirements set forth in this Subsection shall be subject to the prior approval of Lender and its counsel, at Borrower's reasonable expense, which approval shall not be unreasonably withheld, conditioned or delayed. Borrower shall promptly deliver to Lender copies of all Leases, amendments, modifications and waivers which are entered into pursuant to this Subsection, together with Borrower's certification that it has satisfied all of the conditions of this Subsection.

(d) Notwithstanding anything contained herein to the contrary, Borrower shall not, without the prior written consent of Lender (which consent shall not be unreasonably withheld), enter into, renew, extend, materially amend, materially modify, waive any material provisions of, terminate, reduce rents under, accept a surrender of space under, or shorten the term of, any Major Lease or any instrument guaranteeing or providing credit support for any Major Lease. The term "Major Lease" shall mean any Lease for the demised space at the Property described in that certain Indenture of Lease, dated as of August 8, 1990, by and between Borrower, as successor-in-interest to Inn of O'Hare International Limited Partnership, and Mirage Restaurant, Inc.

(e) Upon the occurrence and during the continuance of an Event of Default, to the extent permitted by law, Borrower shall promptly deposit with Lender any and all monies representing security deposits under the Leases, whether or not Borrower actually received such monies (the "Security Deposits"). Lender shall hold the Security Deposits in accordance with the terms of the respective Lease, and shall promptly release the Security Deposits in order to

# UNOFFICIAL COPY

return a tenant's Security Deposit to such tenant if and when such tenant is entitled to the return of the Security Deposit under the terms of the Lease and is not otherwise in default under the Lease. To the extent required by the Lease or Applicable Laws (defined below), Lender shall hold the Security Deposits in an interest bearing account selected by Lender in its sole discretion, provided it complies with the terms of the Lease. In the event Lender is not permitted by law to hold the Security Deposits, Borrower shall deposit the Security Deposits into an account with a federally insured institution as approved by Lender. Upon Borrower's cure of such Event of Default and Lender's acceptance of such cure, Lender shall return to Borrower the Security Deposits in Lender's possession at the time of such cure.

(f) Lender shall, within ten (10) Business Days following written request from Borrower, execute and deliver a non-disturbance agreement (an "NDA"), in a form reasonably acceptable to Lender, with the tenant under any Lease, provided that such Lease that is actually approved in writing by Lender (as opposed to deemed approved). As a clarification of the preceding sentence and without limiting the foregoing, in the event Borrower requests Lender to deliver an NDA for any Lease that would not otherwise require Lender's consent pursuant to Section 3.7(a) hereof, Lender shall not be obligated to deliver such NDA until such time as Lender actually approves such Lease in writing (as opposed to deemed approval).

(g) Notwithstanding the provisions above, to the extent that Lender's prior written approval is required pursuant to this Section 3.7, Lender shall, with respect to new Leases and renewals, modifications, amendments or terminations of existing Leases, use good faith efforts to respond within ten (10) Business Days after Lender's receipt of Borrower's written request for such approval. If Lender fails to respond to such request within ten (10) Business Days, and Borrower sends a second request containing a legend in bold lettering with the following language: "LENDER'S RESPONSE IS REQUIRED WITHIN FIVE (5) BUSINESS DAYS OF RECEIPT OF THIS NOTICE PURSUANT TO THE TERMS OF A MORTGAGE BETWEEN THE UNDERSIGNED AND LENDER" in an envelope marked "PRIORITY", and if Lender fails to respond to such second written request before the expiration of such five (5) Business Day period, then Lender shall be deemed to have approved the matter for which Lender's approval was sought. Borrower shall be required to provide Lender with such information and documentation as may be reasonably required by Lender, including, without limitation, lease comparables and other market information as reasonably required by Lender.

**Section 3.8 Maintenance and Use of Property.** Borrower shall cause the Property to be maintained in a good and safe condition and repair. Borrower shall (or shall cause to be done), provided that the Net Proceeds are made available to Borrower by Lender pursuant to the terms of Section 4.3 hereof, promptly repair, replace or rebuild any part of the Property which may be destroyed by any casualty, or become damaged, worn or dilapidated or which may be affected by any proceeding of the character referred to in Section 3.6 hereof and shall complete and pay for any structure at any time in the process of construction or repair on the Land. Borrower shall not initiate, join in, acquiesce in, or consent to any change in any private restrictive covenant, zoning law or other public or private restriction, limiting or defining the uses which may be made of the Property or any part thereof. If under applicable zoning provisions the use of all or any portion of the Property is or shall become a nonconforming use, Borrower will not cause or knowingly permit the nonconforming use to be discontinued or the nonconforming Improvement to be abandoned without the express written consent of Lender.

# UNOFFICIAL COPY

Lender's prior approval shall be required in connection with any alterations to any Improvements, exclusive of both alterations to tenant spaces required under any Lease and alterations required under the PIP (hereinafter defined), (a) that is reasonably likely to have a material adverse effect on the Property or (b) that, together with any other alterations undertaken at the same time (including any related alterations, improvements or replacements), are reasonably anticipated to have a cost in excess of \$750,000.00 (the "Alteration Threshold"). If the total unpaid amounts incurred with respect to such alterations to the Improvements shall at any time exceed the Alteration Threshold, Borrower shall promptly deliver to Lender as security for the payment of such amounts and as additional security for Borrower's obligations under this Security Instrument, the Note and the Other Security Documents any of the following: (i) cash, (ii) direct non-callable obligations of the United States of America or other obligations which are "government securities" within the meaning of Section 2(a)(16) of the Investment Company Act of 1940, to the extent acceptable to the applicable Rating Agencies, (iii) Letter of Credit (defined below), (iv) other securities acceptable to Lender and the Rating Agencies, or (v) a completion bond, provided that such completion bond is acceptable to the Lender and the Rating Agencies. Such security shall be in an amount equal to the excess of the total unpaid amounts incurred and to be incurred with respect to such alterations to the Improvements over the Alteration Threshold. The term "Letter of Credit" shall mean a transferable, clean, irrevocable, unconditional, standby letter of credit in form, substance and amount reasonably satisfactory to Lender in its reasonable discretion, issued or confirmed by a commercial bank with a long term debt obligation rating of AA or better (or a comparable long term debt obligation rating) as assigned by the Rating Agencies and otherwise satisfactory to Lender in its reasonable discretion (the "Issuing Bank"). The Letter of Credit shall be payable upon presentation of a sight draft only to the order of Lender at a New York City bank. The Letter of Credit shall have an initial expiration date of not less than one (1) year and shall be automatically renewed for successive twelve (12) month periods for the term of the Loan (unless such Letter of Credit provides that the issuing bank may elect not to renew the Letter of Credit upon written notice to the beneficiary at least thirty (30) days prior to its expiration date) and shall provide for multiple draws. The Letter of Credit shall be transferable by Lender and its successors and assigns at a New York City bank.

Provided Borrower otherwise complies with the Loan Documents regarding replacement of FF&E (as defined below), Borrower shall have the right to sell existing hotel furniture, furnishings, fixtures and equipment in the guest rooms, hallways, lobbies, restaurants, lounges, meeting and banquet rooms, parking facilities and other public areas or replacements thereof (collectively "FF&E") and to keep the proceeds of such sale until the Borrower shall have received \$50,000 (the "FF&E Sale Threshold") in the aggregate for all such sales of FF&E during the term of the Loan. Once the FF&E Sale Threshold has been satisfied, the Borrower shall deposit all subsequent proceeds from the sale of FF&E Replacements into the FF&E Reserve Escrow Account (as defined in the Reserve and Security Agreement).

**Section 3.9 Waste.** Borrower shall not commit or suffer or permit to be committed or suffered any waste of the Property or make any change in the use of the Property which will in any way materially increase the risk of fire or other hazard arising out of the operation of the Property, or take any action that might invalidate or give cause for cancellation of any Policy, or do or permit to be done thereon anything that may in any way impair the value of the Property or the security of this Security Instrument. Borrower will not, without the prior written consent of Lender, permit any drilling or exploration for or extraction, removal, or



# UNOFFICIAL COPY

production of any minerals from the surface or the subsurface of the Land, regardless of the depth thereof or the method of mining or extraction thereof, except as permitted by Permitted Exceptions.

**Section 3.10 Compliance with Laws.** (a) Borrower shall promptly comply with all existing and future federal, state and local laws, orders, ordinances, governmental rules and regulations or court orders affecting the Property, or the use thereof ("Applicable Laws").

(b) Borrower shall from time to time, upon Lender's request, provide Lender with evidence reasonably satisfactory to Lender that the Property complies with all Applicable Laws or is exempt from compliance with Applicable Laws.

(c) Notwithstanding any provisions set forth herein or in any document regarding Lender's approval of alterations of the Property, Borrower shall not alter the Property in any manner which would materially increase Borrower's responsibility for compliance with Applicable Laws without the prior written approval of Lender. Lender's approval of the plans, specifications, or working drawings for alterations of the Property shall create no responsibility or liability on behalf of Lender for their completeness, design, sufficiency or their compliance with Applicable Laws. The foregoing shall apply to tenant improvements constructed by Borrower or by any of its tenants. Lender may condition any such approval upon receipt of a certificate of compliance with Applicable Laws from an independent architect, engineer, or other person reasonably acceptable to Lender.

(d) Borrower shall give prompt notice or cause prompt notice to be given to Lender of the receipt by Borrower of any notice related to a material violation of any Applicable Laws and of the commencement of any proceedings or investigations which relate to compliance with Applicable Laws.

(e) After prior written notice to Lender, Borrower, at its own expense, may contest by appropriate legal proceeding, promptly initiated and conducted in good faith and with due diligence, the Applicable Laws affecting the Property, provided that (i) no Event of Default has occurred and is continuing under the Note, this Security Instrument or any of the Other Security Documents; (ii) Borrower is permitted to do so under the provisions of any other mortgage, deed of trust or deed to secure debt affecting the Property; (iii) such proceeding shall be permitted under and be conducted in accordance with the provisions of any other instrument to which Borrower or the Property is subject and shall not constitute a default thereunder; (iv) neither the Property, any part thereof or interest therein, any of the tenants or occupants thereof, nor Borrower shall be affected in any material adverse way as a result of such proceeding; (v) non-compliance with the Applicable Laws shall not impose material civil or criminal liability on Borrower or Lender; (vi) Borrower shall have furnished the security as may be required in the proceeding or reasonably required by Lender to ensure compliance by Borrower with the Applicable Laws; and (vii) Borrower shall have furnished to Lender all other items reasonably requested by Lender.

(f) Borrower will not engage or knowingly permit others to engage in any illegal activities at the Property.

# UNOFFICIAL COPY

**Section 3.11 Books and Records.** (a) Borrower and any Guarantors (defined in Subsection 10.1(e)) and Indemnitor(s) (defined in Section 13.4), if any, shall keep adequate books and records of account in accordance with generally accepted accounting principles ("GAAP"), or the Uniform System of Accounts for the Lodging Industry, as applicable, and furnish to Lender:

(i) an annual occupancy summary for the Property setting forth the occupancy rates, average daily room rates and room revenues for each month of the preceding calendar year, as well as annual averages of the same, and such other information as may customarily be reflected thereon or reasonably requested by Lender within sixty (60) days after the close of each fiscal year of Borrower;

(ii) (A) quarterly operating statements of the Property, prepared and certified by Borrower in the form required by Lender (to the extent Borrower is reasonably capable of preparing such form), detailing the revenues received, the expenses incurred and the net operating income before and after debt service (principal and interest) and major capital improvements for that quarter and containing appropriate year to date information and (B) quarterly balance sheets of Borrower prepared and certified by Borrower in the form required by Lender, each within thirty (30) days after the end of each calendar quarter, except with respect to the fourth calendar quarter, which (x) operating statement for the fourth calendar quarter may be delivered simultaneously with the annual operating statement as required pursuant to subsection (iv) below and (y) balance sheet for the fourth calendar quarter may be delivered simultaneously with the annual balance sheet as required pursuant to subsection (v) below;

(iii) the most current Smith Travel Research Reports then available to Borrower reflecting market penetration and relevant hotel properties competing with the Property within thirty (30) days after the end of each calendar quarter;

(iv) an annual operating statement of the Property, detailing the total revenues received, total expenses incurred, total cost of all capital improvements, total debt service and total cash flow, to be prepared and certified by Borrower in the form required by Lender (to the extent Borrower is reasonably capable of preparing such form), and an annual operating statement certified by an authorized officer of the Borrower, within ninety (90) days after the close of each fiscal year;

(v) an annual balance sheet, profit and loss statement and financial statements of Borrower, any Guarantors and any Indemnitor(s) in the form required by Lender (to the extent Borrower is reasonably capable of preparing such form), prepared and certified by the respective Borrower, Guarantors and/or Indemnitor(s), within one hundred twenty (120) days after the close of each fiscal year of Borrower, Guarantors and Indemnitor(s), as the case may be; and

(vi) an annual operating budget (the "Approved Annual Budget") presented on a monthly basis consistent with the annual operating statement described above for the Property, including cash flow projections for the upcoming year, and all proposed capital

# UNOFFICIAL COPY

replacements and improvements at least fifteen (15) days prior to the start of each calendar year.

(b) Borrower, any Guarantor and any Indemnitor shall furnish Lender with such other additional financial or management information (including State and Federal tax returns) as may, from time to time, be reasonably required by Lender or requested by any Rating Agency in form and substance satisfactory to Lender.

(c) Borrower, any Guarantor and any Indemnitor shall furnish to Lender and its agents convenient facilities for the examination and audit of any such books and records.

(d) Notwithstanding the foregoing, until such time as the Loan has been Securitized, each of the items required to be delivered pursuant to subsections (a)(i) and (ii) shall, upon reasonable request by Lender, be delivered on a monthly rather than quarterly basis, in each case not later than 20 days following the end of the calendar month to which such information relates.

(e) Notwithstanding the foregoing, if required by Lender in connection with a Securitization (hereinafter defined) all financial statements and reports required to be delivered under this Section 3.11 will be in the form and substance required for Lender to comply with Regulation AB under the Securities Act of 1933 and the Securities and Exchange Act of 1934, as the same may be amended from time to time, and Regulation S-X under the Securities Act of 1933, as the same may be amended from time to time.

(f) All information, reports, certificates, financial statements and other materials required to be delivered pursuant to this Section 3.11 shall be delivered in hardcopy and, to the extent readily available, in electronic format.

Notwithstanding anything to the contrary contained herein, Borrower acknowledges and agrees that the obligations of Borrower pursuant to this Section 3.11 are in no way conditioned upon receipt by Borrower of any information or documentation from any other person and/or entity, including, without limitation, the failure of Borrower to receive any such information in a timely manner shall not excuse Borrower from complying with this Section 3.11 or extend the time frame for such compliance.

**Section 3.12 Payment for Labor and Materials.** (a) Subject to the provisions of Section 3.12(b) below, Borrower will promptly pay when due all bills and costs for labor, materials, and specifically fabricated materials incurred in connection with the Property (collectively, the "Labor and Material Costs") and never permit or cause to be permitted to exist in respect of the Property or any part thereof any lien or security interest, even though inferior to the liens and the security interests hereof, and in any event never permit to be created or exist in respect of the Property or any part thereof any other or additional lien or security interest other than the liens or security interests hereof, except for the Permitted Exceptions (defined below).

(b) After prior written notice to Lender, Borrower, at its own expense, may contest by appropriate legal proceeding, promptly initiated and conducted in good faith and with due diligence, the Labor and Material Costs, provided that (i) no Event of Default has occurred and is continuing; (ii) such proceeding shall be permitted under and conducted in accordance

# UNOFFICIAL COPY

with the provisions of any other instrument to which Borrower is subject and shall not constitute a default thereunder; (iii) neither the Property, any part thereof or interest therein, any of the tenants or occupants thereof, nor Borrower shall be affected in any material adverse way as a result of such proceeding; and (iv) the lien of the Labor and Material Costs has been discharged of record (by payment, bonding or otherwise).

**Section 3.13 Performance of Other Agreements.** Borrower shall observe and perform each and every term to be observed or performed by Borrower pursuant to the terms of any agreement or recorded instrument affecting or pertaining to the Property (the "Recorded Matters"), or given by Borrower to Lender for the purpose of further securing an Obligation and any amendments, modifications or changes thereto, provided, however, Borrower shall be entitled to contest the applicability of any of the Recorded Matters in compliance with the requirements of Section 3.10(e) hereof.

**Section 3.14 Change of Name, Identity or Structure.** Except as may be permitted under Article 8 hereof, Borrower will not change Borrower's name, identity (including its trade name or names) or corporate, partnership or other structure without notifying Lender of such change in writing at least thirty (30) days prior to the effective date of such change and, in the case of a change in Borrower's structure, without first obtaining the prior written consent of Lender, which consent shall not be unreasonably withheld or delayed.

**Section 3.15 Existence.** Borrower will continuously maintain (a) its existence and shall not dissolve or permit its dissolution, (b) its rights to do business in the state where the Property is located and (c) its franchises and trade names, if any, subject to Section 3.19.

