

UNOFFICIAL COPY

(5all)

**This document was prepared by,
and after recording, return to:**

Sharon Zaban Letchinger, Esq.
Schwartz Cooper Chartered
180 North LaSalle Street
Suite 2700
Chicago, Illinois 60601



Doc#: 0800833145 Fee: \$88.00
Eugene "Gene" Moore RHSP Fee:\$10.00
Cook County Recorder of Deeds
Date: 01/08/2008 01:42 PM Pg: 1 of 33

Permanent Tax Index Number[s]:

use only.

See Exhibit "A" Attached Hereto

Property Address:

Dixmoor Towne Center
146th and Dixie Highway
Dixmoor, Illinois

8422809 D2 KARSA

INTERCREDITOR AGREEMENT

by and between

LASALLE BANK NATIONAL ASSOCIATION,
a national banking association,
in its capacity as Senior Lender

and

LASALLE BANK NATIONAL ASSOCIATION,
a national banking association,
in its capacity as Junior Lender

Dated as of December 26, 2007

Box 400-CTCC

UNOFFICIAL COPY

INTERCREDITOR AGREEMENT

THIS INTERCREDITOR AGREEMENT (this "Agreement"), dated as of December 26, 2007, by and between **LASALLE BANK NATIONAL ASSOCIATION**, a national banking association, having an office at 135 South LaSalle Street, Chicago, Illinois 60603, in its capacity as Senior Lender (the "Senior Lender"), and **LASALLE BANK NATIONAL ASSOCIATION**, a national banking association, having an office at 135 South LaSalle Street, Chicago, Illinois 60603, in its capacity as Junior Lender (the "Junior Lender").

RECITALS:

WHEREAS, pursuant to the terms, provisions and conditions set forth in that certain Construction Loan Agreement dated of even date herewith (the "Loan Agreement") by and between **DIXMOOR TOWNE CENTER, L.L.C.**, an Illinois limited liability company (the "Borrower"), and **LASALLE BANK NATIONAL ASSOCIATION**, a national banking association, in its capacity as the Senior Lender and the Junior Lender, (i) Senior Lender is making a loan to the Borrower in the original principal amount of Four Million Seven Hundred Fifty Thousand and 00/100 Dollars (\$4,750,000.00) (the "Senior Loan"), and (ii) Junior Lender is making a loan to the Borrower in the original principal amount of One Million One Hundred Seventy Thousand and 00/100 Dollars (\$1,170,000.00) (the "Junior Loan"); and

WHEREAS, the Senior Loan is being made by the Senior Lender to finance a portion of costs of the acquisition and improvement by the Borrower of the real property described on Exhibit A attached hereto (the "Premises") and the Junior Loan is being made by the Junior Lender to finance a portion of the costs of the acquisition and improvement by the Borrower of the Premises; and

WHEREAS, the Senior Loan is evidenced by a Promissory Note of even date herewith made by the Borrower and payable to the order of the Senior Lender in the amount of the Senior Loan (the "Senior Note"), and secured by, among other things, a Construction Mortgage, Security Agreement, Assignment of Rents and Leases and Fixture Filing of even date herewith made by the Borrower to and for the benefit of the Senior Lender (the "Senior Mortgage"), which Senior Mortgage encumbers the Premises; and

WHEREAS, the Junior Loan is evidenced by a Promissory Note of even date herewith made by Borrower and payable to the order of the Junior Lender in the amount of the Junior Loan (the "Junior Note"), and secured by, among other things, (i) a Junior Construction Mortgage, Security Agreement, Assignment of Rents and Leases and Fixture Filing of even date herewith made by the Borrower to and for the benefit of the Junior Lender (the "Junior Mortgage"), which Junior Mortgage encumbers the Premises; and

WHEREAS, the Senior Lender and the Junior Lender desire to enter into this Agreement to provide for the relative priority of the Senior Loan Documents (as defined below) and the Junior Loan Documents (as defined below), and to evidence certain agreements with respect to the relationship between the Junior Loan and the Junior Loan Documents, on the one hand, and the Senior Loan and the Senior Loan Documents, on the other hand.

UNOFFICIAL COPY

NOW, THEREFORE, in consideration of the foregoing recitals and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Senior Lender and the Junior Lender hereby agree as follows:

Section 1. Certain Definitions; Rules of Construction.

(a) As used in this Agreement, the following terms shall have the following respective meanings:

“Affiliate” means, as to any particular Person, any Person directly or indirectly, through one or more intermediaries, controlling, Controlled by or under common control with such first Person.

“Agreement” means this Agreement, as the same may be amended, modified and in effect from time to time, pursuant to the terms hereof.

“Award” has the meaning provided in Section 8(d) hereof.

“Borrower” has the meaning provided in the Recitals hereto.

“Borrower/Common Guarantor Group” has the meaning provided in Section 9(c) hereof.

“Business Day” means a day on which both the Senior Lender and the Junior Lender are open for business.

“Common Guarantor” means any party that has executed a guaranty in connection with both the Senior Loan and the Junior Loan, including the Initial Common Guarantor.

“Continuing Senior Loan Event of Default” means an Event of Default under the Senior Loan for which (i) the Senior Lender has provided notice of such Event of Default to the Junior Lender in accordance with Section 10(a) of this Agreement, and (ii) the cure period provided to the Junior Lender in Section 10(a) of this Agreement has expired.

“Control” means the ownership, directly or indirectly, in the aggregate of more than 50% of the beneficial ownership interests of an entity, or the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of an entity, whether through the ability to exercise voting power, by contract or otherwise. “Controlled by,” “controlling” and “under common control with” shall have the respective correlative meaning thereto.

“Default” means, when used in reference to either the Senior Loan or the Junior Loan, or in reference to any document or documents, the occurrence of an event or the existence of a condition which, with the passage of time or the giving of notice, or both, would constitute an Event of Default under the Senior Loan or the Junior Loan, as the case may be, or under such document or documents.

UNOFFICIAL COPY

Eligibility Requirements: With respect to any institution, the requirement that such institution (i) have total unrestricted assets (in name or under management) in excess of \$600,000,000 and (except with respect to a pension advisory firm, asset manager or similar fiduciary) unrestricted capital/statutory surplus or shareholder's equity in excess of \$250,000,000, and (ii) be regularly engaged in the business of making or owning (or, in the case of a fund advisor or manager, advising or managing with respect to) commercial real estate loans (including junior loans with respect to commercial real estate).

"Enforcement Action" means any (i) judicial or non-judicial foreclosure proceeding, the exercise of any power of sale, the taking of a deed or assignment in lieu of foreclosure, the obtaining of a receiver, or the taking of any other enforcement action against the Premises, the Borrower or any Common Guarantor, including, without limitation, the taking of possession or control of any portion of the Premises, (ii) acceleration of, or demand or action taken in order to collect, all or any indebtedness secured by the Premises, other than giving of notices of default and statements of overdue amounts, or (iii) exercise of any right or remedy available to the Senior Lender under the Senior Loan Documents, at law, in equity or otherwise with respect to the Borrower, the Premises or any Common Guarantor.

"Event of Default" means, when used in reference to either the Senior Loan or the Junior Loan, or in reference to any document or documents, a default or event of default under the Senior Loan or the Junior Loan, as the case may be, or under such document or documents, that has continued after the giving of any applicable notice and the expiration of any applicable grace or cure periods, and has not been cured.

"Initial Common Guarantor" means collectively, S.F. Holdings, L.L.C., an Illinois limited liability company and Michael Silver.

"Junior Lender" has the meaning provided in the first paragraph of this Agreement.

"Junior Loan" has the meaning provided in the Recitals hereto.

"Junior Loan Documents" means the Loan Agreement, the Junior Note and the Junior Mortgage, together with all documents and instruments set forth on Exhibit C hereto, as any of the foregoing may be modified, amended, renewed, extended, supplemented, restated or replaced from time to time, subject to the limitations and agreements contained in this Agreement.

