


B 10 (Official Form 10) (12/08)

<b>UNITED STATES BANKRUPTCY COURT</b>		<b>PROOF OF CLAIM</b>
Name of Debtor <b>Opus West Corporation</b>		Case Number <b>09-34356 (hdh)</b>
NOTE This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property) <b>U.S. Bank National Association</b>		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim  Court Claim Number: _____ (If known)  Filed on _____
Name and address where notices should be sent <b>See attached Addendum</b>  Telephone number _____		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.  <input type="checkbox"/> Check this box if you are the debtor or trustee in this case.
Name and address where payment should be sent (if different from above)  Telephone number _____		
<b>1. Amount of Claim as of Date Case Filed:</b> <b>Not less than \$5,832,288.12</b>  If all or part of your claim is secured, complete item 4 below, however, if all of your claim is unsecured, do not complete item 4.  If all or part of your claim is entitled to priority, complete item 5.  <input checked="" type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		<b>5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507(a).</b> If any portion of your claim falls in one of the following categories, check the box and state the amount.  Specify the priority of the claim  <input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B)  <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. § 507(a)(4)  <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. § 507(a)(5)  <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507(a)(7)  <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. § 507(a)(8)  <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. § 507(a)(____)  <b>Amount entitled to priority:</b> \$ _____  <small>*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>
<b>2. Basis for Claim:</b> _____ <b>Haven Point Project. See attached Addendum</b> (See instruction #2 on reverse side)		
<b>3. Last four digits of any number by which creditor identifies debtor:</b> _____  <b>3a. Debtor may have scheduled account as:</b> _____ (See instruction #3a on reverse side)		
<b>4. Secured Claim (See instruction #4 on reverse side)</b> Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.  Nature of property or right of setoff: <input checked="" type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input checked="" type="checkbox"/> Other Describe: _____  Value of Property: \$ _____ Annual Interest Rate _____ %  Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: _____  Amount of Secured Claim: See attached Addendum    Amount Unsecured: See attached Addendum		
<b>6. Credits:</b> The amount of all payments on this claim has been credited for the purpose of making this proof of claim.		
<b>7. Documents:</b> Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See instruction 7 and definition of "redacted" on reverse side).  DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.  If the documents are not available, please explain _____		
Date: <b>11-5-09</b> Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any. <b>Ziad W. Amra Vice President U.S. Bank N.A.</b>		<b>FOR COURT USE ONLY</b>  <b>OPUS WEST</b>  00530

Josiah M. Daniel, III, SBT #05358500  
Angela B. Degeyter, SBT # 24059669  
**VINSON & ELKINS L.L.P.**  
2001 Ross Avenue, Suite 3700  
Dallas, Texas 75201-2975  
Tel: (214) 220-7700  
Fax: (214) 220-7716

And

Thomas O. Kelly, III  
**DORSEY & WHITNEY LLP**  
Suite 1500, 50 South Sixth Street  
Minneapolis, MN 55402-1498  
Tel: (612) 340-2600  
Fax: (612) 340-2868

**COUNSEL FOR U.S. BANK  
NATIONAL ASSOCIATION**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>In re:</b>	)	<b>Chapter 11</b>
	)	
<b>OPUS WEST CORPORATION, et al.,</b>	)	<b>Case No. 09-34356 (hdh)</b>
	)	
<b>Debtors.</b>	)	<b>Jointly Administered</b>
	)	

**ADDENDUM TO PROOF OF CLAIM**

U.S. Bank National Association, in its capacity as Administrative Bank (in such capacity, "U.S. Bank" or the "Administrative Bank"), by and through its undersigned counsel, hereby files this *Addendum to Proof of Claim* (this "Proof of Claim"). As described herein, U.S. Bank is asserting claims against Opus West Corporation ("Opus West"), Case No. 09-34356 (Opus West its affiliates, which are being jointly administered in this case are collectively referred to herein as the "Debtors"). This Proof of Claim is filed to preserve U.S. Bank's rights and remedies, of every nature, pursuant to those certain notes, contracts, and agreements more fully discussed herein.

## **I. FACTUAL BACKGROUND**

1. On July 6, 2009 (the "Petition Date"), the Debtors filed voluntary petitions under chapter 11 of title 11 of the Bankruptcy Code commencing the chapter 11 cases.

2. The Debtors continue in possession of their property and are operating and managing their businesses as debtors in possession pursuant to Bankruptcy Code §§ 1107(a) and 1108.

3. No request has been made for the appointment of a trustee or examiner in these cases.

### **The Haven Point Project**

4. Pursuant to a Construction Loan Agreement dated December 13, 2007 (the "Haven Loan Agreement") by and among Opus West, the Administrative Bank, and U.S. Bank and certain other parties as lenders thereunder (collectively, the "Haven Banks"), the Haven Banks made loans (the "Haven Loans") to Opus West in connection with the construction of an office complex known as Haven Point ("Haven Point") on certain premises (the "Haven Premises") in the City Rancho Cucamonga, California (the "Haven Point Project"). As of the Petition Date, the principal amount due under the Haven Loan Agreement and other Loan Documents<sup>1</sup> was \$9,229,722.59, and accrued interest was not less than \$244,074.89.<sup>2</sup>

5. Opus West's obligations to the Haven Banks under the Haven Loan Agreement and the other Loan Documents, including, without limitation, Opus West's obligation to pay the Administrative Bank's and the Haven Banks' costs and expenses (including reasonable attorneys' fees) incurred in connection with the Haven Loans, are secured by the Haven Premises

---

<sup>1</sup> Unless the context otherwise indicates, capitalized terms used in this section and not defined herein shall have the meanings provided in the Haven Loan Agreement.

<sup>2</sup> See Loan Obligation Summary, attached hereto as Exhibit A.

and other collateral (collectively, the "Haven Collateral") described in various Loan Documents, including, without limitation:

- (a) a Promissory Note Secured by Deed of Trust (Construction), dated as of January 2, 2008, between Opus West and U.S. Bank, individually and as agent for the other Banks party to the Loan Agreement;
- (b) a Construction Deed of Trust dated as of December 12, 2007 among Opus West, as Trustor, Chicago Title Insurance, as Trustee, and U.S. Bank, as Beneficiary (the "Construction Deed of Trust");
- (c) an Indemnity Agreement (Borrower), between Opus West and U.S. Bank, individually and as agent for the other Banks party to the Haven Loan Agreement;
- (d) an Assignment of Permits Licenses, and Approvals, dated as of December 13, 2007 between Opus West and U.S. Bank, individually and as agent for the other Banks party to the Haven Loan Agreement;
- (e) an Assignment of Contracts, Plans and Specifications dated as of December 13, 2007 between Opus West and U.S. Bank, individually and as agent for the other Banks party to the Haven Loan Agreement; and
- (f) an Assignment of Plans and Related Agreements dated as of February, 2008 by Opus West in favor of U.S. Bank, individually and as agent for the Banks party to the Haven Loan Agreement.<sup>3</sup>

6. Certain defaults under the Haven Loan Agreement and other Loan Documents were in existence on the Petition Date. By the letter dated March 13, 2009,<sup>4</sup> and by letter dated April 14, 2009,<sup>5</sup> the Administrative Bank notified Opus West of the existing defaults and that the Administrative Bank had accelerated and declared, on behalf of the Haven Banks, all of the outstanding principal balance, all accrued and unpaid interest, fees, and other amounts owing to the Administrative Bank and the Haven Banks pursuant to the Loan Documents immediately due and payable in full. Pursuant to the letter dated April 14, 2009, the Administrative Bank made

---

<sup>3</sup> A true and correct copy of the Haven Loan Agreement is attached hereto as Exhibit B, and a true and correct copy of the Construction Deed of Trust is attached hereto as Exhibit C. U.S. Bank will make copies of the additional Loan Documents available upon request.

<sup>4</sup> A true and correct copy of the March 13, 2009 letter is attached hereto as Exhibit D.

<sup>5</sup> A true and correct copy of the April 14, 2009 letter is attached hereto as Exhibit E.

demand upon Opus West for the immediate payment in full of the outstanding principal balance, all accrued and unpaid interest, fees, and other amounts owing to the Administrative Bank and the Haven Banks pursuant to the Loan Documents.<sup>6</sup>

7. After the Petition Date, the Debtors agreed to permit U.S. Bank to seek relief from the automatic stay to exercise all of its rights and remedies under the Haven Loan Agreement and Loan Documents, including, but not limited to, foreclosing on the Haven Collateral. The parties agreed that a modification of the automatic stay was appropriate under Bankruptcy Code § 362(d)(1) because Opus West could not provide adequate protection to U.S. Bank. In addition, such relief was appropriate under Bankruptcy Code § 362(d)(2) because Opus West lacked equity in the Haven Collateral, and such property was not necessary for effective reorganization.

8. On July 17, 2009, U.S. Bank filed a *Motion for Approval of Agreement to Modify the Automatic Stay Pursuant to Bankruptcy Rule 4001(d)* (the "Haven Lift Stay Motion") [Dkt. No. 121], seeking the Court's approval of the parties' lift-stay agreement. No objections were filed and, on August 4, 2009, the Court entered an Order granting the Haven Lift Stay Motion [Dkt. No. 235], authorizing U.S. Bank to pursue its rights and remedies under non-bankruptcy law, including the right to foreclose on the Haven Collateral to preserve and establish the amount of U.S. Bank's deficiency claim.

9. Subsequent to obtaining relief from the automatic stay, U.S. Bank began judicial foreclosure proceedings in Bernardino County, California. Although the state-court foreclosure and sale process has not been completed, a recent appraisal performed at the request of U.S. Bank placed the current market value of Haven Point at approximately \$3,660,000.00, given the

---

<sup>6</sup> See Exhibit D.

state of the project and current market conditions.<sup>7</sup> As such, U.S. Bank estimates that its resulting deficiency claim with regard to the Haven Point Project will likely amount to *at least* \$5,813,797.48, plus the costs of foreclosure, plus pre-petition attorneys' fees in the amount of at least \$18,490.64.

## **II. AMOUNTS DUE TO U.S. BANK**

10. As set forth above, U.S. Bank asserts a claim against Opus West based on the balance due to the Administrative Bank under the Haven Loan Documents in an amount *not less than* \$5,832,288.12, plus any and all other fees, expenses, costs, additional accrued interest, charges, and any and all other debts or obligations of Opus West to the Administrative Bank pursuant to applicable law, whether incurred pre or postpetition, whether contract, tort or statutory, including, but not limited to, 11 U.S.C. § 506(b), and pursuant to the Loan Documents.

## **III. DOCUMENTATION**

11. U.S. Bank's claim against Opus West is evidenced by the above-described Exhibits "A" through "F" attached hereto.

## **IV. DEBTORS' ASSETS SECURING THE OBLIGATION**

12. Opus West's obligation to pay the Administrative Bank's and the Haven Banks' costs and expenses (including reasonable attorneys' fees) incurred in connection with the Haven Loans, are secured by the Haven Collateral. Although U.S. Bank has obtained relief from the automatic stay to commence foreclosure proceedings against the Haven Collateral, the foreclosure sale has not yet occurred. This Proof of Claim is filed to assert and preserve both U.S. Bank's secured claim and deficiency claim against the Debtors.

---

<sup>7</sup> See Summary Narrative Appraisal Report, attached hereto as Exhibit F.

**V. AMENDMENTS AND MODIFICATIONS**

13. This Proof of Claim is filed under compulsion of claims bar date in the Debtors' cases and U.S. Bank reserves the right to amend, modify, or supplement this Proof of Claim, or state additional or related claims, at any time hereafter, particularly with regard to the amount of U.S. Bank's claim after the foreclosure sale occurs. The filing of this Proof of Claim shall not be deemed to be an election or waiver of remedies.

**VI. NO WAIVER**

14. Nothing contained herein shall be deemed or construed as a waiver of any rights of U.S. Bank as to any claims, defenses, actions, set offs or recoupments to which U.S. Bank may be entitled, all of which are expressly reserved.

**VII. PAYMENTS**

15. All payments in connection with this Proof of Claim shall be mailed to:

Ziad W. Amra  
Vice President, Special Assets Group  
U.S. Bancorp Center  
BC-MN-H22A  
800 Nicollet Mall, 22nd Floor  
Minneapolis, MN 55402

**VIII. NOTICES**

16. All notices regarding this Proof of Claim shall be mailed to:

Ziad W. Amra  
Vice President, Special Assets Group  
U.S. Bancorp Center  
BC-MN-H22A  
800 Nicollet Mall, 22nd Floor  
Minneapolis, MN 55402  
Tel.: 612.303.4517  
Fax: 612.303.4660

with copy to:

Thomas O. Kelly  
**DORSEY & WHITNEY LLP**  
Suite 1500, 50 South Sixth Street  
Minneapolis, MN 55402-1498  
Tel: 612.340.2600  
Fax: 612.340.2868

And

Josiah M. Daniel, III  
Angela B. Degeyter  
**VINSON & ELKINS L.L.P.**  
2001 Ross Avenue, Suite 3700  
Dallas, TX 75201  
Tel.: 214.220.7766  
Fax: 214.220.7716

LOAN REQ: 0490 CURRENT FINANCIAL INFO 11/04/09 PAGE 0001 OF 0001  
BANK: 66 AP: 1 OBGOR: 0000153412 OBGAT: 0000000075 OPUS WEST HAVEN  
DATE: 070609 CHG CD: INCLUDE ESCROW AMOUNT(Y/N): Y PAGE:  
ASSN UNIT : 71049 ORG EFF DATE: 12/13/07 OBLIG TYPE: 235  
OFFICER : ZWA00 MAT DATE : 12/13/09 GUARANTEE : NO  
RISK RATE : 85 LST REN DTE : COLL TYPE : 220  
EXP STRAT : LST FIN ST : AUTO DEBIT:  
STAT CODE : 0 NORM TKDOWN OBGOR: 0000153412 RATE : 8.25000000  
CHGOFF STA: N/A TKDOWN OBGAT: 0000000059 REL PRIME: 00001 + 5.00000  
\*\*\*\*\* BALANCE INFO \*\*\*\*\* \*\*\*\*\* PAYOFF INFO \*\*\*\*\*  
ORIG LN AMOUNT: 40,900,000.00 PRINCIPAL AMT : 9,229,722.59  
AVAIL CREDIT : .00 INTEREST AMT : 244,074.89  
NET BOOK BAL : .00 LATE FEES : .00  
12 MTH AVG BAL: 6,195,293.24 OTHER FEES : .00  
FEES COLL YTD : .00 ESCROW : .00  
PER DIEM: 2,115.14476 ==> PAYOFF 07/06/09 : 9,473,797.48  
\*\*\*\*\* PAYMENT INFO \*\*\*\*\*  
TOTAL BILLED: 493,661.97 PAYMENT AMOUNT:  
TOTAL PAST DUE: 493,661.97 PAYMENT TYPE:  
INT FREQ MONTHLY PD TO: 11/12/08 PRIN FREQ PD TO: 12/13/07  
DUE 12/01/09 : .00 DUE : .00  
PSTDUE 04/01/09 : 493,661.97 PSTDUE :  
NO PREPAYMENT INDEMNITY

Exhibit A

**CONSTRUCTION LOAN AGREEMENT**

for a loan in the amount of

**\$40,900,000.00**

**MADE BY AND BETWEEN**

**OPUS WEST CORPORATION,  
a Minnesota corporation  
2555 East Camelback Road, Suite 800  
Phoenix, AZ 85016**

and

**U.S. BANK NATIONAL ASSOCIATION,  
a national banking association,  
101 North First Avenue, Suite 1600  
Phoenix, AZ 85003**

**Dated as of December 13, 2007**

## TABLE OF CONTENTS

	<u>Page</u>
<b>FACTUAL BACKGROUND.....</b>	<b>1</b>
<b>AGREEMENT .....</b>	<b>2</b>
<b>DEFINITIONS .....</b>	<b>2</b>
<b>1. CONDITIONS PRECEDENT TO CLOSING AND DISBURSEMENTS .....</b>	<b>9</b>
1.1 CONDITIONS TO CLOSING .....	9
1.2 CONDITIONS TO INITIAL DISBURSEMENT .....	14
1.3 SUBSEQUENT DISBURSEMENT CONDITIONS.....	15
1.4 FINAL DISBURSEMENT.....	15
<b>2. DISBURSEMENT CONDITIONS AND PROCEDURES; OTHER LOAN TERMS .....</b>	<b>16</b>
2.1 COST BREAKDOWN; DISBURSEMENTS; INTEREST RESERVE.....	16
2.2 LOAN IN BALANCE; BORROWER'S FUNDS ACCOUNT.....	18
2.3 DRAW REQUESTS.....	19
2.4 DISBURSEMENT PROCEDURES .....	20
2.5 ESCROW FOR LOAN CLOSING.....	21
2.6 LOAN DISBURSEMENTS .....	21
2.7 DISBURSEMENT CONDITIONS .....	22
2.8 EXTENSION OF MATURITY DATE.....	22
2.11 COLLATERAL SECURITY .....	24
2.12 AUTOMATIC DEDUCTION.....	25
<b>3. COVENANTS OF BORROWER.....</b>	<b>25</b>
3.1 COMMENCEMENT AND COMPLETION OF IMPROVEMENTS .....	25
3.2 CHANGES .....	25
3.3 CONSTRUCTION INFORMATION AND VERIFICATION .....	26
3.4 PERMITS, LICENSES AND APPROVALS.....	27
3.5 COOPERATION .....	27
3.6 AS-BUILT PLANS; SURVEYS .....	27
3.7 COMPLIANCE WITH LAW .....	27
3.8 TAXES; ADDITIONAL COSTS.....	28
3.9 INSURANCE .....	28
3.10 PAYMENT OF EXPENSES.....	30
3.11 FINANCIAL AND OTHER INFORMATION.....	30
3.12 AUDITS .....	30
3.13 NOTICES .....	31
3.14 KEEPING GUARANTORS AND THIRD PARTY PLEDGORS INFORMED .....	31
3.15 PERFORMANCE OF ACTS .....	31
3.16 PRESERVATION OF RIGHTS.....	32
3.17 INDEMNITY REGARDING CONSTRUCTION AND OTHER RISKS.....	32
3.18 OTHER DEBTS .....	32
3.19 OTHER LIENS .....	32
3.20 NEGATIVE COVENANTS .....	33
3.21 SITE VISITS; RIGHT TO STOP WORK.....	33
3.22 PROTECTION AGAINST LIEN CLAIMS .....	34
3.23 APPRAISALS.....	34

	<u>Page</u>
3.24 TAX RECEIPTS .....	34
3.25 CONDITIONAL SALES CONTRACTS; REMOVAL OF FIXTURES AND EQUIPMENT .....	35
3.26 INCOME FROM PROPERTY .....	35
3.27 PROPERTY MANAGEMENT AGREEMENT .....	35
3.28 RESTRICTIONS .....	35
3.29 EMPLOYEE BENEFIT PLANS; ERISA COMPLIANCE .....	35
3.30 FINANCIAL COVENANTS .....	36
<b>4. PRO FORMA SCHEDULE; LEASES .....</b>	<b>36</b>
4.1 PRO FORMA SCHEDULE .....	36
4.2 LEASE APPROVAL .....	37
4.3 LEASING INFORMATION AND DOCUMENTS .....	38
4.4 PURPOSE AND EFFECT OF LEASE APPROVAL .....	38
4.5 LANDLORD'S OBLIGATIONS .....	38
4.6 COSTS AND EXPENSES .....	38
<b>5. REPRESENTATIONS AND WARRANTIES .....</b>	<b>38</b>
5.1 AUTHORITY; ENFORCEABILITY .....	38
5.2 COMPLIANCE WITH LAW .....	38
5.3 NO VIOLATION .....	39
5.4 NO CLAIMS .....	39
5.5 FINANCIAL INFORMATION .....	39
5.6 ACCURACY .....	39
5.7 LOAN IN BALANCE; ADEQUACY OF LOAN .....	39
5.8 TAXES .....	39
5.9 UTILITIES .....	39
5.10 BORROWER NOT A "FOREIGN PERSON" .....	39
5.12 ERISA PLANS .....	40
5.13 DISCLOSURE TO GUARANTOR AND THIRD PARTIES .....	40
<b>6. SWAP CONTRACT .....</b>	<b>40</b>
6.1 SWAP PAYMENTS; GRANT OF SECURITY INTEREST .....	40
6.2 NO ASSUMPTION OF BORROWER'S OBLIGATIONS .....	40
6.3 SWAP DOCUMENTS .....	40
<b>7. DEFAULT AND REMEDIES .....</b>	<b>40</b>
7.1 EVENTS OF DEFAULT .....	40
7.2 REMEDIES .....	43
<b>8. WAIVER OF JURY TRIAL .....</b>	<b>44</b>
<b>9. MISCELLANEOUS PROVISIONS .....</b>	<b>44</b>
9.1 NO WAIVER; CONSENTS .....	44
9.2 PURPOSE AND EFFECT OF APPROVAL .....	44
9.3 NO THIRD PARTIES BENEFITED .....	45
9.4 JOINT AND SEVERAL LIABILITY .....	45
9.5 NOTICES .....	45
9.6 ACTIONS .....	45
9.7 ATTORNEYS' FEES .....	45
9.8 GOVERNING LAW .....	45

	<u>Page</u>
9.9 HEIRS, SUCCESSORS, AND ASSIGNS; PARTICIPATIONS .....	45
9.10 RELATIONSHIPS WITH OTHER CUSTOMERS .....	46
9.11 DISCLOSURE TO TITLE COMPANY .....	46
9.12 IMPROVEMENT DISTRICT .....	46
9.13 RESTRICTION ON PERSONAL PROPERTY .....	46
9.14 PUBLICITY .....	46
9.15 SEVERABILITY .....	46
9.16 INTERPRETATION .....	46
9.17 AMENDMENTS .....	47
9.18 COUNTERPARTS .....	47
9.19 LANGUAGE OF AGREEMENT .....	47
9.20 EXCHANGE OF INFORMATION .....	47
9.21 SURVIVAL .....	47
9.22 FURTHER PERFORMANCE .....	47
9.23 TIME IS OF THE ESSENCE .....	47
9.24 RECITALS; EXHIBITS .....	47
9.25 LOAN COMMISSION .....	47
9.26 PATRIOT ACT PROVISIONS .....	47
9.27 AUTHORITY TO FILE NOTICES .....	48
9.28 FORCE MAJEURE .....	48
9.29 NO COMMITMENT TO INCREASE LOAN .....	48
9.30 INTEGRATION AND RELATION TO LOAN COMMITMENT .....	48
<b>10. AGENT; LENDER PROVISIONS .....</b>	<b>48</b>
10.1 APPOINTMENT OF AGENT .....	48
10.2 ADMINISTRATION OF LOAN BY AGENT .....	49
10.3 SPECIFIC AUTHORITY OF AGENT .....	49
10.4 RIGHT OF LENDER TO PARTICIPATE IN CERTAIN DECISIONS .....	50
10.5 DELEGATION OF DUTIES .....	51
10.6 EXCULPATORY PROVISIONS .....	51
10.7 RELIANCE BY AGENT .....	51
10.8 DEFAULT; WAIVERS .....	52
10.9 LENDERS' CREDIT DECISIONS; RELIANCE .....	52
10.10 AGENT'S REIMBURSEMENT AND INDEMNIFICATION .....	53
10.11 AGENT IN ITS INDIVIDUAL CAPACITY .....	53
10.12 SUCCESSOR AGENT .....	53
10.13 DUTIES IN CASE OF ENFORCEMENT .....	54
10.14 LENDER PROPORTIONATE SHARES .....	54
10.15 FUNDING ADVANCES .....	54
10.16 NATURE OF OBLIGATIONS OF LENDERS .....	55
10.17 PAYMENTS TO AGENT .....	55
10.18 ADJUSTMENTS .....	55
10.19 SETOFF .....	55
10.20 DISTRIBUTION BY AGENT .....	55
10.21 DELINQUENT LENDER .....	56
10.22 TITLE TO PROJECT .....	57

	<u>Page</u>
11. ASSIGNMENT AND PARTICIPATION PROVISIONS.....	57
11.1 ASSIGNMENT BY LENDER .....	57
11.2 PARTICIPATIONS .....	58
11.3 DISCLOSURE .....	58
11.4 MISCELLANEOUS ASSIGNMENT PROVISIONS.....	58
11.5 NON-U.S. LENDERS .....	58

**LIST OF EXHIBITS TO LOAN AGREEMENT**

Exhibit A – Legal Description  
Exhibit B – Cost Breakdown  
Exhibit C – Compliance Certificate  
Exhibit D – Assignment and Assumption  
Exhibit E – Schedule of Lenders  
Exhibit F – Draw Request Certification

## CONSTRUCTION LOAN AGREEMENT

This Construction Loan Agreement (the "Agreement") is dated for reference purposes as of December 13, 2007, between **OPUS WEST CORPORATION**, a Minnesota corporation (the "Borrower") and **U.S. BANK NATIONAL ASSOCIATION**, a national banking association, its successors and assigns, individually and as a lender and Agent, and each of the lending institutions listed on the Schedule of Lenders, as such may be modified from time to time (Agent, as a lender, and each such lending institution, and their respective successors and assigns, referred to individually or collectively, as the context shall infer, the "Lender").