**Section 3.16 Management Agreement.** (a) The Improvements are operated under the terms and conditions of that certain Property Management Agreement dated as of the date hereof by and between Borrower and Kinseth Hotel Corporation (the "Manager"), (hereinafter, together with any renewals or replacements thereof, being referred to as the "Management Agreement"), which Management Agreement has been approved by Lender. Borrower shall (i) diligently perform and observe all of the material terms, covenants and conditions of the Management Agreement on the part of Borrower to be performed and observed to the end that all things shall be done which are necessary to keep unimpaired the rights of Borrower under the Management Agreement and (ii) promptly notify Lender of the giving of any notice to Borrower of any default by Borrower in the performance or observance of any of the terms, covenants or conditions of the Management Agreement on the part of Borrower to be performed and observed and deliver to Lender a true copy of each such notice. Borrower shall not surrender the Management Agreement, consent to the assignment by the Manager of its interest under the Management Agreement, or terminate or cancel the Management Agreement or materially modify, change, supplement, alter or amend the Management Agreement, in any respect, either orally or in writing without Lender's prior written consent, which consent shall not be unreasonably withheld, delayed or conditioned; provided, however, that Borrower shall have the right to terminate the Management Agreement without Lender's prior written consent upon satisfaction of the following conditions: (i) Borrower delivers to Lender written notice of its intention to terminate the Management Agreement at least thirty (30) days prior to such termination; (ii) Borrower replaces the Manager with a Qualified Manager pursuant to a management agreement reasonably acceptable to Lender; and (iii) such Qualified Manager



# UNOFFICIAL COPY

delivers to Lender a Conditional Assignment of Management Agreement substantially in the form of the Conditional Assignment of Management Agreement delivered to Lender by Manager on the date hereof. Borrower hereby assigns to Lender as further security for the payment of the Debt and for the performance and observance of the terms, covenants and conditions of this Security Instrument, all the rights, privileges and prerogatives of Borrower to surrender the Management Agreement or, subject to Section 3.16(b), to terminate, cancel, or materially modify, change, supplement, alter or amend the Management Agreement in any respect, and any such surrender of the Management Agreement or termination, cancellation, modification, or material change, supplement, alteration or amendment of the Management Agreement without the prior consent of Lender shall be void and of no force and effect, except as provided in the preceding sentence. If Borrower shall default beyond any applicable notice and cure periods in the performance or observance of any material term, covenant or condition of the Management Agreement on the part of Borrower to be performed or observed, then, without limiting the generality of the other provisions of this Security Instrument, and without waiving or releasing Borrower from any of its obligations hereunder, Lender shall have the right, but shall be under no obligation, to pay any sums and to perform any act or take any action as may be appropriate to cause all the terms, covenants and conditions of the Management Agreement on the part of Borrower to be performed or observed to be promptly performed or observed on behalf of Borrower, to the end that the rights of Borrower in, to and under the Management Agreement shall be kept unimpaired and free from default. Subject to the terms of the Leases and the Franchise Agreement, Lender and any person designated by Lender shall have, and are hereby granted, the right to enter upon the Property at any time and from time to time upon reasonable prior written notice to Borrower and at reasonable hours for the purpose of taking any such action, provided, however, that Lender shall not take such action unless an Event of Default has occurred and is continuing. If the Manager under the Management Agreement shall deliver to Lender a copy of any notice sent to Borrower of default under the Management Agreement, such notice shall constitute full protection to Lender for any action taken or omitted to be taken by Lender in good faith, in reliance thereon if Lender does not receive a notice from Borrower disputing the default within five (5) days of Lender's receipt of Manager's notice. Borrower shall notify Lender if the Manager sub-contracts to a third party any or all of its management responsibilities under the Management Agreement. Borrower shall, from time to time, use its commercially reasonable efforts to obtain from the Manager under the Management Agreement such certificates of estoppel with respect to compliance by Borrower with the terms of the Management Agreement as may be reasonably requested by Lender. Subject to Borrower's right to replace the Manager as set forth herein, Borrower shall exercise each individual option, if any, to extend or renew the term of the Management Agreement upon demand by Lender made at any time no earlier than ninety (90) days prior to the last day upon which any such option may be exercised, and Borrower hereby expressly authorizes and appoints Lender its attorney-in-fact to exercise any such option in the name of and upon behalf of Borrower unless Borrower has given Lender written notice that it intends to replace the Manager, which power of attorney shall be irrevocable and shall be deemed to be coupled with an interest. Such power of attorney shall not be exercisable by Lender unless an Event of Default has occurred and is continuing. Any sums reasonably expended by Lender pursuant to this paragraph shall bear interest at the Default Rate (as defined in the Note) from the date such cost is incurred to the date of payment to Lender, shall be deemed to constitute a portion of the Debt, shall be secured by the lien of this Security

# UNOFFICIAL COPY

Instrument and the other Security Documents and shall be immediately due and payable upon demand by Lender therefor.

(b) Without limitation of the foregoing, Borrower, upon the request of Lender, shall terminate the Management Agreement and replace the Manager, without penalty or fee, if at any time during the Loan: (a) the Manager shall become insolvent or a debtor in any bankruptcy or insolvency proceeding, (b) there exists an Event of Default, or (c) there exists a default by Manager under the Management Agreement beyond any applicable notice and cure periods. At such time as the Manager may be removed, a Qualified Manager shall assume management of the Property and shall receive a property management fee acceptable to Lender, provided that such Qualified Manager shall be reasonably acceptable to Lender and Lender shall receive written confirmation from the Rating Agencies that such Qualified Manager will not result in a downgrade, withdrawal or qualification of the initial, or, if higher, then current ratings issued in connection with a Securitization, or if a Securitization has not occurred, any ratings to be assigned in connection with a Securitization (a "Rating Confirmation"). The term "Qualified Manager" as used herein shall mean a reputable and experienced professional management organization (a) which manages, together with its affiliates, at least 10 full-service hotels having no fewer than 1500 hotel rooms of similar or better quality, exclusive of the Property and (b) (i) prior to the occurrence of a Securitization, reasonably approved by Lender, and (ii) after the occurrence of a Securitization, Lender shall have received written confirmation from the Rating Agencies that the employment of such manager will not result in a downgrade, withdrawal or qualification of the initial, or if higher, then current ratings issued in connection with the Securitization.

Section 3.17 Non-Consolidation Opinion. Borrower has complied and will comply with each of the assumptions made with respect to it in that certain substantive non-consolidation opinion letter, dated the date hereof, delivered by Borrower's counsel in connection with the Loan and any subsequent non-consolidation opinion delivered in accordance with the terms and conditions of this Security Instrument or the Cooperation Letter (the "Non-Consolidation Opinion"), including, but not limited to, any exhibits attached thereto. Each entity other than the Borrower with respect to which an assumption is made in the Non-Consolidation Opinion, including, but not limited to, any exhibits attached thereto, has complied and will comply with each of the assumptions made with respect to it in the Non-Consolidation Opinion, including, but not limited to, any exhibits attached thereto.

Section 3.18 Principal Place of Business. Borrower shall not change the principal place of business, chief executive office or State of formation as set forth in Section 5.25 below without at least thirty (30) days prior written notice to Lender. In connection with any change of its principal place of business, chief executive office or State of formation, Borrower agrees to execute and deliver such additional financing statements, security agreements and other instruments as determined by Lender to be necessary to effectively evidence or perfect Lender's security interest in the Property as a result of such change of principal place of business, chief executive office or State of formation.

Section 3.19 Certain Hotel Covenants. Borrower further covenants and agrees with Lender as follows:

# UNOFFICIAL COPY

(a) Borrower shall cause the hotel located on the Property to be operated pursuant to the Franchise Agreement.

(b) Borrower shall: (i) promptly perform and/or observe all of the covenants and agreements required to be performed and observed by it under the Franchise Agreement and do all things necessary to preserve and to keep unimpaired its material rights thereunder; (ii) promptly notify Lender of any default under the Franchise Agreement of which it is aware; (iii) promptly deliver to Lender a copy of each financial statement, business plan, capital expenditures plan, notice, report and estimate received by it under the Franchise Agreement; (iv) promptly give notice to Lender of any notice or information that Borrower receives which indicates that Franchisor is terminating the Franchise Agreement or that Franchisor is otherwise discontinuing its franchise or license to Borrower with respect to the Property; and (v) promptly enforce the performance and observance of all of the covenants required to be performed and observed by Franchisor under the Franchise Agreement, including, without limitation, causing the Property to be operated, maintained and managed at all times and in a manner consistent with the standards for the operation, management and maintenance set forth in the Franchise Agreement.

(c) Borrower shall not, without Lender's prior written consent: (i) surrender, terminate or cancel the Franchise Agreement or otherwise replace Franchisor or enter into any other Franchise Agreement with respect to the Property; (ii) reduce or consent to the reduction of the term of the Franchise Agreement; (iii) increase or consent to the increase of the amount of any charges under the Franchise Agreement; or (iv) otherwise modify, change, supplement, alter or amend, or waive or release any of its rights and remedies under, the Franchise Agreement in any material respect. In the event that the Franchise Agreement expires or is terminated (without limiting any obligation of Borrower to obtain Lender's consent to any termination or modification of the Franchise Agreement in accordance with the terms and provisions of this Security Instrument), Borrower shall enter into a Replacement Franchise Agreement with Franchisor or another Qualified Franchisor, as applicable, within six (6) months from the date of termination or expiration of the Franchise Agreement (provided, however, if Borrower shall use commercially reasonable efforts to enter into a Replacement Franchise Agreement, Borrower shall have an additional ninety (90) days to enter into a Replacement Franchise Agreement with Franchisor or another Qualified Franchisor, as applicable). A "Replacement Franchise Agreement" shall mean either (x) a franchise, trademark and license agreement with a Qualified Franchisor substantially in the same form and substance as the Franchise Agreement, or (y) a franchise, trademark and license agreement with a Qualified Franchisor, which franchise, trademark and license agreement shall be reasonably acceptable to Lender in form and substance, provided, with respect to this subclause (y), Lender, at its option, may require that Borrower shall have obtained prior written confirmation from the applicable Rating Agencies that such franchise, trademark and license agreement will not cause a downgrade, withdrawal or qualification of the then current rating of the Securities or any class thereof. "Qualified Franchisor" shall mean either (1) Franchisor; or (2) in the reasonable judgment of Lender, a reputable and experienced franchisor possessing experience in flagging hotel properties similar in size,

# UNOFFICIAL COPY

scope, use and value as the Property, provided, that Borrower shall have obtained, if such Person is an Affiliate of Borrower, an additional non-consolidation opinion.

(d) Borrower shall not pledge, transfer, assign, mortgage, encumber or allow to be encumbered its interest in the Franchise Agreement or any interest therein except as provided in the Loan Documents to Lender. Without limiting the foregoing, except to the extent required thereunder, Borrower shall not consent to any assignment by the Franchisor of the Franchisor's interest in the Franchise Agreement or its right and interests thereunder.

(e) Borrower shall not, without Lender's prior written consent, enter into transactions with any affiliate, including, without limitation, any arrangement providing for the managing of the hotel on the Property, the rendering or receipt of services or the purchase or sale of inventory, except any such transaction in the ordinary course of business of Borrower if the monetary or business consideration arising therefrom would be substantially as advantageous to Borrower as the monetary or business consideration that would obtain in a comparable transaction with a person not an affiliate of Borrower; notwithstanding the foregoing, Lender hereby approves the Manager (which is an affiliate of Borrower).

Section 3.20 OFAC. At all times throughout the term of the Loan, Borrower and all of its respective Affiliates shall (i) not be a Prohibited Person (defined below) and (ii) be in full compliance with all applicable orders, rules, regulations and recommendations of The Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury.

The term "Prohibited Person" shall mean any person or entity:

(a) listed in the Annex to, or otherwise subject to the provisions of, the Executive Order No. 13224 on Terrorist Financing, effective September 24, 2001, and relating to Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism (the "Executive Order");

(b) that is owned or controlled by, or acting for or on behalf of, any person or entity that is listed to the Annex to, or is otherwise subject to the provisions of, the Executive Order;

(c) with whom Lender is prohibited from dealing or otherwise engaging in any transaction by any terrorism or money laundering law, including the Executive Order;

(d) who commits, threatens or conspires to commit or supports "terrorism" as defined in the Executive Order;

(e) that is named as a "specially designated national and blocked person" on the most current list published by the U.S. Treasury Department Office of Foreign Assets Control at its official website, <http://www.treas.gov/ofac/t11sdn.pdf> or at any replacement website or other replacement official publication of such list; or

(f) who is an Affiliate of a person or entity listed above.



# UNOFFICIAL COPY

Section 3.21 Property Improvement Plan. Borrower covenants and agrees that it will complete the property improvement plan set forth in the Franchise Agreement (the "PIP") at the Property in the manner, and within the time periods required under the Franchise Agreement.

## ARTICLE 4

### SPECIAL COVENANTS

Borrower covenants and agrees that:

Section 4.1 Property Use. The Property shall be used only as a hotel and any ancillary retail, parking, restaurant, fitness center, conference or other uses relating thereto, and for no other uses without the prior written consent of Lender, which consent may be withheld in Lender's sole and absolute discretion.

Section 4.2 Single Purpose Entity. Borrower covenants and agrees that it has not and shall not, and agrees that its managing member ("Principal") has not and shall not:

(a) with respect to Borrower, engage in any business or activity other than the acquisition, development, ownership, operation, leasing, managing and maintenance of the Property and entering into the Loan, and activities incidental thereto, with respect to Principal, engage in any business or activity other than the ownership of its interest in Borrower, and activities incidental thereto;

(b) with respect to Borrower, acquire or own any material assets other than (i) the Property, and (ii) such incidental Personal Property as may be necessary for the operation of the Property, with respect to Principal, acquire or own any material asset other than its interest in Borrower;

(c) merge into or consolidate with any person or entity or, to the fullest extent permitted by law, dissolve, terminate or liquidate in whole or in part, transfer or otherwise dispose of all or substantially all of its assets or change its legal structure;

(d) (i) fail to observe its organizational formalities or preserve its existence as an entity duly organized, validly existing and in good standing (if applicable) under the laws of the jurisdiction of its organization or formation, and qualification to do business in the state where the Property is located, if applicable, or (ii) without the prior written consent of Lender, materially amend, materially modify, terminate or fail to comply with the material provisions of Borrower's Operating Agreement, Certificate of Formation or similar organizational documents, as the case may be, or of Principal's Certificate of Formation or similar organizational documents, as the case may be, whichever is applicable;

(e) form, acquire, hold or own an interest in any subsidiary or make any investment in, or buy or hold evidence of indebtedness (other than cash or investment-grade securities) issued by any person or entity without the consent of Lender other than, with respect to Principal, its interest in Borrower;

# UNOFFICIAL COPY

(f) commingle its assets with the assets of any of its members, general partners, affiliates, principals or of any other person or entity, participate in a cash management system with any other entity or person or fail to use its own separate stationery, invoices and checks bearing its own name;

(g) (x) with respect to Borrower, incur any debt, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than the Debt, except for (i) unsecured trade payables and operational debt not evidenced by a note and in an aggregate amount not exceeding at any one time one million (\$1,000,000) and (ii) indebtedness incurred in the financing or leasing of FF&E or vehicles used at the Property with annual payments not exceeding three percent (3%) of the outstanding amount of the Loan, provided, that any indebtedness incurred by Borrower pursuant to subclauses (i) and (ii) shall be (A) paid within sixty (60) days of the date due, (B) payable to trade creditors and in amounts as are normal and reasonable under the circumstances, and (C) incurred in the ordinary course of business of owning and operating the Property, and (y) with respect to Principal, incur any debt secured or unsecured, direct or contingent (including guaranteeing any obligations);

(h) become insolvent and fail to pay its debts and liabilities (including, as applicable, shared personnel and overhead expenses) only from its assets as the same shall become due;

(i) (i) fail to maintain its records (including financial statements), books of account and bank accounts separate and apart from those of the members, general partners, principals and affiliates of Borrower or Principal, as the case may be, the affiliates of a member, general partner or principal of Borrower or Principal, as the case may be, and any other person or entity, (ii) permit its assets or liabilities to be listed as assets or liabilities on the financial statement of any other entity or person, provided, however, that the Borrower's and Principal's assets may be included in a consolidated financial statement of such entities provided that appropriate notations shall be made on such consolidated financial statement to indicate the separateness of the Borrower and Principal and to indicate that none of any such assets are available to satisfy the debts and obligations of such entity and that such assets are also listed on the Borrower's and the Principal's own separate balance sheet or (iii) include the assets or liabilities of any other person or entity on its financial statements;

(j) except for capital contributions or distributions pursuant to their organizational documents, enter into any contract or agreement with any member, general partner, principal or affiliate of Borrower or Principal, as the case may be, Guarantor or Indemnitor, or any member, general partner, principal or affiliate thereof (other than a business management services agreement, provided that (i) such agreement is acceptable to Lender, (ii) the manager, or equivalent thereof, under such agreement holds itself out as an agent of the Borrower and (iii) the agreement meets the standards set forth in this subsection (j) following this parenthetical), except upon terms and conditions that are commercially reasonable, intrinsically fair and substantially similar to those that would be available on an arms-length basis with third parties other than any member, general partner, principal or affiliate of Borrower or Principal, as the case may be, Guarantor or Indemnitor, or any member, general partner, principal or affiliate thereof;

# UNOFFICIAL COPY

(k) to the fullest extent permitted by law, seek the dissolution or winding up in whole, or in part, of Borrower or Principal, as the case may be;

(l) fail to correct any known misunderstandings regarding the separate identity of Borrower or Principal, as the case may be, from any member, general partner, principal or affiliate thereof or any other person;

(m) guarantee or become obligated for the debts of any other entity or person or hold itself out to be responsible for the debts of another entity or person;

(n) make any loans or advances to any third party, including any member, general partner, principal or affiliate of Borrower or Principal, as the case may be, or any member, general partner, principal or affiliate thereof, and shall not acquire obligations or securities of any member, general partner, principal or affiliate of Borrower or Principal, as the case may be, or any member, general partner, or affiliate thereof;

(o) fail to file its own tax returns or be included on the tax returns of any other person or entity except as required by applicable law and fail to pay any taxes so required to be paid under applicable law;

(p) fail either to hold itself out to the public as a legal entity separate and distinct from any other entity or person or to conduct its business solely in its own name or a name franchised or licensed to it by an entity other than an affiliate of Borrower or Principal, as the case may be, and not as a division or part of any other entity in order not (i) to mislead others as to the identity with which such other party is transacting business, or (ii) to suggest that Borrower or Principal, as the case may be, is responsible for the debts of any third party (including any member, general partner, principal or affiliate of Borrower or Principal, as the case may be, or any member, general partner, principal or affiliate thereof);

(q) fail to maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations;

(r) share any common logo with or hold itself out as or be considered as a department or division of (i) any general partner, principal, member or affiliate of Borrower or Principal, as the case may be, (ii) any affiliate of a general partner, principal or member of Borrower or Principal, as the case may be, or (iii) any other person or entity;

(s) fail to allocate fairly and reasonably any overhead expenses that are shared with an affiliate, including paying for office space and services performed by any employee of an affiliate;

(t) pledge its assets for the benefit of any other person or entity, and with respect to the Borrower, other than with respect to the Loan;

(u) fail to maintain a sufficient number of employees in light of its contemplated business operations and pay the salaries of its own employees from its own funds;

# UNOFFICIAL COPY

(v) fail to provide in its (i) articles of organization, certificate of formation and/or operating agreement, as applicable, if it is a limited liability company, (ii) limited partnership agreement, if it is a limited partnership or (iii) certificate of incorporation, if it is a corporation, that for so long as the Loan is outstanding pursuant to the Note and this Security Instrument, it shall not file or consent to the filing of any petition, either voluntary or involuntary, to take advantage of any applicable insolvency, bankruptcy, liquidation or reorganization statute, seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or similar official or make an assignment for the benefit of creditors without the affirmative vote of Principal, which shall in turn require the affirmative vote of the Independent Director (defined below), it being understood and agreed that, except in connection with the foregoing action listed in this Section 4.2(v), the approval/consent of the Independent Director shall not be required in connection with any other actions taken by Borrower.