"Junior Loan Modification" has the meaning provided in Section 6(b) hereof.

"Junior Mortgage" has the meaning provided in the Recitals hereto.

"Junior Note" has the meaning provided in the Recitals hereto.

"Loan Agreement" has the meaning provided in the Recitals hereto.

"Loan Purchase Price" has the meaning provided in Section 11(a) hereof.

UNOFFICIAL COPY

“Person” means any individual, sole proprietorship, corporation, general partnership, limited partnership, limited liability company or partnership, joint venture, association, joint stock company, bank, trust, estate unincorporated organization, any federal, state, county or municipal government or any agency or political subdivision thereof, endowment fund or any other form of entity.

“Premises” has the meaning provided in the Recitals hereto.

“Proceeding” has the meaning provided in Section 9(c) hereof.

“Protective Advances” means all sums advanced for the purpose of payment of real estate taxes, including special payments in lieu of real estate taxes, maintenance costs, insurance premiums, condominium common assessments, or other items, including capital items, reasonably necessary to protect the Premises from forfeiture, casualty, loss or waste, including, with respect to the Junior Loan, amounts advanced by the Junior Lender pursuant to Section 10(a) hereof.

“Qualified Transferee” means the Senior Lender, the Junior Lender and any one or more of the following:

- (i) a real estate investment trust, bank, saving and loan association, investment bank, insurance company, trust company, commercial credit corporation, pension plan, pension fund or pension advisory firm, mutual fund, government entity or plan, provided that any institution referred to in this clause (a) satisfies the Eligibility Requirements;
- (ii) an investment company, money management firm or “qualified institutional buyer” within the meaning of Rule 144A under the Securities Act of 1933, as amended, or an institutional “accredited investor” within the meaning of Regulation D under the Securities Act of 1933, as amended, provided that any institution referred to in this clause (b) satisfies the Eligibility Requirements;
- (iii) an institution substantially similar to any of the foregoing entities described in clauses (a) or (b) that satisfies the Eligibility Requirements;
- (iv) any entity Controlled by any Lender or by any of the entities described in clause (a), (b) or (c) above; or
- (v) an investment fund, limited liability company, limited partnership or general partnership where a an entity that is otherwise a Qualified Transferee under clauses (i), (ii), (iii) or (iv) above acts as the general partner, managing member or fund manager and at least 50% of the equity interests in such investment vehicle are owned, directly or indirectly, by one or more entities that are otherwise Qualified Transferees under clauses (i), (ii), (iii) or (iv) above.

“Senior Lender” has the meaning provided in the first paragraph of this Agreement.

UNOFFICIAL COPY

“Senior Loan” has the meaning provided in the Recitals hereto.

“Senior Loan Default Notice” has the meaning provided in Section 10(a) hereof.

“Senior Loan Documents” means the Loan Agreement, the Senior Note and the Senior Mortgage, together with the instruments and documents set forth on Exhibit B hereto, as any of the foregoing may be modified, amended, renewed, extended, supplemented, restated or replaced from time to time, subject to the limitations and agreements contained in this Agreement.

“Senior Loan Liabilities” shall mean, collectively, all of the indebtedness, liabilities and obligations of the Borrower evidenced by the Senior Loan Documents and all amounts due or to become due pursuant to the Senior Loan Documents, including interest thereon and any other amounts payable in respect thereof or in connection therewith, including, without limitation, any late charges, default interest, prepayment fees or premiums, exit fees, advances and post-petition interest.

“Senior Loan Modification” has the meaning provided in Section 6(a) hereof.

“Senior Loan Satisfaction” means that, and occurs when, all of the following conditions have been satisfied:

(i) The Senior Lender has no obligation under the Senior Loan Documents to disburse any additional proceeds of the Senior Loan; and

(ii) All of the principal of and interest on the Senior Loan have been indefeasibly paid in full and all other obligations of the Borrower and the other parties to the Senior Loan Documents to the Senior Lender under the Senior Loan Documents have been indefeasibly paid in full.

“Senior Mortgage” has the meaning provided in the Recitals hereto.

“Senior Note” has the meaning provided in the Recitals hereto.

“Transfer” means any assignment, pledge, conveyance, sale, transfer, mortgage, encumbrance, grant of a security interest, issuance of a participation interest, or other disposition, either directly or indirectly, by operation of law or otherwise.

(b) For all purposes of this Agreement, except as otherwise expressly provided or unless the context otherwise requires:

(i) All capitalized terms defined in the recitals to this Agreement shall have the meanings ascribed thereto whenever used in this Agreement and the terms defined in this Agreement have the meanings assigned to them in this Agreement, and the use of any gender herein shall be deemed to include the other genders;

UNOFFICIAL COPY

(ii) Terms not otherwise defined herein shall have the meaning assigned to them in the Loan Agreement;

(iii) All references in this Agreement to designated Sections, subsections, paragraphs, Articles, Exhibits, Schedules and other subdivisions or addenda without reference to a document are to the designated sections, subsections, paragraphs and articles and all other subdivisions of and exhibits, schedules and all other addenda to this Agreement, unless otherwise specified;

(iv) A reference to a Subsection without further reference to a Section is a reference to such Subsection as contained in the same Section in which the reference appears, and this rule shall apply to paragraphs and other subdivisions;

(v) The terms "includes" or "including" shall mean without limitation by reason of enumeration;

(vi) The words "herein", "hereof", "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular provision;

(vii) The words "to the best of the knowledge" and "best knowledge" of the Senior Lender or the Junior Lender, or words of similar import, shall mean to the actual knowledge of officers of the Senior Lender or the Junior Lender, as the case may be, with direct oversight responsibility for the Senior Loan or the Junior Loan, as the case may be, without independent investigation or inquiry and without any imputation of knowledge whatsoever.

Section 2. Approval of Loans and Loan Documents.

(a) The Junior Lender hereby acknowledges that (i) it has received and reviewed and, subject to the terms and conditions of this Agreement, hereby consents to and approves of the making of the Senior Loan and, subject to the terms and provisions of this Agreement, all of the terms and provisions of the Senior Loan Documents, (ii) the execution, delivery and performance of the Senior Loan Documents will not constitute a Default or Event of Default under the Junior Loan Documents, (iii) the Senior Lender is under no obligation or duty to, nor has the Senior Lender represented that it will, see to the application of the proceeds of the Senior Loan by the Borrower or any other Person to whom the Senior Lender disburses such proceeds, and (iv) any application or use of the proceeds of the Senior Loan for purposes other than those provided in the Senior Loan Documents shall not affect, impair or defeat the terms and provisions of this Agreement or the Senior Loan Documents.

(b) The Senior Lender hereby acknowledges that (i) it has received and reviewed, and, subject to the terms and conditions of this Agreement, hereby consents to and approves of the making of the Junior Loan and, subject to the terms and provisions of

UNOFFICIAL COPY

this Agreement, all of the terms and provisions of the Junior Loan Documents, (ii) the execution, delivery and performance of the Junior Loan Documents will not constitute a Default or Event of Default under the Senior Loan Documents, (iii) the Junior Lender is under no obligation or duty to, nor has the Junior Lender represented that it will, see to the application of the proceeds of the Junior Loan by the Borrower or any other Person to whom the Junior Lender disburses such proceeds, and (iv) any application or use of the proceeds of the Junior Loan for purposes other than those provided in the Junior Loan Documents shall not affect, impair or defeat the terms and provisions of this Agreement or the Junior Loan Documents. The Senior Lender hereby acknowledges and agrees that any conditions precedent to the Senior Lender's consent to mezzanine financing as set forth in the Senior Loan Documents or any other agreements with the Borrower, as they apply to the Junior Loan Documents or the making of the Junior Loan, have been either satisfied or waived.

Section 3. Representations and Warranties.