*Unless defined elsewhere in this Agreement, defined terms used herein have the meanings given them in the Definitions Section hereof.*

### Factual Background

A. Lender has agreed to make a construction loan (the "Loan") to Borrower in the principal amount of Forty Million Nine Hundred Thousand and No/100 Dollars (\$40,900,000.00) (the "Loan Amount"). Borrower will use the Loan to construct certain Improvements on real property (the "Land") owned by Borrower and located in the City of Rancho Cucamonga, Bernardino County, California, as described in **Exhibit A**. Borrower will also use the Loan to pay other costs and expenses related to the development of the Land. Borrower intends to complete construction of the Improvements on or before **April 1, 2009** (the "Completion Date").

B. The Improvements are described in plans and specifications (the "Plans and Specifications") which were prepared by the Architect under the Architecture Contract. It is anticipated that the Improvements will be constructed by the Contractor in accordance with the Schedule of Values. When completed, the Improvements will consist of a four (4) story office building containing approximately (1) 133,000 square feet of rentable space, (2) 16,000 square feet of retail space, and (3) 5,000 square feet of space currently designated as a bank branch, as shown in the Plans and Specifications. Borrower has engaged the Architect in connection with the design and/or construction of the Improvements pursuant to the terms of the Architecture Contract. Borrower has agreed to pledge and assign to Agent, for the benefit of Lender, and create a first-priority security interest in favor of Agent, for the benefit of Lender, in and to Borrower's rights and interests in, among other things: (1) the Architecture Contract, (2) the Plans and Specifications, and (3) all other agreements now or hereafter entered into by Borrower with any contractor, architect, engineer, or other consultant or third party in connection with the design, engineering, construction of or on the Property, or the management, maintenance, operation, marketing, leasing of the Property, or any development of or improvement to the Property, in accordance with the Assignment of Contracts. The contracting parties under each contract being assigned shall consent to the Assignment of Contracts and the pledge and assignment by Borrower thereunder.

C. Borrower is executing a promissory note (the "Note") payable to Agent, for the benefit of Lender, evidencing the Loan, which is secured by a Construction Deed of Trust with Assignment of Rents, Security Agreement, and Fixture Filing (the "Deed of Trust") covering all of Borrower's right, title, and interest in and to the Land, the Improvements, and certain other property. In this Agreement, the "Property" means all or any part of the property affected by the Deed of Trust, or any interest in all or any part of it, as the context requires, and "Project" means the project consisting of the Land and all improvements existing or to be constructed thereon, including the Improvements.

D. The Loan is due and payable on **December 13, 2009** (the "Maturity Date"). However, if prior to the Maturity Date, Borrower satisfies all Conditions to Extend, the Maturity Date of the Loan will be extended upon the terms and conditions as more fully set forth in this Agreement and the Note.

E. This Agreement, the Note, and the Deed of Trust, together with all of their exhibits, and all other documents which evidence, guaranty, secure, or otherwise pertain to the Loan collectively constitute the "Loan Documents."

THEREFORE, Borrower, Agent, and Lender agree as follows:

**Agreement**

**Definitions:** The following capitalized words and terms shall have the meanings set forth in the "Factual Background" section above, or if not defined therein, shall have the following meanings when used in this Agreement. All references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. The term "Guarantor" as used in this Agreement and the other Loan Documents shall apply only if any such party exists, and should be ignored if inapplicable.

**"Accelerating Transfer"** has the meaning set forth in the Deed of Trust.

**"Account"** means Borrower's checking account at Agent, in the name of Borrower and designated by Borrower as the operating account for the Project.

**"Adjusted Net Worth"** means, as to Borrower, the sum, at any given time, of Borrower's Tangible Net Worth at such time plus its Subordinated Affiliate Debt outstanding at such time; provided, however, that no more than Ten Million and No/100 Dollars (\$10,000,000.00) of Borrower's Tangible Net Worth shall consist of Affiliate Equity.

**"Affiliate Equity"** means, as to Borrower, equity capital contributions to Borrower from any Affiliate of Borrower, made upon terms and conditions in all respects satisfactory to Agent.

**"Affiliate of"** or **"affiliated with"** means in control of, controlled by or under common control with.

**"Agent"** means **U.S. BANK NATIONAL ASSOCIATION**, a national banking association, in its capacity as administrative agent under any of the Loan Documents, or any successor administrative agent selected pursuant to the terms of this Agreement.

**"Agreement"** means this Construction Loan Agreement between Borrower and Agent.

**"Allowed Transfer"** means a transfer of any interest in Borrower to any person or entity that is an Affiliate of or with any of the following, provided that Borrower has given Agent written notice of such transfer: (i) Opus Corporation or Opus, L.L.C., or (ii) the founder of Opus Corporation, his children, his grandchildren or other members of his family, or (iii) the trustee of a trust or trusts for the benefit of the founder of Opus Corporation, his children, his grandchildren or other members of his family, so long as (1) Borrower remains fully obligated for the Borrower's obligations with respect to the Loan, and (2) Opus West Corporation or one of the other entities listed in subsections (i), (ii) or (iii) immediately above, shall at all times maintain, directly or indirectly, ownership at least ten percent (10%) of the voting stock in the Borrower.

**"Appraisal"** means an MAI certified appraisal of the Project, performed in accordance with FIRREA and Agent's appraisal requirements by an appraiser selected and retained by Agent, in form and content acceptable to Agent.

"Approved Manager" means (a) Borrower; (b) Opus West Management Corporation, an Arizona corporation, or (b) subject to the prior approval of Agent not to be unreasonably withheld, conditioned, or delayed, any other reputable and creditworthy property manager.

"Architect" means **OPUS ARCHITECTS & ENGINEERS, INC.**, a Minnesota corporation, a licensed architect, acting as the architect in connection with the design and/or construction of the Improvements.

"Architecture Contract" means that certain contract entitled, "Project Agreement Form" dated May 17, 2007, executed by and between Borrower and Architect, 2007, covering certain services of the Architect in connection with the design and construction of the Improvements.

"Assignment and Assumption" means an Assignment and Assumption substantially in the form of Exhibit D.

"Assignment of Contracts" means the assignment from Borrower to Agent, for the benefit of Lender, of all of Borrower's right, title, and interest in and to the Construction Contract, the Architecture Contract, the Plans and Specifications, and all contracts related to the construction, design, management, and operation of the Improvements and the Property, together with such written consents of Borrower's contract parties under such contracts as Agent may require.

"Banking Day" means a day, other than a Saturday or Sunday, on which Agent is open for business for all banking functions in Phoenix, Arizona.

"Borrower" has the meaning set forth in the introductory paragraph to this Agreement.

"Borrower's Funds" means all funds on deposit in the Borrower's Funds Account.

"Borrower's Funds Account" means an interest-bearing account at Agent in the name of Borrower on and subject to such terms and conditions, and at such interest rates, as Agent may offer to Borrower. Funds held in the Borrower's Funds Account shall be and remain in the exclusive control of Agent, subject to the terms of this Agreement and any borrower's funds agreement entered into between Borrower and Agent.

"Borrower's Indemnity" means, collectively, all of Borrower's obligations under each indemnity by Borrower in favor of Agent, as Agent for the Lenders, and/or the Indemnified Parties relating to Hazardous Substances, including but not limited to Borrower's covenants, warranties, and indemnification obligations set forth in (a) any Hazardous Substances section or provisions set forth in this Agreement or the other Loan Documents, and/or (b) any separate secured or unsecured indemnity agreement executed by Borrower in connection with the Loan, specifically including all of Borrower's obligations contained in that certain Indemnity Agreement dated of even date herewith executed by Borrower in favor of Agent, as Agent for the Lenders.

"Change in Control" means any transaction or series of transactions that result in any transfer, direct or indirect, of fifty percent (50%) or more of the voting power of Borrower, or other power to direct or cause the direction of the management and policies of Borrower, or fifty percent (50%) or more of the direct or indirect beneficial ownership of Borrower, as the case may be; provided, however, that any Allowed Transfer shall not constitute a "Change of Control" hereunder so long as Borrower promptly provides Agent notice of such Allowed Transfer.

"Closing Date" means the date of recordation of the Deed of Trust.

"Compliance Certificate" has the meaning set forth in Section 3.11 below.

"Completion Date" has the meaning set forth in Recital A above.

"Completion Event" means the date Agent has received evidence acceptable to Agent in its reasonable discretion that the Improvements have been completed in accordance with the requirements set forth in Section 3.1(b) below.

"Conditions to Extend" means those conditions to Lender's obligation to extend the term of the Loan set forth in Section 2.8 below (each, a "Condition to Extend").

"Construction Schedule" means a written construction schedule, including completion timeline, for the Project. The Construction Schedule shall be consistent with any Pro Forma Schedule described in this Agreement, and any other timelines, reports, and/or schedules delivered by Borrower to Agent.

"Contractor" means **OPUS WEST CONSTRUCTION CORPORATION**, a Minnesota corporation, a licensed general contractor, State of California license number 509591, acting as the contractor in connection with the construction and/or rehabilitation of the Improvements.

"Cost Breakdown" means a detailed breakdown of construction, financing, and other development costs related to the Land and Improvements, as more fully described in Exhibit B attached hereto.

"Covered by Insurance" is when defense of a lawsuit has been tendered to the applicable insurance carrier under a valid insurance policy that provides coverage with respect to the claim and has a deductible amount of less than One Hundred Thousand and No/100 Dollars (\$100,000.00), such insurance carrier has accepted such tender of defense, and such insurance carrier proceeds with such defense without denying liability for any part of such claim which could result in liability of One Hundred Thousand and No/100 Dollars (\$100,000.00) or more to Borrower; provided, however, that if any insurance company accepts defense of a claim with a reservation of rights, such claim shall be deemed "Covered by Insurance" until denied.

"Debt to Adjusted Net Worth Ratio" means, as to Borrower, the relationship, expressed as a numerical ratio, between: (i) the total of all liabilities of Borrower which would appear on a balance sheet of the Borrower in accordance with GAAP (including current liabilities, long term liabilities and joint venture liabilities) but excluding Subordinated Affiliate Debt; divided by (ii) Adjusted Net Worth.

"Deed of Trust" has the meaning set forth in Recital C above.

"Default" means, with respect to any Loan Document where "Events of Default" are not defined, any breach or default, subject to any applicable notice and cure periods, under such Loan Document.

"Default Rate" has the meaning given it in the Note; provided, however, that if a default rate is not used or defined in the Note, "Default Rate" shall mean a per annum interest rate of five percent (5%) in excess of the rate of interest charged from time to time under the Note (the "Note Rate"); provided, however, that if a default rate is not used or defined in the Note evidencing the Loan, or if more than one Note Rate applies, the "Default Rate" shall mean a per annum interest rate of five percent (5%) in excess of the highest Note Rate.

"Deferred Contractor Fees" Monies earned or to be earned by the Contractor as described in the Schedule of Values for construction work performed by Contractor related to the Project at Borrower's sole cost and expense, which will be deferred until the Loan has been paid and performed in full and thereafter paid from Borrower's own funds, and not paid with Loan funds.

"Deferred Developer Fees" Monies earned or to be earned by Borrower and/or its Affiliates for work related to the Project performed by or on behalf of Borrower and/or its Affiliates, which will be deferred until the Loan has been paid and performed in full and thereafter paid from Borrower's own funds, and not paid with Loan funds.

"Delinquent Lender" has the meaning set forth in Section 10.21 below.

"Draw Request" means a written request signed by Borrower, together with such documentation and information as Agent may require and meeting the requirements set forth in this Agreement and the other Loan Documents, provided that such Draw Request may be submitted as a telefax or electronic mail request as allowed pursuant to the terms of this Agreement.

"Draw Request Certification" means a draw request certification in the form attached hereto as Exhibit F.

"Eligible Assignee" means any Lender or any Affiliate of a Lender or any commercial bank, insurance company, financial institution, or institutional lender approved by Agent in writing and, so long as there exists no Event of Default or Unmatured Event of Default, approved by Borrower in writing, which approval shall not be unreasonably withheld.

"Events of Default" means those events of default set forth in Section 7.1 (each, an "Event of Default").

"Financial Covenant Indebtedness" means, as to Borrower, collectively, all of the following (without duplication): (a) all items which in accordance with GAAP would be included as "liabilities", including all indebtedness, obligations or liabilities of Borrower for borrowed money or otherwise, whether or not subordinated, (b) all indebtedness, obligations or liabilities for which Borrower or its properties may be or become liable or obligated on a contingent basis, as a guarantor, surety, endorser, co-maker, general partner, or otherwise, including all reimbursement obligations and other liabilities of Borrower with respect to outstanding letters of credit (but without duplication for any such letters if credit issued pursuant to the aforementioned indebtedness), and (c) all obligations of Borrower under capital leases and otherwise to pay the deferred purchase price of property; provided, however, that for the purposes of the calculation of all financial covenants of Borrower hereunder, Financial Covenant Indebtedness shall not include Subordinated Affiliate Debt.

"Fiscal Quarter" means, as to Borrower, each quarterly accounting period of Borrower ending on March 31, June 30, September 30 or December 31 of any Fiscal Year.

"Fiscal Year" means, as to Borrower, the annual accounting period of Borrower ending on December 31<sup>st</sup> of each year, beginning with the annual accounting period of Borrower ending on December 31, 2007.

"Funding Deficiency" means the amount of any requested disbursement which Borrower is entitled to in accordance with the terms of this Agreement (i.e. Borrower has satisfied all applicable conditions to disbursement set forth in the Loan Documents, unless any such unsatisfied condition has been waived in writing by Agent) that is not properly funded hereunder by Agent.

"GAAP" means generally accepted accounting principles.

"Hard Costs" means all materials and labor related to construction and/or rehabilitation of the Improvements and similar costs (specifically excluding all Soft Costs), as determined by Agent.

"Hazardous Substance" means and includes any substance, material, or waste, including asbestos, petroleum, and petroleum products (including crude oil), that is or becomes designated, classified, or regulated as "toxic" or "hazardous" or a "pollutant," or that is or becomes similarly designated, classified,

or regulated, under any federal, state, or local law, regulation, or ordinance, but does not include any such substance that is a customary and ordinary household, cleaning, or office product used on the Property by Borrower or any tenant or agent of Borrower, or customary construction materials used during the course of construction of Improvements on the Property by Borrower or Contractor, provided such use is in accordance with applicable hazardous materials laws and regulations.

"Improvements" means those buildings and other improvements to the Land as shown on the Plans and Specifications.

"In Balance" or "in balance" has the meaning set forth in Section 2.2.

"Indemnified Costs" means all actual or threatened liabilities, claims, actions, causes of action, judgments, orders, damages (including foreseeable and unforeseeable consequential damages), costs, expenses, fines, penalties and losses (including sums paid in settlement of claims and all consultant, expert and legal fees and expenses of Agent's, and, if applicable, Lenders' counsel), including those incurred in connection with any investigation of site conditions or any clean-up, remedial, removal or restoration work (whether of the Property or any other property), or any resulting damages, harm, or injuries to the person or property of any third parties or to any natural resources, excepting those arising out of, or resulting, solely from the applicable Indemnified Party's gross negligence or willful misconduct.

"Indemnified Parties," means each Lender, including Agent as a Lender and acting in its capacity as administrative agent for the Lenders, and each of their parents, subsidiaries, and any affiliated companies, any assignees of any of each such Lender's interest in the Loan or the Loan Documents, any owners of participation or other interests in the Loan or the Loan Documents, any purchasers of all or any portion of the Property at any foreclosure sale or from any Lender or any of its affiliates, and the officers, directors, employees, and agents of each of them (each individually, an "Indemnified Party").

"Insolvency Payments" means all monetary obligations incurred or accrued during the pendency of any Insolvency Proceeding regardless of whether allowed or allowable in such proceeding.

"Insolvency Proceeding" means any bankruptcy, receivership, or other voluntary or involuntary proceeding, in or out of court, for the adjustment of debtor-creditor relationships.

"Interest Reserve" means any reserve or hold back of Loan funds allocated to pay Loan interest, which may be set forth in the Cost Breakdown or as otherwise approved by Agent.

"Land" has the meaning set forth in Recital A above.

"Lender" has the meaning set forth in the introductory paragraph to this Agreement, and includes any other commercial bank, insurance company, financial institution or lender that is or later becomes a party to this Agreement and any and all Eligible Assignees who acquire an interest in the Loan from any Lender as set forth in Section 10 (collectively, the "Lender" or "Lenders" as the context may require.) The term "Lender" as used in this Agreement and the other Loan Documents, unless otherwise specifically set forth herein, means all Lenders collectively, as the context may require, and includes each Lender that is or becomes a Lender pursuant to the terms of this Agreement.

"Liquidity" means cash, cash equivalents, and immediately available funds, not encumbered by debt.

"Loan" means the loan being made available by Lender to Borrower pursuant to the terms of this Agreement as described in Recital A above.

"Loan Amount" has the meaning set forth in Recital A above.

"Loan Budget" is shown on the Cost Breakdown attached as Exhibit B, is broken down by line items, and shows all uses of Loan funds related to the Land and the construction and/or rehabilitation of the Improvements.

"Loan Documents" has the meaning set forth in Recital F above.

"Loan Fee" has the meaning set forth in that certain fee letter agreement of even date herewith being executed by Borrower in connection with the Loan.

"Major Subcontract" means any individual subcontract which provides for work or materials with a cost in excess of One Hundred Thousand and No/100 Dollars (\$100,000.00); provided that multiple subcontracts with the same subcontractor shall be treated collectively as one subcontract for purposes of this definition of Major Subcontract.

"Major Subcontractor" means any subcontractor under a Major Subcontract.

"Material Adverse Effect" means: (a) a material adverse change in, or a material adverse effect upon, the Project, or the operations, business, properties, liabilities (actual or contingent), condition (financial or otherwise) or prospects of Borrower or Borrower and its Subsidiaries taken as a whole; (b) a material impairment of the ability of any party to the Loan Documents to perform its obligations under any such Loan Document to which it is a party; or (c) a material adverse effect upon the legality, validity, binding effect or enforceability against any party to the Loan Documents of any such document or agreement to which it is a party.

"Maturity Date" has the meaning set forth in Recital D above.

"Maximum Loan-to-Value Ratio" means the ratio of the Loan Amount to the Property Value.

"Net Monthly Cash Income" means all actual cash income received from the Property during a calendar month less the actual operating expenses incurred for or attributable to the Property, excluding amounts payable under the Note.

"Non-U.S. Lender" means each Lender (or substituted Lender) that is organized under the laws of a jurisdiction other than the United States, any State thereof or the District of Columbia.

"Note" means that certain promissory note described in Recital C above made by Borrower to the order of Agent, as Agent for the Lenders, in the Loan Amount, as amended, renewed, restated, or replaced from time to time.

"Out of Balance" occurs when Agent in good faith determines that the funds (including all undisbursed Loan funds and any sums provided and to be provided by Borrower or any other party) are insufficient to pay for all costs and expenses of the Property and sums payable under the Loan Documents.

"Plans and Specifications" has the meaning set forth in Recital B above.

"Post-Foreclosure Plan" has the meaning set forth in Section 10.22 below.

"Pro Forma Schedule" has the meaning set forth in Section 4.1 below.

"Project" has the meaning set forth in Recital C above.

"Property" has the meaning set forth in Recital C above.

"Property Management Agreement" means each management agreement or operating agreement relating to the Project, the Land, or the Improvements, or any part thereof.

"Property Value" means the discounted value of the Project at stabilized occupancy as set forth in the Appraisal obtained prior to the Closing Date, or an Updated Appraisal, as the case may be, which shall be determined using the Prospective Stabilization Date.

"Proportionate Share" means, as to any Lender, the percentage identified for such Lender on the Schedule of Lenders, as such percentage may be modified in connection with any assignments made by Lenders in accordance with the provisions of this Agreement. Agent is authorized to unilaterally amend and replace the Schedule of Lenders from time to time to account for any such assignments.

"Prospective Stabilization Date" The prospective stabilization date set forth in the Appraisal or Updated Appraisal, as the case may be, of the Project approved by Agent, or such other date agreed to in writing by Agent.

"Protective Advance" means all sums expended as determined by Agent to be necessary (a) to protect the priority, validity and enforceability of the Loan and the documents evidencing or securing the Loan, (b) to protect the value or the security of any of the collateral for the Loan, (c) to satisfy any liens that encumber all or any portion of the Property or any other collateral for the Loan (unless Borrower has bonded around or is properly contesting such lien in accordance with the Loan Documents), and (d) if the Property or any portion of the Property is acquired by Lender, or by Agent, for the benefit of Lender, amounts expended in accordance with the Post-Foreclosure Plan to complete the Improvements to the Project or operate the Project or any other collateral for the Loan acquired by Lender or Agent for the benefit of Lender.

"Required Lenders" means Lenders whose Proportionate Shares of the Loan total in the aggregate a percentage equal to or greater than 50% (but excluding from such calculation the Proportionate Share of any Delinquent Lender).

"Requirements" has the meaning set forth in Section 3.9.

"Schedule of Lenders" means the schedule of Lenders set forth on Schedule 1 attached hereto, as such may be amended or modified from time to time in accordance the terms of this Agreement.

"Schedule of Values" means that certain schedule of values delivered by Borrower to Agent showing a detailed breakdown of construction costs, broken down by line items, to be charged and/or incurred by Contractor related to the Project, as approved by Agent in its reasonable discretion.

"Soft Costs" means all costs set forth in the Cost Breakdown for developer fees and/or overhead, contractor fees and/or overhead, architects' and engineers' fees, legal and other professional fees and costs, and other similar fees and costs (specifically excluding Hard Costs), as determined by Agent.

"Stored Materials" means building materials or furnishings that are not yet incorporated into the Improvements.

"Stored Materials Advance Limit" means Three Hundred Thousand and No/100 Dollars (\$300,000.00).

"Subject Party" means, for any and all financial covenants set for this Agreement, the subject party (i.e., Borrower or other applicable party) or each subject party, as the context may require) with respect the particular covenant. For any Subject Party who does not have a separate fiscal year end for tax reporting purposes, the fiscal year will be deemed to be the calendar year.

"Subsidiary" means a corporation, partnership, joint venture, limited liability company or other business entity of which a majority of the shares of securities or other interests having ordinary voting power for the election of directors or other governing body (other than securities or interests having such power only by reason of the happening of a contingency) are at the time beneficially owned, or the management of which is otherwise controlled, directly, or indirectly through one or more intermediaries.

"Subordinated Affiliate Debt" means, as to Borrower, all non-contingent Financial Covenant Indebtedness owed solely to one or more Affiliates of Borrower, which Financial Covenant Indebtedness (a) has been subordinated to the Loan and all other Loan obligations and other obligations owed to Agent (including, without limitation, the Indebtedness and Loan obligations as such terms are defined below) pursuant to one or more Agent-approved agreements entered into among Borrower, such Affiliate(s), and Lender, and (b) is made upon terms and conditions in all respects satisfactory to Agent.

"Swap Contract" means, individually and collectively, as the context may require, any rate lock agreement or interest rate protection agreement, such as any rate lock agreement, interest rate swap agreement, International Swaps and Derivatives Association, Inc. Master Agreement, or similar agreement or arrangements now existing or hereafter entered into by Borrower and Agent in connection with the Loan evidenced by the Note, to hedge the risk of variable rate interest volatility or fluctuations in interest rates, as any such agreement or arrangement may be modified, supplemented and in effect from time to time.

"Swap Payments" has the meaning set forth in Section 6.1.

"Tangible Assets" means, as to Borrower, collectively, all cash, immediately available funds, accounts receivable, marketable securities, and other assets (including, without duplication, Affiliate Equity), which would, in accordance with GAAP, be classified as a tangible asset, except deferred assets (other than prepaid insurance, prepaid taxes and land pursuit costs not to exceed fifty percent (50%) of all such costs), patents, copyrights, trademarks, trade names, franchises, goodwill, amounts due from Affiliates (except for funds of Borrower invested in prudent third-party investments, such as government securities, certificates of deposit, and highly rated commercial paper, for Borrower's account and benefit by Borrower or its investment subsidiary), any write up in the book value of any asset resulting from a revaluation thereof subsequent to December 31, 2007, and other similar intangible assets.