(w) fail to hold its assets in its own name;

(x) if Borrower is a corporation, fail to consider the interests of its creditors in connection with all corporate actions to the extent permitted by applicable law;

(y) have any of its obligations guaranteed by an affiliate except for (i) that certain Guaranty of Recourse Obligations of Borrower dated the date hereof given by Investcorp Properties Limited to Lender, and (ii) the Environmental Indemnity (hereinafter defined);

(z) violate or cause to be violated the assumptions made with respect to Borrower and its principals in the Non-Consolidation Opinion;

(aa) with respect to Principal, fail at any time to have at least one independent director (the "Independent Director") that is not and has not been for at least five (5) years preceding such initial appointment:

(i) a stockholder, director (with the exception of serving as an Independent Director of the Manager), officer, trustee, employee, partner, member (with the exception of serving as a Special Member), attorney or counsel of the Manager, the Company, or any Affiliate of either of them;

(ii) a creditor, customer, supplier, or other person who derives any of its purchases or revenues from its activities with the Manager, the Company or any Affiliate of either of them;

(iii) a Person Controlling or under common Control with any Person excluded from serving as Independent Director under (a) or (b); or

(iv) a member of the immediate family by blood or marriage of any Person excluded from serving as Independent Director under (a) or (b).

A natural person who satisfies the foregoing definition other than subparagraph (b) shall not be disqualified from serving as an Independent Director of the Manager if such individual is an Independent Director provided by a nationally-recognized company that

# UNOFFICIAL COPY

provides professional independent directors (a "Professional Independent Director") and other corporate services in the ordinary course of its business.

A natural person who otherwise satisfies the foregoing definition other than subparagraph (a) by reason of being the independent director of a "special purpose entity" affiliated with the Manager or the Company shall not be disqualified from serving as an Independent Director of the Manager if such individual is (i) a Professional Independent Director or (ii) the fees that such individual earns from serving as independent director of Affiliates of the Manager or the Company in any given year constitute in aggregate less than five percent (5%) of such individual's annual income for that year. Notwithstanding the immediately preceding sentence, an Independent Director may not simultaneously serve as Independent Director of the Manager and independent director of a special purpose entity (other than the Manager) that owns a direct or indirect equity interest in the Company or a direct or indirect equity interest in any co-borrower with the Company. For purposes of this paragraph, a "special purpose entity" is an entity, whose organizational documents contain restrictions on its activities substantially similar to those set forth in the Manager's organizational documents.

(bb) with respect to Principal, permit its board of directors to take any action which, under the terms of any certificate of incorporation, by-laws or any voting trust agreement with respect to any common stock, requires the unanimous vote of one hundred percent (100%) of the members of the board unless at the time of such action there shall be at least one member who is an Independent Director.

Notwithstanding anything to the contrary contained herein, no provision contained in this Section 4.2 shall be deemed to create an obligation on the part of Borrower, any member of Borrower, or any member, officer, director, employee or affiliate of any of the foregoing to make loans, equity infusions or capital contributions to Borrower.

Section 4.3 Restoration. The following provisions shall apply in connection with the Restoration of the Property:

(a) If the Net Proceeds (defined below) shall be less than \$500,000 and the costs of completing the Restoration shall be less than \$500,000, the Net Proceeds will be disbursed by Lender to Borrower upon receipt, provided that all of the conditions set forth in Section 4.3(b)(i) are met and Borrower delivers to Lender a written undertaking to expeditiously commence and to satisfactorily complete with due diligence the Restoration in accordance with the terms of this Security Instrument.

(b) If the Net Proceeds are equal to or greater than \$500,000 or the costs of completing the Restoration is equal to or greater than \$500,000, Lender shall make the Net Proceeds available for the Restoration in accordance with the provisions of this Section 4.3(b). The term "Net Proceeds" for the purposes of this Section shall mean: (i) the net amount of all insurance proceeds received by Lender pursuant to Section 3.3(a)(i), (iv), (vi), (vii), (viii) and, as applicable, (x) of this Security Instrument as a result of such damage or destruction, after deduction of its reasonable costs and expenses (including, but not limited to, reasonable counsel fees), if any, in collecting same ("Insurance Proceeds"), or (ii) the net amount of the Award, after



# UNOFFICIAL COPY

deduction of its reasonable costs and expenses (including, but not limited to, reasonable counsel fees), if any, in collecting same ("Condemnation Proceeds"), whichever the case may be.

(i) The Net Proceeds shall be made available to Borrower for the Restoration provided that each of the following conditions are met:

(A) no Event of Default shall have occurred and be continuing under the Note, this Security Instrument or any of the Other Security Documents;

(B) (1) in the event the Net Proceeds are Insurance Proceeds, less than thirty percent (30%) of the total floor area of the Improvements has been damaged, destroyed or rendered unusable as a result of such fire or other casualty or (2) in the event the Net Proceeds are Condemnation Proceeds, less than ten percent (10%) of the land constituting the Property has been taken, such land is located along the perimeter or periphery of the applicable parcel of the Property, no portion of the Improvements is located on such land and such taking does not materially impair access to the Property;

(C) Borrower shall commence the Restoration as soon as reasonably practicable (but in no event later than sixty (60) days after such damage or destruction occurs) and shall diligently pursue the same to satisfactory completion;

(D) Lender shall be satisfied that any operating deficits which will be incurred with respect to the Property as a result of the occurrence of any such fire or other casualty will be covered out of (1) the Net Proceeds, (2) the insurance coverage referred to in Section 3.3(a)(iii), or (3) by other funds of Borrower;

(E) Lender shall be satisfied that, upon the completion of the Restoration, the gross cash flow of the Property for the succeeding twelve (12) month period following the completion of the Restoration will be restored to a level sufficient to cover all carrying costs and operating expenses of the Property for such twelve (12) month period, including, without limitation, debt service on the Note at a coverage ratio (after deducting all required reserves as required by Lender from net operating income) of at least 1.25 to 1.0, which coverage ratio shall be determined by Lender in its sole discretion on the basis of the Applicable Interest Rate (as defined in the Note);

(F) Lender shall be satisfied that the Restoration will be substantially completed on or before the earliest to occur of (1) six (6) months prior to the Maturity Date (as defined in the Note and as the same may be extended pursuant to the terms of the Note), (2) twelve (12) months after the occurrence of such fire or other casualty, or (3) such time as may be required under applicable zoning law, ordinance, rule or regulation in order to repair and restore the Property to the condition it was in immediately prior to such fire or other casualty;

# UNOFFICIAL COPY

(G) the Property and the use thereof after the Restoration will be in compliance with and permitted under all applicable zoning laws, ordinances, rules and regulations;

(H) the Restoration shall be done and completed by Borrower in an expeditious and diligent fashion and in compliance with all applicable governmental laws, rules and regulations (including, without limitation, all applicable Environmental Laws (defined below));

(I) the Management Agreement in effect as of the date of the occurrence of such fire or other casualty or taking, whichever the case may be, shall (1) remain in full force and effect during the Restoration and shall not otherwise terminate as a result of the fire, other casualty or the Restoration or (2) if terminated, shall have been replaced with a Management Agreement with a Qualified Manager prior to the opening or reopening of the Property or any portion thereof for business with the public; and

(J) the Franchise Agreement in effect as of the date of the occurrence of such fire or other casualty or taking, whichever the case may be, shall (1) remain in full force and effect during the Restoration and shall not otherwise terminate as a result of the fire, other casualty or the Restoration or (2) if terminated, shall have been replaced with a Franchise Agreement with a Qualified Franchisor or a franchisor reasonably acceptable to Lender prior to the opening or reopening of the Property or any portion thereof for business with the public.

(ii) The Net Proceeds shall be held by Lender in Eligible Investments (defined below) and, until disbursed in accordance with the provisions of this Section 4.3(b), shall constitute additional security for the Obligations. The Net Proceeds shall be disbursed by Lender to, or as directed by, Borrower from time to time during the course of the 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 the 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 Property arising out of the Restoration 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 insuring the lien of this Security Instrument.

(iii) In the event the total cost of Restoration is \$500,000 or more, all plans and specifications required in connection with the Restoration shall be subject to prior review and acceptance in all respects by Lender 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 the Restoration. The identity of the contractors, subcontractors and materialmen engaged in the Restoration, as well as the contracts under which they have been engaged, shall be subject to prior review and acceptance by Lender and the Casualty

# UNOFFICIAL COPY

Consultant, which approval shall not be unreasonably withheld or delayed. All reasonable costs and expenses incurred by Lender in connection with making the Net Proceeds available for the Restoration including, without limitation, reasonable counsel fees and disbursements and the Casualty Consultant's fees, shall be paid by Borrower.

(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 the Restoration, as certified by the Casualty Consultant, minus the Casualty Retainage. The term "Casualty Retainage" as used in this Section 4.3(b) shall mean an amount equal to 10% of the costs actually incurred for work in place as part of the Restoration, as certified by the Casualty Consultant, until such time as the Casualty Consultant certifies to Lender that Net Proceeds representing 50% of the required Restoration have been disbursed. There shall be no Casualty Retainage with respect to costs actually incurred by Borrower for work in place in completing the last 50% of the required Restoration. The Casualty Retainage shall in no event, and notwithstanding anything to the contrary set forth above in this Section 4.3(b), be less than the amount actually held back by Borrower from contractors, subcontractors and materialmen engaged in the Restoration. The Casualty Retainage shall not be released until the Casualty Consultant certifies to Lender that the Restoration has been completed in accordance with the provisions of this Section 4.3(b) and that all approvals necessary for the re-occupancy and use of the Property have been obtained from all appropriate governmental and quasi-governmental authorities, and Lender receives evidence satisfactory to Lender that the costs of the Restoration have been paid in full or will be paid in full out of the Casualty Retainage, provided, however, that Lender will release the portion of the Casualty Retainage being held with respect to any contractor, subcontractor or materialman engaged in the 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, and 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 reasonably requested by Lender or by the title company insuring the lien of this Security Instrument. If required by Lender, the release of any such portion of the Casualty Retainage 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 reasonable opinion of Lender, 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 the Restoration, Borrower 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 the Restoration on the same conditions applicable to the disbursement of the Net Proceeds,



# UNOFFICIAL COPY

and until so disbursed pursuant to this Section 4.3(b) shall constitute additional security for the 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 the Restoration has been substantially completed in accordance with the provisions of this Section 4.3(b), and the receipt by Lender of evidence satisfactory to Lender that all costs incurred in connection with the Restoration have been paid in full, shall be remitted by Lender to Borrower, provided no Event of Default shall have occurred and shall be continuing under the Note, this Security Instrument or any of the Other Security Documents.

(c) All Net Proceeds not required (i) to be made available for the Restoration or (ii) to be returned to Borrower as excess Net Proceeds pursuant to Section 4.3(b)(vii) may be retained and applied by Lender toward the payment of the Debt whether or not then due and payable in such order, priority and proportions as Lender in its discretion shall deem proper or, at the discretion of Lender, the same may be paid, either in whole or in part, to Borrower for such purposes as Lender shall designate, in its discretion. If Lender shall receive and retain Net Proceeds, then the lien of this Security Instrument shall be reduced only by the amount thereof received and retained by Lender and actually applied by Lender in reduction of the Debt.

(d) "Eligible Investments" shall mean any one or more of the following obligations or securities acquired at a purchase price of not greater than par, including those issued by any Servicer, the trustee under any Securitization or any of their respective Affiliates, payable on demand or having a maturity date not later than the Business Day immediately prior to the first Payment Date following the date of acquiring such investment and meeting one of the appropriate standards set forth below:

(i) obligations of, or obligations fully guaranteed as to payment of principal and interest by, the United States or any agency or instrumentality thereof, provided such obligations are backed by the full faith and credit of the United States of America including, without limitation, obligations of: the U.S. Treasury (all direct or fully guaranteed obligations), the Farmers Home Administration (certificates of beneficial ownership), the General Services Administration (participation certificates), the U.S. Maritime Administration (guaranteed Title XI financing), the Small Business Administration (guaranteed participation certificates and guaranteed pool certificates), the U.S. Department of Housing and Urban Development (local authority bonds) and the Washington Metropolitan Area Transit Authority (guaranteed transit bonds); *provided, however*, that the investments described in this clause (i) must (A) have a predetermined fixed dollar amount of principal due at maturity that cannot vary or change, (B) if rated by S&P, not have an "r" highlighter affixed to their rating, (C) if such investments have a variable rate of interest, have an interest rate tied to a single interest rate index plus a fixed spread (if any) and must move proportionately with that index, and (D) not be subject to liquidation prior to their maturity;

(ii) Federal Housing Administration debentures;

# UNOFFICIAL COPY

(iii) obligations of the following United States government sponsored agencies: Federal Home Loan Mortgage Corp. (debt obligations), the Farm Credit System (consolidated systemwide bonds and notes), the Federal Home Loan Banks (consolidated debt obligations), the Federal National Mortgage Association (debt obligations), the Student Loan Marketing Association (debt obligations), the Financing Corp. (debt obligations), and the Resolution Funding Corp. (debt obligations); *provided, however*, that the investments described in this clause (iii) must (A) have a predetermined fixed dollar amount of principal due at maturity that cannot vary or change, (B) if rated by S&P, not have an "r" highlighter affixed to their rating, (C) if such investments have a variable rate of interest, have an interest rate tied to a single interest rate index plus a fixed spread (if any) and must move proportionately with that index, and (D) not be subject to liquidation prior to their maturity;

(iv) federal funds, unsecured certificates of deposit, time deposits, bankers' acceptances and repurchase agreements with maturities of not more than 365 days of any bank, the short term obligations of which at all times are rated in the highest short term rating category by each Rating Agency (or, if not rated by all Rating Agencies, rated by at least one Rating Agency in the highest short term rating category and otherwise acceptable to each other Rating Agency, as confirmed in writing that such investment would not, in and of itself, result in a downgrade, qualification or withdrawal of the initial or, if higher, then current ratings assigned to the certificates); *provided, however*, that the investments described in this clause (iv) must (A) have a predetermined fixed dollar amount of principal due at maturity that cannot vary or change, (B) if rated by S&P, not have an "r" highlighter affixed to their rating, (C) if such investments have a variable rate of interest, have an interest rate tied to a single interest rate index plus a fixed spread (if any) and must move proportionately with that index, and (D) not be subject to liquidation prior to their maturity;

(v) fully Federal Deposit Insurance Corporation-insured demand and time deposits in, or certificates of deposit of, or bankers' acceptances issued by, any bank or trust company, savings and loan association or savings bank, the short term obligations of which at all times are rated in the highest short term rating category by each Rating Agency (or, if not rated by all Rating Agencies, rated by at least one Rating Agency in the highest short term rating category and otherwise acceptable to each other Rating Agency, as confirmed in writing that such investment would not, in and of itself, result in a downgrade, qualification or withdrawal of the initial or, if higher, then current ratings assigned to the certificates); *provided, however*, that the investments described in this clause (v) must (A) have a predetermined fixed dollar of principal due at maturity that cannot vary or change, (B) if rated by S&P, not have a "r" highlighter affixed to their rating, (C) if such investments have a variable rate of interest, have an interest rate tied to a single interest rate index plus a fixed spread (if any) and must move proportionately with that index, and (D) not be subject to liquidation prior to their maturity;

(vi) debt obligations with maturities of not more than 365 days and at all times rated by each Rating Agency (or, if not rated by all Rating Agencies, rated by at least one Rating Agency and otherwise acceptable to each other Rating Agency, as confirmed in writing that such investments would not, in and of itself, result in a downgrade, qualification or withdrawal of the initial or, if higher, then current ratings assigned to the certificates) in its highest long-term unsecured debt rating category; *provided, however*, that the investments described in this clause (vi) must (A) have a predetermined fixed dollar amount of principal due at maturity that cannot

# UNOFFICIAL COPY

vary or change, (B) if rated by S&P, not have an "r" highlighter affixed to their rating, (C) if such investments have a variable rate of interest, have an interest rate tied to a single interest rate index plus a fixed spread (if any) and must move proportionately with that index, and (D) not be subject to liquidation prior to their maturity;

(vii) commercial paper (including both non-interest-bearing discount obligations and interest-bearing obligations payable on demand or on a specified date not more than one year after the date of issuance thereof) with maturities of not more than 365 days and that at all times is rated by each Rating Agency (or, if not rated by all Rating Agencies, rated by at least one Rating Agency and otherwise acceptable to each other Rating Agency, as confirmed in writing that such investment would not, in and of itself, result in a downgrade, qualification or withdrawal of the initial or, if higher, then current ratings assigned to the certificates) in its highest short-term unsecured debt rating; *provided, however*, that the investments described in this clause (vii) must (A) have a predetermined fixed dollar amount of principal due at maturity that cannot vary or change, (B) if rated by S&P, not have a "r" highlighter affixed to their rating, (C) if such investments have a variable rate of interest, have an interest rate tied to a single interest rate index plus a fixed spread (if any) and must move proportionately with that index, and (D) not be subject to liquidation prior to their maturity;

(viii) units of taxable money market funds or mutual funds, which funds are regulated investment companies, seek to maintain a constant net asset value per share and have the highest rating from each Rating Agency (or, if not rated by all Rating Agencies, rated by at least one Rating Agency and otherwise acceptable to each other Rating Agency, as confirmed in writing that such investment would not, in and of itself, result in a downgrade, qualification or withdrawal of the initial or, if higher, then current ratings assigned to the certificates) for money market funds or mutual funds; and

(ix) any other security, obligation or investment which has been approved as a Permitted Investment in writing by (a) Lender and (b) each Rating Agency, as evidenced by a written confirmation that the designation of such security, obligation or investment as a Permitted Investment will not, in and of itself, result in a downgrade, qualification or withdrawal of the initial or, if higher, then current ratings assigned to the certificates by such Rating Agency; *provided, however*, that such instrument continues to qualify as a "cash flow investment" pursuant to Code Section 860G(a)(6) earning a passive return in the nature of interest and no obligation or security shall be a Permitted Investment if (A) such obligation or security evidences a right to receive only interest payments or (B) the right to receive principal and interest payments on such obligation or security are derived from an underlying investment that provides a yield to maturity in excess of 120% of the yield to maturity at par of such underlying investment.

(e) "Eligible Account" shall mean a separate and identifiable account from all other funds held by the holding institution that is either (i) an account or accounts maintained with a federal or state-chartered depository institution or trust company which complies with the definition of Eligible Institution or (ii) a segregated trust account or accounts maintained with a federal or state chartered depository institution or trust company acting in its fiduciary capacity which, in the case of a state chartered depository institution or trust company is subject to regulations substantially similar to 12 C.F.R. § 9.10(b), having in either case a combined capital

# UNOFFICIAL COPY

and surplus of at least \$50,000,000 and subject to supervision or examination by federal and state authority. An Eligible Account will not be evidenced by a certificate of deposit, passbook or other instrument.