(a) The Junior Lender hereby represents and warrants as follows:

(i) Exhibit C attached hereto contains a true, correct and complete listing of all of the Junior Loan Documents as of the date hereof. To the best of the Junior Lender's knowledge, there currently exists no Default or Event of Default under any of the Junior Loan Documents.

(ii) The Junior Lender is the legal and beneficial owner of the entire Junior Loan free and clear of any lien, security interest, option or other charge or encumbrance.

(iii) There are no conditions precedent to the effectiveness of this Agreement as to the Junior Lender that have not been satisfied or waived.

(iv) The Junior Loan is not cross-defaulted with any loan or credit facility other than the Senior Loan and hedging transactions entered into by the Junior Lender with the Borrower. The Premises secure only the Junior Loan and do not secure any other loan or credit facility extended by the Junior Lender, other than hedging transactions entered into by the Junior Lender with the Borrower.

(b) The Senior Lender hereby represents and warrants as follows:

(i) Exhibit B attached hereto contains is a true, correct and complete listing of the Senior Loan Documents as of the date hereof. To the best of the Senior Lender's knowledge, there currently exists no Default or Event of Default under any of the Senior Loan Documents.

(ii) The Senior Lender is the legal and beneficial owner of the entire Senior Loan free and clear of any lien, security interest, option or other charge or encumbrance.

UNOFFICIAL COPY

(iii) There are no conditions precedent to the effectiveness of this Agreement on the part of the Senior Lender that have not been satisfied or waived.

(iv) The Senior Loan is not cross-defaulted with any loan or credit facility other than the Junior Loan and hedging transactions entered into by the Senior Lender with the Borrower. The Premises secure only the Senior Note and do not secure any other loan or credit facility extended by the Senior Lenders other than hedging transactions entered into by the Senior Lender with the Borrower.

Section 4. Transfer of Junior Loan or Senior Loan.

(a) The following provisions shall apply with respect to Transfers of the Junior Loan

(i) The Junior Lender may, from time to time, in its sole discretion, sell participation interests in the Junior Loan to one or more Persons, without notice to or the consent of the Senior Lender. In such event, the Senior Lender shall for all purposes of this Agreement be entitled to continue to deal with the Junior Lender as if such participation interests had not been sold.

(ii) The Junior Lender may, from time to time, in its sole discretion, make Transfers of interests in the Junior Loan to Affiliates of the Junior Lender, without notice to or the consent of the Senior Lender. All such transferees shall hold their interests in the Junior Loan subject to the terms of this Agreement, and the Senior Lender shall for all purposes of this Agreement be entitled to continue to deal with the Junior Lender as if such Transfer had not been made.

(iii) The Junior Lender may, from time to time, in its sole discretion, make Transfers of interests in the Junior Loan to one or more Qualified Transferees. All such transferees shall hold their interests in the Junior Loan subject to the terms of this Agreement.

(iv) In the case of a Transfer permitted by subparagraph (iii) above, the transferee must assume in writing the obligations of the Junior Lender hereunder and agree to be bound by the terms and provisions hereof. Such transferee shall also remake each of the representations and warranties contained herein for the benefit of the Senior Lender. At least five (5) days prior to such a Transfer, the Junior Lender shall provide to the Senior Lender a certification that such Transfer will be made in accordance with this Section, such certification to include the name and contact information of the Qualified Transferee.

(b) The following provisions shall apply with respect to Transfers of the Senior Loan:

UNOFFICIAL COPY

(i) The Senior Lender may, from time to time, in its sole discretion, sell participation interests in the Senior Loan to one or more Persons, without notice to or the consent of the Junior Lender. In such event, the Junior Lender shall for all purposes of this Agreement be entitled to continue to deal with the Senior Lender as if such participation interests had not been sold.

(ii) The Senior Lender may, from time to time, in its sole discretion, make Transfers of interests in the Senior Loan to Affiliates of the Senior Lender, without notice to or the consent of the Junior Lender. All such transferees shall hold their interests in the Senior Loan subject to the terms of this Agreement, and the Junior Lender shall for all purposes of this Agreement be entitled to continue to deal with the Senior Lender as if such Transfer had not been made.

(iii) The Senior Lender may, from time to time, in its sole discretion, make Transfers of interests in the Senior Loan to one or more Qualified Transferees. All such transferees shall hold their interests in the Senior Loan subject to the terms of this Agreement.

(iv) In the case of a Transfer permitted by subparagraph (iii) above, the transferee must assume in writing the obligations of the Senior Lender hereunder and agree to be bound by the terms and provisions hereof. Such transferee shall also remake each of the representations and warranties contained herein for the benefit of the Junior Lender. At least five (5) days prior to such a Transfer, the Senior Lender shall provide to the Junior Lender a certification that such Transfer will be made in accordance with this paragraph, such certification to include the name and contact information of the Qualified Transferee.

(v) Notwithstanding any such Transfer or subsequent Transfer of the Senior Loan permitted hereunder, the Senior Loan and the Senior Loan Documents shall be and remain a senior obligation in the respects set forth in this Agreement to the Junior Loan and the Junior Loan Documents in accordance with the terms and provisions of this Agreement.

Section 5. Intentionally Omitted.

Section 6. Modifications, Amendments, Etc.

(a) The Senior Lender shall have the right without the consent of the Junior Lender in each instance to enter into any amendment, deferral, extension, modification, increase, renewal, replacement, consolidation, supplement or waiver (collectively, a "Senior Loan Modification") of the Senior Loan or the Senior Loan Documents, provided that no such Senior Loan Modification shall (i) increase the interest rate or principal amount of the Senior Loan, (ii) increase in any other material respect any monetary obligations of the Borrower under the Senior Loan Documents, (iii) extend or shorten the scheduled maturity date of the Senior Loan, except that the Senior Lender may permit the Borrower to exercise any extension options in accordance with the terms and provisions

UNOFFICIAL COPY

of the Senior Loan Documents, (iv) convert or exchange the Senior Loan into or for any other indebtedness or subordinate any of the Senior Loan to any indebtedness of the Borrower, (v) amend or modify the provisions limiting transfers of interests in the Borrower or the Premises, (vi) cross default the Senior Loan with any loan or credit facility other than as described in Section 3(b) hereof, or create a lien on the Premises as security for any other loan or credit facility other than as described in Section 3(b) hereof, (vii) obtain any contingent interest, additional interest or so-called "kicker" measured on the basis of the cash flow or appreciation of the Premises, or other similar equity participation, or (viii) extend the period during which voluntary prepayments are prohibited or during which prepayments require the payment of a prepayment fee or premium or yield maintenance charge or increase the amount of any such prepayment fee, premium or yield maintenance charge; provided, however, that in no event shall the Senior Lender be obligated to obtain the Junior Lender's consent to a Senior Loan Modification in the case of a work-out or other surrender, compromise, release, renewal or indulgence relating to the Senior Loan during the existence of a Continuing Senior Loan Event of Default, except that under no conditions shall action described in clause (i), with respect to increase in principal amount only, clause (iii) with respect to shortening the maturity only, or clause (viii) be taken without the written consent of the Junior Lender, which may given or withheld in its sole and absolute discretion. In addition and notwithstanding the foregoing provisions of this paragraph, any amounts funded by the Senior Lender under the Senior Loan Documents as a result of (A) the making of any Protective Advances or other advances by the Senior Lender, or (B) interest accruals or accretions and any compounding thereof, including default interest, shall not be deemed to contravene this paragraph. Any Senior Loan Modification that is not permitted by the foregoing provisions of this paragraph may be entered into with the written consent of the Junior Lender, which may given or withheld in its sole and absolute discretion.