"Tangible Net Worth" means, as to Borrower, the net book value of the Tangible Assets of Borrower which would be shown on a balance sheet, minus the amount at which Borrower's liabilities (including its Subordinated Affiliate Debt) would be shown on such balance sheet, as determined in accordance with GAAP.

"Unmatured Event of Default" means an event that, with notice or the passage of time, or both, could become an Event of Default.

"Unmatured Monetary Event of Default" means an event that, with notice or the passage of time, or both, could become an Event of Default with respect to monetary covenants, agreements, and obligations.

**1. Conditions Precedent to Closing and Disbursements.**

**1.1 Conditions to Closing.** Before Agent becomes obligated to close the Loan herein contemplated or any Lender becomes obligated to make any disbursement under this Agreement, the

following closing conditions shall have been satisfied at Borrower's sole cost and expense in a manner acceptable to Agent in its sole and absolute discretion. No waiver of any closing condition is effective unless expressly made in writing by Agent.

(a) Financial Statements of Borrower and Other Financial Information. Borrower shall have delivered to Agent all financial statements and other financial information currently required under the Loan Documents, certified as being true, correct, and complete in all material respects by an authorized officer, manager, member, or general partner of Borrower or other applicable parties.

(b) Organizational Documents and Certificates. Borrower shall have delivered to Agent, for each party to each of the Loan Documents:

(i) All organization documents and evidence of due formation and good standing requested by Agent.

(ii) All resolutions, certificates of authority, incumbency certificates, or other evidence of authorization requested by Agent.

(iii) Evidence of such party's Federal Tax Identification Number.

(iv) An Article 9 Certificate in form and substance acceptable to Agent.

(c) Loan Documents and Other Items. Borrower shall have duly executed or obtained the due execution of, and delivered to Agent, all Loan Documents and other items required by Agent to be executed in connection with the Loan, including but not limited to this Agreement, the Note, the Deed of Trust, the Borrower's Indemnity, the Assignment of Contracts (with the written consents of such of Borrower's contract parties under the contracts assigned thereunder as Agent may require), UCC-1 financing statements, and any and all other such documentation otherwise required by Agent to fulfill the purposes of this Agreement. Agent shall have received, reviewed, and approved current bankruptcy, federal tax lien and judgment searches, and searches of all Uniform Commercial Code financing statements filed in each place UCC financing statements are to be filed hereunder, demonstrating the absence of adverse claims.

(d) Security Interests Perfected. The Deed of Trust shall have been duly recorded in a first-priority lien position on the Property, subject only to such exceptions and conditions to title as Agent has approved in its sole and absolute discretion. Lender's security interest in all personal property and fixtures described in the Deed of Trust shall have been duly perfected in a first-priority lien position. Lender's security interest in all property pledged as collateral security for the Loan, as described in one or more security instruments executed by Borrower, and/or any third party pledgor, in favor of Agent individually and as a Lender and as Agent for the Lenders, shall have been duly perfected in a first-priority lien position.

(e) Title Insurance Commitment. Agent shall have received a commitment to issue an ALTA extended coverage lender's policy of title insurance underwritten by a title insurance company approved by Agent in its sole and absolute discretion in an amount not less than the Loan Amount and insuring the lien of the Deed of Trust to be a first-priority lien on the Property, subject only to such exceptions and conditions to title as Agent has approved in its sole and absolute discretion, and containing such endorsements as Agent may require, which may include zoning, survey, access, parcel contiguity, variable rate, environmental, tax parcel, and subdivision endorsements. In addition, if required by Agent, one or more other title insurance companies acceptable to Agent shall have issued such coinsurance and/or reinsurance as Agent may require. No title matter may be insured over by any title

company without the express written consent of Agent. The final title insurance policy shall be delivered to Agent within a reasonable time following the issuance of the title insurance commitment.

(f) Survey. If requested by Agent, Borrower shall have delivered to Agent an ALTA/ACSM survey of the Land and any existing Improvements thereon certified to Agent and the title insurance company by a licensed land surveyor and showing the location of all boundary lines, easements, rights of way, and other matters affecting the Land. Such survey shall be certified by the land surveyor within ninety (90) days of the Loan Closing Date. Such survey shall be sufficient for the deletion of the survey exception, if any, from the Lender's title insurance policy.

(g) Flood Hazard Evidence and Insurance. Borrower shall have provided Agent with evidence as to whether or not the Land or any portion thereof is located in an area identified as having "special flood hazards" as such term is defined in the federal Flood Disaster Protection Act of 1973, as amended. If any part of the Improvements is in a special flood hazard area, Borrower shall have provided Agent with a flood insurance policy as part of the insurance requirements of this Agreement.

(h) Insurance. Borrower shall have provided evidence that there is in effect all insurance required by Agent pursuant to this Agreement and the other Loan Documents, written by insurers, and in form and in amount satisfactory to Agent.

(i) Taxes. Borrower shall have provided to Agent the tax identification number(s) assigned to the Land and evidence that all taxes and assessments levied against or affecting the Property have been paid current, or in the event Borrower has commenced a legal or administrative challenge to any such tax or assessment, evidence that such liability has been bonded over, or that funds for the payment thereof (in the amount of the original assessment) have been escrowed with an independent third party with provisions for the payment thereof satisfactory to Agent in its sole and absolute discretion. Additionally if requested by Agent, Borrower shall also provide a sales tax clearance letter from the appropriate taxing authority.

(j) Appraisal. Agent shall have received, reviewed and approved, in Agent's sole and absolute discretion, an MAI certified appraisal of the Property, performed in accordance with FIRREA and Agent's appraisal requirements by an appraiser selected and retained by Agent, in form and content acceptable to Agent showing a fair market value of the Property (based upon the Property's stabilized value) resulting in a Maximum Loan-to-Value Ratio not exceeding eighty-one percent (81%).

(k) Environmental. Agent shall have received, reviewed, and approved, in Agent's sole and absolute discretion, a Phase I Environmental Site Assessment prepared by a licensed or registered environmental engineer or other qualified party satisfactory to Agent, and the information set forth in it must be acceptable to Agent. If requested by Agent, Borrower shall also provide to Agent one or more of the following, as determined by Agent in its sole and absolute discretion: (i) a Phase II Environmental Site Assessment, (ii) an environmental survey, and/or (iii) a report prepared by a licensed or registered environmental engineer or other qualified party satisfactory to Agent stating that no Hazardous Substances are present in, on, under or around the Property and that no condition or circumstance warranting further investigation or analysis exists in the opinion of the preparer of the report.

(l) Agreements Related to the Property. If requested by Agent, Borrower shall provide Agent with copies of all ongoing agreements related to the Property, including but not limited to all property management agreements, all service contracts and warranties, all leases affecting the Property, and such other Property-related information which Agent may reasonably request, if any. All such agreements required by Agent shall be in full force and effect.

(m) Existing Leases; Subordinations. If there are any leases of any part of the Land or any space within the Improvements in existence as of the loan closing date (i) copies of those leases must be delivered to and approved by Agent, and (ii) if required by Agent, Agent shall have received fully executed estoppel certificates, subordination agreements, and/or subordination, nondisturbance and attornment agreements, in form and substance acceptable to Agent.

(n) Fees. Borrower shall have paid to Agent, in immediately available funds, all fees and costs called for under this Agreement or by any Loan commitment letter, including but not limited to the Loan Fee.

(o) Approval of Items. Agent shall have received and approved all items required by Agent prior to the closing of the Loan pursuant to this Agreement which are subject to the approval of Agent. All contracts or agreements included in such items shall be in full force and effect. Such items include but are not limited to:

- (i) The Cost Breakdown, including the Loan Budget.
- (ii) The Construction Contract, the Architecture Contract (if any), and all other contracts listed on Exhibit B to the Assignment of Contracts.
- (iii) The Plans and Specifications.
- (iv) A Construction Schedule.
- (v) A site plan showing the layout of the Project.
- (vi) A list of all contractors' names, addresses, phone numbers, and respective contract amounts.
- (vii) Any leasing, management, and/or development agreements entered into by Borrower in connection with the construction and/or the operation of the Project.

(p) Zoning; Zoning Letter. Borrower shall have provided to Agent evidence satisfactory to Agent in its sole and absolute discretion that the Property is properly zoned for its intended use and that any and all zoning stipulations have been complied with. If requested by Agent, such evidence shall include an originally executed letter addressed to Agent from the applicable governmental authority, dated within six (6) months of Loan Closing Date, indicating that all applicable zoning ordinances and/or restrictive covenants affecting the Property permit the use of the property for its intended purposes and that there are no variances or other conditions currently outstanding that would affect the zoning as stated. Such evidence, including any zoning letter, shall be in a form sufficient to permit the title insurance company to issue a zoning endorsement (ALTA Form 3.0 or equivalent).

(q) Condition of Property. INTENTIONALLY OMITTED.

(r) No Default. No event shall have occurred and be continuing which would constitute a Event of Default (as defined in the applicable document), Default, or an Unmatured Event of Default under any of the Loan Documents.

(s) No Condemnation Proceedings. Neither the Property nor any interest in it shall be affected by eminent domain or condemnation proceedings.

(t) No Mechanic's or Materialmen's Liens, Stop Notices, or Like Notices or Filings. If any construction of Improvements upon the Property has not been complete beyond the period for filing mechanic's or materialman's liens pursuant to applicable law, neither Borrower or Agent shall have received or have knowledge of any bonded stop notice, notice of mechanic's or materialmen's liens, or other similar notice or filing affecting or which could affect the Property or the priority of any disbursement, unless Borrower files a release bond or otherwise provides information satisfactory to Agent in its sole and absolute discretion that such notice or filing will not have such an effect.

(u) Opinion Letters. If required by Agent, Borrower has delivered to Agent, as Agent for the Lenders, a favorable opinion from independent counsel, opining to such matters as Agent may require, in form and substance satisfactory to Agent in its sole and absolute discretion, by counsel acceptable to Agent for Borrower and/or any other parties to the Loan Documents.

(v) Evidence of Equity. Borrower shall have provided evidence of total contribution equity in the Project by Borrower, Contractor, and/or their Affiliates, in an aggregate amount not less than Four Million Six Hundred Sixty-Four Thousand Seven Hundred Six and No/100 Dollars (\$4,664,706.00), comprised of (i) Borrower's cash equity in the Project of not less than Two Million One Hundred Ninety-Four Thousand Nine Hundred Fifty-Six and No/100 Dollars (\$2,194,956.00), *plus* (ii) Deferred Contractor Fees in an amount not less than One Million Two Hundred Forty-Two Thousand Fifty-Nine and No/100 Dollars (\$1,242,059.00); *plus* (iii) Deferred Developer Fees in an amount not less than One Million Two Hundred Twenty-Seven Thousand Sixty Hundred Ninety-One and No/100 Dollars (\$1,227,691.00). Borrower's cash equity must be either (1) deposited with the Lender on or prior to the date of this Agreement and disbursed prior to the first disbursement of Loan proceeds or (2) used to pay direct Project costs approved by Lender with evidence of payment delivered to Lender prior to the first disbursement of Loan proceeds, which evidence shall be acceptable to Agent, and may include but may not be limited to canceled checks or other evidence of payment and/or lien waivers.

(w) Contractor Bonding. INTENTIONALLY OMITTED.

(x) Accounts Opened. Borrower shall have opened all accounts required pursuant to the Loan Documents, including the Account and, if required by Agent, the Borrower's Funds Account.

(y) Utilities; Utility Letters. Agent shall have received evidence satisfactory to Agent in its sole and absolute discretion that all utilities necessary to develop and occupy the Land and Improvements will be provided.

(z) Soils Report. If required by Agent, Borrower shall have delivered to Agent a soils report prepared within three (3) years prior to the closing of the Loan and acceptable to Agent in its sole and absolute discretion prepared by a qualified licensed soils engineer acceptable to Agent in its sole and absolute discretion. The soils report shall be satisfactory to Agent, shall be based upon adequate due diligence, and shall state that there are no unusual or hazardous soil conditions in, on, under, or around the Property, that no condition or circumstance warranting further investigation or analysis exists in the opinion of the soils engineer, and that construction of all Improvements as proposed is feasible under existing soil conditions so long as the recommendations of the soils report are followed.

(aa) Access. Unless waived by Agent, Borrower shall have delivered to Agent evidence that all streets and roads necessary for access to the property have been dedicated for public use and are completed and accepted by the appropriate governmental authorities, or otherwise private easements have been grants to Borrower providing such access, in a form sufficient to permit the title insurance company to issue an access endorsement (CLTA Form 103.7 or ALTA 17 or equivalent). This information can be shown on the survey by a notation of "dedicated" by the name of the street. Alternatively, copies of any recorded private easements should be submitted with the title commitment.

(bb) Compliance With Requirements; Engineer's/Architects Certificate. Borrower shall have provided to Agent evidence satisfactory to Agent in its sole and absolute discretion that the Property and the Project is in compliance with; and when completed will comply with, all Requirements, including without limitation, all zoning ordinances, environmental protection laws, and all other laws and governmental rules and regulations including the Americans with Disabilities Act. If requested by Agent, such evidence shall include an original certificate executed by the Architect and/or Project engineer, on Agent's prescribed form or otherwise in form and substance acceptable to Agent, certifying compliance therewith.

(cc) Permits. Agent shall have received copies of all building permits, licenses, and consents for the Improvements that have been issued to Borrower.

(dd) Construction Schedule and Cost Statement. Agent shall have received a construction schedule of the proposed progress of work and anticipated disbursement of loan proceeds.

(ee) Loan-To-Cost. Lender shall have received evidence reasonably satisfactory to Lender that the Loan Amount shall not exceed ninety percent (90%) of the total cost of the Project.

(ff) Miscellaneous. Borrower shall have delivered to Agent any other item reasonably deemed necessary by individually and as a Lender and as Agent for the Lenders (as such terms are described and defined in the Loan Agreement) and their respective successors and assigns and shall have fulfilled any other condition reasonably required by Agent to fulfill the intention of this Agreement and any Loan commitment issued to Borrower.

**1.2 Conditions to Initial Disbursement.** Before Agent or any Lender becomes obligated to make the initial disbursement of Loan funds under this Agreement, the following conditions shall have been satisfied at Borrower's sole cost and expense in a manner acceptable to Agent in its sole and absolute discretion. No waiver of any condition is effective unless expressly made in writing by Agent.

(a) Closing Conditions. All closing conditions set forth above shall have been satisfied or shall have been waived or deferred by Agent in its sole and absolute discretion.

(b) Draw Request. Agent shall have received a complete and accurate Draw Request from Borrower, together with a Draw Request Certification for such Draw Request, and Agent shall have determined that all conditions contained in this Agreement to the disbursement of the items set forth in the Draw Request have been met or waived in writing by Agent. For purposes hereof, a Draw Request shall not be considered "complete and accurate," and Agent shall have no obligation to fund all or any part of such Draw Request, unless and until such Draw Request includes and is accompanied by all items requested by Agent, which are complete and accurate, and in form and content acceptable to Agent in its sole and absolute discretion.

(c) Title Endorsements. If the initial disbursement is made after the closing of the Loan, Agent shall have received a "bring-down" or "date-down" endorsement, and/or other endorsements required by Agent, to the title insurance policy, insuring the continuing first-priority lien of the Deed of Trust on the Property, subject only to such exceptions and conditions to title as Agent has approved in its sole and absolute discretion, including first-priority lien of the disbursement, in form and substance acceptable to Agent in its sole and absolute discretion.

(d) Additional Conditions if Construction Commenced. If construction has commenced on the Property, the subsequent disbursement conditions set forth below shall be satisfied, or shall have been waived or deferred by Agent in its sole and absolute discretion.

**1.3 Subsequent Disbursement Conditions.** After the initial disbursement, but before any Lender becomes obligated to make any subsequent disbursement of Loan funds under this Agreement, all of the following conditions shall have been satisfied at Borrower's sole cost and expense in a manner acceptable to Agent in its sole and absolute discretion. No waiver of any condition is effective unless expressly made in writing by Agent.

(a) Closing and Initial Disbursement Conditions; Title Endorsement. All closing conditions and initial disbursement conditions set forth above shall have been satisfied and remain satisfied as of the date of the disbursement, or shall have been waived or deferred by Agent in its sole and absolute discretion. With respect to title insurance, Agent shall have the right to require, with each subsequent disbursement, at Borrower's sole cost and expense, a "bring-down" or "date-down" endorsement to the title insurance policy, in form and substance reasonably acceptable to Agent.

(b) No Damage to Improvements. The Improvements shall not be materially damaged and not repaired, unless Agent shall have received funds from Borrower or insurance proceeds sufficient to pay for all repairs in a timely manner as determined by Agent in its sole and absolute discretion.

(c) No Mechanic's or Materialmen's Liens, Stop Notices, or Like Notices or Filings. Agent shall not have received or have knowledge of any bonded stop notice, notice of mechanic's or materialmen's liens or other similar notice or filing affecting or which could affect the Property or the priority of the disbursement, unless Borrower files a release bond or otherwise provides information satisfactory to Agent in its sole and absolute discretion that such notice or filing will not have such an effect.

(d) Loan "In Balance". The Loan shall be "in balance" as determined by Agent in its sole and absolute discretion, and Agent shall have approved any revised Cost Breakdown proposed by Borrower.

(e) Soils Report Compliance. INTENTIONALLY DELETED.

(f) Foundation Survey. If requested by Agent, Borrower shall have provided to Agent a survey showing the foundations of all Improvements then in place on the Land.

(g) Permits. Excepting those previously issued to Borrower and delivered to Agent pursuant to **Section 1.1(cc)** above, with respect to any work for which a Draw Request is made, Agent shall have received copies of all applicable building permits, licenses, and consents for such Improvements. Additionally Borrower shall have delivered to Agent copies of all building permits, licenses, and consents for the Improvements promptly upon Borrower's receipt thereof.

**1.4 Final Disbursement.** Before Agent, or any Lender, becomes obligated to make any final disbursement of Hard Costs and/or any final disbursement of retention under this Agreement, the following conditions shall have been satisfied at Borrower's sole cost and expense in a manner acceptable to Agent in its sole and absolute discretion. No waiver of any such condition is effective unless expressly made in writing by Agent.

(a) Closing, Initial, and Subsequent Disbursement Conditions. All closing conditions, initial disbursement conditions, and subsequent disbursement conditions set forth above shall have been satisfied or shall have been waived by Agent in its sole and absolute discretion.

(b) Final Draw Request. Agent shall have received a complete and accurate final Draw Request from Borrower, and Agent shall have determined that all conditions contained in this

Agreement to the disbursement of the items set forth in the final Draw Request have been met. Unless otherwise agreed to in writing by Agent, the final Draw Request shall be accompanied by written certification by the Architect and/or the Contractor (as determined by Agent) that all Improvements as completed conform to the Plans and Specifications and all Requirements (which shall include the Contractor's and/or Architect's execution of the standard AIA G702 and G703), together with such other documentation and information as Agent may reasonably require.

(c) Title Endorsements. Agent shall have received, at Borrower's sole cost and expense, endorsements to, or a reissue of, the title insurance policy, in form and substance acceptable to Agent in its sole and absolute discretion, insuring lien-free completion of the Improvements, and the continuing first-priority lien of the Deed of Trust, and including first-priority lien of the disbursement.

(d) Improvements Complete. All Improvements must be completed in accordance with Section 3.1(b) below and all Requirements.

(e) Governmental Approvals. Agent shall have received written evidence acceptable to Agent of the issuance of certificates of occupancy and/or any other approvals and acceptances required to be issued by all appropriate governmental authorities.

(f) As-Built Plans and Survey. If requested by Agent, then within one hundred twenty (120) days after the completion of the Improvements in accordance with Section 3.1(b) below, Borrower shall have provided to Agent a complete set of Plans and Specifications and/or a survey showing the Improvements as built.

2. Disbursement Conditions and Procedures; Other Loan Terms.

2.1 Cost Breakdown; Disbursements; Interest Reserve.

(a) Cost Breakdown. Subject to the satisfaction of all closing and disbursement conditions precedent set forth in this Agreement, Agent shall make disbursements of the Loan based on the Cost Breakdown. Set forth in the Cost Breakdown is the Loan Budget. From each line item within the Cost Breakdown, Agent shall disburse Loan funds in an amount not to exceed the total amount shown in the Loan Budget for that line item, taking into account all prior disbursements, retention requirements, and any reallocation of funds to which Agent has consented to in writing.

(b) Line Items Not Requiring Retention. For each line item set forth in the Cost Breakdown determined by Agent to be a Soft Cost, Agent shall make one or more disbursements without retention for each Draw Request, subject to the terms and conditions contained herein.

(c) Line Items Requiring Retention. Unless otherwise agreed in writing by Agent, for each line item set forth in the Cost Breakdown determined by Agent to be a Hard Cost, each disbursement hereunder shall be equal to ninety percent (90%) of the amount applied for in the applicable Draw Request and Agent shall retain the remaining ten percent (10%) undisbursed portion of these line items as retention.

(d) Release of Retention.

(i) Agent shall disburse the amounts held as retention in accordance with the terms of this Agreement when all of the following conditions are satisfied or waived in writing by Agent:

(A) The Improvements shall have been completed in accordance with Section 3.1(b) below.

(B) If requested by Agent, Agent shall have received evidence that a valid notice of completion and/or other completion documentation acceptable to Agent for the Improvements has been executed and recorded (if required or advisable under applicable law).

(C) All final disbursement conditions set forth in this Agreement have been satisfied or waived in writing by Agent.

(ii) Notwithstanding the foregoing, Agent shall make disbursements, without retention, in accordance with the terms of this Agreement, for the following items:

(1) \_\_\_\_\_, (2) \_\_\_\_\_, (3) \_\_\_\_\_,  
(4) \_\_\_\_\_, (5) \_\_\_\_\_; when all of the following conditions are satisfied or waived in writing by Agent:

(A) The work for which the disbursement is requested shall have been completed as determined by Agent.

(B) If required by Agent, a construction inspection of the work by Agent's inspector shall have been completed, at Borrower's sole cost and expense, and Agent's inspector shall have approved such work as being complete.

(C) Agent shall have received one or more unconditional lien waivers covering all amounts previously disbursed with respect to the work, and conditional lien waivers covering the disbursement amount. Thereafter, upon payment of the disbursement for the work, Agent shall promptly receive an unconditional lien waiver covering the disbursement amount.

(D) All subsequent disbursement conditions set forth in Section 1.3 above have been satisfied.

(e) Interest Reserve. Notwithstanding any Interest Reserve set forth in the Cost Breakdown, all Net Monthly Cash Income from the Property shall be used to pay accrued interest coming due under the Loan. After (i) all Net Monthly Cash Income has been used, and (ii) all disbursement conditions are met (or have been waived in writing by Agent) as determined in Agent's sole and absolute discretion, Agent shall disburse funds from the Interest Reserve to pay the excess monthly accrued interest coming due under the Loan. All disbursements from the Interest Reserve shall be made first from Borrower's Funds which may be allocated to that line item. Loan funds shall be disbursed from the Interest Reserve only after any and all such Borrower's Funds have been exhausted.

(f) Contingency Line Items. From time to time, Borrower may request Loan funds from a contingency line item (if any) set forth on the Cost Breakdown, subject to any retention or other requirements set forth herein or in any other Loan Document applying to that line item, or request Agent to allocate or reallocate Loan funds from a contingency line item, or increase, decrease, and/or deplete a contingency line item. Each such request shall be in writing (by Draw Request, submission of a revised Cost Breakdown, or other written request, as applicable) and shall contain such supporting documentation, including change orders, invoices, and canceled checks, in such forms as Agent shall require. Agent in its sole and absolute discretion may decline any such request for contingency funds, or any request to allocate, reallocate, increase, decrease, or deplete any contingency line item.

(g) Use of Disbursements; Revised Cost Breakdown. Borrower agrees to use disbursements solely in conformity with the Cost Breakdown and Loan Budget. Subject to subsection (f) above, if the Improvements cannot be completed in strict conformity with the most recently approved Cost Breakdown, Borrower shall immediately submit to Agent for its approval a revised Cost Breakdown. The revised Cost Breakdown shall identify Borrower's requested changes in any line items and shall be accompanied by Borrower's written statement of reasons for the changes. If further changes are required, Borrower shall seek Agent's approval, following the procedures described above. Agent may withhold further disbursements unless and until Agent approves the revised Cost Breakdown. Agent reserves the right to approve or disapprove any Cost Breakdown in its reasonable judgment. The most recently approved Cost Breakdown supersedes all previously approved Cost Breakdowns. Nothing contained in this section, or any approval by Agent of a revised Cost Breakdown, shall obligate Agent to advance any proceeds in excess of the Loan Amount.