(f) "Eligible Institution" shall mean a depository institution or trust company the short term unsecured debt obligations or commercial paper of which are rated at least A-1 by S&P in the case of accounts in which funds are held for thirty (30) days or less (or, in the case of accounts in which funds are held for more than thirty (30) days, the long term unsecured debt obligations of which are rated at least "AA" by S&P and "Aaa" by Moody's).

Section 4.4 ERISA. Borrower covenants and agrees that:

(a) It shall not 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 Security Instrument and the Other Security Documents) to be a non-exempt (under a statutory or administrative class exemption) prohibited transaction under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

(b) Borrower further covenants and agrees to deliver to Lender such certifications or other evidence from time to time throughout the term of the Security Instrument, as requested by Lender in its sole discretion, that (i) Borrower is not 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(3) of ERISA; (ii) Borrower is not subject to state statutes regulating investments and fiduciary obligations with respect to governmental plans; and (iii) one or more of the following circumstances is true:

(i) Equity interests in 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 Borrower are held by "benefit plan investors" within the meaning of 29 C.F.R. § 2510.3-101(f)(2); or

(iii) 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 an investment company registered under The Investment Company Act of 1940.

## ARTICLE 5

### REPRESENTATIONS AND WARRANTIES

Borrower represents and warrants to Lender that:

Section 5.1 Warranty of Title. Borrower has good title to the Property and has the right to mortgage, grant, bargain, sell, pledge, assign, warrant, transfer and convey the same and that Borrower possesses an unencumbered fee simple absolute estate in the Land and the Improvements and that it owns the Property free and clear of all liens, encumbrances and charges



# UNOFFICIAL COPY

whatsoever except for those exceptions shown in the title insurance policy (the "Title Policy") insuring the lien of this Security Instrument (the "Permitted Exceptions"). The Permitted Exceptions do not and will not materially adversely affect or interfere with the value, or materially adversely affect or interfere with the current use or operation, of the Property, or the security intended to be provided by this Security Instrument or the ability of Borrower to repay the Note or any other amount owing under the Note, this Security Instrument or the Other Security Documents or to perform its obligations thereunder in accordance with the terms of the Note, this Security Instrument or the Other Security Instrument. This Security Instrument, when properly recorded in the appropriate records, together with the Assignment of Leases (the "Assignment of Leases") and any Uniform Commercial Code financing statements required to be filed in connection therewith, will create (i) a valid, perfected first priority lien on the Property, subject only to Permitted Exceptions and the liens created by this Security Instrument and the Other Security Documents and (ii) perfected security interests in and to, and perfected collateral assignments of, all personalty (including the Leases), all in accordance with the terms thereof, in each case subject only to any applicable Permitted Exceptions and such other liens created by this Security Instrument and the Other Security Documents. The Assignment of Leases, when properly recorded in the appropriate records, creates a valid first priority assignment of, or a valid first priority security interest in, certain rights under the related Leases, subject only to a license granted to Borrower to exercise certain rights and to perform certain obligations of the lessor under such Leases, including the right to operate the Property. No Person other than Borrower owns any interest in any payments due under such Leases that is superior to or of equal priority with Lender's interest therein. Borrower shall forever warrant, defend and preserve the title and the validity and priority of the lien of this Security Instrument and shall forever warrant and defend the same to Lender against the claims of all persons whomsoever.

Section 5.2 Legal Status and Authority. Borrower (A) is duly organized, validly existing and in good standing under the laws of its state of organization or incorporation; (B) is duly qualified to transact business and is in good standing in the state where the Property is located; and (C) has all necessary approvals, governmental and otherwise, and full power and authority to own, operate and lease the Property. Borrower (and the undersigned representative of Borrower, if any) has full power, authority and legal right to execute this Security Instrument, and to mortgage, grant, bargain, sell, pledge, assign, warrant, transfer and convey and grant a security interest in the Property pursuant to the terms hereof and to keep and observe all of the terms of this Security Instrument on Borrower's part to be performed.

Section 5.3 Validity of Documents. (a) The execution, delivery and performance of the Note, this Security Instrument and the Other Security Documents and the borrowing evidenced by the Note (i) are within the power and authority of Borrower; (ii) have been authorized by all requisite organizational action; (iii) have received all necessary approvals and consents, corporate, governmental or otherwise; (iv) will not violate, conflict with, result in a breach of or constitute (with notice or lapse of time, or both) a material default under any provision of law, any order or judgment of any court or governmental authority, the articles of incorporation, by-laws, partnership or trust agreement, articles of organization, operating agreement, or other governing instrument of Borrower, or any indenture, agreement or other instrument to which Borrower is a party or by which it or any of its assets or the Property is or may be bound or affected; (v) will not result in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of its assets, except the lien and security interest created



# UNOFFICIAL COPY

hereby; and (vi) will not require any authorization or license from, or any filing with, any governmental or other body (except for the recordation of this Security Instrument in appropriate land records in the State where the Property is located and except for Uniform Commercial Code filings relating to the security interest created hereby); and (b) the Note, this Security Instrument and the Other Security Documents constitute the legal, valid and binding obligations of Borrower.

**Section 5.4 Litigation.** There is no action, suit or proceeding, judicial, administrative or otherwise (including any condemnation or similar proceeding), pending or, to the best of Borrower's knowledge, threatened or contemplated against, or affecting, Borrower, a Guarantor, if any, an Indemnitor, if any, or, to the best of Borrower's knowledge, the Property.

**Section 5.5 Status of Property.** (a) No portion of the Improvements is located in an area identified by the Secretary of Housing and Urban Development or any successor thereto as an area having special flood hazards pursuant to the Flood Insurance Acts or, if any portion of the Improvements is located within such area, Borrower has obtained and will maintain the insurance prescribed in Section 3.3 hereof.

(b) To the best of Borrower's knowledge, all necessary certificates, licenses and other approvals, governmental and otherwise, necessary for the operation of the Property and the conduct of its business and all required zoning, building code, land use, environmental and other similar permits or approvals have been obtained and are in full force and effect as of the date hereof and not subject to revocation, suspension, forfeiture or modification.

(c) Except as previously disclosed to Lender in writing or otherwise shown on the survey delivered to Lender in connection with the closing of the Loan or as disclosed in the Environmental Report (as defined in the Environmental Indemnity) or in that certain Zoning and Site Requirements Summary prepared by the Planning and Zoning Resource Corporation for the Property and dated September 5, 2006, to Borrower's knowledge, the Property and the present and contemplated use and occupancy thereof are in full compliance with all applicable zoning ordinances, building codes, land use and Environmental Laws (hereinafter defined) and other similar laws.

(d) The Property is served by all utilities required for the current use thereof. All utility service is provided by public utilities and the Property has accepted or is equipped to accept such utility service. To the best of Borrower's knowledge, except as disclosed in the survey of the Property delivered to Lender in connection with the closing of the Loan and in the Title Policy, all public utilities necessary to the continued use and enjoyment of the Property as presently used and enjoyed are located in the public right-of-way abutting the Property, and all such utilities are connected so as to serve the Property without passing over other property, or are subject to valid easements.

(e) All public roads and streets necessary for service of and access to the Property for the current or contemplated use thereof have been completed, are serviceable and all-weather and are physically and legally open for use by the public.

(f) The Property is served by public water and sewer systems.

# UNOFFICIAL COPY

(g) The Property is free from damage caused by fire or other casualty.

(h) To the best of Borrower's knowledge, all costs and expenses of any and all labor, materials, supplies and equipment used in the construction of the Improvements have been (i) paid in full, (ii) are not yet due or (iii) have been fully bonded and insured.

(i) Borrower has paid in full for, and is the owner of, all furnishings, fixtures and equipment (other than tenants' and Manager's property) used in connection with the operation of the Property, free and clear of any and all security interests, liens or encumbrances, except the lien and security interest created hereby.

(j) All liquid and solid waste disposal, septic and sewer systems located on the Property are in a good and safe condition and repair and in compliance with all Applicable Laws.

(k) Except as disclosed on the survey delivered to Lender in connection with the closing of the Loan, all the Improvements lie within the boundaries of the Land.

**Section 5.6 No Foreign Person.** Borrower is not a "foreign person" within the meaning of Section 1445(f)(3) of the Internal Revenue Code of 1986, as amended and the related Treasury Department regulations, including temporary regulations.

**Section 5.7 Separate Tax Lot.** The Property is assessed for real estate tax purposes as one or more wholly independent tax lot or lots, separate from any adjoining land or improvements not constituting a part of such lot or lots, and no other land or improvements is assessed and taxed together with the Property or any portion thereof.

**Section 5.8 Leases.** (a) Borrower is the landlord under the Leases; (b) to the best of Borrower's knowledge, the Leases are valid and enforceable and in full force and effect; (c) to the best of Borrower's knowledge, all of the Leases are arms-length agreements with bona fide, independent third parties; (d) except as may be set forth in an estoppel certificate received by Lender in connection with the closing of the Loan (a "Closing Estoppel Certificate"), to Borrower's knowledge no party under any Lease is in material default; (e) except as disclosed to Lender in writing, all Rents due have been paid in full; (f) intentionally omitted; (g) none of the Rents reserved in the Leases have been assigned or otherwise pledged or hypothecated; (h) none of the Rents have been collected for more than one (1) month in advance (except a security deposit shall not be deemed rent collected in advance); (i) except as previously disclosed to Lender in writing, to Borrower's knowledge, the premises demised under the Leases have been completed and the tenants under the Leases have accepted the same and have taken possession of the same on a rent-paying basis; (j) to the best of Borrower's knowledge and except as may be set forth in a Closing Estoppel Certificate, there exist no offsets or defenses to the payment of any portion of the Rents; (k) except as may be set forth in a Closing Estoppel Certificate, Borrower has received no notice from any tenant challenging the validity or enforceability of any Lease; (l) there are no agreements with the tenants under the Leases other than expressly set forth in each Lease; (m) to the best of Borrower's knowledge, the Leases are valid and enforceable against Borrower and the tenants set forth therein; (n) except as previously disclosed to Lender in writing, no Lease contains an option to purchase, right of first refusal to purchase, or any other

# UNOFFICIAL COPY

similar provision; (o) no person or entity has any possessory interest in, or right to occupy, the Property except under and pursuant to a Lease; (p) each lease is subordinate to this Security Instrument, either pursuant to its terms or a recordable subordination agreement; (q) all security deposits relating to the Leases reflected on the certified rent roll delivered to Lender have been collected by Borrower; and (r) to the best of Borrower's knowledge, except as previously disclosed to Lender in writing, no brokerage commissions or finders fees are due and payable regarding any Lease, other than commissions or fees, if any, due in connection with renewals, extensions or expansions pursuant to existing Leases.

**Section 5.9 ERISA Compliance.** (a) As of the date hereof and throughout the term of this Security Instrument, (i) Borrower is not and will not be an "employee benefit plan" as defined in Section 3(3) of ERISA, which is subject to Title I of ERISA, and (ii) the assets of Borrower do not and will not constitute "plan assets" of one or more such plans for purposes of Title I of ERISA; and

(b) As of the date hereof and throughout the term of this Security Instrument, (i) Borrower is not and will not be a "governmental plan" within the meaning of Section 3(32) of ERISA and (ii) transactions by or with Borrower are not and will not be subject to state statutes applicable to Borrower regulating investments of and fiduciary obligations with respect to governmental plans.

**Section 5.10 Solvency.** Borrower (a) has not entered into the transaction or executed the Note, this Security Instrument or any Other Security Document with the actual intent to hinder, delay or defraud any creditor and (b) has received reasonably equivalent value in exchange for its obligations under such documents. Giving effect to the Loan, the fair saleable value of Borrower's assets exceeds and will, immediately following the making of the Loan, exceed Borrower's total liabilities, including, without limitation, subordinated, unliquidated, disputed and contingent liabilities. The fair saleable value of Borrower's assets is and will, immediately following the making of the Loan, be greater than Borrower's probable liabilities, including the maximum amount of its contingent liabilities on its debts as such debts become absolute and matured. 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. Borrower does not intend to, and does not believe that it will, incur debt and liabilities (including contingent liabilities and other commitments) beyond its ability to pay such debt and liabilities as they mature (taking into account the timing and amounts of cash to be received by Borrower and the amounts to be payable on or in respect of obligations of Borrower). Except as expressly disclosed to Lender in writing, no petition in bankruptcy has been filed against Borrower, any Indemnitor, any Guarantor, any Principal or any related entity thereof, or any principal, general partner or member thereof, in the last seven (7) years, and neither Borrower, any Indemnitor, any Guarantor, or Principal nor any related entity thereof, nor any principal, general partner or member thereof, in the last seven (7) years has ever made an assignment for the benefit of creditors or taken advantage of any insolvency act for the benefit of debtors.

**Section 5.11 Business Purposes.** The loan evidenced by the Note secured by the Security Instrument and the Other Security Documents (the "Loan") is solely for the business purpose of Borrower, and is not for personal, family, household, or agricultural purposes.

# UNOFFICIAL COPY

Section 5.12 Taxes. Borrower, any Guarantor and any Indemnitor have filed all federal, state, county, municipal, and city income and other tax returns required to have been filed by them and have paid all taxes and related liabilities which have become due pursuant to such returns or pursuant to any assessments received by them. Neither Borrower, any Guarantor nor any Indemnitor knows of any basis for any additional assessment in respect of any such taxes and related liabilities for prior years.

Section 5.13 Mailing Address. Borrower's mailing address, as set forth in the opening paragraph hereof or as changed in accordance with the provisions hereof, is true and correct.

Section 5.14 No Change in Facts or Circumstances; Misstatement of Facts. (a) To the best of Borrower's knowledge, all information in the application for the Loan submitted to Lender (the "Loan Application") and in all rent rolls, all reports, certificates, financial statements and other documents submitted in connection with the Loan Application or in satisfaction of the terms thereof, are accurate, complete and correct in all respects. There has been no material adverse change in any condition, fact, circumstance or event that would make any such information materially inaccurate, incomplete or otherwise misleading.

(b) To the best of Borrower's knowledge after due inquiry and investigation, the Note, this Security Instrument and the Other Security Documents do not contain any untrue statement of a material fact or omit to state any material fact necessary to make statements contained herein or therein not materially misleading. There is no fact presently known to Borrower which has not been disclosed which adversely affects, or would reasonably likely have a materially adverse effect on the business, operations or condition (financial or otherwise), of Borrower.

Section 5.15 Disclosure. Borrower has disclosed to Lender all material facts and has not failed to disclose any material fact known to Borrower after due inquiry and investigation that could cause any representation or warranty made herein to be materially misleading.

Section 5.16 Third Party Representations. To the best of Borrower's knowledge after due inquiry and investigation, each of the representations and the warranties made by each Guarantor and Indemnitor herein or in any Other Security Document(s) is true and correct in all material respects.

Section 5.17 Illegal Activity. No portion of the Property has been or will be purchased, improved, equipped or furnished with proceeds of any illegal activity and to the best of Borrower's knowledge, there are no illegal activities or activities relating to any controlled substance at the Property.

Section 5.18 Contracts. All contracts, agreements, consents, waivers, documents and writings of every kind or character, including, without limitation, the Management Agreement, at any time to which Borrower is a party to be delivered to Lender pursuant to any of the provisions of this Security Instrument are valid and enforceable against Borrower and, to the best knowledge of Borrower, are enforceable against all other parties



# UNOFFICIAL COPY

thereto, and, to Borrower's actual knowledge, in all respects are what they purport to be and, to the best knowledge of Borrower, to the extent that any such writing shall impose any obligation or duty on the party thereto or constitute a waiver of any rights which any such party might otherwise have, said writing shall be valid and enforceable against said party in accordance with its terms, except as such enforcement may be limited by applicable bankruptcy, insolvency, reorganization or similar laws affecting the rights of creditors generally.

Section 5.19 Non-Consolidation Opinion. All of the facts and assumptions set forth in the Non-Consolidation Opinion are true and correct.

Section 5.20 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 Legal Requirements or by the terms and conditions of this Security Instrument, the Note or the Other Security Documents.

Section 5.21 Forfeiture. There has not been and shall never be committed by Borrower or any other person in occupancy of or involved with the operation or use of the Property any act or omission affording the federal government or any state or local government the right of forfeiture as against the Property or any part thereof or any monies paid in performance of Borrower's obligations under the Note, this Security Instrument or the Other Security Documents. Borrower hereby covenants and agrees not to commit, permit or suffer to exist any act or omission affording such right of forfeiture.

Section 5.22 Investment Company Act. Borrower is not (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 1935, 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.

Section 5.23 Contingent Liabilities. There are no material residual or contingent liabilities with respect to (i) the Property (to Borrower's knowledge) or (ii) Borrower.

Section 5.24 Special Assessments. Except as disclosed in the Title Policy and to the knowledge of Borrower, there are no pending or proposed special or other assessments for public improvements or otherwise affecting the Property, nor, to the knowledge of Borrower, are there any contemplated improvements to the Property that may result in such special or other assessments.

Section 5.25 Principal Place of Business; State of Formation. Borrower's principal place of business and its chief executive office as of the date hereof is c/o Investcorp International, Inc., 280 Park Avenue, New York, New York 10017. Borrower is organized under the laws of the State of Delaware.



# UNOFFICIAL COPY

Section 5.26 OFAC. Borrower represents and warrants that neither Borrower or any of its respective Affiliates is a Prohibited Person and Borrower and all of its respective Affiliates are in full compliance with all applicable orders, rules, regulations and recommendations of The Office of Foreign Assets Control of the U.S. Department of the Treasury.

Section 5.27 Franchise Agreement. The Franchise Agreement, pursuant to which Borrower has the right to operate the hotel located on the Property under a name and/or hotel system controlled by such Franchisor, is in full force and effect and there is no default, breach or violation existing thereunder by any party thereto and no event has occurred that, with the passage of time or the giving of notice, or both, would constitute a default, breach or violation by any party thereunder. No fees under the Franchise Agreement are accrued and unpaid.

## ARTICLE 6

### OBLIGATIONS AND RELIANCES

Section 6.1 Relationship of Borrower and Lender. The relationship between Borrower and Lender is solely that of debtor and creditor, and Lender has no fiduciary or other special relationship with Borrower, and no term or condition of any of the Note, this Security Instrument and the Other Security Documents shall be construed so as to deem the relationship between Borrower and Lender to be other than that of debtor and creditor.

Section 6.2 No Reliance on Lender. The members, general partners, principals and (if Borrower is a trust) beneficial owners of Borrower are experienced in the ownership and operation of properties similar to the Property, and Borrower and Lender are relying solely upon such expertise and business plan in connection with the ownership and operation of the Property. Borrower is not relying on Lender's expertise, business acumen or advice in connection with the Property.