(b) The Junior Lender shall have the right without the consent of the Senior Lender in each instance to enter into any amendment, deferral, extension, modification, increase, renewal, replacement, consolidation, supplement or waiver (collectively, a "Junior Loan Modification") of the Junior Loan or the Junior Loan Documents, provided that no such Junior Loan Modification shall (i) increase the interest rate or principal amount of the Junior Loan, (ii) increase in any other material respect any monetary obligations of the Borrower under the Junior Loan Documents, (iii) extend or shorten the scheduled maturity date of the Junior Loan, except that the Junior Lender may permit the Borrower to exercise any extension options in accordance with the terms and provisions of the Junior Loan Documents, (iv) convert or exchange the Junior Loan into or for any other indebtedness or subordinate any of the Junior Loan to any indebtedness of the Borrower, (v) provide for any additional contingent interest, additional interest or so-called "kicker" measured on the basis of the cash flow or appreciation of the Premises, (vi) cross default the Junior Loan with any loan or credit facility other than as described in Section 3(a) hereof, (vii) create a lien on the Premises as security for any other loan or credit facility other than as described in Section 3(a) hereof, or (viii) provide for any security for the Junior Loan from the Borrower or any Common Guarantor other than as described in the Junior Loan Documents as in effect on the date of this Agreement.

UNOFFICIAL COPY

Notwithstanding anything to the contrary contained herein, if an Event of Default exists under the Junior Loan Documents, the Junior Lender shall be permitted to modify or amend the Junior Loan Documents in connection with a work-out or other surrender, compromise, release, renewal or modification of the Junior Loan except that under no conditions shall action described in clause (i) with respect to increases in principal amounts only, clause (iii) with respect to shortening the maturity only, or clause (v) be taken by the Junior Lender without the written consent of the Senior Lender, which may be given or withheld in its sole and absolute discretion. In addition and notwithstanding the foregoing provisions of this paragraph, any amounts funded by the Junior Lender under the Junior Loan Documents as a result of (A) the making of any Protective Advances or other advances by the Junior Lender, or (B) interest accruals or accretions and any compounding thereof, including default interest, shall not be deemed to contravene this paragraph. Any Junior Loan Amendment that is not permitted by the foregoing provisions of this paragraph may be entered into with the written consent of the Senior Lender, which may be given or withheld in its sole and absolute discretion.

(c) The Senior Lender shall deliver to the Junior Lender copies of any and all modifications, amendments, extensions, consolidations, spreaders, restatements, alterations, changes or revisions to any one or more of the Senior Loan Documents, including, without limitation, any side letters, waivers or consents entered into, executed or delivered by the Senior Lender, within a reasonable time after any of such applicable instruments have been executed by the Senior Lender.

(d) The Junior Lender shall deliver to the Senior Lender copies of any and all modifications, amendments, extensions, consolidations, spreaders, restatements, alterations, changes or revisions to any one or more of the Junior Loan Documents, including, without limitation, any side letters, waivers or consents entered into, executed or delivered by the Junior Lender, within a reasonable time after any of such applicable instruments have been executed by the Junior Lender.

Section 7. Subordination of Junior Loan and Junior Loan Documents.

(a) The Junior Lender hereby subordinates and makes junior the Junior Loan, the Junior Loan Documents and the liens and security interests created thereby, and all rights, remedies, terms and covenants contained therein to (i) the Senior Loan, (ii) the liens and security interests created by the Senior Loan Documents, and (iii) all of the terms, covenants, conditions, rights and remedies contained in the Senior Loan Documents, and no amendments or modifications to the Senior Loan Documents or waivers of any provisions thereof shall affect the subordination thereof as set forth in this paragraph.

(b) Every document and instrument included within the Junior Loan Documents shall be subject and subordinate to each and every document and instrument included within the Senior Loan Documents and all extensions, modifications, consolidations, supplements, amendments, replacements and restatements of and to the Senior Loan Documents.

UNOFFICIAL COPY

(c) Until such time as Senior Loan Satisfaction has occurred, the Junior Lender shall not in any way, manner or respect seek to foreclose or otherwise enforce or realize on the Junior Loan, the Junior Loan Documents and the liens and security interests created thereby against the Premises or any of the other collateral that secures the Senior Loan, including, without limitation, any foreclosure of the Junior Mortgage against the Premises; provided, however, that (i) if the Senior Lender has commenced a foreclosure or other proceeding to realize on any collateral which secures both the Senior Loan and the Junior Loan, the Junior Lender may join in such foreclosure or other proceeding in order to protect and realize on its junior position in such collateral; (ii) if the Senior Lender has commenced any proceeding against any Common Guarantor, the Junior Lender may commence a proceeding against such Common Guarantor, provided that the Junior Lender expressly acknowledges in such proceeding that its right of recovery against such Common Guarantor is subordinate to the rights of the Senior Lender as provided in this Agreement; and (iii) the restriction contained in this paragraph shall no longer apply if an Event of Default under the Junior Loan has occurred and is continuing, and if a period of one hundred eighty-one (181) days or more has elapsed since the earliest date as of which such Event of Default occurred and the Junior Lender gave written notice of the occurrence of such Event of Default to the Senior Lender.

Section 8. Payment Subordination.

(a) Except (i) as otherwise expressly provided in this Agreement and (ii) in connection with the exercise by the Junior Lender of its rights and remedies in accordance with the terms of this Agreement, all of the Junior Lender's rights to payment of the Junior Loan and the obligations evidenced by the Junior Loan Documents are hereby subordinated to all of the Senior Lender's rights to payment by the Borrower and each Common Guarantor of the Senior Loan and the obligations secured by the Senior Loan Documents, and prior to Senior Loan Satisfaction the Junior Lender shall not accept or receive payments, including, without limitation, whether in cash or other property and whether received directly, indirectly or by set-off, counterclaim or otherwise, from the Borrower, the Premises or any Common Guarantor, and shall not take any action or commence any legal proceeding in order to recover any amount from the Borrower, the Premises or any Common Guarantor. If a Proceeding is pending or a Continuing Senior Loan Event of Default has occurred and is continuing, the Senior Lender shall be entitled to receive payment and performance in full of all amounts due or to become due to the Senior Lender before the Junior Lender is entitled to receive any payment on account of the Junior Loan. All payments or distributions upon or with respect to the Junior Loan which are received by the Junior Lender contrary to the provisions of this Agreement shall be received and held in trust by the Junior Lender for the benefit of the Senior Lender and shall be paid over to the Senior Lender in the same form as so received, with any necessary endorsement, and payments or distributions, in the case of cash, shall be applied to, or in the case of non-cash property or securities, shall be held as collateral for, the payment or performance of, the Senior Loan in accordance with the terms of the Senior Loan Documents. Nothing contained herein shall prohibit the Junior Lender from making Protective Advances and adding the amount thereof to the

UNOFFICIAL COPY

principal balance of the Junior Loan, notwithstanding the existence of a Default or Event of Default under the Senior Loan at such time.

(b) Notwithstanding anything to the contrary contained in this Agreement, including, without limitation, paragraph (a) of this Section, provided that no Event of Default shall then exist under the Senior Loan Documents, the Junior Lender may accept payments of any amounts due and payable from time to time which the Borrower is obligated to pay to the Junior Lender in accordance with the terms and conditions of the Junior Loan Documents as in effect on the date of this Agreement and as they may be modified in accordance with the terms of this Agreement, and the Junior Lender shall have no obligation to pay over to the Senior Lender any such amounts.

(c) In the event of a casualty to the buildings or improvements constructed on any portion of the Premises or a condemnation or taking under a power of eminent domain of all or any portion of the Premises, the Senior Lender shall have a first and prior interest in and to any payments, awards, proceeds, distributions, or consideration arising from any such event (the "Award"). If the amount of the Award is in excess of all amounts owed to the Senior Lender under the Senior Loan Documents, however, and either Senior Loan Satisfaction has occurred or the Borrower is entitled to a remittance of same under the Senior Loan Documents other than to restore the Premises, such excess Award or portion to be so remitted to the Borrower shall, to the extent permitted in the Senior Loan Documents, be paid to or at the direction of the Junior Lender, unless other Persons have claimed the right to such awards or proceeds, in which case the Senior Lender shall only be required to provide notice to the Junior Lender of such excess Award and of any other claims thereto. In the event of any competing claims for any such excess Award, the Senior Lender shall continue to hold such excess Award until the Senior Lender receives an agreement signed by all Persons making a claim to the excess Award or a final order of a court of competent jurisdiction directing the Senior Lender as to how and to which Persons the excess Award is to be distributed. Notwithstanding the foregoing, in the event of a casualty or condemnation, the Senior Lender shall release the Award from any such event to the Borrower if and to the extent required by the terms and conditions of the Senior Loan Documents in order to repair and restore the Premises in accordance with the terms and provisions of the Senior Loan Documents. Any portion of the Award made available to the Borrower for the repair or restoration of the Premises shall not be subject to attachment by the Junior Lender.