(h) Disbursement to Pay Fees and Costs. Agent, at its option, may use Loan funds to pay loan fees owing to Agent or any Lender, interest on the Loan, legal fees and expenses of Agent's or any Lender's attorneys which are payable by Borrower, and such other sums as may be owing from time to time by Borrower to Agent or any other Lender with respect to the Loan all without further authorization by Borrower; provided, however, that Agent shall notify Borrower in writing of all such disbursements to pay fees and/or costs. Agent, at its option, may make any such payment on Borrower's behalf by (i) debiting the Loan funds in the amount of the payment and disbursing such amount to itself or any other Lender, as applicable, or (ii) disbursing all or part of the payment amount into the Account, and then either debiting the Account or invoicing Borrower in the amount of the payment(s). For these purposes, Agent is not restricted to the line items and cost categories of the Cost Breakdown. Borrower acknowledges that such a use of Loan funds by Agent or for the benefit of one or more Lender, may cause the Loan to become "out of balance," requiring deposits by Borrower into the Borrower's Funds Account.

(i) Debit of Loan at Closing. As of the day the Loan closes, Agent is authorized to make payments on Borrower's behalf by debiting the Loan funds and disbursing such amounts to itself or any other Lender, as applicable, for all costs and expenses payable by Borrower and discussed by Agent or any other Lender pursuant to the terms of this Agreement, if such have not been received by Agent in immediately available funds directly from Borrower's own funds. Such expenses shall include but not be limited to: (i) reasonable legal fees and expenses of Agent's and Lenders' counsel, (ii) loan administration and documentation fees, (iii) appraisal fees, and if applicable, appraisal review fees, (iv) construction inspection fees, (v) the Loan Fee, if any; and (vi) and other fees and costs required to be paid to Agent by Borrower under this Agreement.

(j) Interest on Disbursements. Interest on each disbursement, whether initiated by Borrower, Agent, or any Lender, shall accrue from the time the Loan funds are so debited in the amount of the disbursement.

(k) Contractor's Fees/Developer Fees/Overhead. Except as otherwise agreed in writing by Agent, no Loan funds shall be disbursed by Agent for developer fees and/or contractor's fees. Borrower understands and acknowledges that (i) Deferred Contractor Fees, and (ii) Deferred Developer Fees, in the amounts set forth in Section 1.1(v) above, are required by Lender as a material condition of and a material consideration for the making of the Loan to Borrower.

## **2.2 Loan In Balance; Borrower's Funds Account.**

(a) If at any time and from time to time Agent determines that the sums of (i) any undisbursed portion of the Loan to which Borrower is entitled (exclusive of the contingency amounts in the Cost Breakdown), plus (ii) any sums to be paid by Borrower or any other party from other funds on

deposit with Agent or anticipated in the approved Cost Breakdown, are insufficient to pay through completion of Improvements and the Maturity Date the actual unpaid costs of the construction, marketing and leasing, ownership, maintenance and sale or leasing of the Property, as and if applicable, (including any interest and other sums accruing or payable under the Loan Documents), the Loan is "out of balance." If the Loan is "out of balance," Borrower shall, within ten (10) days after written demand by Agent, deposit with Agent the amount of the deficiency in the Borrower's Funds Account with interest earned thereon to be added to such account. The Loan is "in balance" when sufficient sums are in the Cost Breakdown to satisfy the requirements of this Section.

(b) Borrower acknowledges that the Loan may become "out of balance" from a shortage of funds in any single line item or category of the Cost Breakdown, even if there are undisbursed Loan funds in other line items or categories. Borrower further acknowledges that changes in circumstances may cause the Loan to become "out of balance", including but not limited to projections of interest rates, anticipated extensions of the Maturity Date, cost overruns and construction change orders, or failure of the Improvements to be leased and occupied as anticipated by the Pro Forma Schedule.

(c) The disbursement procedures described in this Agreement shall apply to the Loan funds and also any Borrower's Funds which may be on deposit in the Borrower's Funds Account. Any such Borrower's Funds shall be fully disbursed until they are exhausted prior to any Loan funds being disbursed.

### **2.3 Draw Requests.**

(a) For each disbursement, Borrower shall submit to Agent (or such other persons authorized in writing by Borrower), at least ten (10) Banking Days prior to the date of the requested disbursement, a Draw Request signed by Borrower and if required by Agent, the Architect and/or the Contractor, together with such documentation and information as Agent may require. Each Draw Request shall be acceptable in form and substance to Agent in the exercise of its reasonable judgment, and shall include such supporting items of information and documentation, including invoices, cancelled checks, lien waivers, and other evidence, as Agent may require to show that Borrower is in compliance with the Loan Documents. If Agent so requires, any given Draw Request shall also include written certification by the Architect and/or the Contractor (as determined by Agent) that the Improvements as constructed to date substantially conform to the Plans and Specifications.

(b) In each Draw Request, Borrower shall request disbursement for one or more specified line items of the Loan Budget. Borrower may submit a Draw Request to Agent no more than once in a calendar month, unless Agent agrees, in its sole and absolute discretion, to make disbursements more frequently. Borrower shall use all Loan funds and all Borrower's Funds strictly for the purposes for which they were disbursed by Lender.

(c) Unless Borrower has notified Agent in writing to the contrary, each Draw Request shall constitute Borrower's representation and warranty to Agent and the other Lenders that (i) the Loan is "in balance," (ii) all prior disbursements, as well as that currently being requested, were and will be used in strict compliance with the Loan Budget, and (iii) no Event of Default (as defined in the applicable document), Default, or Unmatured Event of Default has occurred and is continuing under any of the Loan Documents, and shall also constitute a reaffirmation of the representations and warranties of Borrower set forth in the Loan Documents as true and correct as of the date of such Draw Request.

#### **(d) Telecopy or Electronic Mail Authorization.**

(i) The Agent may honor telecopy or electronic mail instructions for advances or repayments given by any person authorized to sign a Draw Request pursuant to the terms of this

Agreement, or any one of the individual signer(s) of this Agreement, or a person or persons authorized by any person authorized to sign a Draw Request pursuant to the terms of this Agreement or any one of the signer(s) of this Agreement.

(ii) The Borrower hereby indemnifies, defends, and holds Agent and all Indemnified Parties harmless for, from, and against all liability, loss, and costs in connection with any act resulting from telecopy or electronic mail instructions it reasonably believes are made by any person authorized to sign a Draw Request pursuant to the terms of this Agreement, or by one of the individual signer(s) of this Agreement, or by a person or persons authorized by any person authorized to sign a Draw Request pursuant to the terms of this Agreement or any one of the signer(s) of this Agreement, or by any other individual authorized by the Borrower to give such instructions. This indemnity shall survive the termination of Agreement and/or the payment in full of the Loan.

**2.4 Disbursement Procedures.** Unless otherwise agreed to in writing by Agent, the following procedures will apply with respect to the disbursement of the Loan.

(a) **Soft Costs.** Soft Costs shall be disbursed based upon Agent's approval of Borrower's Draw Requests as set forth in this Agreement. No disbursements for Soft Costs will be made until all conditions for disbursement applicable to the disbursement of such soft costs set forth in the Loan Documents have been met.

(b) **Hard Costs.** Hard Costs shall be disbursed on a percentage of completion basis. No disbursements for Hard Costs will be made until Agent or its designated construction inspector or consultant has completed a site inspection, including a construction inspection by Agent's inspector, at Borrower's sole cost and expense, and Agent or its construction inspector or consultant shall have approved the applicable percentage of completion of the Hard Costs being requested, and all other conditions under this Agreement for disbursement have been met.

(c) **Procedures Generally.** Agent shall make disbursements in accordance with its standard disbursement procedures. After the closing of the Loan, Agent may send to Borrower a letter summarizing the Agent's current disbursement procedures to be followed when Borrower submits each Draw Request. As part of each Draw Request, Borrower will be required to submit a package of disbursement items and information as required by Agent, but consistent with this Agreement. The items which shall be included as part of the Draw Request include the following:

(i) **Request for Payment.** As a cover sheet to the Draw Request, Borrower shall submit to Agent a request for payment on a Agent-prescribed form setting forth, among other things, the total amount requested, any Loan Budget reallocations requested, and a draw summary by line item.

(ii) **Contractor's Application and Certificate for Payment.** Borrower shall submit to Agent a Contractor's Application and Certificate for Payment (i.e., AIA Documents G702 and G703) prepared and fully executed by the Contractor. If required by Agent, such Certificate for Payment shall also be fully executed by the Architect thus certifying the work covered therein. By submitting the Certificate for Payment to Agent, Borrower acknowledges its review and approval of such documents and all information it contains.

(iii) **Lien Waivers.** All Draw Requests for Hard Costs shall include a conditional lien waiver in the amount of the current payment due for each Hard Cost item set forth in the foregoing Certificate of Payment (and the AIA G702 and G703 thereto) being submitted. The subsequent Draw Request shall include an unconditional lien waiver for each such Hard Cost item

and shall cover an amount which (A) is at least the total amount disbursed for such Hard Cost item pursuant to the previous Draw Request, and (B) when totaled with all previous unconditional lien waivers for such Hard Cost item, totals at least the total aggregate amount previously disbursed for such Hard Cost item. Borrower agrees that any conditional or unconditional lien waiver delivered pursuant to this Section shall be in the form of conditional or unconditional (as applicable) lien waiver set forth in or required by applicable law.

(iv) Back-Up Invoices for Soft Costs. All Draw Requests for Soft Costs shall include back-up invoices for each Soft Cost item over Twenty-Five Thousand and No/100 Dollars (\$25,000.00). Unless otherwise agreed in writing by Agent, each such invoice shall (A) indicate the correct address of the Project, (B) be no more than sixty (60) days old, except for Soft Costs incurred and paid prior to the closing of the Loan, and (C) be in an amount which reconciles with the applicable request for payment form.

(v) Offsite Stored Materials. Agent will disburse for materials to be used in the construction of the Improvements which are or will be stored at a location other than the Project site, so long as the aggregate of advances for such offsite stored materials does not exceed the Stored Materials Advance Limit if and only if, all of the following conditions are met:

(A) All conditions to disbursement set forth in the Loan Documents have been satisfied or waived in writing by Agent.

(B) Borrower shall have delivered to Agent a bill of sale and/or copies of invoices covering such offsite stored materials, and if required by Agent in Agent's discretion, Agent shall have filed a UCC-1 Financing Statement which shows of record as perfecting a first-priority security interest in the offsite stored materials.

(C) Unless otherwise agreed in writing by Agent, such offsite stored materials shall be located in a bonded warehouse and shall be properly tagged and identified as determined by Agent.

(D) Borrower shall have delivered evidence to Agent acceptable to Agent that such materials will be stored in a manner and condition acceptable to Agent. If reasonably requested by Agent, then at Borrower's sole cost and expense, such offsite stored materials may be inspected at the storage site by Agent or Agent's independent third party inspector or consultant.

(E) At Borrower's sole cost and expense, Borrower shall have provided to Agent evidence of such additional insurance with respect to the offsite stored materials as Agent may require. Such additional insurance shall include coverage for transportation of such offsite stored materials from the storage site to the Project site.

**2.5 Escrow for Loan Closing.** In connection with the Loan closing and the initial disbursement of Loan proceeds by Agent under this Agreement, Agent, at its option, may require that such disbursement be made through an escrow maintained with a title insurance company or law firm acceptable to Agent in its sole and absolute discretion, in accordance with escrow instructions prepared by Agent.

**2.6 Loan Disbursements.** Unless Agent and Borrower have otherwise agreed in writing, Agent, if it so chooses, may make disbursements into the Account and/or directly to the Contractor, subcontractors, laborers, or material suppliers.

**2.7 Disbursement Conditions.**

(a) Fulfillment of Conditions. Lender need not make any disbursement of Loan funds until Borrower fulfills all conditions of the Loan Documents, at Borrower's sole cost and expense and in a manner acceptable to Agent in its sole and absolute discretion (unless another standard is specified) including the Loan closing conditions and the Loan disbursement conditions set forth in Section 1 above. Borrower acknowledges that delays in disbursements may result from the time necessary for Agent to verify satisfactory fulfillment of any and all conditions to a given disbursement. Borrower consents to all such delays. Agent may waive a condition of disbursement, but each such waiver shall be enforceable against Agent and the other Lenders only if it is expressly made in writing by Agent. If Agent makes a disbursement before fulfillment of one or more required conditions, that disbursement alone shall not be a waiver of such conditions, and Agent reserves the right to require their fulfillment before making any subsequent disbursements. Agent may condition any disbursement made following waiver of any one or more conditions upon receipt of an endorsement to Lender's title insurance policy. If all conditions are not satisfied, Lender, in its sole and absolute discretion, may disburse as to certain items or categories of costs and not others.

(b) Deferral of Conditions; Conditions Subsequent. If Borrower has not fulfilled all closing conditions and initial disbursement conditions prior to the date set for closing the Loan, Lender, at its option, may close the Loan without disbursing any Loan funds or may close the Loan and disburse some or all of the Loan funds subject to Borrower's compliance with any or all such condition(s) as conditions subsequent to the Loan closing. In such event, Agent shall notify Borrower of the conditions subsequent that must be met and the time period(s) within which Borrower is required to comply. If no time period for compliance is specified by Agent as to any condition subsequent, then Borrower shall comply with such condition subsequent within forty-five (45) days of the date of closing of the Loan; provided, however, that if such condition subsequent cannot reasonably be satisfied by Borrower within such forty-five (45) day period, then so long as Borrower diligently pursues the satisfaction of such condition, Borrower may request and Agent shall extend such period in its reasonable discretion for up to an additional forty-five (45) days so that Borrower can in good faith satisfy such condition subsequent. Failure of Borrower to comply with all conditions subsequent within the applicable time periods shall be an Event of Default hereunder.

**2.8 Extension of Maturity Date.** If on or before the Maturity Date, Borrower satisfies the conditions set forth in this Section, the Maturity Date will be extended to **December 13, 2010**. If the Maturity Date is so extended (i) all sums outstanding under the Loan will be due and payable on the extended Maturity Date, and (ii) all references herein and in the other Loan Documents to the "Maturity Date" shall thereafter mean such extended Maturity Date. Lender's obligation to extend the Maturity Date as described above is subject to the following conditions to extend (collectively, the "Conditions to Extend"), all of which shall be satisfied as determined by Agent in its sole and absolute discretion, unless otherwise waived in writing by Agent:

(a) Notice of Intention to Extend. Borrower shall deliver to Agent, at least thirty (30) days prior to the Maturity Date, a written notice of Borrower's intention to extend the Loan as described above pursuant to the terms and conditions set forth in this Agreement, together with supporting documentation and evidence showing that all Conditions to Extend have been met or will be met on or before the Maturity Date, all in form and substance satisfactory to Agent in its sole and absolute discretion.

(b) Conditions to Final Disbursement Met. All Conditions to Final Disbursement shall have been met or waived in writing by Agent.

(c) Completion of Construction. Borrower shall have completed construction of the Improvements in accordance with Section 3.1(b) below on or before the Completion Date to Agent's satisfaction, and shall have provided Agent with a Certificate of Occupancy, and if requested by Agent, a Notice of Completion, Completion Affidavit, or other evidence of completion acceptable to Agent. Borrower shall provide Agent satisfactory evidence that all costs associated with such construction have been paid in full, and that the Property is subject to no liens, conditional sales contracts, or other encumbrances or interests except as approved in writing by Agent.

(d) Good Condition and Repair. Agent shall be satisfied that the Property, including any construction on it, has been well maintained and is in good condition and repair, except for any insured casualty which is being repaired as provided in the Loan Documents.

(e) Title Endorsements. Agent shall have received, at Borrower's sole cost and expense, a title policy "bring-down" or "date down" endorsement, and such other title endorsements or title policies as Agent may request, or a reissue of, the title policy, in form and substance acceptable to Agent in its sole and absolute discretion, insuring lien-free completion of the Improvements, and the continuing first-priority lien of the Deed of Trust.

(f) No Default. No Event of Default (as defined in the applicable document) or Default shall have occurred, and no Unmatured Event of Default shall have occurred and be continuing under any of the Loan Documents.

(g) No Material Adverse Effect. No Material Adverse Effect shall have occurred with respect to Borrower or the Project.

(h) Loan In Balance. Agent shall be satisfied that the Loan is "in balance."

(i) Pro Forma Schedule. INTENTIONALLY OMITTED.

(j) Execution and Recordation of Modification Documents. Borrower and Agent shall have executed and delivered such modifications to the Loan Documentation as Agent may require, including any such documents as Agent may require to be in recordable form.

(k) Extension Fee. Agent shall have received the Extension Fee as described and defined in the Fee Letter, which is a nonrefundable extension fee, in consideration of such extension of the Maturity Date, on or before Maturity Date

(l) Updated Financial Reporting. Agent shall have received historic and year-to-date quarterly operating statements and rent rolls for the Project.

(m) Updated Appraisal and Remargin Requirements. If required by Agent, in Agent's sole and absolute discretion, the following requirements shall apply:

(i) Updated Appraisal; Updated Appraisal Maximum Loan-to-Value Ratio. Agent shall have obtained, at Borrower's sole cost and expense, an Updated Appraisal of the Project, and based on the results of such Updated Appraisal, the Updated Appraisal Maximum Loan-to-Value Ratio shall not exceed eighty-one percent (81%).

(ii) Remargin Requirements. If the Updated Appraisal Maximum Loan-to-Value Ratio requirement set forth in subsection (i) above is not met upon such testing, as determined by Agent in its reasonable discretion, then Agent shall notify Borrower in writing of

such failure and, Borrower shall, within ten (10) days after such notice, make the appropriate Remargin Payment or Remargin Deposit in an amount sufficient in Agent's reasonable judgment to meet the Updated Appraisal Maximum Loan-to-Value Ratio requirement. If a Remargin Deposit is made pursuant to this subsection, such Remargin Deposit shall be released upon the first to occur of the following: (a) when the Loan has been paid and performed in full; or (b) at Borrower's request, to be applied as a principal paydown of the Loan.

**2.11 Collateral Security.**

(a) Other Collateral. In addition to the Land, Improvements, and other Property described above, the Loan shall be secured by all of the following:

(i) Personalty Related to the Land and Improvements. A first-priority lien on all of Borrower's right, title and interest in and to equipment, furniture, fixtures, and materials to be incorporated into the Improvements, and any other personal property owned by Borrower located on or used in connection with the Land and Improvements.

(ii) Contracts, Plans and Specifications; Development Agreement. An assignment of, and first-priority security interest in all of Borrower's right, title and interest in and to: (A) the Construction Contract, the Architecture Contract, and all engineer contract(s), development contracts, management contracts, and all other agreements now or hereafter entered into by Borrower with any contractor in connection with construction of or on the Property and/or with any architect, engineer, or other consultant in connection with the design, engineering, construction of or on, management of, or for services on or related to, the Property, (B) the Plan and Specifications and all other plans, specifications, and drawings with respect to the Property, and (c) the Development Agreement.

(iii) Borrower's Funds Account. An assignment of, and first-priority security interest in all of the following accounts (whether opened prior to, concurrently with, or subsequent to, the closing of the Loan), and all funds contained or deposited therein: (A) the Borrower's Funds Account, if any, and (B) the Account, and (C) any other Project accounts of Borrower, if any.

(iv) Swap Payments. An assignment of, a lien on, and first-priority security interest in all Swap Payments due at any time and from time to time from Agent to Borrower under any Swap Contract, if any.

(b) Release of Collateral. Unless otherwise agreed in writing by the Required Lenders, Lender's security interest in all collateral for the Loan shall be released by Agent when the Loan has been paid and performed in full; provided, however, that if there is any conflict in the release terms contained in any security agreement, assignment, or other security instrument as to the terms upon which the Lender's security interest in the collateral described in that document, or any portion thereof, shall be terminated and/or released, and the terms of this Section, the terms of any such security agreement, assignment, or other security instrument shall control and govern the collateral described therein.

(c) Collateral Documents. Borrower agrees to execute and/or authorize, as the case may be, any and all documents, including security agreements and financing statements, as Agent may reasonably request in order to create, perfect, or continue the security interests described above.

**2.12 Automatic Deduction.** At Borrower's election, automatic deduction may be used to make payments under the Loan. If Borrower so elects, then the following shall apply:

(a) **Monthly Payments.** Except when Agent disburses Loan proceeds from the Interest Reserve, Borrower agrees that monthly payments on the Loan will be deducted automatically on the due date from the Account.

(b) **Date of Debit.** Agent will debit the Account on the dates the payments on the Loan become due. If a due date does not fall on a Banking Day (as such term is defined in the Note), Agent will debit the Account on the first Banking Day following the due date.

(c) **Maintenance of Funds.** Borrower will maintain sufficient funds in the Account on the dates Agent enters debits authorized by this Agreement. If there are insufficient funds in the Account on the date Agent enters any debit authorized by this Agreement, the debit will be reversed.

(d) **Security.** Borrower hereby grants to Agent, for the benefit of Lender, a security interest in the Account, and any other accounts from which Borrower may hereafter authorize Agent to debit payments due on the Loan, for the purpose of securing the payment of amounts Agent is authorized to deduct from the Account or such other accounts.

**3. Covenants of Borrower.** Borrower promises to keep each of the covenants set forth below, unless Agent has waived compliance in writing.

**3.1 Commencement and Completion of Improvements.**

(a) Borrower shall commence construction of the Improvements within thirty (30) days after the date of recordation of the Deed of Trust and shall continue construction diligently to completion, provided, however, that it shall not be a breach by Borrower of this obligation to diligently continue construction to the extent that Borrower cannot so continue construction because of a Funding Deficiency.

(b) Subject to **Section 9.28** below, by the Completion Date, Borrower shall have completed construction of the Improvements. As used in this Agreement, completion of Improvements includes completing construction of the structural components, operating systems, and all other elements of such buildings, but not including tenant improvements. Unless otherwise agreed to in writing by Agent, the Improvements are deemed complete for all purposes of this Agreement when (i) they have been substantially completed in accordance with the Plans and Specifications, as evidenced by the written certification of the Architect and/or the Contractor (as determined by Agent) in a form satisfactory to Agent, (ii) Borrower has provided Agent with a certificate of occupancy and/or any other approvals required to be issued by all appropriate governmental authorities in order to permit occupancy of all units and facilities within the Improvements, notice of completion (recorded, when advisable or necessary under applicable law) and passage of the requisite time without the filing of claims for mechanic's or materialmen's liens, completion affidavit, or other evidence satisfactory to Agent that the Improvements are complete, are lien-free, and have been inspected by and received final approval of the appropriate governmental authorities.

**3.2 Changes.**

(a) Borrower agrees to provide Agent with copies of all change orders (for any change in any work or materials for the Improvements, whether positive or negative), together with all additional documents relating thereto that Agent may require. These documents may include the following: (i) plans and specifications indicating the proposed change, (ii) a written description of the

proposed change and related working drawings, and (iii) a written estimate of the cost of the proposed change and the time necessary to complete it.

(b) Borrower shall obtain Agent's prior written approval of any change order, if with respect to such change order any of the following apply:

(i) the cost of such change exceeds One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00); or

(ii) if the aggregate amount of all changes (whether positive or negative) will then exceed Five Hundred Thousand and No/100 Dollars (\$500,000.00); or

(iii) regardless of cost, if such change is a material change in structure, design, function, or exterior appearance of the Improvements; or

(iv) regardless of cost, if such change would cause any line item or category of the cost breakdown to be increased or decreased by five percent (5%) or more; or

(v) regardless of cost, if such change could materially affect the value of Agent's security adversely; or

(vi) regardless of cost, if such change will delay completion of the Improvements beyond the Completion Date.

(c) In addition, Borrower shall obtain Agent's prior written approval of all material changes in the scope or general conditions of the Construction Contract, the Architecture Contract, or any other contracts for the construction of the Improvements. Finally, Borrower shall obtain from the appropriate persons or entities all approvals of any changes in plans, specifications, work, materials or contracts required by any of the Requirements (including those of any governmental agency) or under the terms of any lease, loan commitment, or other agreement relating to the Property.

(d) Agent may take a reasonable time to evaluate any requests for proposed changes and may require that all approvals required from other parties be obtained before it reviews any requested change. Agent may approve or disapprove changes in the exercise of its reasonable judgment. Borrower acknowledges that delays may result and agrees that, so long as the delays are not unreasonable in duration, they will not affect Borrower's obligation to complete the Improvements by the Completion Date.