Section 6.3 No Lender Obligations. (a) Notwithstanding the provisions of Section 1.1(f) and (l) or Section 1.2, Lender is not undertaking the performance of (i) any obligations under the Leases; or (ii) any obligations with respect to such agreements, contracts, certificates, instruments, franchises, permits, trademarks, licenses and other documents.

(b) By accepting or approving anything required to be observed, performed or fulfilled or to be given to Lender pursuant to this Security Instrument, the Note or the Other Security Documents, including without limitation, any officer's certificate, balance sheet, statement of profit and loss or other financial statement, survey, appraisal, or insurance policy, Lender shall not be deemed to have warranted, consented to, or affirmed the sufficiency, the legality or effectiveness of same, and such acceptance or approval thereof shall not constitute any warranty or affirmation with respect thereto by Lender.

Section 6.4 Reliance. Borrower recognizes and acknowledges that in accepting the Note, this Security Instrument and the Other Security Documents, Lender is expressly and primarily relying on the truth and accuracy of the warranties and representations

# UNOFFICIAL COPY

set forth in Article 5 and Article 12 without any obligation to investigate the Property and notwithstanding any investigation of the Property by Lender; that such reliance existed on the part of Lender prior to the date hereof; that the warranties and representations are a material inducement to Lender in accepting the Note, this Security Instrument and the Other Security Documents; and that Lender would not be willing to make the Loan and accept this Security Instrument in the absence of the warranties and representations as set forth in Article 5 and Article 12.

## ARTICLE 7

### FURTHER ASSURANCES

**Section 7.1 Recording of Security Instrument, etc.** Borrower forthwith upon the execution and delivery of this Security Instrument and thereafter, from time to time, will cause this Security Instrument and any of the Other Security Documents creating a lien or security interest or evidencing the lien hereof upon the Property and each instrument of further assurance to be filed, registered or recorded in such manner and in such places as may be required by any present or future law in order to publish notice of and fully to protect and perfect the lien or security interest hereof upon, and the interest of Lender in, the Property. Borrower hereby authorizes the filing of any UCC-1 Financing Statement in the appropriate filing offices necessary to perfect Lender's security interest in the Personal Property. Borrower will pay all taxes, filing, registration or recording fees, and all expenses incident to the preparation, execution, acknowledgment, filing and/or recording of the Note, this Security Instrument, the Other Security Documents, any note or deed of trust or mortgage supplemental hereto, any security instrument with respect to the Property, any UCC-1 Financing Statement and any instrument of further assurance, and any modification or amendment of the foregoing documents, and all federal, state, county and municipal taxes, duties, imposts, assessments and charges arising out of or in connection with the execution and delivery of this Security Instrument, any deed of trust or mortgage supplemental hereto, any security instrument with respect to the Property or any instrument of further assurance, and any modification or amendment of the foregoing documents, except where prohibited by law so to do.

**Section 7.2 Further Acts, etc.** Borrower will, at the cost of Borrower, and without expense to Lender, do, execute, acknowledge and deliver all and every such further acts, deeds, conveyances, deeds of trust, mortgages, assignments, notices of assignments, transfers and assurances as Lender shall, from time to time, reasonably require, for the better assuring, conveying, assigning, transferring, and confirming unto Lender the Property and rights hereby deeded, mortgaged, granted, bargained, sold, conveyed, confirmed, pledged, assigned, warranted and transferred or intended now or hereafter so to be, or which Borrower may be or may hereafter become bound to convey or assign to Lender, or for carrying out the intention or facilitating the performance of the terms of this Security Instrument or for filing, registering or recording this Security Instrument, or for complying with all Applicable Laws. Borrower, on demand, will execute and deliver and hereby authorizes Lender, following ten (10) days' notice to Borrower, to execute in the name of Borrower or without the signature of Borrower to the extent Lender may lawfully do so, one or more financing statements, chattel mortgages or other instruments, to evidence more effectively the security interest of Lender in the Property.

# UNOFFICIAL COPY

Borrower grants to Lender an irrevocable power of attorney coupled with an interest for the purpose of exercising and perfecting any and all rights and remedies available to Lender at law and in equity, including without limitation such rights and remedies available to Lender pursuant to this Section 7.2.

**Section 7.3 Changes in Tax, Debt Credit and Documentary Stamp Laws.** (a) If any law is enacted or adopted or amended after the date of this Security Instrument which deducts the Debt from the value of the Property for the purpose of taxation or which imposes a tax, either directly or indirectly, on the Debt or Lender's interest in the Property, Borrower will pay the tax, with interest and penalties thereon, if any. If Lender is advised by counsel chosen by it that the payment of tax by Borrower would be unlawful or taxable to Lender or unenforceable or provide the basis for a defense of usury, then Lender shall have the option, exercisable by written notice of not less than ninety (90) days to declare the Debt immediately due and payable.

(b) Borrower will not claim or demand or be entitled to any credit or credits on account of the Debt for any part of the Taxes or Other Charges assessed against the Property, or any part thereof, and no deduction shall otherwise be made or claimed from the assessed value of the Property, or any part thereof, for real estate tax purposes by reason of this Security Instrument or the Debt. If such claim, credit or deduction shall be required by law, Lender shall have the option, exercisable by written notice of not less than ninety (90) days, to declare the Debt immediately due and payable.

(c) If at any time the United States of America, any State thereof or any subdivision of any such State shall require revenue or other stamps to be affixed to the Note, this Security Instrument, or any of the Other Security Documents or impose any other tax or charge on the same, Borrower will pay for the same, with interest and penalties thereon, if any.

**Section 7.4 Estoppel Certificates.** (a) After request by Lender (which request, provided no Event of Default has occurred and is continuing, shall not be made more than two (2) times in any calendar year unless requested by an Investor, prospective Investor or any Rating Agency), Borrower, within ten (10) days, shall furnish Lender or any proposed assignee with a statement, duly acknowledged and certified, setting forth (i) the amount of the original principal amount of the Note, (ii) the unpaid principal amount of the Note, (iii) the rate of interest of the Note, (iv) the terms of payment and maturity date of the Note, (v) the date installments of interest and/or principal were last paid, (vi) that, except as provided in such statement, there are no defaults or events which with the passage of time or the giving of notice or both, would constitute an event of default under the Note or the Security Instrument, (vii) that the Note and this Security Instrument are valid, legal and binding obligations and have not been modified or if modified, giving particulars of such modification, (viii) whether any offsets or defenses exist against the obligations secured hereby and, if any are alleged to exist, a detailed description thereof, (ix) that all Leases are in full force and effect and (provided the Property is not a residential multifamily property) have not been modified (or if modified, setting forth all modifications), (x) the date to which the Rents thereunder have been paid pursuant to the Leases, (xi) whether or not, to the best knowledge of Borrower, any of the lessees under the Leases are in default under the Leases, and, if any of the lessees are in default, setting forth the specific nature of all such defaults, (xii) the amount of security deposits held by Borrower under each Lease and that such amounts are consistent with the amounts required under each Lease, and (xiii) as to any

# UNOFFICIAL COPY

other matters reasonably requested by Lender and reasonably related to the Leases, the obligations secured hereby, the Property or this Security Instrument.

(b) Borrower shall use commercially reasonable efforts to deliver to Lender, promptly upon request, duly executed estoppel certificates from any tenant under a Major Lease and as required by Lender attesting to such facts regarding the Major Lease as Lender may require or in such form as may be required pursuant to the terms of such Major Lease, including but not limited to attestations that such Major Lease covered thereby is in full force and effect with no defaults thereunder on the part of any party, that none of the Rents have been paid more than one month in advance, and that the lessee claims no defense or offset against the full and timely performance of its obligations under the Major Lease.

(c) Upon any transfer or proposed transfer contemplated by Section 19.1 hereof, at Lender's request, Borrower, any Guarantors and any Indemnitor(s) shall provide an estoppel certificate to the Investor (defined in Section 19.1) or any prospective Investor in such form, substance and detail as Lender, such Investor or prospective Investor may reasonably require.

(d) Borrower shall use commercially reasonable efforts to deliver to Lender, promptly upon request, an estoppel certificate from Manager or any successor Qualified Manager appointed pursuant to the terms hereof, as applicable, stating that (i) the Management Agreement is in full force and effect and has not been modified, amended or assigned (or if modified, setting forth the modification(s)), (ii) neither Manager or Qualified Manager, as applicable, nor, to Manager's or Qualified Manager's knowledge, as applicable, Borrower is in default under any of the terms, covenants or provisions of the Management Agreement, and Manager or Qualified Manager, as applicable, knows of no event which, but for the passage of time or the giving of notice or both, would constitute an event of default under the Management Agreement, (iii) neither Manager or Qualified Manager, as applicable, nor, to Manager's or Qualified Manager's knowledge, as applicable, Borrower has commenced any action or given or received any notice for the purpose of terminating the Management Agreement, and (iv) all sums due and payable to Manager or Qualified Manager, as applicable, under the Management Agreement, have been paid in full.

(e) Intentionally deleted.

**Section 7.5 Flood Insurance.** After Lender's request, Borrower shall deliver evidence satisfactory to Lender that no portion of the Improvements is situated in a federally designated "special flood hazard area" or if it is, that Borrower has obtained insurance meeting the requirements of Section 3.3(a)(i).

**Section 7.6 Intentionally Omitted.**

**Section 7.7 Replacement Documents.** Upon receipt of an affidavit of an officer of Lender as to the loss, theft, destruction or mutilation of the Note or any Other Security Document which is not of public record, and, in the case of any such mutilation, upon surrender and cancellation of such Note or Other Security Document, Borrower will issue, in lieu thereof, a replacement Note or Other Security Document, dated the date of such lost, stolen, destroyed or



# UNOFFICIAL COPY

mutilated Note or Other Security Document in the same principal amount thereof and otherwise of like tenor.

## ARTICLE 8

### DUE ON SALE/ENCUMBRANCE

**Section 8.1 Transfer Definitions.** For purposes of this Article 8, an “Affiliated Manager” shall mean any managing agent in which Borrower, any Guarantor or Indemnitor has, directly or indirectly, any legal, beneficial or economic interest; a “Restricted Party” shall mean Borrower, or any Affiliated Manager or any shareholder, partner, member or non-member manager, or any direct legal or beneficial owner of Borrower, any Affiliated Manager or any non-member manager and a “Sale or Pledge” shall mean a voluntary or involuntary sale, conveyance, transfer or pledge of a legal or beneficial interest.

**Section 8.2 No Sale/Encumbrance.** (a) Borrower shall not sell, convey, mortgage, grant, bargain, encumber, pledge, assign, grant options with respect to, or otherwise transfer or dispose of (directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise, and whether or not for consideration or of record) the Property or any part thereof or any legal or beneficial interest therein or permit a Sale or Pledge of an interest in any Restricted Party (collectively a “Transfer”), other than pursuant to Leases of space in the Improvements to tenants in accordance with the provisions of Section 3.7, without (i) the prior written consent of Lender and (ii) if a Securitization has occurred or is pending, delivery to Lender of written confirmation from the Rating Agency that the Transfer will not result in the downgrade, withdrawal or qualification of the then current ratings assigned to any Securities or the proposed rating of any Securities.

(b) A Transfer shall include, but not be limited to, (i) an installment sales agreement wherein Borrower agrees to sell the Property or any part thereof for a price to be paid in installments; (ii) an agreement by Borrower leasing all or a substantial part of the Property for other than actual occupancy by a space tenant thereunder or a sale, assignment or other transfer of, or the grant of a security interest in, Borrower’s right, title and interest in and to any Leases or any Rents; (iii) if a Restricted Party is a corporation, any merger, consolidation or Sale or Pledge of such corporation’s stock or the creation or issuance of new stock; (iv) if a Restricted Party is a limited or general partnership or joint venture, any merger or consolidation or the change, removal, resignation or addition of a general partner or the Sale or Pledge of the partnership interest of any general partner or any profits or proceeds relating to such partnership interest, or the Sale or Pledge of limited partnership interests or any profits or proceeds relating to such limited partnership interests or the creation or issuance of new limited partnership interests; (v) if a Restricted Party is a limited liability company, any merger or consolidation or the change, removal, resignation or addition of a managing member or non-member manager (or if no managing member, any member) or the Sale or Pledge of the membership interest of a managing member (or if no managing member, any member) or any profits or proceeds relating to such membership interest, or the Sale or Pledge of non-managing membership interests or the creation or issuance of new non-managing membership interests; (vi) if a Restricted Party is a trust or nominee trust, any merger, consolidation or the Sale or Pledge of the legal or beneficial interest in a Restricted Party or the creation or issuance of new legal or beneficial interests; or (vii) the



# UNOFFICIAL COPY

removal or the resignation of the managing agent or leasing agent (including, without limitation, an Affiliated Manager) other than in accordance with Section 3.16.

**Section 8.3 Permitted Transfers.** Notwithstanding the provisions of Section 8.1 and Section 8.2, the following transfers shall not be deemed to be a Transfer (and shall not require the consent or confirmation of Lender or any Rating Agency): (i) a transfer by devise or descent or by operation of law upon the death of a member, partner or shareholder of a Restricted Party; and (ii) the Sale or Pledge, in one or a series of transactions, of the direct or indirect stock, partnership interests or membership interests, as applicable, in a Restricted Party. Notwithstanding the foregoing, at all times during the term of the Loan, Investcorp International, Inc. ("Investcorp") or any Affiliate (hereinafter defined) thereof must (A) own, directly or indirectly, at least seven and one half percent (7.5%) of the voting and beneficial ownership interests in Borrower and (B) control the day-to-day operations of Borrower.

The term "Affiliate", as used herein, shall mean, as to any person or entity, any other person or entity that directly or indirectly, is in control of, is controlled by or is under common control with such person or entity or is a director or officer of such person or entity or of an Affiliate of such person or entity. As used herein, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of management, policies or activities of a person or entity, whether through ownership of voting securities, by contract or otherwise.

**Section 8.4 Lender's Rights.** Lender reserves the right to condition the consent required hereunder upon a modification of the terms hereof and on assumption of the Note, this Security Instrument and the Other Security Documents as so modified in connection with the proposed Transfer, payment of a transfer fee equal to one half of one percent (0.50%) of the principal balance of the Note, a \$4,000 processing fee, and all of Lender's reasonable expenses incurred in connection with such Transfer, the approval by a Rating Agency of the proposed transferee, the proposed transferee's continued compliance with the covenants set forth in this Security Instrument, including, without limitation, the covenants in Section 4.2 hereof, or such other conditions and/or legal opinions as Lender shall determine in its sole discretion to be in the interest of Lender. All expenses incurred by Lender shall be payable by Borrower whether or not Lender consents to the Transfer. 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. Notwithstanding anything to the contrary contained in this Article 8, (a) no transfer (whether or not such transfer shall constitute a Transfer) shall be made to any person and/or entity or to any person and/or entity which has an required Affiliate or direct or indirect owner which is not in full compliance with all applicable orders, rules, regulations and recommendations of The Office of Foreign Assets Control of the U.S. Department of the Treasury and (b) in the event any transfer (whether or not such transfer shall constitute a Transfer) results in any entity or party owning in excess of forty-nine percent (49%) of the direct or indirect ownership interest in Borrower or Borrower's managing member or general partner, Borrower shall, prior to such transfer, deliver a substantive non-consolidation opinion to Lender, which opinion shall be in form, scope and substance acceptable in all respects to Lender and, after a Securitization, the Rating Agencies.

# UNOFFICIAL COPY

**Section 8.5 Qualified Transferee.** (i) Notwithstanding anything to the contrary contained in this Article 8, Lender shall not withhold its consent, which consent (x) prior to a Securitization, may be withheld by Lender in its sole discretion and (y) after a Securitization, shall not be unreasonably withheld, to a two-time sale, assignment, or other transfer of the Property provided that (a) Lender receives sixty (60) days prior written notice of such transfer, (b) no Event of Default has occurred and is continuing under this Security Instrument, the Note or the Other Security Documents and (c) upon the satisfaction (in the reasonable determination of Lender) or waiver of such conditions as may be imposed by Lender, which may include, but shall not be limited to, the following matters:

(1) Borrower or Transferee (defined below) shall pay a transfer fee equal to one half of one percent (0.50%) of the principal balance of the Note and any and all costs incurred in connection with the transfer (including, without limitation, Lender's counsel fees and disbursements and all recording fees, title insurance premiums and mortgage and intangible taxes);

(2) The proposed transferee (the "Transferee") shall comply with all of the requirements of Section 4.2;

(3) Transferee shall assume all of the obligations of Borrower under the Note, this Security Instrument and the Other Security Documents in a manner satisfactory to Lender in all respects, including, without limitation, by entering into an assumption agreement in form and substance satisfactory to Lender and delivering such legal opinions as Lender may reasonably require;

(4) The Property shall be managed by a Qualified Manager following such transfer;

(5) If a Securitization has occurred, and unless Transferee is wholly owned and controlled by a Qualified Transferee (hereinafter defined), Transferee shall deliver to Lender written confirmation from the Rating Agency that the transfer and the assumption by Transferee shall not result in a downgrade, withdrawal or qualification of the ratings then assigned to the Securities;

(6) Transferee shall deliver an endorsement to the existing title policy insuring this Security Instrument as modified by the assumption agreement, as a valid first lien on the Property and naming the Transferee as owner of the fee estate of the Property, which endorsement shall insure that as of the recording of the assumption agreement, the Property shall not be subject to any additional exceptions or liens other than those contained in the title policy issued in connection with this Security Instrument;

# UNOFFICIAL COPY

(7) Transferee shall deliver to Lender an opinion of counsel from an independent law firm with respect to the substantive non-consolidation of Transferee and its constituent entities (partners, members or shareholders), which law firm and which opinion shall be satisfactory in all respects to (i) Lender, if a Securitization has not occurred, or (ii) Lender and the Rating Agencies, if a Securitization has occurred; and

(ii) The term "Qualified Transferee" shall mean any entity (or any entity wholly owned by and controlled by) any one of the following entities, subject to the reasonable approval of Lender:

(A) a pension fund, pension trust or pension account that has total assets of at least \$250 Million that are managed by an entity that controls or manages at least \$500 Million of real estate equity assets;

(B) a pension fund advisor that controls or manages at least \$500 Million of real estate equity assets immediately prior to such transfer;

(C) an insurance company that is subject to supervision by the insurance commission, or a similar official or agency, of a state or territory of the United States (including the District of Columbia), which has a net worth, as of a date no more than six (6) months prior to the date of the transfer, of at least \$500 Million and controls real estate equity assets of at least \$500 Million immediately prior to such transfer; or

(D) a corporation organized under the banking laws of the United States or any state or territory of the United States (including the District of Columbia) that has a combined capital and surplus of at least \$250 Million;

Provided the Transferee has assumed all of Borrower's obligations and liabilities (including, without limitation, those pursuant to the Environmental Indemnity) in a manner acceptable to Lender, Borrower shall be released from its obligation under the Loan from and after the date of sale or transfer. In addition, provided a replacement Guarantor and Indemnitor (which Guarantor and Indemnitor shall be approved in writing by Lender) have assumed all of the applicable obligations and liabilities of Guarantor and Indemnitor (including, without limitation, those pursuant to the Environmental Indemnity) in a manner reasonably acceptable to Lender, Guarantor and Indemnitor shall be released from their respective obligation under the Loan from and after the date of sale or transfer

The provisions of this Section 8.5 shall in no way alter the rights of Borrower to prepay the Loan in accordance with the provisions of Article 5 of the Note.