Section 9. Rights of Subrogation; Bankruptcy.

(a) Each of the Junior Lender and the Senior Lender hereby waives any requirement for marshaling of assets thereby in connection with any foreclosure of any security interest or any other realization upon collateral in respect of the Senior Loan Documents or the Junior Loan Documents, as applicable, or any exercise of any rights of set-off or otherwise. Each of the Junior Lender and the Senior Lender assumes all responsibility for keeping itself informed as to the condition, financial or otherwise, of the Borrower, each Common Guarantor, the condition of the Premises and all other collateral and other circumstances and, except for notices expressly required by this

UNOFFICIAL COPY

Agreement, neither the Senior Lender nor the Junior Lender shall have any duty whatsoever to obtain, advise or deliver information or documents to the other relative to such condition, business, assets or operations. The Junior Lender agrees that the Senior Lender owes no fiduciary duty to the Junior Lender in connection with the administration of the Senior Loan and the Senior Loan Documents and the Junior Lender agrees not to assert any such claim. The Senior Lender agrees that the Junior Lender owes no fiduciary duty to the Senior Lender in connection with the administration of the Junior Loan and the Junior Loan Documents and the Senior Lender agrees not to assert any such claim.

(b) No payment or distribution to the Senior Lender pursuant to the provisions of this Agreement and no Protective Advance by the Junior Lender shall entitle the Junior Lender to exercise any right of subrogation in respect thereof prior to Senior Loan Satisfaction, or result in the creation of any lien in favor of the Junior Lender on the Premises or any other collateral for the Senior Loan that is either prior to or on a parity with the lien of the Senior Lender on the Premises and the other collateral for the Senior Loan.

(c) The provisions of this Agreement shall be applicable both before and after the commencement, whether voluntary or involuntary, of any case, proceeding or other action against the Borrower or any Common Guarantor under any existing or future law of any jurisdiction relating to bankruptcy, insolvency, reorganization or relief of debtors (a "Proceeding"). Prior to Senior Loan Satisfaction, the Junior Lender shall not, and shall not solicit any person or entity to, and shall not direct or cause the Borrower or any entity which controls the Borrower, or any Common Guarantor or any entity which controls any Common Guarantor (the "Borrower/Common Guarantor Group") to (i) commence any Proceeding; (ii) institute proceedings to have the Borrower or any Common Guarantor adjudicated a bankrupt or insolvent; (iii) consent to or acquiesce in, the institution of bankruptcy or insolvency proceedings against the Borrower or any Common Guarantor; (iv) file a petition or consent to the filing of a petition seeking reorganization, arrangement, adjustment, winding-up, dissolution, composition, liquidation or other relief by or on behalf of the Borrower or any Common Guarantor; (v) seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for the Borrower, any Common Guarantor, the Premises or any portion thereof, or any other collateral securing the Senior Loan or any portion thereof; (vi) make an assignment for the benefit of any creditor of the Borrower or any Common Guarantor; (vii) seek to consolidate the Premises or any other assets of the Borrower or any Common Guarantor with the assets of any member of the Borrower/Common Guarantor Group in any proceeding relating to bankruptcy, insolvency, reorganization or relief of debtors; or (viii) take any action in furtherance of any of the foregoing.

(d) If the Junior Lender is deemed to be a creditor of the Borrower in any Proceeding (i) the Junior Lender shall not make any election, give any consent, commence any action or file any motion, claim, obligation, notice or application or take any other action in such Proceeding by or against the Borrower or any Common Guarantor without the prior consent of the Senior Lender; (ii) the Senior Lender may vote

UNOFFICIAL COPY

in any such Proceeding any and all claims of the Junior Lender, and the Junior Lender hereby appoints the Senior Lender as its agent, and grants to the Senior Lender an irrevocable power of attorney coupled with an interest, and its proxy, for the purpose of exercising any and all rights and taking any and all actions available to the Junior Lender in connection with any case by or against the Borrower or any Common Guarantor in such Proceeding, including without limitation, the right to file and prosecute any claims, to vote to accept or reject a plan, to make any election under Section 1111(b) of the Bankruptcy Code; provided, however, that with respect to any proposed plan of reorganization in respect of which creditors are voting, the Senior Lender may vote on behalf of the Junior Lender only if the proposed plan would result in the Senior Lender being "impaired" (as such term is defined in the United States Bankruptcy Code); and (iii) the Junior Lender shall not challenge the validity or amount of any claim submitted by the Senior Lender in good faith in such Proceeding, or any valuations of the Premises or other Senior Loan collateral submitted by the Senior Lender in good faith in such Proceeding, or take any other action in such Proceeding which is adverse to the Senior Lender's enforcement of its claim or receipt of adequate protection (as defined in the Bankruptcy Code).

Section 10. Rights of Cure.

(a) Prior to the Senior Lender commencing any Enforcement Action under the Senior Loan Documents, the Senior Lender shall provide written notice of the Event of Default on the Senior Loan which would permit the Senior Lender to commence such Enforcement Action to the Junior Lender whether or not the Senior Lender is obligated to give notice thereof to the Borrower or any Common Guarantor (each, a "Senior Loan Default Notice"), and shall permit the Junior Lender an opportunity to cure such Event of Default in accordance with the provisions of this paragraph. If the Event of Default is a monetary Event of Default, the Junior Lender shall have until five (5) Business Days after the later of the giving of the Senior Loan Default Notice, and the expiration of the Borrower's cure provision, if any, to cure such monetary Event of Default. With the exception of a cure by the Junior Lender of an Event of Default in the payment of the Senior Loan in full on the maturity date thereof, the Junior Lender shall not be required, in order to effect a cure hereunder, to pay any interest calculated at the default rate under the Senior Loan Documents to the extent the same is in excess of the rate of interest which would have been payable by the Borrower in the absence of such Event of Default. If the Event of Default is of a non-monetary nature, the Junior Lender shall have the same period of time as the Borrower under the Senior Loan Documents to cure such non-monetary Event of Default; provided, however if such non-monetary Event of Default is susceptible of cure but cannot reasonably be cured within such period and if curative action was promptly commenced and is being continuously and diligently pursued by the Junior Lender, the Junior Lender shall be given an additional period of time as is reasonably necessary for the Junior Lender in the exercise of due diligence to cure such non-monetary Event of Default for so long as (i) the Junior Lender makes or causes to be made timely payment of the Borrower's regularly scheduled monthly principal and interest payments under the Senior Loan and any other amounts due under the Senior Loan Documents, (ii) such additional period of time does not exceed thirty (30) days,

UNOFFICIAL COPY

unless such non-monetary Event of Default is of a nature that cannot reasonably be cured within such thirty (30) days, in which case, the Junior Lender shall have such additional time as is reasonably necessary to cure such non-monetary Event of Default, (iii) such Event of Default is not caused by a bankruptcy, insolvency or assignment for the benefit of creditors of the Borrower, and (iv) during such additional non-monetary cure period, there is no material impairment to the construction, value, use or operation of the Premises. Any additional cure period granted to the Junior Lender hereunder shall automatically terminate upon the bankruptcy or similar insolvency of the Borrower. In the event it elects to cure any monetary or non-monetary Event of Default, the Junior Lender shall defend and hold harmless the Senior Lender for all cost, expenses, losses, liabilities, obligations, damages, penalties, costs and disbursements imposed on, incurred by or asserted against the Senior Lender arising from or during the period of such cure.