### **3.3 Construction Information and Verification.**

(a) Within twenty (20) days after receiving notification from Agent, Borrower shall deliver to Agent, for Agent's review and approval, any and all of the following information and documents that Agent may request:

(i) Current plans and specifications for the Improvements certified by the Architect as being complete and accurate;

(ii) A current, complete, and correct list showing the name, address, and telephone number of each contractor, Major Subcontractor, and material supplier engaged in connection with the construction of the Improvements and the total dollar amount of each contract

and subcontract (including any changes), together with the amounts paid through the date of the list;

(iii) True and correct copies of the most current versions of all executed contracts major identified in the list described in clause (ii) above, including any changes;

(iv) A current construction progress schedule showing the progress of construction and the projected sequencing and completion times for uncompleted work, all as of the date of the schedule; and

(v) Any update to any item described above, previously delivered to Agent.

(b) Borrower expressly authorizes Agent to contact the Architect, Contractor or any contractor, subcontractor, material supplier, surety, or any governmental authority or agency to verify or discuss any information disclosed in accordance with this Section and any other information related to the Property that Agent may reasonably require.

(c) Any defaulting architect, contractor, subcontractor, material supplier, or surety shall be replaced promptly, and Borrower shall deliver promptly all required information and documents to Agent regarding each replacement architect, contractor, subcontractor, material supplier, and surety. Agent may disapprove any architect, contractor, subcontractor, material supplier, surety, or other party Agent in its reasonable judgment deems financially or otherwise unqualified; however, in no event may the absence of disapproval be deemed approval.

(d) If, based on any construction progress schedule or other materials submitted by Borrower, Agent in its reasonable judgment determines that the Improvements will not be completed by the Completion Date, Agent may request Borrower in writing to reschedule the work of construction to permit timely completion. Within fifteen (15) days after receiving such a request from Agent, Borrower shall deliver to Agent a revised construction progress schedule and Pro Forma Schedule showing completion of the Improvements by the Completion Date.

**3.4 Permits, Licenses and Approvals.** Borrower shall obtain, comply with, and keep in effect all permits, licenses, and approvals required from governmental bodies in order to construct, occupy, operate, market, and lease or sell the Land and Improvements. Borrower shall deliver copies of all such permits, licenses, and approvals to Agent promptly, and in any event within five (5) days after receipt thereof.

**3.5 Cooperation.** Borrower shall cooperate at all times with Agent in bringing about the timely completion of the Improvements, and Borrower shall resolve all disputes arising during the work of construction in a manner allowing work to proceed expeditiously.

**3.6 As-Built Plans; Surveys.** If requested by Agent, after the Completion Date, Borrower shall promptly provide to Agent, at Borrower's sole cost and expense (a) as-built plans and specifications for the Improvements as actually completed, certified by the Architect as being complete and accurate, and/or (b) an as-built ALTA survey of the Land and Improvements in form and substance satisfactory to Agent, certified by a licensed land surveyor and showing the location of the completed improvements, and all boundary lines, easements, rights of way, and other matters affecting the Land.

**3.7 Compliance with Law.** Borrower shall construct the Improvements in a good and workmanlike manner in accordance with sound building practices, as well as the Plans and Specifications and the recommendations of any soils report satisfactory to Agent. Borrower shall comply with all existing and future laws, regulations, orders, building codes, restrictions and requirements of, and all permits and

approvals from, and agreements with and commitments to, all governmental, judicial, or legal authorities having jurisdiction over the Property, including those pertaining to the ownership, construction, marketing, sale, leasing, or financing of the Improvements, and with all zoning ordinances and recorded covenants and restrictions and other title encumbrances affecting the Property (collectively, the "Requirements").

**3.8 Taxes; Additional Costs.** Borrower shall not deduct any taxes from any payments it makes to Agent or any Lender. If any government authority imposes any taxes on any payments made by Borrower, Borrower shall pay the taxes and shall also pay to Agent, for the benefit of Lender, at the time interest is paid, any additional amount which the Agent specifies as necessary to preserve the after-tax yield Lender would have received if such taxes had not been imposed. Upon request by Agent, the Borrower will confirm that it has paid the taxes by giving the Agent official tax receipts (or notarized copies) within thirty (30) days after the due date. However, the Borrower will not pay Agent's or any Lender's net income taxes. Additionally, Borrower shall pay Agent, on demand, for Lender's costs or losses arising from any statute or regulation, or any request or requirement of a regulatory agency. The costs and losses (a) will be allocated to the loan in a manner determined by the Agent, using any reasonable method, and (b) include the following: (i) any reserve or deposit requirements, and (ii) any capital requirements relating to Agents or the other Lenders assets and commitments for credit.

**3.9 Insurance.**

(a) Borrower shall provide, maintain, and keep in force at all times prior to repayment of the Loan, Commercial General Liability Insurance, which includes coverage for terrorism acts, a waiver of subrogation rights, and that includes:

- (i) Two Million and No/100 Dollars (\$2,000,000.00) property damage per occurrence;
- (ii) Three Million and No/100 Dollars (\$3,000,000.00) bodily damage per occurrence;
- (iii) Five Million and No/100 Dollars (\$5,000,000.00) aggregate limit; and
- (iv) Two Million and No/100 Dollars (\$2,000,000.00) excess or umbrella liability coverage.

This policy shall name the Borrower as an insured and Agent, for the benefit of Lender, as an additional insured. Coverage shall be written on an occurrence, not claims made, basis. Borrower shall supply Agent with an ORIGINAL Accord 25 Certificate of Commercial General Liability Insurance showing such coverage, together with an Additional Insured Endorsement naming Agent, for the benefit of Lender, as additional insured.

(b) Borrower shall provide, maintain, and keep in force at all times during any period of construction the following (in addition to, and not in lieu of, the Commercial General Liability Insurance described in **Section 3.11(a)** above):

- (i) A policy or policies of "builder's risk special form" insurance in nonreporting form, in an amount not less than the full insurable completed value of the Property on a replacement cost basis. The policy or policies must insure against loss or damage by hazards customarily included within such "all risk" policies, and shall include: (1) a Mortgagee Clause naming Agent, for the benefit of Lender, as mortgagee with a thirty (30) day notice to Agent in the event of cancellation, non-renewal or material change, (2) a Loss Payee Clause naming Agent, for the benefit of Lender, as loss payee, (3) a Replacement Cost Endorsement, (4)

no coinsurance clause, (5) vandalism and malicious mischief coverage, (6) boiler and machinery coverage, (7) demolition, increased cost of construction coverage, (8) in-transit coverage, and (9) terrorism coverage. This policy shall name the Borrower as an insured and Agent, for the benefit of Lender, as an additional insured. Coverage shall be written on an occurrence, not claims made, basis. Borrower shall supply Agent with an ORIGINAL (or certified copy) Builder's All-Risk, Completed Value, Non-Reporting Form Policy or ORIGINAL Accord 27 Certificate of Insurance or other form acceptable to Agent reflecting coverage of 100% of the replacement cost.

(ii) If Borrower is an owner/builder, then Borrower's comprehensive liability insurance shall include product/completed operations and contractual coverage.

(iii) Such policy or policies of worker's compensation insurance as may be required by applicable worker's compensation insurance laws (including employer's liability insurance, if required by Agent), covering all employees of Borrower and any contractors of Borrower.

(iv) Upon completion of the Improvements, loss of rents insurance in an amount of not less than the greater of (1) 100% of one year's Rental Value of the Property or (2) to twelve (12) months' principal and interest payments, taxes, and insurance premiums relating to the Property. For purposes hereof, "Rental Value" shall include (1) the total projected gross rental income from tenant occupancy of the Property as set forth in any tenant leases, and any other projections delivered to Agent, (2) the amount of all charges which are the legal obligation of tenants and which would otherwise be the obligation of the applicable Borrower, and (3) the fair rental value of any portion of the Property which is occupied by Borrower, or any Affiliate of Borrower.

(c) Borrower shall provide, maintain, and keep in force at all times prior to repayment of the Loan, any and all additional insurance Agent in its reasonable judgment may from time to time require, against commonly insured hazards for similarly situated properties. Such additional insurance may include flood insurance as required by federal law and earthquake and/or sinkhole insurance as required by Agent. At Agent's request, Borrower shall supply Agent with an original, countersigned original, or certified copy of any policy. All policies of insurance required under the Loan Documents shall be issued by companies approved by Agent having an A.M. Best's rating acceptable to Agent, with limits, coverage, forms, deductibles, inception and expiration dates and cancellation provisions acceptable to Agent, and shall provide that all proceeds be payable to Agent to the extent of its interest. An approval by Agent is not, and may not be deemed to be, a representation of the solvency of any insurer or the sufficiency of any amount of insurance. Each policy of insurance required under the Loan Documents shall provide that it may not be modified or canceled without at least thirty (30) days' prior written notice to Agent. When any required insurance policy expires, Borrower shall furnish Agent with proof acceptable to Agent that the policy has been reinstated or a new policy issued, continuing in force the insurance covered by the expired policy. Borrower shall also furnish evidence satisfactory to Agent that all premiums for such policy have been paid within thirty (30) days of renewal or issuance. If Agent fails to receive such proof and evidence, Agent has the right, but not the obligation, to obtain current coverage and advance funds to pay the premiums for it. Borrower shall repay Agent immediately on demand for any advance for such premiums, which will be an additional loan to Borrower bearing interest at the Default Rate and secured by the Deed of Trust and any other collateral held by Agent in connection with the Loan. As to all policies of insurance provided by Borrower, Borrower shall be named as the insured and any additional insured parties shall be subject to Agent's approval. As to all policies of insurance provided by a third party other than Borrower (e.g., any contractor, subcontractor, or tenant), Borrower shall be named as an additional insured.

**3.10 Payment of Expenses.** Borrower shall pay Agent's and each Lender's reasonable costs and expenses incurred in connection with the making, disbursement, and administration of the Loan. Borrower shall also pay any and all of Agent's and each Lender's costs and expenses incurred in connection with any revisions, extensions, renewals, or "workouts" of the Loan, and in the exercise of any of Agent's or Lender's rights or remedies under this Agreement. Such costs and expenses include charges for title insurance (including endorsements), filing, recording, and escrow charges, fees for appraisal and appraisal review, architectural and engineering review, construction services (including those of Agent's construction inspector) and environmental services, mortgage taxes, document review and preparation, reasonable legal fees and expenses of Agent's and each Lender's counsel, and any other reasonable fees and costs for services, regardless of whether such services are furnished by such party's employees or agents or independent contractors. Borrower acknowledges that amounts payable under this Section are not included in any loan or commitment fees for the Loan. All such sums incurred by Agent and/or any other Lender and not immediately reimbursed by Borrower will be considered an additional loan to Borrower secured by the Deed of Trust and bearing interest at the Default Rate.

**3.11 Financial and Other Information.**

(a) **Financial and Other Information of Borrower.** Borrower shall keep true and correct financial books and records, using GAAP, or such other accounting principles as Agent in its reasonable judgment may find acceptable from time to time. Borrower shall provide to Agent the following:

(i) As soon as reasonably practicable, and in any event within one hundred twenty (120) days after Borrower's fiscal year end, such Borrower's annual financial statements, which shall include Borrower's balance sheet, income statement, statement of cash flow, and all supporting schedules. These financial statements shall be prepared and audited by a Certified Public Accountant acceptable to Agent.

(ii) As soon as reasonably practicable, and in any event within sixty (60) days after each fiscal quarter end of Borrower (excepting Borrower's 4<sup>th</sup> fiscal quarter), Borrower's quarterly balance sheets and income statements. These financial statements may be prepared by Borrower if certified to be true and correct by Borrower. Such certification by Borrower can be contained in and thus be a part of the Compliance Certificate described below.

(iii) Within forty-five (45) days after each fiscal quarter end of Borrower, including Borrower's fiscal year end, a duly executed of Compliance Certificate in the form of **Exhibit C** (each, a "Compliance Certificate"), attached hereto, together with such backup documentation as may be reasonably requested by Agent, showing Borrower's compliance with financial covenants and other matters.

(iv) Within thirty (30) days after the end of each calendar month, a monthly leasing report for the Project.

(v) After the completion of the Improvements in accordance with **Section 3.1(b)** above, then within thirty (30) days after the end of each calendar quarter, a quarterly rent roll for the Project.

(vi) Promptly upon the request of Agent, such other information (excluding tax returns) as Agent may reasonably request concerning the affairs and properties of such Borrower.

**3.12 Audits.** Borrower shall allow Agent and its agents to inspect Borrower's properties and examine, audit, and make copies of Borrower's books and records at any reasonable time. If any of

Borrower's properties, books, or records are in the possession of a third party, Borrower authorizes that third party to permit Agent or its agents to have access to perform inspections or audits and to respond to Agent's requests for information concerning such properties, books and records.

**3.13 Notices.** Borrower shall notify Agent promptly in writing of any and all of the following:

(a) Any litigation affecting Borrower where the amount claimed is or may be One Hundred Thousand and No/100 Dollars (\$100,000.00) or more, and which (i) is not dismissed within sixty (60) days of the filing thereof, and (ii) is not Covered by Insurance.

(b) Any written or oral communication Borrower receives from any governmental, judicial, or legal authority giving notice of any claim or assertion that the Land or Improvements fail in any respect to comply with any of the Requirements or any other applicable governmental law.

(c) Any material adverse change in the physical condition of the Property (including any damage suffered as a result of fire, earthquakes, or floods).

(d) Any material adverse change in Borrower's financial condition, any material adverse change in Borrower's operations, or any other circumstance, event, or occurrence that results in a material adverse change in Borrower's ability to timely perform any of its obligations under any of the Loan Documents.

(e) Any notice that the Borrower's business fails in any respect to comply with any Requirement, and/or any substantial dispute between the Borrower and any government authority.

(f) Any change in the Borrower's name, legal structure or business structure, state in which the Borrower has filed its entity incorporation or organizational documents, and/or location of its place of business or its chief executive office if it has more than one place of business, Borrower's organizational identification number assigned by the state of its incorporation or organization, and/or any change in the location of Borrower's books and records, which are currently located at Borrower's chief executive office.

(g) The institution of any steps by Borrower to withdraw from or terminate any employee benefit plan as to which Borrower may have liability.

(h) Any Change in Control of Borrower.

(i) Any Event of Default, Default, or Unmatured Event of Default under any of the Loan Documents by Borrower and any alleged breach or default any of the Loan Documents by Agent or any Lender.

(j) Any default (subject to applicable cure periods) by the Contractor or any subcontractor, material supplier, or surety related to the Property, or any material adverse change in the financial condition or operations of any of them.

**3.14 Keeping Guarantors and Third Party Pledgors Informed.** INTENTIONALLY OMITTED.

**3.15 Performance of Acts.** Upon Agent's request, Borrower shall perform all acts necessary or advisable to perfect any lien or security interest provided for in the Loan Documents or to carry out the intent of the Loan Documents.

**3.16 Preservation of Rights.** Borrower shall obtain, preserve and maintain in good standing, as applicable, all rights, privileges and franchises necessary or desirable for the operation of the Property and the conduct of Borrower's business thereon or therefrom.

**3.17 Indemnity Regarding Construction and Other Risks.** Borrower indemnifies, defends, and holds the Indemnified Parties harmless for, from, and against any and all actual or threatened liabilities, claims, actions, causes of action, judgments, orders, damages (including foreseeable and unforeseeable consequential damages), costs, expenses, fines, penalties, and losses (including sums paid in settlement of claims and all reasonable consultant, expert and legal fees and expenses of the applicable Indemnified Parties' counsel), and any resulting damages, harm or injuries to the person or property of any third parties, directly or indirectly arising out of or resulting from (a) construction of any improvements on the Property, (b) the ownership, management, maintenance, operation, marketing, leasing, sale, or use of the Property, including any such claims based on theories of derivative liability, comparative negligence or otherwise, (c) any development of or improvement to the Property, including any defective workmanship or materials, (d) any failure to satisfy any Requirements or any reports, maps, development agreements, or regulatory agreements that apply or pertain to the Property, (e) breach of any representation or warranty made or given by Borrower to any of the Indemnified Parties or to any prospective or actual lessee or buyer of all or any portion of the Property, and/or (f) any claim or cause of action of any kind by any party that any Indemnified Party is liable for any act or omission of Borrower or any other person or entity in connection with the ownership, management, maintenance, operation, marketing, leasing, sale, or use of the Property, or any development of or improvement to the Property, excepting those arising out of, or resulting, solely from the applicable Indemnified Party's gross negligence or willful misconduct. Notwithstanding, anything to the contrary in any other Loan Document, the provisions of this Section shall survive the termination of this Agreement, repayment of the Loan, and foreclosure of the Deed of Trust or similar proceedings.

**3.18 Other Debts.** Except as otherwise disclosed in writing to Agent prior to the date of this Agreement or provided herein or in any other Loan Document, without Agent's prior written consent, Borrower shall not have outstanding or incur any direct or contingent debts or long term monetary lease obligations (i.e., lease obligations in excess of one (1) year) related to or secured by the Property, other than those to Agent for the benefit of Lender, or become liable for the debts of others. This does not prohibit:

- (a) Acquiring goods, supplies, or merchandise on normal trade credit.
- (b) Endorsing negotiable instruments received in the usual course of business.
- (c) Obtaining surety bonds in the usual course of business.
- (d) Debts, lines of credit, and/or leases in existence on the date of this Agreement previously disclosed in writing to Agent.

**3.19 Other Liens.** Except as otherwise disclosed in writing to Agent prior to the date of this Agreement or provided herein or in any other Loan Document, without Agent's prior written consent, Borrower shall not create, assume, or allow any security interest or lien (including judicial liens) on the Property, except:

- (a) Deeds of trust and security agreements in favor of Agent, for the benefit of Lender.
- (b) Liens for taxes not yet due.
- (c) Liens outstanding on the date of this Agreement previously disclosed in writing to the Agent.

**3.20 Negative Covenants.** Except as otherwise provided herein or in any other Loan Document, without Agent's prior written consent, Borrower shall not:

- (a) engage in any business activities substantially different from Borrower's present business;
- (b) liquidate or dissolve Borrower's business;
- (c) lease, sell, or otherwise dispose of all or a substantial part of Borrower's business or Borrower's assets or sell or otherwise dispose of any assets for less than fair market price;
- (d) enter into any consolidation, merger, pool, joint venture, syndicate or other combination, excepting (i) real estate-related partnerships, joint ventures, limited liability companies, and similar entities to accommodate real estate transactions that Borrower and/or Borrower's Affiliates are a party to (each a "Borrower Real Estate Entity"), and (ii) any of the foregoing between Borrower and/or Borrower's Affiliates and/or any person or entity described within the definition of "Allowed Transfers" herein;
- (e) INTENTIONALLY OMITTED;
- (f) INTENTIONALLY OMITTED;
- (g) cause, permit, or suffer any direct or indirect Change in Control in Borrower; or
- (h) make any loans, advances, or other extensions of credit to anyone, excepting any loans, advances, or other extensions of credit to or between Borrower, Borrower's Affiliates, any Borrower Real Estate Entity, and/or any person or entity described within the definition of "Allowed Transfers" herein.

**3.21 Site Visits; Right to Stop Work.**

(a) Agent and its agents and representatives shall have the right to enter and visit the Property at any reasonable time for the purposes of performing an appraisal, observing the work of construction and examining all materials, plans, specifications, working drawings, and other matters relating to the construction. For purposes of these site visits, Borrower shall maintain at all times a full set of working drawings at the construction site. Agent has the right to examine, copy and audit the books, records, accounting data and other documents of Borrower and its contractors relating to the Property or construction of the Improvements. In each instance, Agent shall give Borrower reasonable notice before entering the Property and make reasonable efforts to avoid interfering with Borrower's use of the Property when exercising any of the rights granted in this Section. Notwithstanding anything herein to the contrary, Agent or its agents and representatives conducting tests upon the Property pursuant to this Section shall be liable to repair any material damage to the Property caused by the conducting of such tests upon the Property, except (a) where (i) the damage is not reasonably avoidable in the performance of such testing; and (ii) such testing results in the discovery of Hazardous Substances or any other adverse condition affecting the Property in violation of the Borrower's Indemnity, or which Borrower must correct pursuant to the terms of this Agreement; or (b) if such testing is done when a Default or an Event of Default (subject to applicable notice and cure periods) has occurred and is continuing under this Agreement, the Borrower's Indemnity, or any of the other Loan Documents, or (c) when such testing is required by law or regulation.

(b) If Agent in its reasonable judgment determines that any work or materials fail to conform to the approved Plans and Specifications or sound building practices, or that they otherwise depart from any of the requirements of this Agreement, Agent may require the work, or a portion thereof,

to be stopped and may withhold disbursements until the matter is corrected. If this occurs, Borrower shall correct the work to Agent's satisfaction promptly and halt all other work to the extent that such other work relates to or otherwise cannot be properly completed absent completion of the corrective work, pending completion of such corrective work. No such action by Agent will affect Borrower's obligation to complete the Improvements in accordance with the Pro Forma Schedule and on or before the Completion Date.

(c) Agent has no duty to visit the site, to supervise or observe construction, or to examine any books or records. Any site visit, observation, or examination by Agent is solely for the purpose of protecting Agent's rights and interests. No site visit, observation, or examination by Agent shall impose any liability on Agent or result in a waiver of any default of Borrower or be a representation that Borrower is or will be in compliance with the Plans and Specifications, that the construction is free from defective materials or workmanship, or that the construction complies with all applicable Requirements. Neither Borrower nor any other party is entitled to rely on any site visit, observation, or examination by Agent. Agent owes no duty of care to protect Borrower or any other party against, or to inform Borrower or any other party of, any negligent or defective design or construction of the Improvements or any other adverse condition affecting the Property.

**3.22 Protection Against Lien Claims.** Borrower shall pay or otherwise promptly discharge all claims and liens for labor done and materials and services furnished in connection with the construction of the Improvements. If a mechanic's or materialman's lien has been recorded against the Land or a bonded stop notice has been issued with respect to the Land or Improvements, Borrower shall promptly deliver, or cause the title insurance company to deliver, a copy of such claim or lien to Agent (whether recorded or not). Borrower has the right to contest in good faith any claim or lien, provided that it does so diligently and without prejudice to Lender and without delay in completing the Improvements. If Borrower contests any such claim or lien, then promptly upon Agent's request, Borrower shall provide, or shall cause the Contractor to provide, a bond, cash deposit, or other security satisfactory to Agent in the exercise of its reasonable judgment. If Borrower chooses to contest such claim or lien in good faith, unless otherwise agreed to in writing by Agent, Borrower may record a payment bond in form and substance acceptable to Agent either (a) in an amount adequate to cover the Construction Contract amount, or (b) specifically covering such claim or lien. Agent shall not be required to make any further disbursements of the Loan unless and until Agent has received evidence acceptable to Agent in its sole and absolute discretion that each such claim or lien has been released, and that title to the Land is clear of each such claim or lien.

**3.23 Appraisals.** If required by Agent or if required by applicable law or regulations, Agent shall have the right to order appraisals of the Property from time to time from an appraiser selected by Agent, which appraisals shall comply with all federal and state standards for appraisals and otherwise shall be satisfactory to Agent in all material respects. Borrower agrees to pay the cost and expense for any Updated Appraisal ordered to satisfy any Condition to Extend set forth in **Section 2.8** above, and for all such appraisals and reviews thereof ordered by Agent pursuant to this Section when (a) an Event of Default has occurred or an Unmatured Event of Default has occurred and is continuing hereunder, or (b) such appraisal or update is required by applicable law or regulation.

**3.24 Tax Receipts.** Borrower shall provide to Agent, within thirty (30) days after the end of the fiscal year of the applicable governmental authority, bills and receipts showing the payment (to the extent then due and payable) of all taxes and assessments that are or may become a lien upon the Property or any portion thereof. If Borrower fails, following demand, to provide Agent the tax receipts required by this Section, without limiting the other remedies available to Lender under this Agreement, Agent may, at Borrower's sole expense, obtain and enter into a tax services contract with respect to the Property with a tax reporting agency satisfactory to Agent.

**3.25 Conditional Sales Contracts; Removal of Fixtures and Equipment.** Without Agent's prior written consent, Borrower shall not (a) purchase or contract for any materials, equipment, furnishings, fixtures, or articles of personal property to be placed or installed on the Land or any Improvements under any security agreement or other agreement where the seller reserves or purports to reserve a lien, security interest, or title thereto, or the right of removal or repossession after such items are installed on or in the Property, or (b) remove or permit to be removed from the Land or the Improvements any equipment, machinery, or fixtures used in connection with the ownership, management, maintenance, operation, or enjoyment thereof unless replaced by articles of equal suitability and value owned by Borrower free and clear of any lien or security interest.