# UNOFFICIAL COPY

## ARTICLE 9

### PREPAYMENT

Section 9.1 Prepayment. The Debt may not be prepaid in whole or in part except in strict accordance with the express terms and conditions of the Note and this Security Instrument.

## ARTICLE 10

### DEFAULT

Section 10.1 Events of Default. The occurrence of any one or more of the following events shall constitute an "Event of Default":

- (a) if any portion of the Debt is not paid on the date the same is due or if the entire Debt is not paid in full on or before the Maturity Date;
- (b) if any of the Taxes or Other Charges are not paid prior to delinquency except to the extent sums sufficient to pay such Taxes and Other Charges have been deposited with Lender in accordance with the terms of this Security Instrument;
- (c) if the Policies are not kept in full force and effect, or if the Policies are not delivered to Lender within five (5) Business Days of Lender's request;
- (d) if Borrower or Principal violates or does not comply with any of the provisions of Section 4.2 or Article 8, including, but not limited to, if Borrower or Principal shall fail to comply with any material provision of its operating agreement, articles or certificate of incorporation, partnership agreement or any other governing documents;
- (e) if any representation or warranty of Borrower, any Indemnitee or any person guaranteeing payment of the Debt or any portion thereof or performance by Borrower of any of the terms of this Security Instrument (a "Guarantor"), or any member, general partner, principal or beneficial owner of any of the foregoing, made herein or in the Environmental Indemnity or in any guaranty, or in any certificate, report, financial statement or other instrument or document furnished to Lender shall have been false or misleading in any material respect when made; provided, however, that to the extent that the person or entity making such representation or warranty can establish that it had no actual or constructive knowledge of the falsehood or misleading nature of such representation or warranty when made, and that such falsehood or misleading nature was undiscoverable through commercially reasonable diligence, then such false or misleading representation or warranty shall constitute an Event of Default only if Borrower or such person or entity fails to make true and accurate such representation or warranty (by modifying or correcting the condition underlying such representation or warranty) within ten (10) days after Borrower's or such person's or entity's discovery of such underlying condition;

# UNOFFICIAL COPY

(f) if (i) Borrower or any managing member or general partner of Borrower, or any Guarantor or Indemnitor shall commence any case, proceeding or other action (A) under any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization, conservatorship or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to it or its debts, or (B) seeking appointment of a receiver, trustee, custodian, conservator or other similar official for it or for all or any substantial part of its assets, or Borrower or any managing member or general partner of Borrower, or any Guarantor or Indemnitor shall make a general assignment for the benefit of its creditors; or (ii) there shall be commenced against Borrower or any managing member or general partner of Borrower, or any Guarantor or Indemnitor any case, proceeding or other action of a nature referred to in clause (i) above which (A) results in the entry of an order for relief or any such adjudication or appointment or (B) remains undismissed, undischarged or unbonded for a period of sixty (60) days; or (iii) there shall be commenced against Borrower or any managing member or general partner of Borrower, or any Guarantor or Indemnitor any case, proceeding or other action seeking issuance of a warrant of attachment, execution, distraint or similar process against all or any substantial part of its assets which results in the entry of any order for any such relief which shall not have been vacated, discharged, or stayed or bonded pending appeal within sixty (60) days from the entry thereof; or (iv) Borrower or any managing member or general partner of Borrower, or any Guarantor or Indemnitor shall take any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts set forth in clause (i), (ii), or (iii) above; or (v) Borrower or any managing member or general partner of Borrower, or any Guarantor or Indemnitor shall generally not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due;

(g) if Borrower shall be in default beyond applicable notice and grace periods under any other mortgage, deed of trust, deed to secure debt or other security agreement covering any part of the Property whether it be superior or junior in lien to this Security Instrument;

(h) subject to the provisions of Section 3.4(b) hereof, if the Property becomes subject to any mechanic's, materialman's or other lien other than a lien for local real estate taxes and assessments not then delinquent and the lien shall remain undischarged of record (by payment, bonding or otherwise) for a period of thirty (30) days;

(i) if any federal tax lien is filed against Borrower, any member or general partner of Borrower, any Guarantor, any Indemnitor or Borrower's interest in the Property and same is not discharged of record within thirty (30) days after same is filed;

(j) (i) Borrower fails to timely provide Lender with the written certification and evidence referred to in Section 4.4 hereof, or (ii) Borrower consummates a transaction which would cause the Security Instrument or Lender's exercise of its rights under this Security Instrument, the Note or the Other Security Documents to constitute a nonexempt prohibited transaction under ERISA or result in a violation of a state statute regulating governmental plans, subjecting Lender to liability for a violation of ERISA or a state statute;



# UNOFFICIAL COPY

(k) if Borrower shall fail to deliver to Lender, within ten (10) days after request by Lender (which request by Lender shall be sent after the expiration of any applicable notice and grace periods contained in Section 7.4(a) and (c)), the estoppel certificates required pursuant to the terms of Section 7.4(a) and (c);

(l) if any of the assumptions contained in the Non-Consolidation Opinion, including, but not limited to, any exhibits attached thereto, were not true and correct as of the date of such Non-Consolidation Opinion or thereafter became untrue or incorrect in any respect. For purposes of this subsection (l), in the event the Property is transferred pursuant to the terms of Article 8 hereof, the term "Non-Consolidation Opinion" from and after the date of such transfer shall only refer to the substantive non-consolidation opinion delivered to Lender as a condition to such transfer;

(m) if any default occurs under any guaranty or indemnity executed in connection herewith (including, without limitation, the Environmental Indemnity (defined in Section 13.4)) and such default continues after the expiration of applicable grace periods, if any;

(n) if Borrower is in material default under the Management Agreement beyond the expiration of applicable notice and grace periods, if any, thereunder or if the Management Agreement is cancelled, terminated (except with respect to the temporary or permanent termination of the Management Agreement with respect to the leasing function of the Property in accordance with Section 3.16 hereof) or surrendered, unless in such case Borrower shall enter into a new management agreement on market terms and conditions with a Qualified Manager in accordance with Section 3.16 hereof;

(o) if for more than ten (10) days after notice from Lender, Borrower shall continue to be in default under any term, covenant or condition of the Note, this Security Instrument or the Other Security Documents (including, without limitation, the Cooperation Letter) not set forth in Section 10.1(a) through (n) above, then, 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 that if such default cannot reasonably be cured within such thirty (30) day period and Borrower 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 so long as it shall require Borrower in the exercise of due diligence to cure such default, it being agreed that no such extension shall be for a period in excess of sixty (60) days; or

(p) if a default occurs under the Franchise Agreement which remains uncured after the giving of any required notice and the expiration of any applicable cure period, or if the Franchise Agreement expires or terminates unless in such case Borrower shall enter into a new franchise agreement on market terms and conditions in accordance with Section 3.19 hereof.

# UNOFFICIAL COPY

## ARTICLE 11

### RIGHTS AND REMEDIES

Section 11.1 Remedies. Upon the occurrence of any Event of Default, Borrower agrees that Lender may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Borrower and in and to the Property, including, but not limited to, the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Lender may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Lender:

- (a) declare the entire unpaid Debt to be immediately due and payable;
- (b) institute proceedings, judicial or otherwise, for the complete foreclosure of this Security Instrument under any applicable provision of law in which case the Property or any interest therein may be sold for cash or upon credit in one or more parcels or in several interests or portions and in any order or manner;
- (c) with or without entry, to the extent permitted and pursuant to the procedures provided by applicable law, institute proceedings for the partial foreclosure of this Security Instrument for the portion of the Debt then due and payable, subject to the continuing lien and security interest of this Security Instrument for the balance of the Debt not then due, unimpaired and without loss of priority;
- (d) sell for cash or upon credit the Property or any part thereof and all estate, claim, demand, right, title and interest of Borrower therein and rights of redemption thereof, pursuant to power of sale or otherwise, at one or more sales, in one or more parcels, at such time and place, upon such terms and after such notice thereof as may be required or permitted by law;
- (e) subject to the provisions of Article 15, institute an action, suit or proceeding in equity for the specific performance of any covenant, condition or agreement contained herein, in the Note or in the Other Security Documents;
- (f) subject to the provisions of Article 15, recover judgment on the Note either before, during or after any proceedings for the enforcement of this Security Instrument or the Other Security Documents;
- (g) apply for the appointment of a receiver, trustee, liquidator or conservator of the Property, without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of Borrower, any Guarantor, Indemnitor or of any person, firm or other entity liable for the payment of the Debt;
- (h) subject to any applicable law, the license granted to Borrower under Section 1.2 shall automatically be revoked and Lender may enter into or upon the Property, either personally or by its agents, nominees or attorneys and dispossess Borrower and its agents and servants therefrom, without liability for trespass, damages or otherwise and exclude Borrower and its agents or servants wholly therefrom, and take possession of all books, records and accounts relating thereto and Borrower agrees to surrender possession of the Property and of

# UNOFFICIAL COPY

such books, records and accounts to Lender upon demand, and thereupon Lender may (i) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with all and every part of the Property and conduct the business thereat; (ii) complete any construction on the Property in such manner and form as Lender deems advisable; (iii) make alterations, additions, renewals, replacements and improvements to or on the Property; (iv) exercise all rights and powers of Borrower with respect to the Property, whether in the name of Borrower or otherwise, including, without limitation, the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents of the Property and every part thereof; (v) require Borrower to pay monthly in advance to Lender, or any receiver appointed to collect the Rents, the fair and reasonable rental value for the use and occupation of such part of the Property as may be occupied by Borrower; (vi) require Borrower to vacate and surrender possession of the Property to Lender or to such receiver and, in default thereof, Borrower may be evicted by summary proceedings or otherwise; and (vii) apply the receipts from the Property to the payment of the Debt, in such order, priority and proportions as Lender shall deem appropriate in its sole discretion after deducting therefrom all expenses (including reasonable attorneys' fees) incurred in connection with the aforesaid operations and all amounts necessary to pay the Taxes, Other Charges, Insurance Premiums and other expenses in connection with the Property, as well as just and reasonable compensation for the services of Lender, its counsel, agents and employees;

(i) exercise any and all rights and remedies granted to a secured party upon default under the Uniform Commercial Code, including, without limiting the generality of the foregoing: (i) the right to take possession of the Personal Property or any part thereof, and to take such other measures as Lender may deem necessary for the care, protection and preservation of the Personal Property, and (ii) request Borrower at its expense to assemble the Personal Property and make it available to Lender at a convenient place acceptable to Lender. Any notice of sale, disposition or other intended action by Lender with respect to the Personal Property sent to Borrower in accordance with the provisions hereof at least five (5) days prior to such action, shall constitute commercially reasonable notice to Borrower;

(j) apply any sums then deposited in the Escrow Fund and any other sums held in escrow or otherwise by Lender in accordance with the terms of this Security Instrument or any Other Security Document to the payment of the following items in any order in its sole discretion:

- (i) Taxes and Other Charges;
- (ii) Insurance Premiums;
- (iii) interest on the unpaid principal balance of the Note;
- (iv) amortization of the unpaid principal balance of the Note; or
- (v) all other sums payable pursuant to the Note, this Security Instrument and the Other Security Documents, including, without limitation, advances made by Lender pursuant to the terms of this Security Instrument;

# UNOFFICIAL COPY

(k) surrender the Policies maintained pursuant to Article 3 hereof, collect the unearned Insurance Premiums and apply such sums as a credit on the Debt in such priority and proportion as Lender in its discretion shall deem proper, and in connection therewith, Borrower hereby appoints Lender as agent and attorney-in-fact (which is coupled with an interest and is therefore irrevocable) for Borrower to collect such Insurance Premiums;

(l) apply the undisbursed balance of any Net Proceeds Deficiency deposit, together with interest thereon, to the payment of the Debt in such order, priority and proportions as Lender shall deem to be appropriate in its discretion;

(m) foreclosure by power of sale or otherwise and apply the proceeds of any recovery to the Debt in accordance with Section 11.2 or to any deficiency under the Security Instrument;

(n) exercise all rights and remedies under any Causes of Action, whether before or after any sale of the Property by foreclosure, power of sale, or otherwise and apply the proceeds of any recovery to the Debt in accordance with Section 11.2 or to any deficiency under this Security Instrument; or

(o) pursue such other remedies as Lender may have under applicable law.

In the event of a sale, by foreclosure, power of sale, or otherwise, of less than all of the Property, this Security Instrument shall continue as a lien and security interest on the remaining portion of the Property unimpaired and without loss of priority. Notwithstanding the provisions of this Section 11.1 to the contrary, if any Event of Default as described in clause (i) or (ii) of Section 10.1(f) shall occur, the entire unpaid Debt shall be automatically due and payable, without any further notice, demand or other action by Lender.

Section 11.2 Application of Proceeds. The purchase money, proceeds and avails of any disposition of the Property, or any part thereof, or any other sums collected by Lender pursuant to the Note, this Security Instrument or the Other Security Documents, may be applied by Lender to the payment of the Debt in such priority and proportions as Lender in its discretion shall deem proper.

Section 11.3 Right to Cure Defaults. Upon the occurrence of any Event of Default beyond any applicable notice and cure periods, Lender may, but without any obligation to do so and without notice to or demand on Borrower and without releasing Borrower from any obligation hereunder, make or do the same in such manner and to such extent as Lender may deem necessary to protect the security hereof. Lender is authorized to enter upon the Property for such purposes, or appear in, defend, or bring any action or proceeding to protect its interest in the Property or to foreclose this Security Instrument or collect the Debt. The actual out-of-pocket cost and expense of any cure hereunder (including reasonable attorneys' fees to the extent permitted by law), with interest as provided in this Section 11.3, shall constitute a portion of the Debt and shall be due and payable to Lender upon demand. All such actual out-of-pocket costs and expenses incurred by Lender in remedying such Event of Default or such failed payment or act or in appearing in, defending, or bringing any such action or proceeding shall bear interest at the Default Rate (as defined in the Note), for the period after notice from Lender that such cost



# UNOFFICIAL COPY

or expense was incurred to the date of payment to Lender. All such actual out-of-pocket costs and expenses incurred by Lender together with interest thereon calculated at the Default Rate shall be deemed to constitute a portion of the Debt and be secured by this Security Instrument and the Other Security Documents and shall be immediately due and payable upon demand by Lender therefor.

Section 11.4 Actions and Proceedings. Lender has the right to appear in and defend any action or proceeding brought with respect to the Property and, after the occurrence and during the continuance of an Event of Default beyond any applicable notice and cure periods, to bring any action or proceeding, in the name and on behalf of Borrower, which Lender, in its discretion, decides should be brought to protect its interest in the Property.

Section 11.5 Recovery of Sums Required to Be Paid. Lender shall have the right from time to time to take action to recover any sum or sums which constitute a part of the Debt as the same become due, without regard to whether or not the balance of the Debt shall be due, and without prejudice to the right of Lender thereafter to bring an action of foreclosure, or any other action, for a default or defaults beyond any applicable notice and cure periods by Borrower existing at the time such earlier action was commenced.

Section 11.6 Examination of Books and Records. Lender, its agents, accountants and attorneys shall have the right, upon reasonable prior written notice to Borrower (unless an Event of Default exists, in which case no notice shall be required), to examine and audit, during reasonable business hours, the records, books, management and other papers of Borrower and its affiliates or of any Guarantor or Indemnitor which pertain to their financial condition or the income, expenses and operation of the Property, at the Property or at any office regularly maintained by Borrower, its affiliates or any Guarantor or Indemnitor where the books and records are located. Lender and its agents shall have the right to make copies and extracts from the foregoing records and other papers.

Section 11.7 Other Rights, etc. (a) The failure of Lender to insist upon strict performance of any term hereof shall not be deemed to be a waiver of any term of this Security Instrument. Borrower shall not be relieved of Borrower's obligations hereunder by reason of (i) the failure of Lender to comply with any request of Borrower, any Guarantor or any Indemnitor to take any action to foreclose this Security Instrument or otherwise enforce any of the provisions hereof or of the Note or the Other Security Documents, (ii) the release, regardless of consideration, of the whole or any part of the Property, or of any person liable for the Debt or any portion thereof, or (iii) any agreement or stipulation by Lender extending the time of payment or otherwise modifying or supplementing the terms of the Note, this Security Instrument or the Other Security Documents.

(b) It is agreed that the risk of loss or damage to the Property is on Borrower, and Lender shall not have any liability whatsoever for decline in value of the Property, for failure to maintain the Policies, or for failure to determine whether insurance in force is adequate as to the amount of risks insured. Possession by Lender shall not be deemed an election of judicial relief, if any such possession is requested or obtained, with respect to any Property or collateral not in Lender's possession.

# UNOFFICIAL COPY

(c) Lender may resort for the payment of the Debt to any other security held by Lender in such order and manner as Lender, in its discretion, may elect. Lender may take action to recover the Debt, or any portion thereof, or to enforce any covenant hereof without prejudice to the right of Lender thereafter to foreclose this Security Instrument. The rights of Lender under this Security Instrument shall be separate, distinct and cumulative and none shall be given effect to the exclusion of the others. No act of Lender shall be construed as an election to proceed under any one provision herein to the exclusion of any other provision. Lender shall not be limited exclusively to the rights and remedies herein stated but shall be entitled to every right and remedy now or hereafter afforded at law or in equity.

Section 11.8 Right to Release Any Portion of the Property. Lender may release any portion of the Property for such consideration as Lender may require without, as to the remainder of the Property, in any way impairing or affecting the lien or priority of this Security Instrument, or improving the position of any subordinate lienholder with respect thereto, except to the extent that the obligations hereunder shall have been reduced by the actual monetary consideration, if any, received by Lender for such release, and may accept by assignment, pledge or otherwise any other property in place thereof as Lender may require without being accountable for so doing to any other lienholder. This Security Instrument shall continue as a lien and security interest in the remaining portion of the Property.