Section 11. Right to Purchase Senior Loan.

(a) If the Senior Loan has been accelerated or any Enforcement Action has been commenced and is continuing under the Senior Loan Documents (a "Purchase Option Event"), upon ten (10) Business Days' prior written notice to the Senior Lender, the Junior Lender shall have the right to purchase, in whole but not in part, the Senior Loan for a price equal to the outstanding principal balance thereof, together with all accrued interest and other amounts due thereon, including, without limitation, any late charges, default interest, exit fees, prepayment premiums and post-petition interest, any Protective Advances made by the Senior Lender, and any interest charged by the Senior Lender on any advances for monthly payments of principal or interest on the Senior Loan or on any Protective Advances, including all costs and expenses, including legal fees and expenses, actually incurred by the Senior Lender, in enforcing the terms of the Senior Loan Documents (the "Loan Purchase Price"). Concurrently with payment to the Senior Lender of the Loan Purchase Price, the Senior Lender shall deliver or cause to be delivered the Junior Lender all Senior Loan Documents held by or on behalf of the Senior Lender and shall execute in favor of the Junior Lender or its designee assignment documentation, in form and substance reasonably acceptable to the Junior Lender, at the sole cost and expense of the Junior Lender, to assign the Senior Loan and its rights under the Senior Loan Documents, without recourse, representations or warranties, except for representations as to the outstanding balance of the Senior Loan and as to the Senior Lender's not having assigned or encumbered its rights in the Senior Loan. The right of the Junior Lender to purchase the Senior Loan shall automatically terminate (i) upon a transfer of the Premises by foreclosure or other judicial sale, sale by power of sale, or delivery of a deed in lieu of foreclosure, or (ii) if a Purchase Option Event ceases to exist.

(b) The Junior Lender shall not to enter any agreement with the Borrower or any Affiliate thereof to purchase the Senior Loan pursuant to paragraph (a) above or in connection with any refinancing of the Senior Loan in any manner designed to avoid or circumvent the provisions of the Senior Loan Documents which require the payment of a prepayment fee or yield maintenance charge in connection with a prepayment of the Senior Loan by the Borrower.

UNOFFICIAL COPY

Section 12. Intentionally Omitted.

Section 13. Additional Understandings. For as long as the Junior Loan remains outstanding:

(a) The Senior Lender shall promptly notify the Junior Lender if the Borrower seeks or requests a release of the lien of the Senior Loan or seeks or requests the Senior Lender's consent to, or takes any action in connection with or in furtherance of, a sale or transfer of all or any material portion of the Premises, the granting of a further mortgage, deed of trust or similar encumbrance against the Premises or a prepayment or refinancing of the Senior Loan. In the event of a request by the Borrower for the Senior Lender's consent to either (i) the sale or transfer of all or any material portion of the Premises, or (ii) the granting of a further mortgage, deed of trust or similar encumbrance against the Premises, the Senior Lender shall, if the Senior Lender has the right to consent, obtain the prior written consent of the Junior Lender prior to the Senior Lender's granting of its consent or agreement thereto.

Section 14. Obligations Hereunder Not Affected.

(a) All rights, interests, agreements and obligations of the Senior Lender and the Junior Lender under this Agreement shall remain in full force and effect irrespective of:

(i) any lack of validity or enforceability of the Senior Loan Documents or the Junior Loan Documents or any other agreement or instrument relating thereto;

(ii) any taking, exchange, release or non-perfection of any other collateral, or any taking, release or amendment or waiver of or consent to or departure from any guaranty, for all or any portion of the Senior Loan or the Junior Loan;

(iii) any manner of application of collateral, or proceeds thereof, to all or any portion of the Senior Loan or the Junior Loan, or any manner of sale or other disposition of any collateral for all or any portion of the Senior Loan or the Junior Loan or any other assets of the Borrower or any Affiliates of the Borrower;

(iv) any change, restructuring or termination of the structure or existence of the Borrower, any Common Guarantor or any Affiliates of the Borrower or any Common Guarantor; or

(v) any other circumstance which might otherwise constitute a defense available to, or a discharge of, the Borrower, any Common Guarantor or a subordinated creditor or a senior lender subject to the terms hereof.

(b) This Agreement shall continue to be effective or be reinstated, as the case may be, if at any time any payment of all or any portion of the Senior Loan is rescinded

UNOFFICIAL COPY

or must otherwise be returned by the Senior Lender or the Junior Lender upon the insolvency, bankruptcy or reorganization of the Borrower or any Common Guarantor or otherwise, all as though such payment had not been made.

Section 15. Notices. All notices and other communications provided for in this Agreement (“Notices”) shall be in writing. The “Notice Addresses” of the parties for purposes of this Agreement are as follows:

Senior Lender: LaSalle Bank National Association
135 South LaSalle Street
Suite 2800
Chicago, Illinois 60603
Attention: Commercial Real Estate Division

With a copy to: Schwartz Cooper Chartered
180 North LaSalle Street
Suite 2700
Chicago, Illinois 60601
Attention: Michael S. Kurtzon, Esq.

Junior Lender: LaSalle Bank National Association
135 South LaSalle Street
Suite 315
Chicago, Illinois 60603
Attention: Wealth Management Group

With a copy to: Schwartz Cooper Chartered
180 North LaSalle Street
Suite 2700
Chicago, Illinois 60601
Attention: Michael S. Kurtzon, Esq.

or such other address as a party may designate by notice duly given in accordance with this Section to the other parties. A Notice to a party shall be effective when delivered to such party’s Notice Address by any means, including, without limitation, personal delivery by the party giving the Notice, delivery by United States regular, certified or registered mail, or delivery by a commercial courier or delivery service. If the Notice Address of a party includes a facsimile number or electronic mail address, Notice given by facsimile or electronic mail shall be effective when delivered at such facsimile number or email address. If delivery of a Notice is refused, it shall be deemed to have been delivered at the time of such refusal of delivery. The party giving a Notice shall have the burden of establishing the fact and date of delivery or refusal of delivery of a Notice.

UNOFFICIAL COPY

Section 16. Estoppel Certificates.

(a) The Junior Lender shall, within ten (10) days following a request from the Senior Lender, provide the Senior Lender with a written statement setting forth the then current outstanding principal balance of the Junior Loan, the aggregate accrued and unpaid interest under the Junior Loan, and stating whether to the best of Junior Lender's knowledge any Default or Event of Default exists under the Junior Loan.

(b) The Senior Lender shall, within ten (10) days following a request from the Junior Lender, provide the Junior Lender with a written statement setting forth the then current outstanding principal balance of the Senior Loan, the aggregate accrued and unpaid interest under the Senior Loan, and stating whether to the best of the Senior Lender's knowledge any Default or Event of Default exists under the Senior Loan.

Section 17. Further Assurances. So long as all or any portion of the Senior Loan and the Junior Loan remains unpaid and the Senior Mortgage encumbers any portion of the Premises, the Junior Lender and the Senior Lender shall each execute, acknowledge and deliver in recordable form and upon demand of the other, any other instruments or agreements reasonably required in order to carry out the provisions of this Agreement or to effectuate the intent and purposes hereof.

Section 18. No Third Party Beneficiaries; No Modification. The parties hereto do not intend the benefits of this Agreement to inure to the Borrower, any Common Guarantor or any other Person. This Agreement may not be changed or terminated orally, but only by an agreement in writing signed by the party against whom enforcement of any change is sought. Without limiting the foregoing, if the Junior Mortgage shall be satisfied, released or otherwise relinquished by the Junior Lender, the provisions herein related to the Junior Mortgage shall not be affected.