**3.26 Income from Property.** Borrower shall first apply all income from leases, and all other income derived from the Property, to pay costs and expenses associated with the ownership, maintenance, development, operation, and marketing of the Land and Improvements, including all amounts then required to be paid under the Loan Documents, before using or applying such income for any other purpose. At all times until the Loan is paid in full, (a) all Net Monthly Cash Income shall be used first to pay accrued monthly interest payments coming due under the Loan except as otherwise provided in the Loan Documents, and (b) except as may be otherwise permitted herein, Borrower may not distribute any income to any of its members, partners, or shareholders, allow any member, partner, or shareholder to withdraw capital or make any payments on indebtedness owed to any member, partner, or shareholder.

**3.27 Property Management Agreement.** If any Property will be managed at any time during the term of the Loan by a third party property manager, such property manager shall be an Approved Manager, and any property management agreement entered into with respect to any Property must be in writing and be terminable upon no more than thirty (30) days written notice without penalty or charge (other than for unpaid accrued management fees), unless otherwise agreed in writing by Agent, and a copy any such property management agreement shall promptly be provided by Borrower to Agent.

**3.28 Restrictions.** Except as otherwise set forth herein, Borrower shall not record any covenants, conditions, restrictions, or easements (collectively, "Restrictions"), affecting all or part of the Property without the prior written consent of Agent; in Agent's sole and absolute discretion, in each instance. Borrower may submit to Agent a proposed form of any covenants, conditions, restrictions and/or easements affecting all or part of the Property and may request Agent to approve and to subordinate the Deed of Trust to such Restrictions. Agent has no obligation to grant such a request by Borrower. However, Agent will consider and honor any such request if it does not impair or affect the security of any obligation evidenced by the Loan Documents, all as Agent may determine in its sole and absolute discretion. Borrower acknowledges that delays may result from the approval process and agrees that, so long as the delays are not unreasonable in duration, they shall not affect Borrower's obligations to timely perform any other requirement set forth in this Agreement. With respect to any Restrictions which are recorded, upon Agent's request, Borrower shall execute and deliver to Agent an assignment of Borrower's rights thereunder, in form and substance acceptable to Agent in its sole and absolute discretion, as security for the performance of Borrower's obligations under the Loan Documents.

**3.29 Employee Benefit Plans; ERISA Compliance.** Except if Borrower is not a party in interest to any plan defined or regulated under ERISA, and the assets of Borrower are not "plan assets" of any employee benefit plan covered by ERISA or Section 4975 of the Internal Revenue Code, Borrower shall at all times maintain each employee benefit plan as to which Borrower may have any liability, in compliance with all applicable laws, rules, and regulations. Borrower shall at all times comply with the provisions of ERISA with respect to any retirement or other employee benefit plan to which it is party as employer. As soon as possible after Borrower knows, or has reason to know, that any Reportable Event (as defined in ERISA) with respect to any such plan of Borrower has occurred, it shall furnish to Agent a written statement setting forth details as to such Reportable Event and the action, if any, which Borrower

proposes to take with respect thereto, together with a copy of the notice of such Reportable Event furnished to the Pension Benefit Guaranty Corporation.

**3.30 Financial Covenants.** Financial terms used herein which are not specifically defined herein shall have the meanings ascribed to them under GAAP. Borrower shall comply with all of the following covenants. Borrower understands, acknowledges, and agrees that failure to comply with these covenants shall constitute an Event of Default hereunder and under the Loan Documents.

(a) **Minimum Adjusted Net Worth.** Borrower shall maintain Adjusted Net Worth as of the end of each fiscal quarter in an amount not less than One Hundred Million and No/100 Dollars (\$100,000,000.00).

(b) **Minimum Liquidity.** Borrower shall maintain at all times prior to repayment of the Loan, Liquidity of not less than Two Million and No/100 Dollars (\$2,000,000.00).

(c) **Debt to Adjusted Net Worth Ratio.** Borrower shall maintain a Debt to Adjusted Net Worth Ratio as of the end of each fiscal quarter of not more than (a) 6.00 to 1.00 for the quarterly testing periods ended **December 31, 2007, March 31, 2008, June 30, 2008, September 30, 2008, and December 31, 2008**, and (b) 5.00 to 1.00, beginning with the quarterly testing period ended **March 31, 2009**, and continuing each quarterly testing period thereafter.

**4. Pro Forma Schedule; Leases.**

**4.1 Pro Forma Schedule.**

(a) The following is Borrower's Pro Forma Schedule (the "Pro Forma Schedule"):

Date	Requirement
April 1, 2009	Notice of Completion for all Improvements
April 1, 2009	Certificate of Occupancy for all Improvements

(b) Borrower understands and acknowledges that Lender, in making the Loan, has relied on Borrower's projections set forth above in the Pro Forma Schedule.

(c) Whenever Borrower knows or believes there has been or will be a material failure to meet the projections of the Pro Forma Schedule, Borrower shall submit to Agent for its approval a revised Pro Forma Schedule in the form set forth above. Also, whenever Agent in its reasonable judgment determines that there has been or will be a material failure to meet such projections, Agent may make written demand on Borrower to submit a revised Pro Forma Schedule to Agent for its approval. Borrower shall submit a revised Pro Forma Schedule to Agent within fifteen (15) days after any such demand. Borrower shall use its best efforts to meet the projections of the currently approved Pro Forma Schedule.

(d) Any revised Pro Forma Schedule shall identify any changes in any projections or other economic terms and be accompanied by Borrower's statement of reasons for the changes. Borrower shall execute such documentation as Agent may reasonably require in connection with the

revised Pro Forma Schedule. Agent need make no further disbursements unless and until it approves the revised Pro Forma Schedule. Agent reserves the right to approve or disapprove any Pro Forma Schedule in its reasonable judgment. The most recently approved Pro Forma Schedule supersedes all previously approved Pro Forma Schedules.

**4.2 Lease Approval.**

(a) Except as specifically provided below, each lease of any part of the Property is subject to Agent's written approval as to form and substance prior to execution and delivery. Agent (and all other parties whose approval is required) shall approve Borrower's standard form of lease or rental agreement prior to its use by Borrower. Borrower may not materially modify the lease form approved by Agent without Agent's prior written consent, together with the approval of all other parties whose consent is required.

(b) Notwithstanding the foregoing, Borrower may enter into leases (and amendments) in the ordinary course of business with bona fide third party tenants without Agent's prior written consent if Borrower uses the lease form approved by Agent and complies with all of the following:

(i) Within fifteen (15) days after Agent's written request therefor, Agent receives a copy of the executed lease (accompanied by all financial information and certificates obtained by Borrower pertaining to the tenant).

(ii) The lease meets the requirements of each party whose consent or approval is required for the lease.

(iii) The lease reflects an arm's-length transaction.

(iv) The lease is for a term of five (5) years or less, unless otherwise agreed in writing by Lender.

(v) The lease does not affect more than 15,000 rentable square feet of or within the Improvements unless otherwise agreed in writing by Lender.

(vi) The lease, together with all leases previously executed, does not cause the Loan to become "out of balance," and the lease conforms to any projections delivered by Borrower to Agent. Borrower acknowledges that the Loan may become "out of balance" if the landlord's aggregate economic obligations under the leases exceed, or the net operating income from the Property fails to meet, Borrower's projections for such obligations, thereby increasing the cost or decreasing the value of the Property.

(c) If any leases exist at or prior to the closing of the Loan, (i) Borrower shall have provided to Agent a true, correct, and complete copy of each such lease, including all amendments or modifications thereto and any agreements related thereto, (ii) each such pre-existing lease is subject to Agent's review and approval in its sole and absolute discretion, (ii) if required by Agent, in its sole and absolute discretion, for each such pre-existing lease, Borrower shall obtain and deliver to Lender a Subordination Agreement, Subordination, Nondisturbance, and Attornment Agreement, and/or Tenant Estoppel Certificate in form and substance acceptable to Agent in its sole and absolute discretion.

(d) Agent may consider any executed lease it receives to be unsatisfactory if the lease fails to meet any of the requirements of this Agreement. If this happens, or if Borrower at any time fails to submit any executed lease (and accompanying information) at the time required by this Section, or if any Event of Default has occurred and is continuing, Agent may make written demand on Borrower to

submit all future leases for Agent's approval prior to execution. Borrower shall comply with any such demand by Agent.

**4.3 Leasing Information and Documents.** Borrower shall deliver to Agent a monthly leasing report for the Project, and after completion of the Improvements in accordance with **Section 3.1(b)** above, a quarterly rent roll, as required pursuant to **Section 3.11(a)** above. Borrower shall promptly deliver to Agent such tenant income certificates, leasing schedules and reports, and other leasing information as Agent from time to time may request. In addition, upon the request of Agent, Borrower shall promptly obtain and deliver to Agent such estoppel certificates, subordination agreements, and/or subordination, nondisturbance, and attornment agreements in form and substance acceptable to Agent, executed by such tenants as Agent from time to time may require.

**4.4 Purpose and Effect of Lease Approval.** Agent's approval of any lease is for the sole purpose of protecting Lender's security and preserving Lender's rights under the Loan Documents. No approval by Agent will result in a waiver of any default of Borrower. In no event will Agent's approval of any lease be a representation of any kind with regard to the lease, its enforceability, or the financial capacity of any tenant thereunder or guarantor thereof.

**4.5 Landlord's Obligations.** Borrower shall perform all obligations required to be performed by it as landlord under any lease affecting any part of the Land or any space within the Improvements.

**4.6 Costs and Expenses.** If Agent's prior written approval is required for any Lease, Borrower shall pay to Agent, as a condition to such consent Agent's costs and expenses (including, without limitation, reasonable attorneys' fees) incurred in connection therewith. Such costs and expenses shall be due and payable whether or not such consent is given.

**5. Representations and Warranties.**

Borrower promises that each representation and warranty set forth below is and will be true, accurate and correct as of the date of this Agreement. Each Draw Request delivered to Agent will be deemed a reaffirmation of each and every representation and warranty made by Borrower in this Agreement.

**5.1 Authority; Enforceability.** Borrower has complied with any and all laws and regulations concerning their organization, existence, and the transaction of its business. Borrower and, if applicable, any third party trustor, has the right and power to own the Property and to develop the Land and Improvements as contemplated in the Loan Documents. Borrower is authorized to execute, deliver, and perform its obligations under the Loan Documents. Those documents are valid and binding obligations of Borrower.

**5.2 Compliance With Law.** Borrower is familiar and has complied with all of the Requirements, as well as all other applicable laws, regulations, and ordinances. Borrower has properly obtained, or will properly obtain, all permits, licenses, and approvals necessary to construct the Improvements, and Borrower has delivered to Agent true and correct copies of each such permit, license, and approval. To the best of Borrower's knowledge and belief, no information or fact exists that would reasonably cause Borrower to believe that all permits, licenses, and approvals required to construct, occupy, operate, market, lease, or sell the Improvements that have not been obtained as of the date hereof will not be readily and properly obtainable prior to the Completion Date. No provision or obligation of Borrower contained in any of the Loan Documents violates any of the Requirements or any order or ruling of any court or governmental entity. No such provision or obligation conflicts with, or constitutes a breach or default under, any agreement binding or regulating the Property.

**5.3 No Violation.** The execution and delivery of this Agreement and the other Loan Documents and performance by Borrower of its obligations hereunder and thereunder will not result in a default under any other material agreement to which Borrower is a party.

**5.4 No Claims.** No claims, actions, proceedings, or investigations are pending against Borrower or affecting the Property or any collateral for the Loan, except for those previously disclosed by Borrower to Agent in writing. To the best of Borrower's knowledge, no threat of any such claim, action, proceeding, or investigation exists, except for those previously disclosed by Borrower to Agent in writing.

**5.5 Financial Information.** All financial information delivered to Agent and/or any Lender, including all information relating to the financial condition of (a) Borrower or any of its partners, shareholders, or members (as applicable), and (b) the Property, fairly and accurately represents, in all material respects, the financial condition being reported on as of its date. All such information is prepared in accordance with GAAP consistently applied, unless otherwise noted. There has been no material adverse change in the financial condition of any of the persons described above-reported at any time to Agent or any Lender, except as previously disclosed to Agent or the other applicable Lender in writing in later financial information and found acceptable to Agent, or such other Lender, as the case may be, in its sole and absolute discretion. Borrower has disclosed to Agent any and all leases affecting the Property or any portion thereof or interest therein.

**5.6 Accuracy.** To the best of Borrower's knowledge and belief, all reports, documents, instruments, information, and forms of evidence delivered to Agent concerning the Loan or required by this Agreement, any Loan commitment, and/or the other Loan Documents are accurate, correct, and sufficiently complete to give Agent true and accurate knowledge of their subject matter. None of them contains any misrepresentation or material omission.

**5.7 Loan In Balance; Adequacy of Loan.** The Loan is "in balance," and the undisbursed Loan funds, together with any sums provided or to be provided by Borrower as shown in the Cost Breakdown, are sufficient to construct the Improvements through completion and to accomplish the purposes contemplated by the Loan Documents.

**5.8 Taxes.** Borrower has filed all required state, federal, and local income tax returns and has paid all taxes when due and payable. Borrower knows of no basis for any additional assessment of taxes.

**5.9 Utilities.** All utility services, including gas, water, sewage, electrical, and telephone, necessary to develop and occupy the Land and Improvements are available, or will be available upon completion of the Improvements, at or within the boundaries of the Land. In the alternative, Borrower has taken all steps necessary to assure that all utility services will be available upon completion of the Improvements.

**5.10 Borrower Not a "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 from time to time.

**5.11 No Breaches or Defaults.** No event has occurred and is continuing which would constitute an Event of Default (as defined in the applicable document), a Default, or an Unmatured Event of Default under any of the Loan Documents.

**5.12 ERISA Plans.** Either:

(a) Borrower is not a party in interest to any plan defined or regulated under ERISA, and the assets of Borrower are not "plan assets" of any employee benefit plan covered by ERISA or Section 4975 of the Internal Revenue Code, or

(b) If Borrower is a party in interest to a plan defined or regulated under ERISA, then all of the following are true: (i) the Borrower has fulfilled its obligations, if any, under the minimum funding standards of ERISA and the Code with respect to each Plan and is in compliance in all material respects with the presently applicable provisions of ERISA and the Code, and has not incurred any liability with respect to any Plan under Title IV of ERISA, (ii) no reportable event has occurred under Section 4043(b) of ERISA for which the PBGC requires thirty (30) days notice, (iii), no action by the Borrower to terminate or withdraw from any Plan has been taken and no notice of intent to terminate a Plan has been filed under Section 4041 of ERISA, and (iv) no proceeding has been commenced with respect to a Plan under Section 4042 of ERISA, and no event has occurred or condition exists which might constitute grounds for the commencement of such a proceeding.

**5.13 Disclosure to Guarantor and Third Parties.** INTENTIONALLY OMITTED

**6. Swap Contract.** After the Closing Date, Borrower may elect to purchase from Agent a swap for the Loan, which will be governed by a Swap Contract entered into between Agent and Borrower. The Swap Contract is a "Loan Document." Capitalized terms used here without definition shall have the meanings given to them in the Swap Contract. With respect to any Swap Contract, the following shall apply:

**6.1 Swap Payments; Grant of Security Interest.** Under the Swap Contract, Agent or Borrower may be obligated from time to time to make certain payments ("Swap Payments") to the other party. Each Swap Payment to be made by Agent to Borrower shall be collateral for the Loan. As security for the prompt payment and performance of the Loan, and all obligations and indebtedness of Borrower to Lender under the Loan Documents, and all renewals, extensions, modifications, amendments, and/or supplements thereto, Borrower hereby irrevocably and unconditionally assigns, grants, pledges, transfers, and sets over to Agent, for the benefit of Lender, and there is hereby created a security interest in favor of Agent, for the benefit of Lender, in and to each Swap Payment due from Agent to Borrower, whether now or hereafter existing, and all proceeds thereof.

**6.2 No Assumption of Borrower's Obligations.** Borrower expressly understands and agrees that Agent does not assume any duties or obligations of Borrower arising out of the Note, any Swap Contract, or any other Loan Document.

**6.3 Swap Documents.** If Borrower elects to purchase a swap for the Loan, in connection with the Swap Contract, Borrower will execute certain documents as required by Agent, which may include, without limitation, (a) an ISDA International Swaps and Derivatives Association, Inc. Master Agreement, (b) a Schedule to Master Agreement, a consent to letter agreement regarding cross-collateralization of obligations under ISDA Master Agreement, and a Continuing Guaranty (Unlimited) (Derivatives) relating to the Borrower's obligations under the Swap Contract.

**7. Default and Remedies.**

**7.1 Events of Default.** An Event of Default will occur under this Agreement upon the occurrence of any of the following events:

(a) Borrower fails to make any payment of principal or interest under the Note within five (5) days after written notice from Lender; or

(b) Borrower fails to make any deposit of funds demanded by Lender under this Agreement within ten (10) days after Lender's written demand; or

(c) Borrower fails to comply with any other covenant contained in this Agreement calling for the payment of money and does not cure that failure within ten (10) days after written notice from Lender; or

(d) Borrower becomes insolvent or the subject of any Insolvency Proceeding, or any such party consents to the appointment or taking of possession by a receiver (or similar official) with respect to its business or property, or makes an assignment for the benefit of creditors; provided, however, that any involuntary Insolvency Proceeding shall not be considered an Event of Default hereunder if it is either (i) consented to in writing by Agent, or (ii) dismissed within ninety (90) days of the filing thereof; or

(e) Borrower dissolves or liquidates, or any of these events happens to any indemnitor hereunder or under any of the other Loan Documents (if any); or

(f) An Accelerating Transfer occurs; or

(g) Any representation or warranty when made or given in any of the Loan Documents proves to be false or misleading in any material respect; or

(h) Construction of the Improvements is not completed by the Completion Date, provided, however, that it shall not be a default by Borrower hereunder to the reasonable extent that construction is delayed because of a Funding Deficiency; or

(i) Construction of the Improvements is halted or abandoned prior to the Completion Date for any period of twenty (20) consecutive days for any cause not beyond the reasonable control of Borrower or any of its contractors or subcontractors, except as otherwise agreed in writing by Agent; or

(j) Any governmental, judicial or legal authority having jurisdiction over the Property orders or requires that construction of the Improvements be stopped in whole or in part, or any required approval, license or permit is withdrawn or suspended, and the order, requirement, withdrawal or suspension remains in effect either (i) for a period of thirty (30) days, or (ii) for a total period of ninety (90) days, so long as Borrower begins within the initial thirty (30) day period and continues diligently to take steps to remove the effect of the order, requirement, withdrawal or suspension, and Agent, exercising reasonable judgment, determines that Borrower is reasonably likely to prevail; or

(k) Borrower is in default under the Architecture Contract, the Construction Contract, any other contract for the construction or rehabilitation (as applicable) of the Improvements or any lease of any part of the Land or any space within the Improvements, either (i) for a period of thirty (30) days, or (ii) for a total period of ninety (90) days, so long as Borrower begins within the initial thirty (30) day period and continues diligently to cure the default, and Agent, exercising reasonable judgment, determines that the cure cannot be reasonably completed at or before expiration of the initial thirty (30) day period; or

(l) Any Material Adverse Effect occurs with respect to Borrower; or

(m) INTENTIONALLY OMITTED; or

(n) INTENTIONALLY OMITTED; or

(o) INTENTIONALLY OMITTED; or

(p) INTENTIONALLY OMITTED; or

(q) Any of the following occurs: (i) any judgments, writs, warrants of attachment, executions, or similar process not Covered by Insurance are issued or levied against Borrower or its assets in an aggregate amount that exceeds Seven Hundred Fifty Thousand and No/100 Dollars (\$750,000.00), and such judgments, writs, warrants of attachment, executions, or similar process shall not be stayed, released, vacated, or fully bonded prior to any sale and in any event within sixty (60) days after its issuance or levy, or (ii) any government authority takes action materially adversely affecting either (A) Borrower's intended use of the Property, or (B) Borrower's ability to repay the Loan; or

(r) Agent, on behalf of and for the benefit of Lender, fails to have an enforceable first-priority lien on or first-priority security interest in any property given as security for the Loan (except as otherwise agreed by Agent in writing), and Borrower fails to pay the Loan in full within ten (10) days after Agent's written demand; or

(s) Under any of the Loan Documents, an Event of Default (as defined in that document, subject to applicable notice and cure periods) or Default occurs; or

(t) The occurrence of any one or more of the following events with respect to the Borrower, provided such event or events could reasonably be expected, in the judgment of the Agent, to subject the Borrower to any tax, penalty, or liability (or any combination of the foregoing) which, in the aggregate, could have a material adverse effect on the financial condition of the Borrower with respect to a Plan: (a) a reportable event shall occur with respect to a Plan which is, in the reasonable judgment of the Agent, likely to result in the termination of such Plan for purposes of Title IV of ERISA, or (b) any Plan termination (or commencement of proceedings to terminate a Plan) or the Borrower's full or partial withdrawal from a Plan; or

(u) Borrower fails to satisfy the financial covenants set forth in Section 3.30 above; or

(w) Under any Swap Contract, an Event of Default (as defined in that document, subject to applicable notice and cure periods) or Default of Borrower occurs; or

(z) Borrower fails to comply with any provision contained in this Agreement, other than those events specifically referred to above and thus set out as separate Events of Default in this Section 7.1; provided, however, that as to any non-monetary failure that is susceptible of cure, so long as (i) the collateral for the Loan is not materially impaired during any cure period and (ii) Borrower's ability to pay or perform under the Loan is not materially adversely impacted during any such cure period, such failure shall not be an Event of Default hereunder if cured by Borrower within thirty (30) days after written notice from Agent; provided, however, that the cure period to comply with such non-monetary covenants, agreements, and obligations shall be extended for a period of not more than an additional forty-five (45) days if the ability to cure such failure to comply within the specified cure period is not within the reasonable control of Borrower, the failure can be cured by Borrower within such extended cure period, and Borrower promptly and in good faith undertakes the curing of such failure and diligently thereafter in good faith pursues the curing to completion.

**7.2 Remedies.**

(a) If an Event of Default occurs under this Agreement, Agent, on behalf of Lender, may exercise any right or remedy under any of the Loan Documents or otherwise available at law or in equity, and all of such rights and remedies are cumulative. If any Event of Default occurs, Lender's obligation to lend under the Loan Documents automatically terminates, and Agent in its sole and absolute discretion may withhold any one or more disbursements. Agent may also withhold any one or more disbursements after an Unmatured Event of Default occurs and is continuing. By making a Loan disbursement, Agent will not be deemed to have waived any Event of Default unless Agent agrees otherwise in writing in each instance.

(b) If any Event of Default occurs, Agent shall have the right in its sole and absolute discretion to enter the Property and take possession of it, whether in person, by agent or by court-appointed receiver, collect rents and otherwise protect its collateral and rights under the Loan Documents. If Agent exercises any of the rights or remedies provided in this Section, that exercise shall not make Agent a partner or joint venturer of Borrower. All sums which are expended by Agent in preserving its collateral shall be considered an additional loan to Borrower secured by the Deed of Trust and bearing interest at the Default Rate, and shall be secured by the Deed of Trust and any other collateral held by Agent in connection with the Loan.

(c) If Borrower becomes the subject of any Insolvency Proceeding (which, if an involuntary Insolvency Proceeding has not been (i) consented to in writing by Agent, or (ii) dismissed within ninety (90) days of the filing thereof), all of Borrower's obligations under the Loan Documents automatically become immediately due and payable upon the filing of the petition commencing such proceeding, all without notice of default, presentment or demand for payment, protest, or notice of nonpayment or dishonor, or other notices or demands of any kind or character. Upon the occurrence of any other Event of Default, all of Borrower's obligations under the Loan Documents may become due and payable immediately without notice of default, presentment, or demand for payment, protest, or notice of nonpayment or dishonor, or other notices or demands of any kind or character, all at Agent's option, exercisable in its sole and absolute discretion. If such acceleration occurs, Agent may apply any undisbursed Loan funds and any sums in the Account and/or the Borrower's Funds Account to Borrower's obligations under the Loan Documents, in any order and proportions as Agent may determine in its sole and absolute discretion.