Section 11.9 Intentionally Omitted.

Section 11.10 Right of Entry. Subject to the terms of the Leases, Lender and its agents shall have the right to enter and inspect the Property at all reasonable times upon reasonable prior written notice to Borrower.

Section 11.11 Subrogation. If any or all of the proceeds of the Note have been used to extinguish, extend or renew any indebtedness heretofore existing against the Property, then, to the extent of the funds so used, Lender shall be subrogated to all of the rights, claims, liens, titles, and interests existing against the Property heretofore held by, or in favor of, the holder of such indebtedness and such former rights, claims, liens, titles, and interests, if any, are not waived but rather are continued in full force and effect in favor of Lender and are merged with the lien and security interest created herein as cumulative security for the repayment of the Debt, the performance and discharge of Borrower's obligations hereunder, under the Note and the Other Security Documents and the performance and discharge of the Other Obligations.

## ARTICLE 12

### ENVIRONMENTAL MATTERS

Section 12.1 Environmental Representations and Warranties. Borrower represents and warrants, based solely upon (i) the Environmental Report (as defined in the Environmental Indemnity), copies of which have been delivered to Lender, and (ii) information that Borrower actually knows, that except as expressly disclosed in the Environmental Report: (a) there are no Hazardous Materials (defined below) or underground storage tanks in, on, or under the Property, except those that are both (i) in compliance with Environmental Laws (defined below) and with permits issued pursuant thereto (if such permits are required), and

# UNOFFICIAL COPY

(ii) either (A) in amounts not in excess of that necessary to operate the Property or (B) fully disclosed to and approved by Lender in writing pursuant to the Environmental Report; (b) there are no past, present or threatened Releases (defined below) of Hazardous Materials in violation of any Environmental Law and which would require remediation by a governmental authority in, on, under or from the Property except as described in the Environmental Report; (c) there is no threat of any Release of Hazardous Materials migrating to the Property except as described in the Environmental Report; (d) there is no past or present non-compliance with Environmental Laws, or with permits issued pursuant thereto, in connection with the Property except as described in the Environmental Report; (e) Borrower does not know of, and has not received, any written or oral notice or other communication from any person or entity (including but not limited to a governmental entity) relating to Hazardous Materials in, on, under or from the Property; and (f) Borrower has truthfully and fully provided to Lender, in writing, any and all information relating to environmental conditions in, on, under or from the Property known to Borrower or contained in Borrower's files and records, including but not limited to any reports relating to Hazardous Materials in, on, under or migrating to or from the Property and/or to the environmental condition of the Property. "Environmental Law" means any present and future federal, state and local laws, statutes, ordinances, rules, regulations, standards, policies and other government directives or requirements, as well as common law, that apply to Borrower or the Property and relate to Hazardous Materials, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act and the Resource Conservation and Recovery Act. "Hazardous Materials" shall mean petroleum and petroleum products and compounds containing them, including gasoline, diesel fuel and oil; explosives; flammable materials; radioactive materials; polychlorinated biphenyls ("PCBs") and compounds containing them; lead and lead-based paint; asbestos or asbestos-containing materials in any form that is or could become friable; underground or above-ground storage tanks, whether empty or containing any substance; any substance the presence of which on the Property is prohibited by any federal, state or local authority; any substance that requires special handling; and any other material or substance now or in the future defined as a "hazardous substance," "hazardous material," "hazardous waste," "toxic substance," "toxic pollutant," "contaminant," "pollutant" or other words of similar import within the meaning of any Environmental Law. "Release" of any Hazardous Materials includes but is not limited to any release, deposit, discharge, emission, leaking, spilling, seeping, migrating, injecting, pumping, pouring, emptying, escaping, dumping, disposing or other movement of Hazardous Materials.

**Section 12.2 Environmental Covenants.** Borrower covenants and agrees that so long as Borrower owns, manages, is in possession of, or otherwise controls the operation of the Property: (a) all uses and operations on or of the Property, whether by Borrower or any other person or entity, shall be in compliance with all Environmental Laws and permits issued pursuant thereto; (b) there shall be no Releases of Hazardous Materials in, on, under or from the Property; (c) there shall be no Hazardous Materials in, on, or under the Property, except those that are both (i) in compliance with all Environmental Laws and with permits issued pursuant thereto, if and to the extent required, and (ii) (A) in amounts not in excess of that necessary to operate the Property or (B) fully disclosed to and approved by Lender in writing; (d) Borrower shall keep the Property free and clear of all liens and other encumbrances imposed pursuant to any Environmental Law, whether due to any act or omission of Borrower or any other person or entity (the "Environmental Liens"); (e) Borrower shall, at its sole cost and expense, fully and expeditiously cooperate in all activities pursuant to Section 12.3 below, including but not limited

# UNOFFICIAL COPY

to providing all relevant information and making knowledgeable persons available for interviews; (f) Borrower shall, at its sole cost and expense, perform any environmental site assessment or other investigation of environmental conditions in connection with the Property, pursuant to any reasonable written request of Lender, upon Lender's reasonable belief that the Property is in violation of any Environmental Laws, and share with Lender the reports and other results thereof, and Lender and other Indemnified Parties (as defined in the Environmental Indemnity) shall be entitled to rely on such reports and other results thereof; (g) Borrower shall, at its sole cost and expense, comply with all reasonable written requests of Lender to (i) reasonably effectuate remediation of any Hazardous Materials in, on, under or from the Property in violation of any Environmental Law; and (ii) comply with any Environmental Law; (h) Borrower shall not allow any tenant or other user of the Property to violate any Environmental Law; and (i) Borrower shall immediately notify Lender in writing after it has become aware of (A) any presence or Release or threatened Releases of Hazardous Materials in, on, under, from or migrating towards the Property; (B) any non-compliance with any Environmental Laws related in any way to the Property; (C) any actual or potential Environmental Lien; (D) any required or proposed remediation of environmental conditions relating to the Property; and (E) any written or oral notice or other communication of which Borrower becomes aware from any source whatsoever (including but not limited to a governmental entity) relating in any way to Hazardous Materials.

**Section 12.3 Lender's Rights.** Subject to the terms of the Leases, Lender and any other person or entity designated by Lender, including but not limited to any representative of a governmental entity, and any environmental consultant, and any receiver appointed by any court of competent jurisdiction, shall have the right, but not the obligation, to enter upon the Property at all reasonable times and upon reasonable prior written notice to Borrower to assess any and all aspects of the environmental condition of the Property and its use, including but not limited to conducting any environmental assessment or audit (the scope of which shall be determined in Lender's sole and absolute discretion) and taking samples of soil, groundwater or other water, air, or building materials, and conducting other invasive testing. Borrower shall reasonably cooperate with and provide access to Lender and any such person or entity designated by Lender.

## ARTICLE 13

### INDEMNIFICATIONS

**Section 13.1 General Indemnification.** Borrower shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless the Indemnified Parties from and against any and all Losses (defined below) actually imposed upon or actually incurred by or asserted against any Indemnified Parties and directly or indirectly arising out of or in any way relating to any one or more of the following (except to the extent arising out of the gross negligence or willful misconduct of the Indemnified Parties): (a) any accident, injury to or death of persons or loss of or damage to property occurring in, on or about the Property or any part thereof or on the adjoining sidewalks, curbs, adjacent property or adjacent parking areas, streets or ways; (b) any use, nonuse or condition in, on or about the Property or any part thereof or on the adjoining sidewalks, curbs, adjacent property or adjacent parking areas, streets or ways;



# UNOFFICIAL COPY

(c) performance of any labor or services or the furnishing of any materials or other property in respect of the Property or any part thereof; (d) any failure of the Property to be in compliance with any Applicable Laws; (e) any and all claims and demands whatsoever which may be asserted against Lender by reason of any alleged obligations or undertakings on its part to perform or discharge any of the terms, covenants, or agreements contained in any Lease; or (f) the payment of any commission, charge or brokerage fee to anyone which may be payable in connection with the funding of the Loan evidenced by the Note and secured by this Security Instrument. Any amounts payable to Lender by reason of the application of this Section 13.1 shall become immediately due and payable and shall bear interest at the Default Rate from the date loss or damage is sustained by Lender until paid.

The term "Losses" shall mean any and all actual claims, suits, liabilities (including, without limitation, strict liabilities), actions, proceedings, obligations, debts, damages, losses, costs, expenses, fines, penalties, charges, fees, expenses, judgments, awards, amounts paid in settlement of whatever kind or nature (including but not limited to reasonable attorneys' fees and other costs of defense).

**Section 13.2 Mortgage and/or Intangible Tax.** Borrower shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless the Indemnified Parties from and against any and all Losses imposed upon or incurred by or asserted against any Indemnified Parties and directly or indirectly arising out of or in any way relating to any tax on the making and/or recording of this Security Instrument, the Note or any of the Other Security Documents.

**Section 13.3 Duty to Defend; Attorneys' Fees and Other Fees and Expenses.** Upon written request by any Indemnified Party, Borrower shall defend such Indemnified Party (if requested by any Indemnified Party, in the name of the Indemnified Party) by attorneys and other professionals approved by the Indemnified Parties, not to be unreasonably withheld or delayed. Notwithstanding the foregoing, any Indemnified Parties may, in their sole and absolute discretion and upon determining that (a) Borrower's attorneys and professionals are not defending any claim or proceeding in a manner reasonably acceptable to such Indemnified Party, or (b) Borrower's interests, in connection with any claims or proceeding, conflict with those of such Indemnified Party, engage their own attorneys and other professionals to defend or assist them, and, at the option of Indemnified Parties, their attorneys shall control the resolution of any claim or proceeding. Upon demand, Borrower shall pay or, in the sole and absolute discretion of the Indemnified Parties, reimburse, the Indemnified Parties for the payment of reasonable fees and disbursements of attorneys, engineers, environmental consultants, and other professionals in connection therewith.

**Section 13.4 Environmental Indemnity.** Simultaneously with this Security Instrument, Borrower and other persons or entities defined therein have executed and delivered that certain environmental indemnity agreement dated the date hereof (collectively, the "Indemnitors") to Lender (the "Environmental Indemnity"). The Environmental Indemnity is not secured by this Security Instrument.

**Section 13.5 ERISA Indemnity.** Borrower shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless the Indemnified Parties from and against any and all losses (including, without limitation, reasonable attorneys' fees and costs incurred in

# UNOFFICIAL COPY

the investigation, defense, and settlement of losses incurred in correcting any prohibited transaction or in the sale of a prohibited loan, and in obtaining any individual prohibited transaction exemption under ERISA that may be required, in Lender's sole discretion) that Lender may incur, directly or indirectly, as a result of a default under Section 4.4 or Section 5.9.

## ARTICLE 14

### WAIVERS

Section 14.1 Waiver of Counterclaim. Borrower hereby waives the right to assert a counterclaim, other than a mandatory or compulsory counterclaim, in any action or proceeding brought against it by Lender arising out of or in any way connected with this Security Instrument, the Note, any of the Other Security Documents, or the Obligations.

Section 14.2 Marshalling and Other Matters. Borrower hereby waives, to the extent permitted by law, the benefit of all appraisement, valuation, stay, extension, reinstatement and redemption laws now or hereafter in force and all rights of marshalling in the event of any sale hereunder of the Property or any part thereof or any interest therein. Further, Borrower hereby expressly waives any and all rights of redemption from sale under any order or decree of foreclosure of this Security Instrument or behalf of Borrower, and on behalf of each and every person acquiring any interest in or title to the Property subsequent to the date of this Security Instrument and on behalf of all persons to the extent permitted by Applicable Laws.

Section 14.3 Waiver of Notice. Borrower shall not be entitled to any notices of any nature whatsoever from Lender except (a) with respect to matters for which this Security Instrument specifically and expressly provides for the giving of notice by Lender to Borrower, and (b) with respect to matters for which Lender is required by Applicable Laws to give notice, and Borrower hereby expressly waives the right to receive any notice from Lender with respect to any matter for which this Security Instrument does not specifically and expressly provide for the giving of notice by Lender to Borrower.

Section 14.4 Waiver of Statute of Limitations. Borrower hereby expressly waives and releases to the fullest extent permitted by law, the pleading of any statute of limitations as a defense to payment of the Debt or performance of its Other Obligations.

Section 14.5 Sole Discretion of Lender. Wherever pursuant to this Security Instrument (a) Lender exercises any right given to it to approve or disapprove, (b) any arrangement or term is to be satisfactory to Lender, or (c) any other decision or determination is to be made by Lender, the decision of Lender to approve or disapprove, all decisions that arrangements or terms are satisfactory or not satisfactory and all other decisions and determinations made by Lender, shall be in the sole and absolute discretion of Lender, except as may be otherwise expressly and specifically provided herein.

Section 14.6 Waiver of Trial by Jury. BORROWER HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, THE RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER IN CONTRACT, TORT OR OTHERWISE, RELATING DIRECTLY OR INDIRECTLY TO THE LOAN EVIDENCED

# UNOFFICIAL COPY

BY THE NOTE, THE APPLICATION FOR THE LOAN EVIDENCED BY THE NOTE, THE NOTE, THIS SECURITY INSTRUMENT OR THE OTHER SECURITY DOCUMENTS OR ANY ACTS OR OMISSIONS OF LENDER, ITS OFFICERS, EMPLOYEES, DIRECTORS OR AGENTS IN CONNECTION THEREWITH.

## ARTICLE 15

### EXCULPATION

Section 15.1 Exculpation. The provisions of Article 14 of the Note are hereby incorporated by reference to the fullest extent as if the text of such Article were set forth in its entirety herein and shall control over any contrary provisions contained herein.

## ARTICLE 16

### NOTICES

Section 16.1 Notices. All notices or other written communications hereunder shall be deemed to have been properly given (i) upon delivery, if delivered in person or by facsimile transmission with receipt acknowledged by the recipient thereof and confirmed by telephone by sender, (ii) one (1) Business Day (defined below) after having been deposited for overnight delivery with any reputable overnight courier service, or (iii) three (3) Business Days after having been deposited in any post office or mail depository regularly maintained by the U.S. Postal Service and sent by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to Borrower:

c/o Investcorp  
280 Park Avenue  
New York, New York 10017  
Attention: F. Jonathan Dracos  
Facsimile No.: (212) 983-7073

With a copy to:

Paul, Hastings, Janofsky and Walker LLP  
75 East 55th Street  
New York, NY 10022  
Attention: Eric R. Landau, Esq.  
Facsimile No.: (212) 230-7655

**UNOFFICIAL COPY**

If to Lender:

Morgan Stanley Lender Capital Inc.  
1221 Avenue of the Americas  
27th Floor  
New York, New York 10020  
Attention: James Flaum & Kevin Swartz  
Facsimile No. (212) 507-4139/4146

With a copy to:

Cadwalader, Wickersham & Taft LLP  
227 West Trade Street, Suite 2400  
Charlotte, NC 28202  
Attention: James Hassan, Esq.  
Facsimile No.: (704) 348-5200

or addressed as such party may from time to time designate by written notice to the other parties.

Either party by notice to the other may designate additional or different addresses for subsequent notices or communications.

For purposes of this Subsection "Business Day" shall mean a day on which commercial banks are not authorized or required by law to close in New York, New York.

#### ARTICLE 17

##### SUBMISSION TO JURISDICTION

Section 17.1 Submission to Jurisdiction. With respect to any claim or action arising hereunder or under the Note or the Other Security Documents, Borrower, to the extent permitted by Applicable Law, (a) irrevocably submits to the nonexclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York, New York, and appellate courts from any thereof, and (b) irrevocably waives any objection which it may have at any time to the laying on venue of any suit, action or proceeding arising out of or relating to this Security Instrument brought in any such court, irrevocably waives any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum. Nothing in this Security Instrument will be deemed to preclude Lender from bringing an action or proceeding with respect hereto in any other jurisdiction.

#### ARTICLE 18

##### APPLICABLE LAW

Section 18.1 Choice of Law. THIS SECURITY INSTRUMENT SHALL BE DEEMED TO BE A CONTRACT ENTERED INTO PURSUANT TO THE LAWS OF THE



# UNOFFICIAL COPY

STATE OF NEW YORK AND SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, PROVIDED HOWEVER, THAT WITH RESPECT TO THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIEN OF THIS SECURITY INSTRUMENT, AND THE DETERMINATION OF DEFICIENCY JUDGMENTS, THE LAWS OF THE STATE WHERE THE PROPERTY IS LOCATED SHALL APPLY.

Section 18.2 Provisions Subject to Applicable Law. All rights, powers and remedies provided in this Security Instrument may be exercised only to the extent that the exercise thereof does not violate any applicable provisions of law and are intended to be limited to the extent necessary so that they will not render this Security Instrument invalid, unenforceable or not entitled to be recorded, registered or filed under the provisions of any Applicable Law. If any term of this Security Instrument or any application thereof shall be invalid or unenforceable, the remainder of this Security Instrument and any other application of the term shall not be affected thereby.

## ARTICLE 19

### SECONDARY MARKET

Section 19.1 Transfer of Loan. Lender may, at any time, sell, transfer or assign the Note, this Security Instrument and the Other Security Documents, and any or all servicing rights with respect thereto, or grant participation therein (the "Participations") 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 (a "Securitization"). Lender may forward to each purchaser, transferee, assignee, servicer, participant, or investor in such Participations and/or Securities (collectively, the "Investor") or any Rating Agency rating such Participations and/or Securities and 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 Debt and to Borrower, any Guarantor, any Indemnitor(s) and the Property, whether furnished by Borrower, any Guarantor, any Indemnitor(s) or otherwise, as Lender determines necessary or desirable. Borrower irrevocably waives any and all rights it may have under Applicable Laws to prohibit such disclosure, including but not limited to any right of privacy.

Section 19.2 Cooperation. Borrower, any Guarantor and any Indemnitor agree to cooperate with Lender in connection with any transfer made or any Securities created pursuant to Section 19.1, including, without limitation, complying with all of the terms and conditions of that certain Letter, dated the date hereof, from Lender to Borrower and Investcorp Properties Limited (the "Cooperation Letter").

# UNOFFICIAL COPY

## ARTICLE 20

### COSTS

Section 20.1 Performance at Borrower's Expense. Borrower acknowledges that in connection with (a) the extension, renewal, modification, amendment and termination of the Loan (other than in connection with a Securitization), (b) the release or substitution of collateral therefor, (c) obtaining certain consents, waivers and approvals with respect to the Property, or (d) the review of any Lease or proposed Lease or the preparation or review of any subordination, non-disturbance agreement (the occurrence of any of the above shall be called an "Event"), Borrower shall be liable to reimburse Lender for all out-of-pocket costs and expenses incurred by Lender; provided, however, Lender shall use commercially reasonable efforts to minimize such costs and expenses. Borrower hereby acknowledges and agrees to pay, immediately, with or without demand, all such expenses (as the same may be increased or decreased from time to time) upon the occurrence of any Event. Wherever it is provided for herein that Borrower pay any costs and expenses, such costs and expenses shall include, but not be limited to, all reasonable legal fees and disbursements of Lender, whether with respect to retained firms or the reimbursement for the expenses of in-house staff.