Section 19. Successors and Assigns. This Agreement shall bind all successors and permitted assigns of the Junior Lender and the Senior Lender and shall inure to the benefit of all successors and permitted assigns of the Senior Lender and the Junior Lender.

Section 20. Counterpart Originals. This Agreement may be executed in counterpart originals, each of which shall constitute an original, and all of which together shall constitute one and the same agreement.

Section 21. Legal Construction. In all respects, including, without limitation, matters of construction and performance of this Agreement and the obligations arising hereunder, this Agreement shall be governed by, and construed in accordance with, the internal laws of the State of Illinois applicable to agreements intended to be wholly performed within the State of Illinois.

Section 22. No Waiver; Remedies. No failure on the part of the Senior Lender to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right hereunder preclude any other or further exercise

UNOFFICIAL COPY

thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

Section 23. No Joint Venture. Nothing provided herein is intended to create a joint venture, partnership, tenancy-in-common or joint tenancy relationship between or among any of the parties hereto.

Section 24. Captions. The captions in this Agreement are inserted only as a matter of convenience and for reference, and are not and shall not be deemed to be a part hereof.

Section 25. Conflicts. In the event of any conflict, ambiguity or inconsistency between the terms and conditions of this Agreement and the terms and conditions of any of the Senior Loan Documents or the Junior Loan Documents, the terms and conditions of this Agreement shall control.

Section 26. No Release. Nothing herein contained shall operate to release the Borrower or any Common Guarantor from its or his obligation to keep and perform all of the terms, conditions, obligations, covenants and agreements contained in the Senior Loan Documents, or any liability of the Borrower or any Common Guarantor under the Senior Loan Documents, or to release the Borrower or any Common Guarantor from its or his obligation to keep and perform all of the terms, conditions, obligations, covenants and agreements contained in the Junior Loan Documents or any liability of the Borrower or any Common Guarantor under the Junior Loan Documents.

Section 27. Continuing Agreement. This Agreement is a continuing agreement and shall remain in full force and effect until the earliest of (i) Senior Loan Satisfaction, (ii) transfer of the Premises by foreclosure of the Senior Mortgage or the exercise of the power of sale contained therein or by deed in lieu of foreclosure, or (iii) payment in full of the Junior Loan; provided, however, that any rights or remedies of either party hereto arising out of any breach of any provision hereof occurring prior to such date of termination shall survive such termination.

Section 28. Entire Agreement. This Agreement sets forth all of the covenants, promises, agreements, conditions and understandings of the parties relating to the subject matter of this Agreement, and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them relating to the subject matter of this Agreement other than as are set forth herein.

Section 29. Severability. In the event that any provision of this Agreement or the application hereof to any party hereto shall, to any extent, be invalid or unenforceable under any applicable statute, regulation, or rule of law, then such provision shall be deemed inoperative to the extent that it may conflict therewith and shall be deemed modified to conform to such statute, regulation or rule of law, and the remainder of this Agreement and the application of any such invalid or unenforceable provisions to parties, jurisdictions or circumstances other than to whom or to which it is held invalid or unenforceable, shall not be affected thereby nor shall same affect the validity or enforceability of any other provision of this Agreement.

UNOFFICIAL COPY

Section 30. Expenses.

(a) To the extent not paid by the Borrower or out of or from any collateral securing the Senior Loan which is realized by the Senior Lender, the Junior Lender agrees upon demand to pay to the Senior Lender the amount of any and all reasonable expenses, including, without limitation, the reasonable fees and expenses of counsel and of any experts or agents, which the Senior Lender may incur in connection with the (i) exercise or enforcement of any of the rights of the Senior Lender against the Junior Lender hereunder to the extent that the Senior Lender is the prevailing party in any dispute with respect thereto or (ii) failure by the Junior Lender to perform or observe any of the provisions hereof.

(b) To the extent not paid by the Borrower or out of or from any collateral securing the Junior Loan which is realized by the Junior Lender, the Senior Lender agrees upon demand to pay to the Junior Lender the amount of any and all reasonable expenses, including, without limitation, the reasonable fees and expenses of counsel and of any experts or agents, which the Junior Lender may incur in connection with the (i) exercise or enforcement of any of the rights of the Junior Lender against the Senior Lender hereunder to the extent that the Junior Lender is the prevailing party in any dispute with respect thereto or (ii) failure by the Senior Lender to perform or observe any of the provisions hereof.

Section 31. Injunction, Declaratory Judgment, Specific Performance. The Senior Lender and the Junior Lender each acknowledge, and waive any defense based on a claim, that monetary damages are not an adequate remedy to redress a breach by the other hereunder and that a breach by either the Senior Lender or the Junior Lender hereunder would cause irreparable harm to the other. Accordingly, the Senior Lender and the Junior Lender agree that upon a breach of this Agreement by the other, the remedies of injunction, declaratory judgment and specific performance shall be available to such non-breaching party.

Section 32. Mutual Disclaimer.

(a) Each of the Senior Lender and the Junior Lender are sophisticated lenders or investors in real estate and their respective decision to enter into the Senior Loan and the Junior Loan is based upon their own independent expert evaluation of the terms, covenants, conditions and provisions of, respectively, the Senior Loan Documents and the Junior Loan Documents and such other matters, materials and market conditions and criteria which each of the Senior Lender and the Junior Lender deem relevant. Each of the Senior Lender and the Junior Lender has not relied in entering into this Agreement, and respectively, the Senior Loan and the Senior Loan Documents, or the Junior Loan and the Junior Loan Documents, upon any oral or written information, representation, warranty or covenant from the other, or any of the other's representatives, employees, Affiliates or agents other than the representations and warranties of the other contained herein. Each of the Senior Lender and the Junior Lender further acknowledges that no employee, agent or representative of the other has been authorized to make, and that each of the Senior Lender and the Junior Lender have not relied upon, any statements,

UNOFFICIAL COPY

representations, warranties or covenants other than those specifically contained in this Agreement. Without limiting the foregoing, each of the Senior Lender and the Junior Lender acknowledges that the other has made no representations or warranties as to the Senior Loan or the Junior Loan or the Premises, including, without limitation, the cash flow of the Premises, the value, marketability, condition or future performance of the Premises, the existence, status, adequacy or sufficiency of the leases, or the tenancies or occupancies of the Premises, to pay all amounts which may become due from time to time pursuant to the Senior Loan or the Junior Loan.

(b) Each of the Senior Lender and the Junior Lender acknowledges that the Senior Loan and the Junior Loan Documents are distinct, separate transactions and loans, separate and apart from each other.

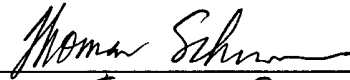
**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK;
SIGNATURE PAGE FOLLOWS]**

UNOFFICIAL COPY

IN WITNESS WHEREOF, the Senior Lender and the Junior Lender have executed this Agreement as of the date and year first set forth above.

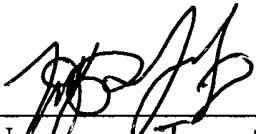
SENIOR LENDER:

LASALLE BANK NATIONAL ASSOCIATION

By: 
Printed Name: THOMAS SCHROEDER
Title: SENIOR VICE PRESIDENT

JUNIOR LENDER:

LASALLE BANK NATIONAL ASSOCIATION

By: 
Printed Name: Timothy P. Kelly
Title: Sr. Vice President

Property of Cook County Clerk's Office

UNOFFICIAL COPY

STATE OF Illinois)
) ss.
COUNTY OF COOK)

I, Sharon Zaban Letchinger a Notary Public in and for said County, in the State aforesaid, do hereby certify that Thomas Schroeder, the Senior Vice President of **LASALLE BANK NATIONAL ASSOCIATION**, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such Senior Vice President appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said Bank, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal, this 20th day of December, 2007.