(d) Also upon any Event of Default that occurs during the course of construction of the Improvements, Agent in its sole and absolute discretion may enter and take possession of the Property, whether in person, by agent or by court-appointed receiver, and take any and all actions that Agent in its sole discretion may consider necessary to complete construction of the Improvements, including making changes in plans, specifications, work or materials and entering into, modifying or terminating any contractual arrangements, all subject to Agent's right at any time to discontinue any work without liability. By choosing to complete the Improvements, Agent does not assume any liability to Borrower or any other person for completing them or for the manner or quality of their construction, and Borrower expressly waives any such liability. If Agent exercises any of the rights or remedies provided in this subsection, that exercise will not make Agent, or cause Agent to be deemed, a partner or joint venturer of Borrower. Agent in its sole discretion may choose to complete construction in its own name. All sums expended by Agent in completing construction will be considered to have been disbursed to Borrower and will be secured by the Deed of Trust and any other collateral held by Agent, for the benefit of Lender, in connection with the Loan, any such sums will be considered to be a Loan of principal or an additional Loan to Borrower bearing interest at the Default Rate, and shall be secured by the Deed of Trust and any other collateral held by Agent, for the benefit of Lender, in connection with the Loan. For these purposes Agent, in its sole and absolute discretion, may reallocate any line item or cost category of the Cost Breakdown.

(e) As security for the payment and performance of all obligations of Borrower under the Loan Documents, Borrower hereby grants Agent and each Lender, and their respective successors and assigns, a security interest in, a lien on, and an express contractual right to set off against all depository account balances, cash, and any other property of Borrower now or hereafter in the possession or control of each such Lender and the right to refuse to allow withdrawals from any account. Without limiting the foregoing, the security interest granted herein and the right of setoff granted to each Lender hereunder is intended to cover and include the Account, any Borrower's Funds Account, and any Remargin Funds Account. Lender may, at any time upon the occurrence of any Default or Event of Default or Unmatured Event of Default under this Agreement or any other Loan Document, setoff against any amounts outstanding under the Loan whether or not the Loan or any portion thereof is then due or has been accelerated, all without any advance or contemporaneous notice of demand of any kind to Borrower, such notice and demand being expressly waived.

**8. Waiver of Jury Trial.** TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW, THE PARTIES HEREBY KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVE ANY RIGHT TO TRIAL BY JURY OR OF ANY CLAIM, DEMAND, ACTION, OR CAUSE OF ACTION BASED UPON OR ARISING UNDER THIS AGREEMENT OR ANY OF THE LOAN DOCUMENTS OR ANY OF THE TRANSACTIONS CONTEMPLATED THEREIN, OR IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DISCUSSIONS, DEALINGS, OR ACTIONS OF THE PARTIES TO THIS AGREEMENT OR EITHER OF THEM (WHETHER ORAL OR WRITTEN) WITH RESPECT THERETO, OR TO THE TRANSACTIONS RELATED THERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREINAFTER ARISING, AT LAW OR IN EQUITY, INCLUDING WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS, BREACH OF DUTY CLAIMS, AND ALL OTHER COMMON LAW OR STATUTORY CLAIMS. EACH PARTY HERETO HEREBY CONSENTS AND AGREES THAT ANY SUCH CLAIM, DEMAND, ACTION, OR CAUSE OF ACTION SHALL BE DECIDED BY A TRIAL COURT WITHOUT A JURY, AND THAT EITHER PARTY TO THIS AGREEMENT MAY FILE AN ORIGINAL COUNTERPART OR A COPY HEREOF WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF ITS RIGHT TO TRIAL BY JURY. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION (AND EACH OTHER PROVISION OF THIS AGREEMENT AND EACH OTHER DOCUMENT TO WHICH IT IS A PARTY) AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR LENDER IN MAKING THE LOAN. EACH PARTY HERETO FURTHER REPRESENTS AND WARRANTS THAT IT HAS BEEN REPRESENTED IN THE SIGNING OF THIS AGREEMENT AND IN THE MAKING OF THIS WAIVER BY INDEPENDENT LEGAL COUNSEL, OR HAS HAD THE OPPORTUNITY TO BE REPRESENTED BY INDEPENDENT LEGAL COUNSEL SELECTED OF ITS OWN FREE WILL, AND THAT IT HAS HAD THE OPPORTUNITY TO DISCUSS THIS WAIVER WITH COUNSEL.

**9. Miscellaneous Provisions.**

**9.1 No Waiver; Consents.** Each waiver by Agent or any Lender must be in writing, and no waiver may be construed as a continuing waiver. No waiver shall be implied from Agent's or any Lender's delay in exercising or failure to exercise any right or remedy against Borrower or any security. Agent's or any Lender's consent to any act or omission by Borrower shall not be construed as a consent to any other or subsequent act or omission or as a waiver of the requirement for Agent's or any Lender's consent to be obtained in any future or other instance. All of Agents and each Lenders' rights and remedies are cumulative.

**9.2 Purpose and Effect of Approval.** Agent's or any Lender's approval of any matter in connection with the Loan is for the sole purpose of protecting their security and rights. No such approval shall result in a waiver of any default of Borrower. In no event shall Agent's or any Lender's approval be a representation of any kind with regard to the matter being approved.

**9.3 No Third Parties Benefited.** This Agreement is made and entered into for the sole protection and benefit of Borrower, Agent, and each Lender, and their permitted successors and assigns. No trust fund is created by this Agreement, and no other persons or entities have any right of action under this Agreement or any right to the Loan funds.

**9.4 Joint and Several Liability.** If more than one person or entity executes this Agreement as Borrower, each shall be jointly and severally liable to Lender for the faithful performance of the obligations of Borrower under this Agreement and the other Loan Documents.

**9.5 Notices.** All notices given under this Agreement shall be in writing and be given by personal delivery, overnight receipted courier (such as UPS, Airborne, or Federal Express) or by registered or certified United States mail, postage prepaid, sent to the party at its address appearing below its signature. Notices shall be effective upon the first to occur of receipt, when proper delivery is refused, or the expiration of forty-eight (48) hours after deposit in registered or certified United States mail as described above. Addresses for notice may be changed by any party by notice to any other party in accordance with this Section. If more than one person or entity executes this Agreement as Borrower, service of any notice on any one Borrower shall be effective service on all Borrower parties for all purposes.

**9.6 Actions.** Agent and/or any Lender shall have the right, but not the obligation, to commence, appear in, and defend any action or proceeding that might affect its security or its rights, duties, or liabilities relating to the Loan, the Property, or any of the Loan Documents. Borrower shall pay promptly on demand all of Agent's and any such Lender's out-of-pocket costs, expenses, and reasonable legal fees and expenses of Agent's and any such Lender's counsel incurred in those actions or proceedings.

**9.7 Attorneys' Fees.** In any lawsuit or arbitration arising out of or relating to this Agreement, the Loan Documents or the Loan, the prevailing party will be entitled to recover from each other party such sums as the court or arbitrator adjudges to be reasonable attorneys' fees in the action or arbitration, in addition to costs and expenses otherwise allowed by law. In all other actions or proceedings, including any matter arising out of or relating to any Insolvency Proceeding, Borrower agrees to pay all of Agent's and each Lender's costs and expenses, including reasonable attorneys' fees, incurred in enforcing or protecting Agent's and Lender's rights or interests. From the time(s) incurred until paid in full to Agent, all such sums shall bear interest at the Default Rate. Whenever Borrower is obligated to pay or reimburse Agent's and/or any Lender for any attorneys' fees, those fees include the allocated costs for services of in-house counsel, to the extent not prohibited by applicable law.

**9.8 Governing Law.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of Arizona, without regard to the choice of law rules of that state, except to the extent that any of such laws may now or hereafter be preempted by Federal law. Borrower consents to the jurisdiction of any Federal or State court within the State of Arizona, submits to venue in such state, and also consents to service of process by any means authorized by Federal law or the law of such state. Without limiting the generality of the foregoing, Borrower hereby waives and agrees not to assert by way of motion, defense, or otherwise in such suit, action, or proceeding, any claim that (i) Borrower is not subject to the jurisdiction of the courts of the above-referenced state or the United States District Court for such state, or (ii) such suit, action, or proceeding is brought in an inconvenient forum, or (iii) the venue of such suit, action, or proceeding is improper.

**9.9 Heirs, Successors, and Assigns; Participations.** The terms of this Agreement shall bind and benefit the heirs, legal representatives, successors, and assigns of the parties; provided, however, that except for Allowed Transfers, Borrower may not assign this Agreement or any Loan funds, or assign or delegate any of its rights or obligations, without the prior written consent of Lender in each

instance, subject to **Sections 10 and 11** below. Subject to **Sections 10 and 11** below, Lender in its sole and absolute discretion may sell or assign the Loan or participations or other interests in all or part of the Loan on the terms and subject to the conditions of the Loan Documents, all without notice to or the consent of Borrower. Also without notice to or the consent of Borrower, any Lender or its affiliates may disclose to any actual or prospective purchaser of any securities issued or to be issued by such Lender and to any actual or prospective purchaser or assignee of any participation or other interest in the Loan or any other loans made by such Lender to Borrower (whether under this Agreement or otherwise), any financial or other information, data or material in such Lender's possession relating to Borrower, any partners of Borrower, the Loan, the Improvements, or the Property.

**9.10 Relationships With Other Customers.** From time to time, Agent or any of the other Lenders may have business relationships with Borrower's customers, suppliers, contractors, tenants, partners, members, shareholders, officers, or directors, or with businesses offering products or services similar to those of Borrower, or with persons seeking to invest in, borrow from, or lend to Borrower. Borrower agrees that Agent and any of the other Lenders may extend credit to such parties and take any action it deems necessary to collect the credit, regardless of the effect that such extension or collection of credit may have on Borrower's financial condition or operations. Borrower further agrees that in no event shall Agent or any of the other Lenders be obligated to disclose to Borrower any information concerning any other customer of Agent or any of the other Lenders.

**9.11 Disclosure to Title Company.** Without notice to or the consent of Borrower, Agent may disclose to any title insurance company insuring any interest of Lender under the Deed of Trust (whether as primary insurer, coinsurer or reinsurer) any information, data, or material in Lender's possession relating to Borrower, the Loan, the Improvements, or the Property.

**9.12 Improvement District.** Borrower shall not consent to, vote in favor of, or directly or indirectly advocate or assist in, the incorporation of any part of the Property into any improvement or community facilities district, special assessment district or other district without Agent's prior written consent in each instance.

**9.13 Restriction on Personal Property.** Except for the replacement of personal property made in the ordinary course of Borrower's business with items of equal or greater value, Borrower shall not sell, convey or otherwise transfer or dispose of its interest in any personal property in which Lender has a security interest, or contract to do any of the foregoing, without the prior written consent of Agent, and any other Lenders whose consent is required pursuant to the terms of this Agreement, in each instance.

**9.14 Publicity.** Borrower hereby agrees that Lender, at its expense, may publicize the financing of the Property and, in connection therewith, may use the address, description and photographs or other illustrative drawings of the Property.

**9.15 Severability.** The invalidity or unenforceability of any one or more provisions of this Agreement shall in no way affect any other provision. If any court of competent jurisdiction determines any provision of this Agreement or any of the other Loan Documents to be invalid, illegal or unenforceable, that portion shall be deemed severed from the rest, which shall remain in full force and effect as though the invalid, illegal or unenforceable portion had never been a part of the Loan Documents.

**9.16 Interpretation.** Whenever the context requires, all words used in the singular shall be construed to have been used in the plural, and vice versa, and each gender shall include any other gender. The captions of the sections of this Agreement are for convenience only and do not define or limit any terms or provisions. The word "include(s)" means "include(s), without limitation," and the word

"including" means "including, but not limited to." No listing of specific instances, items or matters in any way limits the scope or generality of any language of this Agreement. Whenever any provision of this Agreement, including any representation, covenant, or Event of Default contained herein, applies to a guarantor, third party pledgor, or any other party to any Loan Document other than Borrower, such provision only applies to such party during the time that such party's guaranty, pledge, or other Loan Document, as applicable, remains in effect.

**9.17 Amendments.** This Agreement may not be modified or amended except by a written agreement signed by the party against whom enforcement is sought.

**9.18 Counterparts.** This Agreement and any attached consents or exhibits requiring signatures may be executed in counterparts, and all counterparts constitute but one and the same document.

**9.19 Language of Agreement.** The language of this Agreement shall be construed as a whole according to its fair meaning and not strictly for or against any party.

**9.20 Exchange of Information.** Borrower agrees that Agent and any of the other Lenders may exchange or disclose financial and other information about Borrower or the Property with or to any of their respective affiliates or other related entities and with any party that becomes a Lender hereunder or otherwise acquires a participation or other interest in all or part of the Loan.

**9.21 Survival.** The representations, warranties, acknowledgments, and agreements set forth herein shall survive the date of this Agreement.

**9.22 Further Performance.** Borrower, whenever and as often as they shall be requested by Agent, shall execute, acknowledge, and deliver, or cause to be executed, acknowledged, and delivered to Agent, such further instruments and documents, and do any and all things as may be requested, in order to carry out the intent and purpose of this Agreement and the other Loan Documents.

**9.23 Time is of the Essence.** Time is of the essence in the performance of this Agreement and the other Loan Documents by Borrower, and each and every term thereof.

**9.24 Recitals; Exhibits.** The recitals to this Agreement set forth above in the "Factual Background" are true, complete, accurate, and correct, and such recitals are incorporated hereby by reference. The exhibits to this Agreement are incorporated hereby by reference.

**9.25 Loan Commission.** Except as otherwise agreed in writing by Agent: (a) Agent shall be obligated to pay any brokerage commission or fee in connection with or arising out of the Loan, and (b) Borrower shall pay any and all brokerage commissions or fees arising out of or in connection with the Loan.

**9.26 Patriot Act Provisions.** The following notification is provided to Borrower pursuant to Section 326 of the USA Patriot Act of 2001, 31 U.S.C. Section 5318 (as such maybe amended or recodified from time to time, the "Patriot Act"):

(a) **Important Information About Procedures for Opening a New Account.** To help the government fight the funding of terrorism and money laundering activities, federal law requires all financial institutions to obtain, verify, and record information that identifies each person or entity that opens an account, including any deposit account, treasury management account, loan, other extension of credit, or other financial services product. Borrower is hereby notified that when Borrower opens an account, including but not limited to the Account, any Borrower's Funds Account, any Remargin Funds

Account, and any reserve account that may be required pursuant to the terms of this Agreement, if any (i) if Borrower is not an individual, Agent will ask for Borrower's name, taxpayer identification number, business address, and other information that will allow Agent to identify Borrower, and may also ask to see Borrower's legal organizational documents or other identifying documents, and (ii) if Borrower is an individual, Agent will ask for Borrower's name, taxpayer identification number, residential address, date of birth, and other information that will allow Agent to identify Borrower, and may also ask to see Borrower's driver's license or other identifying documents.

(b) **Government Regulation.** Borrower shall not (a) be or become subject at any time to any law, regulation, or list of any government agency (including, without limitation, the U.S. Office of Foreign Asset Control list) that prohibits or limits Agent or any other Lender from making any advance or extension of credit to Borrower or from otherwise conducting business with Borrower, or (b) fail to provide documentary and other evidence of Borrower's identity as may be requested by Agent at any time to enable Agent to verify Borrower's identity or to comply with any applicable law or regulation, including, without limitation, Section 326 of the Patriot Act.

**9.27 Authority to File Notices.** Borrower irrevocably appoints Agent as its attorney-in-fact, with full power of substitution, to file or record, at Borrower's cost and expense, and in Borrower's name, any notices of completion, notices of cessation of labor, or any other notices that Agent in its sole and absolute discretion considers necessary or desirable to protect its security, if Borrower fails to do so. The appointment granted in this Section shall be deemed to be a power coupled with an interest.

**9.28 Force Majeure.** If the work of construction is affected and delayed directly by fire, earthquake or other acts of God, strike, lockout, acts of public enemy, riot, insurrection or governmental regulation of the sale or transportation of materials, supplies, or labor, Borrower shall notify Agent in writing within five (5) calendar days after the event causing the delay. So long as no Event of Default has occurred and is continuing, Agent shall extend the Completion Date by a period of time equal to the period of the delay, but not more than a total of thirty (30) days and not extending beyond the Maturity Date. Such an extension shall not affect the time for performance of, or otherwise modify, any of Borrower's other obligations under the Loan Documents or the Maturity Date.

**9.29 No Commitment to Increase Loan.** From time to time, Agent may approve changes to the Plans and Specifications at Borrower's request and also require Borrower to make corrections to the work of construction, all on and subject to the terms and conditions of this Agreement. Borrower acknowledges that no such action or other action by Agent or any Lender will in any manner commit or obligate Lender or any to increase the amount of the Loan.

**9.30 Integration and Relation to Loan Commitment.** The Loan Documents (a) integrate all the terms and conditions mentioned in or incidental to this Agreement, (b) supersede all oral negotiations and prior writings with respect to their subject matter, including Lender's loan commitment to Borrower, and (c) are intended by the parties as the final expression of the agreement with respect to the terms and conditions set forth in those documents and as the complete and exclusive statement of the terms agreed to by the parties. No representation, understanding, promise or condition shall be enforceable against any party unless it is contained in the Loan Documents. If there is any conflict between the terms, conditions and provisions of this Agreement and those of any other agreement or instrument, including any other Loan Document, the terms, conditions and provisions of this Agreement shall prevail.

## **10. Agent; Lender Provisions.**

**10.1 Appointment of Agent.** Each Lender hereby irrevocably designates and appoints Agent as the agent for such Lender to act as specified herein and in the other Loan Documents, and each such Lender hereby irrevocably authorizes Agent to take such actions, exercise such powers, and perform

such duties as are expressly delegated to or conferred upon Agent by the terms of this Agreement and the other Loan Documents, together with such other powers as are reasonably incidental thereto. Agent shall hold the Loan Documents and the collateral securing the Loan and any other documents or instruments delivered by Borrower or Agent, as the case may be, in connection therewith, and all payments or proceeds received in connection therewith, for the direct and undivided benefit and protection of Lenders and Agent in accordance with the terms and conditions of this Agreement and subject to applicable laws. Agent agrees to act as such upon the express conditions contained in this Section. Agent shall not have any duties or responsibilities to any Lender except those expressly set forth herein or in the other Loan Documents, nor shall it have any fiduciary relationship with any Lender, and no implied covenants, responsibilities, duties, obligations, or liabilities shall be read into this Agreement or otherwise exist against Agent. The provisions of this Section are solely for the benefit of Agent and each Lender, and, except as specifically and expressly stated herein, Borrower shall not have any rights as a third party beneficiary nor any obligations under any of the provisions of such Section. Each Lender agrees with Borrower and Agent (a) that Borrower shall correspond solely with Agent (and not with any Lender) and shall be entitled to rely upon all actions of Agent regarding all matters in connection with the Loan, (b) that only Agent (and not any Lender) shall correspond with Borrower in connection with the Loan and the Loan Documents and (c) payments made to Agent by Borrower shall be sufficient to discharge Borrower's obligation, whether or not Agent makes proper disbursements to each Lender. Borrower may rely upon any consent, approval, or instructions received from Agent.

**10.2 Administration of Loan by Agent.** Agent shall be responsible for administering the Loan on a day-to-day basis. In the exercise of such administrative duties, Agent shall use the same diligence and standard of care that is customarily used by Agent with respect to similar loans held by Agent solely for its own account.

**10.3 Specific Authority of Agent.** Each Lender delegates to Agent the full right and authority on its behalf to take the following specific actions in connection with its administration of the Loan:

(a) To approve fundings, to determine whether or not any condition precedent to Lenders' obligations to make a funding have been satisfied, and to make fundings in accordance with the provisions of the Loan Documents, but only to the extent immediately available funds are provided to Agent by the respective Lender for such purpose.

(b) Subject to the limitations in Section 10.4(b) below, to make Protective Advances.

(c) To receive all payments of principal, interest, fees, and other charges paid by, or on behalf of, Borrower and, except for fees to which Agent is entitled pursuant to the Loan Documents or otherwise, to distribute all such funds to the respective Lender as provided for hereunder.

(d) To keep and maintain complete and accurate files and records of all material matters pertaining to the Loan, and make such files and records available for inspection and copying by each Lender and its respective employees and agents during normal business hours upon reasonable prior notice to Agent.

(e) To do or omit doing all such other actions as may be reasonably necessary or incident to the implementation, administration, and servicing of the Loan and the rights and duties delegated herein.

**10.4 Right of Lender to Participate in Certain Decisions.**

(a) Unanimous Approval. Notwithstanding the provisions of Section 10.3, the unanimous written approval of all Lenders (other than a Delinquent Lender) shall be required with respect to the following actions:

(i) (A) Extending the Maturity Date, except as expressly provided in this Agreement, (B) reducing the rate of interest, (C) extending the time of payment of interest or principal on the Loan, (D) increasing the principal amount of the Loan (other than fundings provided for hereunder), or (E) forgiving any indebtedness (except Loan Fees and/or costs to which Agent is entitled) evidenced or secured by the Loan Documents.

(ii) Any action that would release or discharge any material portion of the collateral for the Loan other than in accordance with the express provisions of the Loan Documents.

(iii) Any action that amends, modifies, or waives any provisions of this Section 10.4(a).

(iv) Any action that reduces the percentage specified in the definition of Required Lenders.

(v) The release of any guarantor, if any, or waiver of any guaranty, if any.

(vi) Any action that amends or modifies any provision of Section 10 or Section 11 of this Agreement or any other provision of any Loan Documents that relates to the rights or obligations of Agent.

(vii) The waiver of any monetary Event of Default described in Section 7.1.

(b) Approval of Required Lenders. Unless required to act under the express terms of any Loan Document, Agent will not take any of the following actions without the consent of the Required Lenders (and shall take the following actions upon the request of the Required Lenders):

(i) Subject to the provisions of Section 10.8 of this Agreement, acceleration of the maturity of the Loan and declaration of an Event of Default.

(ii) Subject to the provisions of Section 10.8 of this Agreement, the exercise of any foreclosure or other remedy under the Loan Documents.

(iii) Make Protective Advances in excess of Five Hundred Thousand and No/100 Dollars (\$500,000.00) in the aggregate.

(iv) Make any material amendment or modification of the Loan Documents that does not require the unanimous consent of Lenders under Section 10.4(a).

(v) Waive any material condition to a funding, any Event of Default or Default.

(c) Deemed Consent or Approval. With respect to any requested amendment, waiver, consent, or other action which requires the approval of the Required Lenders or all Lenders, as

the case may be, in accordance with the terms of this Agreement, or if Agent is required hereunder to seek, or desires to seek, the approval of the Required Lenders or all Lenders, as the case may be, prior to undertaking a particular action or course of conduct, Agent in each case shall provide each Lender with written notice of any such request for amendment, waiver, or consent or any other requested or proposed action or course of conduct, accompanied by such detailed background information and explanations as may be reasonably necessary to determine whether to approve or disapprove such amendment, waiver, consent, or other action or course of conduct. Agent may (but shall not be required to) include in any such notice, printed in capital letters or boldface type, a legend substantially to the following effect:

"THIS COMMUNICATION REQUIRES IMMEDIATE RESPONSE. FAILURE TO RESPOND WITHIN TEN CALENDAR DAYS FROM THE RECEIPT OF THIS COMMUNICATION SHALL CONSTITUTE A DEEMED APPROVAL BY THE ADDRESSEE OF THE ACTION REQUESTED BY BORROWER OR THE COURSE OF CONDUCT PROPOSED BY AGENT AND RECITED ABOVE."

If the foregoing legend is included by Agent in its communication, a Lender shall be deemed to have approved such proposed action or course of conduct for all purposes hereunder if such Lender fails to respond to such communication by written notice to Agent within ten (10) calendar days of such Lender's receipt of such notice.

**10.5 Delegation of Duties.** Agent may execute any of its duties under this Agreement or any other Loan Document by or through its agents or attorneys-in-fact, and shall be entitled to the advice of counsel concerning all matters pertaining to its rights and duties hereunder or under the other Loan Documents. Agent shall not be responsible for the negligence or misconduct of any agent or attorney-in-fact unless selection thereof constitutes gross negligence or willful misconduct.

**10.6 Exculpatory Provisions.** Neither Agent nor any of its officers, directors, employees, Agents, attorneys-in-fact, or affiliates shall be liable for any action lawfully taken or omitted to be taken by it or them under or in connection with this Agreement or the other Loan Documents, except for its or their gross negligence or willful misconduct. Neither Agent nor any of its officers, directors, employees, Agents, attorneys-in-fact, or affiliates shall be responsible for or have any duty to ascertain, inquire into, or verify (a) any recital, statement, representation, or warranty made by Borrower or any of its partners, members, managers, officers, directors, or agents contained in this Agreement or the other Loan Documents or in any certificate or other document delivered in connection therewith, or any recital, statement, representation, or warranty made by any guarantor or any third party indemnitor, if any, or any of their respective partners, members, managers, officers, directors, or agents contained in the Loan Documents or in any certificate or other document delivered in connection therewith; (b) the performance or observance of any of the covenants or agreements contained in, or the conditions of, this Agreement or the other Loan Documents; (c) the state or condition of any properties of Borrower or any other obligor hereunder constituting collateral for the obligations of Borrower hereunder, or any information contained in the books or records of Borrower; (d) the validity, enforceability, collectability, effectiveness, or genuineness of this Agreement or any other Loan Document or any other certificate, document, or instrument furnished in connection therewith; or (e) the validity, priority, or perfection of any lien securing or purporting to secure the Loan or the value or sufficiency of any of the collateral.