Section 20.2 Legal Fees for Enforcement. (a) Borrower shall pay all reasonable legal fees incurred by Lender in connection with (i) the preparation of the Note, this Security Instrument and the Other Security Documents, and (ii) the items set forth in Section 20.1 above, and (b) Borrower shall pay to Lender on demand any and all reasonable expenses, including legal expenses and attorneys' fees, incurred or paid by Lender in protecting its interest in the Property or in collecting any amount payable hereunder or in enforcing its rights hereunder with respect to the Property (including commencing any foreclosure action), whether or not any legal proceeding is commenced hereunder or thereunder, and such sums payable pursuant to this clause (b) shall also be payable with interest thereon at the Default Rate (as defined in the Note) from the date paid or incurred by Lender until such expenses are paid by Borrower.

## ARTICLE 21

### DEFINITIONS

Section 21.1 General Definitions. Unless the context clearly indicates a contrary intent or unless otherwise specifically provided herein, words used in this Security Instrument may be used interchangeably in singular or plural form and the word "Borrower" shall mean "each Borrower and any subsequent owner or owners of the Property or any part thereof or any interest therein," the word "Lender" shall mean "Lender and any subsequent holder of the Note," the word "Note," shall mean "the Note and any other evidence of indebtedness secured by this Security Instrument," the word "person" shall include an individual, corporation, partnership, limited liability company, trust, unincorporated association, government, governmental authority, and any other entity, the word "Property" shall include any portion of the Property and any interest therein, and the phrases "legal fees", "attorneys' fees" and "counsel fees" shall include any and all attorneys', paralegal and law clerk fees and disbursements, including, but not limited to, fees and disbursements at the pre-trial, trial and

# UNOFFICIAL COPY

appellate levels incurred or paid by Lender in protecting its interest in the Property, the Leases and the Rents and enforcing its rights hereunder.

Section 21.2 Headings, etc. The headings and captions of various Articles and Sections of this Security Instrument are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof.

## ARTICLE 22

### MISCELLANEOUS PROVISIONS

Section 22.1 No Oral Change. This Security Instrument, and any provisions hereof, may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of Borrower or Lender, but only by an agreement in writing signed by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.

Section 22.2 Liability. If Borrower consists of more than one person, the obligations and liabilities of each such person hereunder shall be joint and several. This Security Instrument shall be binding upon and inure to the benefit of Borrower and Lender and their respective successors and assigns forever.

Section 22.3 Inapplicable Provision. If any term, covenant or condition of the Note or this Security Instrument is held to be invalid, illegal or unenforceable in any respect, the Note and this Security Instrument shall be construed without such provision.

Section 22.4 Duplicate Originals; Counterparts. This Security Instrument may be executed in any number of duplicate originals and each duplicate original shall be deemed to be an original. This Security Instrument may be executed in several counterparts, each of which counterparts shall be deemed an original instrument and all of which together shall constitute a single Security Instrument. The failure of any party hereto to execute this Security Instrument, or any counterpart hereof, shall not relieve the other signatories from their obligations hereunder.

Section 22.5 Number and Gender. Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns and pronouns shall include the plural and vice versa.

## ARTICLE 23

### LOCAL LAW PROVISIONS

Section 23.1 Principals of Construction. In the event of any inconsistencies between the terms and conditions of this Article 23 and the terms and conditions of this Mortgage, the terms and conditions of this Article 23 shall control and be binding.

Section 23.2 Maturity Date. In the first "WHEREAS" provision on page 1 hereof, the following is hereby inserted after the words "(such Note, together with all extensions,

# UNOFFICIAL COPY

renewals, replacements, restatements or modifications thereof being hereinafter referred to as the "Note")”:

“which Note provides, among other things, for final payment of principal and interest under the Note, if not sooner paid or payable as provided therein, to be due on October 7, 2011;”

Section 23.3 Maximum Amount Secured Hereby. The following is hereby inserted at the end of Section 2.3:

“ provided, however, that the indebtedness secured hereby shall in no event exceed an amount equal to three hundred percent (300%) of the face amount of the Note.”

Section 23.4 Waiver of Statutory Rights. Borrower hereby waives, to the extent now or hereafter permitted by law, all rights of redemption and reinstatement of this Mortgage pursuant to the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15 1101 *et seq.* (“IMFL”), on behalf of itself and all those taking by, through or under Borrower.

Section 23.5 Compliance With Illinois Mortgage Foreclosure Law. In the event that any provision of this Security Instrument shall be inconsistent with any provision of IMFL, the provisions of IMFL shall take precedence over the provisions of this Security Instrument, but shall not invalidate or render unenforceable any other provision of this Security Instrument that can be construed in a manner consistent with IMFL. If any provision of this Security Instrument shall grant to Lender any rights or remedies upon any Event of Default by Borrower which are more limited than the rights that would otherwise be vested in Lender under IMFL in the absence of said provision, Lender shall be vested with the rights granted in IMFL to the full extent permitted by law. Without limiting the generality of the foregoing, all expenses incurred by Lender to the extent reimbursable under IMFL, whether incurred before or after any decree or judgment of foreclosure, and whether or not enumerated in this Security Instrument, shall be added to the Debt secured by this Security Instrument or by the judgment of foreclosure.

Section 23.6 Intentionally Omitted.

Section 23.7 Financing Statement. This Security Instrument also constitutes a financing statement for the purpose of Section 9-402 of the Illinois Uniform Commercial Code (Illinois Revised Statutes, Section 26) and shall constitute a “fixture filing” under such statutes and shall be filed in the real estate records of Cook County, Illinois.

- (1) Name of Debtor: Schiller Hotel Holdings, LLC
- Debtor’s Mailing Address: c/o Investcorp International  
280 Park Avenue, 37th floor  
New York, New York 10017  
Attention: F. Jonathan Dracos  
Telephone: (212) 599-4700  
Facsimile: (212) 983-7073



**UNOFFICIAL COPY**

Address of Property: 10249 West Irving Park Road  
Schiller Park, Illinois 60176

Name of Secured Party: Morgan Stanley Lender Capital Inc.

Address of Secured Party: 1221 Avenue of the Americas  
New York, New York 10020

(2) This financing statement covers the following types or items of property: the property described in this instrument, and all other items of personal property now or at any time hereafter owned by Borrower and used in connection with the Property.

(3) Some of the above goods are or are to become fixtures on the real property described herein. Borrower is the record owner of the real property described herein upon which the foregoing fixtures and other items and types of property are located."

Section 23.8 Use of Loan Proceeds. Borrower covenants and agrees that all of the proceeds of the Note secured by this Security Instrument will be used solely for business purposes and in furtherance of the regular business affairs of Borrower, and the entire principal obligation secured hereby constitutes: (a) a "business loan" as that term is defined in, and for all purposes of, the Illinois Interest Act, Section 815 ILCS 205/4(1)(c); and (b) "a loan secured by a mortgage on real estate" within the purview and operation of Section 815 ILCS 205/4(1)(l).

Section 23.9 Usury. All agreements between Borrower and Lender (including, without limitation, those contained in this Security Instrument, the Note and any other Loan Documents) are expressly limited so that in no event whatsoever shall the amount paid or agreed to be paid to Lender exceed the highest lawful rate of interest permissible under the laws of the State of Illinois. If, from any circumstances whatsoever, fulfillment of any provision hereof or of the Note or any other documents securing the Debt, at the time performance of such provision shall be due, shall involve the payment of interest exceeding the highest rate of interest permitted by law which a court of competent jurisdiction may deem applicable hereto, then, ipso facto, the obligation to be fulfilled shall be reduced to the highest lawful rate of interest permissible under the laws of the State of Illinois; and if for any reason whatsoever, Lender shall ever receive as interest an amount which would be deemed unlawful, such interest shall be applied to the payment of the last maturing installment or installments of the indebtedness secured hereby (whether or not then due and payable) and not to the payment of interest.

Section 23.10 Lender's Right to Purchase Insurance on Behalf of Borrower. Pursuant to the terms of the Collateral Protection Act, 815 ILCS 180/1 et seq., Borrower is hereby notified that unless Borrower provides Lender with evidence of the insurance coverage required by this Security Instrument, Lender may purchase insurance at Borrower's expense to protect Lender's interests in the Property, which insurance may, but need not, protect the interests of Borrower. The coverage purchased by Lender may not pay any claim made by Borrower or any claim made against Borrower in connection with the Property. Borrower may later cancel any insurance purchased by Lender, but only after providing Lender with evidence that Borrower has obtained the insurance as required hereunder. If Lender purchases insurance for the Property, the Borrower will be responsible for the costs of such insurance, including



# UNOFFICIAL COPY

interest and any other charges imposed in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to the indebtedness secured hereby. The costs of such insurance may be greater than the cost of insurance Borrower may be able to obtain for itself.

Section 23.11 Lender's Right To Foreclose. It is the intention of Borrower and Lender that the enforcement of the terms and provisions of this Security Instrument shall be accomplished in accordance with the Illinois Mortgage Foreclosure Law (the "Act"), 735 ILCS 5/15-1101 et seq., and with respect to such Act, Borrower agrees and covenants that:

(a) Lender and Borrower shall have the benefit of all of the provisions of the Act, including all amendments thereto which may become effective from time to time after the date hereof. In the event any provision of the Act which is specifically referred to herein may be repealed, Lender and Borrower shall have the benefit of such provision as most recently existing prior to such repeal, as though the same were incorporated herein by express reference. If any provision in this Security Instrument shall be inconsistent with any provision of the Act, provisions of the Act shall take precedence over the provisions of this Security Instrument but shall not invalidate or render unenforceable any other provision of this Security Instrument that can be construed in a manner consistent with the Act. If any provision of this Security Instrument shall grant to Lender (including Lender acting as a mortgagee-in-possession) or a receiver appointed pursuant to the provisions of Section 5.3(a) of this Security Instrument any powers, rights or remedies prior to, upon or following the occurrence of an Event of Default which are more limited than the powers, rights or remedies that would otherwise be vested in Lender or in such receiver under the Act in the absence of said provision, Lender and such receiver shall be vested with the powers, rights and remedies granted in the Act to the full extent permitted by law.

(b) Notwithstanding anything to the contrary in this Security Instrument or any of the Loan Documents, any action to enforce this Security Instrument or to pursue any of the remedies set forth herein must be brought in the courts of the State of Illinois, in the county in which the Property is located.

[NO FURTHER TEXT ON THIS PAGE]

UNOFFICIAL COPY  
IN WITNESS WHEREOF, THIS SECURITY INSTRUMENT has been executed by  
Borrower the day and year first above written.

**BORROWER:**

SCHILLER HOTEL HOLDINGS, LLC, a  
Delaware limited liability company

By: 

Name: F. Jonathan Dracos  
Title: Vice President

Property of Cook County Clerk's Office

# UNOFFICIAL COPY

## ACKNOWLEDGMENTS

STATE OF New York )  
 ) ss.:  
COUNTY OF New York )

On ~~August~~ <sup>September 11</sup>, 2006, before me, Megan Motisi, personally appeared Fo Jonathan Dracos, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person or the entity on behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Megan Motisi  
Signature

(This area for official notarial seal)

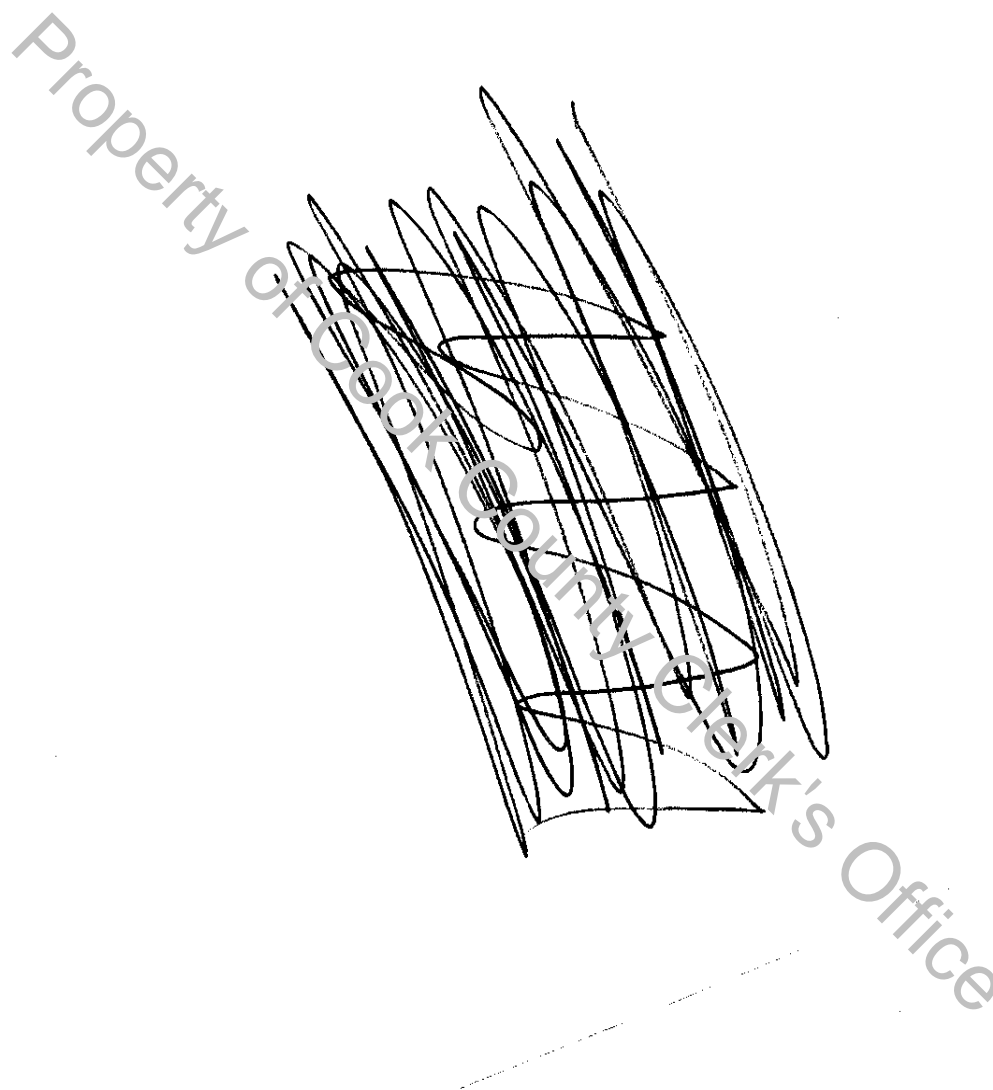
MEEGAN T. MOTISI  
NOTARY PUBLIC, State of New York  
No. 01M06089261  
Qualified in Westchester County  
Commission Expires March 24, 2007

Property of Cook County Clerk's Office

# UNOFFICIAL COPY

## EXHIBIT A

(Description of Land)



# UNOFFICIAL COPY

## EXHIBIT A

### Legal Description

#### PARCEL A:

That part of Lot 2 in subdivision of the West half (1/2) of the South West quarter (1/4) of Section 16, Township 40 North, Range 12 East of the Third Principal Meridian recorded April 14, 1921 as document number 7112572, lying Northerly of a line drawn from a point on the West line of said Lot, 557.684 feet South of the North West corner thereof, to a point on East line of said Lot, 500 feet South of the North East corner thereof, excepting therefrom that part thereof lying North of a line which intersects the East and West boundaries of said Lot 2, 27.46 feet South of the North East and North West corners thereof as per Document 57C-6303 all in Cook County, Illinois.

Also excepting therefrom that part thereof described as follows:

That part of Lot 2 in the Subdivision of the West half (1/2) of the South West quarter (1/4) of Section 16; Township 40 North, Range 12 East of the Third Principal Meridian recorded April 14, 1921 as document number 7112572, described as follows:

Commencing at a point on the South East corner of the Parcel described in Document Number 57C-6303, said Point being on the East line of Lot 2; thence South 0 26' 17" East, along said East line, a distance of 170.73 feet to the Point of Beginning; thence Southerly along the arc of a circle, concave to the East, having a radius of 185.77 feet, an arc distance of 105.84 feet and a chord bearing South 0 26' 17" East to said East line; thence North 0 26' 17" West, along said East line a distance of 104.42 feet to the Point of Beginning, in Cook County, Illinois.

#### PARCEL B:

That part of Lot 2 in subdivision of the West half (1/2) of the South West quarter (1/4) of Section 16, Township 40 North, Range 12 East of the Third Principal Meridian recorded April 14, 1921 as document number 7112572, lying Southerly of a line drawn from a point on the West line of said Lot, 557.684 feet South of the North West corner to a point on East line of said Lot, 500 feet South of the North East corner thereof, and the North 8.98 feet of Lot 7 in said subdivision of the West half (1/2) of the South West quarter (1/4) of Section 16, Township 40 North, Range 12 East of the Third Principal Meridian, in Cook County, Illinois.

also

That part of Lot 1 in subdivision of the West half (1/2) of the South West quarter (1/4) of Section 16, Township 40 North, Range 12 East of the Third Principal Meridian recorded April 14, 1921 as document number 7112572, described as follows:

Commencing at the South West corner of said Lot 1; thence North along West line of said Lot 1 to a point 500 feet South of North West corner of said Lot 1; thence Easterly along a line forming an angle of 90 to right with last described line a distance of 232.74 feet to a point; thence Southwesterly along a line (said line running to left and having a



# UNOFFICIAL COPY

radius of 5854.58 feet) a distance of 359.59 feet to a point on South line of said Lot 1, 214.50 feet West of South East corner of said Lot 1, thence West along South line of said Lot 1 to Point of Beginning in Cook County, Illinois.

also

That part of Lot 8 in the subdivision of the West half (1/2) of the South West quarter (1/4) (except that part lying North of Irving Park Road) of Section 16, Township 40 North, Range 12 East of the Third Principal Meridian recorded April 14, 1921 as document number 7112572, lying Northwesterly of a curved line, said line being the arc of a curve to the right with a radius of 5,854.58 feet and intersects the West line of said Lot 8, 382.01 feet North of its South West corner and the North line of said Lot 8, 214.5 feet West of its North East corner in Cook County, Illinois.

Tax Parcel Number(s):

12-16-307-004-0000

12-16-307-005-0000

12-16-307-027-0000

12-16-307-032-0000

Property of Cook County Clerk's Office