[Signature]
NOTARY PUBLIC

(SEAL)



UNOFFICIAL COPY

STATE OF Illinois)
) ss.
COUNTY OF Cook)

I, Sharon Zaban Letchinger a Notary Public in and for said County, in the State aforesaid, do hereby certify that Timothy P. Finley, the Senior Vice President of **LASALLE BANK NATIONAL ASSOCIATION**, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such Senior Vice President appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said Bank, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal, this 26th day of December, 2007.

[Signature]
NOTARY PUBLIC

(SEAL)



UNOFFICIAL COPY

JOINDER OF BORROWER AND COMMON GUARANTOR

The undersigned **DIXMOOR TOWNE CENTER, L.L.C.**, an Illinois limited liability company, being the Borrower as defined in the foregoing Agreement, **S.F. HOLDINGS, L.L.C.**, an Illinois limited liability company and **MICHAEL SILVER**, being the Initial Common Guarantor as defined in the foregoing Agreement, hereby join in the foregoing Agreement, consent to the provisions thereof, agree not to make any payment, or cause or permit any act to occur, that is inconsistent with the provisions of said Agreement, agree that until such time as the Junior Loan has been fully paid and performed, as between the undersigned and the Senior Lender, in the event of any conflict between said Agreement and the Senior Loan Documents, said Agreement shall control, and agree that until such time as Senior Loan Satisfaction has occurred, as between the undersigned and the Junior Lender, in the event of any conflict between said Agreement and the Junior Loan Documents, said Agreement shall control.

[JOINDER SIGNATURE PAGE FOLLOWS THIS PAGE]

UNOFFICIAL COPY

BORROWER:

DIXMOOR TOWNE CENTER, L.L.C., an Illinois limited liability company

By: Inner City Retail, L.L.C., an Illinois limited liability company, its manager

By: [Signature]
Name: Nicholas Little
Title: manager

INITIAL COMMON GUARANTOR:

S.F. HOLDINGS, L.L.C., an Illinois limited liability company

By: Aaron Holdings, Inc., an Illinois corporation, its manager

By: [Signature]
Its: president

[Signature]
MICHAEL SILVER individually

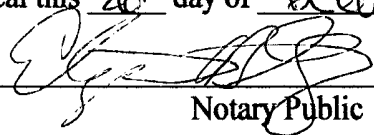
Property of Cook County Clerk's Office

UNOFFICIAL COPY

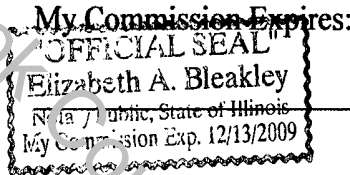
STATE OF ILLINOIS)
) SS.
COUNTY OF Cook)

The undersigned, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that Michael Silver, the Manager, Inner City Retail, L.L.C., an Illinois limited liability company, the manager of DIXMOOR TOWNE CENTER, L.L.C., an Illinois limited liability company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such Manager, appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said limited liability company, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 20th day of December, 2007.



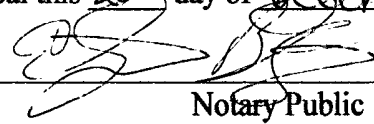
Notary Public



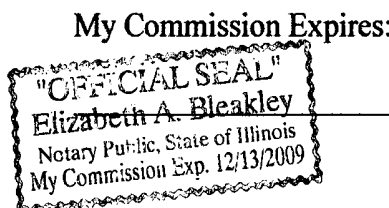
STATE OF ILLINOIS)
) SS.
COUNTY OF Cook)

The undersigned, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that Michael Silver, the Sole Director and President Aaron Holdings, Inc., an Illinois corporation, the manager of S.F. HOLDINGS, L.L.C., an Illinois limited liability company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such _____, appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said limited liability company, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 20th day of December, 2007.



Notary Public

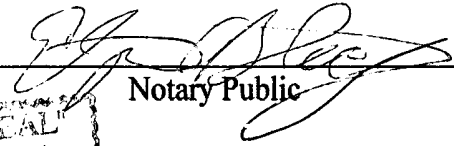


UNOFFICIAL COPY

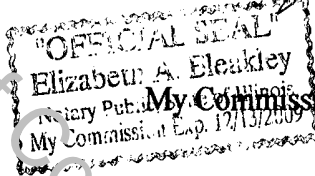
STATE OF ILLINOIS)
) SS.
COUNTY OF Cook)

The undersigned, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that Michael Silver, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as his own free and voluntary act, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 20th day of December, 2007.



Notary Public



My Commission Expires: _____

Property of Cook County Clerk's Office

UNOFFICIAL COPY

EXHIBIT "A"

LEGAL DESCRIPTION

PARCEL 1:

LOT 1 IN THE DIXMOOR TOWNE CENTER SUBDIVISION, IN THE SOUTHWEST 1/4 OF THE NORTHWEST 1/4 OF SECTION 7, TOWNSHIP 36 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED OCTOBER 4, 2007 AS DOCUMENT NUMBER 0727715150, IN COOK COUNTY, ILLINOIS.

PARCEL 2:

NON-EXCLUSIVE RECIPROCAL EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CREATED BY OPERATING AND EASEMENT AGREEMENT DATED OCTOBER 2, 2007 AND RECORDED OCTOBER 10, 2007 AS DOCUMENT 0727734097 MADE BY AND BETWEEN DIXMOOR TOWNE CENTER, L.L.C., AN ILLINOIS LIMITED LIABILITY COMPANY AND ALDI, INC., AN ILLINOIS CORPORATION, FOR THE PURPOSE OF INGRESS AND EGRESS, PEDESTRIAN PASSAGE OVER THE AREAS AS DEFINED THEREIN AND SHOWN ON "EXHIBIT C" OF SAID AGREEMENT, THE USE OF COMMON UTILITY LINES, THE DISCHARGE OF SURFACE STORM WATER DRAINAGE, THE CONSTRUCTION OF CURBS, DRIVEWAYS AND SIGNS AND THE REPAIR, MAINTENANCE AND REPLACEMENT OF PARTY WALLS.

ADDRESS: SE corner of West 145th Street and Dixie Highway
Dixmoor, IL

PINS: 29-07-127-005 thru -008;
29-07-127-012 thru -022;
29-07-127-025 thru -044;
29-07-127-047 and -048;
29-07-128-003 thru -022;
29-07-136-001 thru -004;
29-07-136-011
29-07-136-014 thru -024;
29-07-136-027 and -028;
29-07-136-033 thru -039; and
29-07-136-041

UNOFFICIAL COPY

EXHIBIT B

SENIOR LOAN DOCUMENTS

1. Construction Loan Agreement
2. Promissory Note
3. Construction Mortgage, Security Agreement, Assignment of Rents and Leases and Fixture Filing
4. Assignment of Rents and Leases
5. Environmental Indemnity Agreement
6. Guaranty of Payment and Performance
7. Uniform Commercial Code Financing Statements for filing with Illinois Secretary of State and Cook County
8. Certificate of Representations, Warranties and Covenants
9. Collateral Assignment of Development Agreement
10. Assignment and Subordination of Management Agreement
11. Assignment of Plans, Specifications, Construction and Service Contracts, Licenses and Permits
12. Account Pledge Agreement
13. Assignment of Site Improvements Escrow Agreement

UNOFFICIAL COPY

EXHIBIT C

JUNIOR LOAN DOCUMENTS

1. Construction Loan Agreement
2. Promissory Note
3. Junior Construction Mortgage, Security Agreement, Assignment of Rents and Leases and Fixture Filing
4. Junior Assignment of Rents and Leases
5. Environmental Indemnity Agreement
6. Guaranty of Payment and Performance
7. Uniform Commercial Code Financing Statements for filing with Illinois Secretary of State and Cook County
8. Certificate of Representations, Warranties and Covenants
9. Collateral Assignment of Development Agreement
10. Assignment and Subordination of Management Agreement
11. Assignment of Plans, Specifications, Construction and Service Contracts, Licenses and Permits
12. Account Pledge Agreement
13. Assignment of Site Improvements Escrow Agreement