**10.7 Reliance by Agent.** Agent shall be entitled to rely, and shall be fully protected in relying, upon any notice, consent, certificate, affidavit, or other document or writing believed by it to be genuine and correct and to have been signed, sent, or made by the proper party, person, or persons, and upon the advice and statements of legal counsel (including, without limitation, counsel to Borrower), independent accountants, and other experts selected by Agent. Agent shall be fully justified in failing or refusing to take any action under this Agreement or any other Loan Document unless it shall first receive such advice or concurrence of the Required Lenders as it deems appropriate or it shall first be indemnified to its satisfaction by Lenders for, from, and against any and all liability and expense which

may be incurred by it by reason of the taking or failing to take any such action. Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Agreement and the other Loan Documents in accordance with any written request of the Required Lenders, and each such request of the Required Lenders, and any action taken or failure to act by Agent pursuant thereto, shall be binding upon all Lenders; provided, however, that Agent shall not be required in any event to act, or to refrain from acting, in any manner which is contrary to the Loan Documents or to applicable laws.

**10.8 Default; Walvers.**

(a) Agent shall not be deemed to have knowledge or notice of the occurrence of any Event of Default, Default, or Unmatured Event of Default unless Agent has actual knowledge of the same or has received notice from a Lender or Borrower referring to this Agreement, describing such Event of Default, Default, or Unmatured Event of Default and stating that such notice is a "notice of default." If Agent obtains such actual knowledge or receives such a notice, Agent shall give prompt notice thereof to each Lender. Agent shall take such action with respect to such Event of Default or Default, or, if applicable, Unmatured Event of Default as shall be reasonably directed by the Required Lenders. Except as otherwise provided for in Section 10.4(a), the Required Lenders may, by written approval, waive any Event of Default, Default, or Unmatured Event of Default, other noncompliance with the terms, covenants, and conditions of the Loan Documents, and Agent shall do so upon request of the Required Lenders, by writing, other than any monetary Event of Default described in Section 7.1, which waiver requires the unanimous written approval of all Lenders (other than a Delinquent Lender) in accordance with Section 11.4(a)(vii). Unless and until Agent shall have received such direction, Agent may (but shall not be obligated to) take such action, or refrain from taking such action, with respect to any such Event of Default, Default, or Unmatured Event of Default, or other noncompliance as it shall deem advisable in the best interest of Lenders; provided, however, that Agent shall not accelerate the Loan without the prior written consent of the Required Lenders.

(b) Notwithstanding the above, if the Required Lenders cannot come to agreement regarding acceleration of the Loan and the exercise of remedies under the Loan Documents within thirty (30) days after the time when Lenders shall have had actual notice of any Event of Default or Default, thereby resulting in a deadlock, then Agent shall, at the end of such thirty (30) day period, give notice to Borrower that the Loan is accelerated and Agent shall thereafter take such action (pursuant to the Loan Documents under which it is acting as Agent) as Agent deems advisable to enforce Lenders' rights under this Agreement and the other Loan Documents.

**10.9 Lenders' Credit Decisions; Reliance.**

(a) Each Lender agrees that it has, independently, and without reliance upon any other party hereto, or upon the directors, officers, agents, or employees of any other party hereto, but only in reliance upon information supplied to it by or on behalf of Borrower and upon such other information as it has deemed appropriate, made its own independent credit analysis and decision to enter into this Agreement. Without limiting the foregoing, each Lender acknowledges that it has received copies of the Loan Documents and financial statements, certificates, instruments, documents, affidavits, resolutions, and agreements as it deems necessary to make its credit analysis and decisions in respect of the Loan. Each Lender also agrees that it shall independently, and without reliance upon any other party hereto, continue to make its own independent credit analyses and decisions in acting or not acting under the Loan Documents. Except as specifically provided herein, Agent shall have no duty or responsibility, either initially or on a continuing basis, to provide any Lender with any credit or other information with respect thereto, whether coming into its possession before the date of this Agreement or at any time or times thereafter; provided, however, that Agent shall, promptly upon request of any Lender, provide such Lender with credit or other information regarding the Loan that is in the possession of Agent and that was not prepared or revised by Agent or Agent's agents or representatives.

(b) Each Lender hereby acknowledges that, except as specifically set forth herein, Agent (i) makes no warranty or representation to any Lender with respect to any statements, warranties or representations (written or otherwise, express or implied) made in or in connection with the Loan Documents, the financial condition of Borrower, or the title or the value of any of the collateral, and (ii) shall not be responsible to any Lender for the due execution, legality, validity, enforceability, genuineness, sufficiency, or collectability of any of the Loan Documents or any other instrument or document furnished pursuant thereto or in connection with the Loan or the legality, validity, enforceability, genuineness, sufficiency, perfection, or priority of any rights in all or any portion of the collateral. Agent shall not be bound to ascertain accuracy of any notice, consent, or request believed by it to be genuine and correct.

**10.10 Agent's Reimbursement and Indemnification.** Lenders agree to promptly reimburse and indemnify, defend, and hold Agent harmless for, from, and against their respective Proportionate Shares of (a) any amounts not reimbursed by Borrower for which Agent is entitled to reimbursement by Borrower under this Agreement or the other Loan Documents, including Protective Advances, (b) any other expenses incurred by Agent on behalf of Lenders in connection with the preparation, execution, delivery, administration, amendment, waiver, or enforcement of this Agreement and the other Loan Documents, and (c) any liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses, or fundings of any kind and nature whatsoever which may be imposed on, incurred by, or asserted against Agent in any way relating to or arising out of this Agreement or the other Loan Documents or any other document delivered in connection therewith or any transaction contemplated thereby, or the enforcement of any of the terms hereof or thereof; provided, however, that no Lender shall be liable for any of the foregoing to the extent that they arise from the gross negligence or willful misconduct of Agent. WITHOUT LIMITATION, THE FOREGOING INDEMNITY SHALL APPLY TO MATTERS THAT IN WHOLE OR IN PART ARE CAUSED BY OR ARISE OUT OF THE NEGLIGENCE OF AGENT. If any indemnity furnished to Agent for any purpose shall, in the opinion of Agent, be insufficient or become impaired, Agent may call for additional indemnity from Lenders and cease, or not commence, to do the action indemnified against until such additional indemnity is furnished.

**10.11 Agent in its Individual Capacity.** With respect to its Proportionate Share of the Loan, Agent, in its capacity as a Lender, shall have the same rights and powers hereunder and under any other Loan Document as any other Lender and may exercise the same as though it were not Agent for Lenders, and the term "Lender" or "Lenders" shall, unless the context otherwise indicates, include Agent, in its capacity as a Lender. Agent may accept deposits from, lend money to, and generally engage in any kind of banking or trust business with Borrower or any Affiliate of any Borrower as if it were not Agent for Lenders hereunder.

**10.12 Successor Agent.** If Agent defaults in its obligations as Agent for Lenders hereunder, Lenders whose Proportionate Shares total in the aggregate at least sixty-six and sixty-seven hundredths percent (66.67%) (but excluding from such calculation the Proportionate Share of Agent) may, prior to Agent's cure of any such default, remove Agent at any time by giving thirty (30) days' prior written notice to Agent, Borrower, and the other Lenders. In addition, after the Completion Event, Agent may at any time upon thirty (30) days prior written notice to Borrower and Lenders elect to resign as Agent hereunder. Upon any such resignation or removal, the Required Lenders shall have the right to appoint a successor to Agent, subject to approval by Borrower if no Event of Default, Default, or Unmatured Event of Default then exists under any of the Loan Documents, which approval shall not be unreasonably withheld or delayed. If no successor to Agent shall have been so appointed by the Required Lenders and accepted such appointment within thirty (30) days after Agent gives notice of resignation or the Required Lenders' give notice of removal, as the case may be, then Agent may appoint, on behalf of Borrower and the other Lenders, a successor Agent, subject to approval by Borrower if no Event of Default, Default, or Unmatured Event of Default then exists, which approval shall not be unreasonably withheld or delayed. Each such successor Agent under this Section 10.12 shall be a financial institution which (i) has total assets equal to or in excess of \$25,000,000,000 and (ii) has a rating on the debt obligations issued by

such financial institution (or by a parent entity owning beneficially all of the capital stock of such financial institution) of "BBB" or higher by Standard & Poors or "Baa2" or higher by Moodys. Upon the acceptance of any appointment as Agent hereunder by a successor to Agent, such successor shall thereupon succeed to and become vested with all the rights, powers, privileges, and duties of Agent, and Agent shall be discharged from its duties and obligations hereunder and under the other Loan Documents. After Agent resigns, the provisions of this Section 10 shall continue in effect for its benefit in respect of any actions taken or omitted to be taken by it while it was acting as Agent hereunder. Agent or its successor shall promptly notify Borrower in writing of the appointment of the successor Agent.

**10.13 Duties in Case of Enforcement.** In case one or more Events of Default, Defaults, or Unmatured Events of Default have occurred and shall be continuing, and whether or not acceleration of the Loan shall have occurred, Agent shall, at the request, or may, upon the consent, of the Required Lenders, and provided that Lenders have given to Agent such additional indemnities and assurances against expenses and liabilities as Agent may reasonably request, proceed to enforce the provisions of this Agreement and the other Loan Documents respecting the foreclosure of the Deed of Trust or any other security instrument or agreement, the construction of the Improvement, the sale or other disposition of all or any part of the collateral and the exercise of any other legal or equitable rights or remedies as it may have hereunder or under any other Loan Documents or otherwise by virtue of applicable laws, or to refrain from so acting if similarly requested by the Required Lenders. Agent shall be fully protected in so acting or refraining from acting upon the instruction of the Required Lenders, and such instruction shall be binding upon all Lenders. The Required Lenders may direct Agent in writing as to the method and the extent of any such foreclosure, sale, or other disposition or the exercise of any other right or remedy, Lenders hereby agreeing to indemnify, defend, and hold Agent harmless for, from, and against all costs and liabilities incurred in respect of all actions taken or omitted in accordance with such direction, provided that Agent need not comply with any such direction to the extent that Agent reasonably believes Agent's compliance with such direction to be unlawful or commercially unreasonable in any applicable jurisdiction. Agent may, in its discretion, but without obligation, in the absence of direction from the Required Lenders, take such interim actions as it believes necessary to preserve the rights of Lenders hereunder and in and to any collateral, including but not limited to petitioning a court for injunctive relief, appointment of a receiver or preservation of the proceeds of any collateral. Each Lender acknowledges and agrees with Agent, Borrower and all other Lenders that no individual Lender may separately enforce or exercise any of the provisions of any of the Loan Documents, other than through Agent.

**10.14 Lender Proportionate Shares.** Each Lender's Proportionate Share shall be as set forth on Schedule 1 to this Agreement, as the same may be amended from time to time by Agent to account for modifications in the Proportionate Share of any one or more Lenders, and each Lender shall be deemed to own an undivided interest equal to its Proportionate Share in (a) the Loan; (b) all Loan Documents; (c) all principal and interest due under or in connection with the Loan; and (d) each Lender's share of loan fees, extension fees and all other fees due under this Agreement or in connection with the Loan (excluding only fees payable pursuant to the Fee Letter, the appraisal review fee, the environmental review fee and fees paid to third parties by Agent or a Lender and reimbursed by Borrower).

**10.15 Funding Advances.** Agent shall give written notice (including notice by email or facsimile) to each Lender of each request for a funding of Loan proceeds by facsimile transmission, hand delivery or overnight courier, not later than 1:00 p.m. (Phoenix, Arizona time) on the Business Day immediately preceding the date the funding is to be made. Each such notice shall be accompanied by a written summary of the request for a funding and shall specify (a) the date of the requested funding, (b) the aggregate amount of the requested funding, and (c) each Lender's Proportionate Share of the requested funding. Each Lender agrees with Borrower, Agent and all other Lenders that it will, before 11:00 a.m. (Phoenix, Arizona time) on the date set forth in any such request for a funding, make available to Agent, at an account to be designated by Agent in Phoenix, Arizona, in same day funds, such Lender's Proportionate Share of the requested funding. After Agent's receipt of such funds, Agent shall make such

funds available to Borrower as provided for in this Agreement. Promptly after receipt by Agent of written request from any Lender, Agent shall deliver to the requesting Lender the accompanying certifications and such other instruments, documents, certifications and approvals delivered by or on behalf of Borrower to Agent in support of the requested funding.

**10.16 Nature of Obligations of Lenders.** The obligations of Lenders under this Agreement are several and not joint. Failure of any Lender to fulfill its obligations hereunder shall not result in any other Lender becoming obligated to advance more than its Proportionate Share of the Loan or of any funding, nor shall such failure release or diminish the obligations of any other Lender to fund its Proportionate Share of the Loan provided herein.

**10.17 Payments to Agent.** All payments of principal of and interest on the Loan shall be made to Agent by Borrower or other obligor for the account of Lenders in immediately available funds as provided in the Note and this Agreement. Agent agrees promptly to distribute to each Lender, on the Business Day each such payment is made if such payment is received by Agent by 11:00 a.m. (CST time) on such day or if received thereafter on the next Business Day, such Lender's Proportionate Share of each such payment (including each Lender's respective share in interest payments) in immediately available funds, except as otherwise expressly provided herein. Each payment to Agent under this **Section 10.17** shall constitute a payment to each Lender in the amount of such Lender's Proportionate Share of such payment (including each Lender's respective share in interest payments), and any such payment to Agent shall not be considered outstanding for any purpose after the date of such payment to Agent without regard to whether or when Agent makes distribution thereof as provided above. If any payment received by Agent is insufficient to pay both all accrued interest and all principal then due and owing, Agent shall first apply such payment to all outstanding interest until paid in full and shall then apply the remainder of such payment to all principal then due and owing, and shall distribute the payment to each Lender accordingly. In no event shall Agent be responsible for any shortfall in payments required to be made by Borrower.

**10.18 Adjustments.** If, after Agent has paid each Lender's Proportionate Share of any payment received or applied by Agent in respect of the Loan, that payment is rescinded or must otherwise be returned or paid over by Agent, whether pursuant to any bankruptcy or insolvency law, sharing of payments clause of any loan agreement or otherwise, such Lender shall, at Agent's request, promptly return its Proportionate Share of such payment or application to Agent, together with Lender's Proportionate Share of any interest or other amount required to be paid by Agent with respect to such payment or application.

**10.19 Setoff.** If Agent, acting in its individual capacity, shall exercise any right of setoff against a deposit balance or other account of Borrower held by such Lender on account of the obligations of Borrower under this Agreement, Agent shall apply all such sums for the benefit of all Lenders hereunder in accordance with the terms of this Agreement.

**10.20 Distribution by Agent.** If, in the opinion of Agent, distribution of any amount received by it in such capacity hereunder or under the Note or under any of the other Loan Documents might involve any liability, it may refrain from making distribution until its right to make distribution shall have been adjudicated by a court of competent jurisdiction or has been resolved by the mutual consent of all Lenders. In addition, Agent may request full and complete indemnity, in form and substance satisfactory to it, prior to making any such distribution. If a court of competent jurisdiction shall adjudge that any amount received and distributed by Agent is to be repaid, each Person to whom any such distribution shall have been made shall either repay to Agent its Proportionate Share of the amount so adjudged to be repaid or shall pay over to the same in such manner and to such Persons as shall be determined by such court.

**10.21 Delinquent Lender.**

(a) If for any reason any Lender shall fail or refuse to abide by its obligations under this Agreement, including without limitation its obligation to make available to Agent its Proportionate Share of any disbursement of Loan funds, expenses, or setoff for a period of two (2) Banking Days or more (a "Delinquent Lender"), then in addition to the rights and remedies that may be available to Agent and the other Lenders at law and in equity, such Delinquent Lender's right to participate in the administration of the Loan and the Loan Documents, including, without limitation, any rights to consent to or direct any action or inaction of Agent, shall be suspended during the pendency of such failure or refusal.

(b) If for any reason the Delinquent Lender fails to make timely payment to Agent or any Lender of any amount required to be paid to it hereunder, in addition to other rights and remedies that Agent or such Lender may have under **Section 10.21(a)** or otherwise, Agent and such Lender shall be entitled (i) to collect interest from the Delinquent Lender for the period from the date on which the payment was due until the date on which the payment is made for each day during such period at the Default Rate, (ii) to withhold or set off, and to apply to the payment of the defaulted amount and any related interest, any amounts to be paid to the Delinquent Lender under this Agreement, (iii) to bring an action or suit against the Delinquent Lender in a court of competent jurisdiction to recover the defaulted amount and any related interest, (iv) to arrange for the purchase of the Proportionate Share of the Loan of the Delinquent Lender as provided in **Section 10.21(d)**; and (v) to advance funds on behalf of the Delinquent Lender as provided in **Section 10.21(e)**.

(c) The Delinquent Lender shall indemnify, defend, and hold Agent and each of the other Lenders harmless for, from, and against any and all losses, damages, liabilities, and expense (including attorneys' fees) which they may sustain or incur by reason of or in consequence of the Delinquent Lender's failure or refusal to abide by the terms of this Agreement.

(d) If a Lender becomes a Delinquent Lender, the other Lenders who are not Delinquent Lenders shall have the right, but not the obligation, in their sole discretion, to acquire (pro rata based on the respective Proportionate Share of Lenders exercising such right, as adjusted to reflect the deletion of the Delinquent Lender's Proportionate Share) all of such Delinquent Lender's right, title and interest in and to the Loan. In the event that the other Lenders do not elect to purchase the Delinquent Lender's right, title and interest in the Loan, Borrower shall have the right to designate an Eligible Assignee to acquire all of such Delinquent Lender's right, title and interest in and to the Loan. In either case, the purchase price shall be the principal and accrued interest allocable to the Delinquent Lender's Proportionate Share of the Loan and shall be paid on the closing day of such purchase. On the date of closing of such purchase, the Delinquent Lender shall pay Agent a processing fee of \$3,000.00. The Delinquent Lender shall retain liability for all obligations in respect of the Loan and this Agreement arising prior to the date of transfer and shall execute and deliver such documents as may be reasonably necessary to effect such transfer.

(e) If a Lender becomes a Delinquent Lender, the other Lenders may (pro rata based on the respective Proportionate Share of Lenders exercising such right), but are not obligated to, make advances to Agent in the amounts that the Delinquent Lender is obligated to advance under this Agreement. Such advances shall be treated as loans made to the Delinquent Lender, shall bear interest at the Default Rate (payable on demand), shall be due and payable upon demand, and shall be paid prior to any payment being made to the Delinquent Lender.

(f) The exercise of the above remedies shall not reduce, diminish or liquidate the Delinquent Lender's obligation for the sharing of losses and reimbursement of costs, liabilities, and

expenses under the Loan Documents and this Agreement. The obligations of the Delinquent Lender arising prior to any purchase pursuant to **Section 10.21(d)** shall survive any such purchase.

**10.22 Title to Project.** If all or any portion of the collateral for the Loan is acquired by Agent as the result of a foreclosure or the acceptance of a deed or assignment in lieu of foreclosure, or is retained in satisfaction of all or any part of Borrower's obligations, title to any such collateral or any portion thereof shall be held in the name of Agent or a nominee or affiliate of Agent, in any case as Agent, for the ratable benefit of Agent and Lenders, as their interests may appear. Agent shall promptly after the taking of title prepare a recommended course of action for such collateral (the "Post-Foreclosure Plan"), which shall be subject to the approval, in accordance with the procedure set forth in **Section 10.4(c)**, of Required Lenders. Agent shall manage, operate, repair, administer, complete, construct, restore or otherwise deal with the collateral so acquired in accordance with the Post-Foreclosure Plan and administer all transactions relating thereto, including, without limitation, employing a managing Agent and other Agents, contractors and employees, including Agents for the sale of such collateral, or any portion thereof, and the collecting of rent and other sums from such collateral, and paying expenses of such collateral. Agent shall render, or cause to be rendered by the managing Agent, to each Lender, monthly, an income and expense statement for such collateral. Each Lender shall promptly contribute its Proportionate Share of any operating loss for such collateral, and such other expenses and operating reserves as Agent shall deem reasonably necessary. Agent shall not undertake completion of any Improvements to the Property if the cost to the Lenders of completion thereof would exceed the unadvanced portion of the Loan (unless Agent is pursuing rights under a bond or the Required Lenders otherwise agree) or if prohibited by the Post-Foreclosure Plan. In the event the Required Lenders agree to the construction of Improvements notwithstanding the incurrence of costs in excess of the unadvanced portion of the Loan, each Lender shall fund its Proportionate Share in accordance with the funding provisions of **Section 10.15**. To the extent there is net operating income from such collateral, Agent shall determine the amount and timing of distributions to Lenders. All such distributions shall be made to Lenders in accordance with their Proportionate Shares. Agent shall undertake to sell such collateral, at such price and upon such terms and conditions as the Required Lenders shall reasonably determine to be most advantageous to Lenders. Any purchase money mortgage taken in connection with the disposition of such collateral in accordance with the immediately preceding sentence shall name Agent, as Agent for Lenders, as the mortgagee. In such case, Agent and Lenders shall enter into an agreement with respect to such purchase money mortgage defining the rights of Agent and Lenders in the same Proportionate Shares as provided hereunder.

**11. Assignment and Participation Provisions.**

**11.1 Assignment by Lender.** Except as provided herein, any Lender may assign to one or more Eligible Assignees all or a portion of its Proportionate Share of the Loan and its interests, rights and obligations under this Agreement, upon satisfaction of the following conditions: (a) Agent shall have given its prior written consent to such assignment, which consent shall not be unreasonably withheld, (b) each such assignment shall be of a constant, and not a varying, percentage of all the assigning Lender's rights and obligations under this Agreement, (c) each assignment of less than the entirety of such Lender's Proportionate Share shall be in an amount that is at least the lesser of \$10,000,000 or the entire remaining interest of such Lender in the Loan, (d) the parties to such assignment shall execute and deliver to Agent an Assignment and Acceptance Agreement in the form attached hereto as **Exhibit D** ("Assignment Agreement"), under which the assignee shall assume the obligations of the assigning Lender under this Agreement and the other Loan Documents, and (e) Agent shall be paid an administrative fee by the assignor in the amount of \$3,500 for each such assignment. From and after the effective date specified in the Assignment Agreement, which effective date shall be at least five (5) Business Days after the execution thereof, (x) the assignee thereunder shall be a party to this Agreement and have the rights and obligations of a Lender hereunder and (y) the assigning Lender shall be released from any obligations thereafter accruing under this Agreement. Notwithstanding the foregoing, in no case

may the Proportionate Share of the Loan held by Agent or its Affiliates, as a Lender, be less than twenty-five percent (25%) unless either there exists an Event of Default or Default under the Loan Documents or the Completion Event shall have occurred. Agent shall promptly notify Borrower in writing of such assignment or sale.

**11.2 Participations.** Each Lender may sell participations to one or more banks or other financial institutions in all or a portion of such Lender's rights and obligations under this Agreement and the other Loan Documents; provided that (a) each such participation shall be in a minimum amount of the lesser of \$10,000,000 or the entire remaining interest of such Lender in the Loan, (b) each participant shall meet the requirements of an Eligible Assignee, (c) any such sale or participation shall not affect the rights and duties of the selling Lender hereunder to Borrower and (d) the only rights granted to the participant pursuant to such participation arrangements with respect to waivers, amendments or modifications of the Loan Documents shall be the rights to approve waivers, amendments or modifications that would reduce the principal of or the interest rate on the Loan, release any material portion of the collateral, extend the term or increase the amount of the Proportionate Share of such Lender as it relates to such participant, reduce the amount of any loan fees and extension fees to which such participant is entitled or extend any regularly scheduled payment date for principal or interest. Agent shall have no obligation to provide any reports, funds or information to any participant of any Lender.

**11.3 Disclosure.** Any Lender may disclose information obtained by such Lender pursuant to this Agreement to assignees or participants and potential assignees or participants hereunder.

**11.4 Miscellaneous Assignment Provisions.**

(a) Any assigning Lender shall retain its rights to be indemnified pursuant to this Agreement with respect to any claims or actions arising prior to the date of such assignment.

(b) If any assignee Lender is not incorporated under the laws of the United States of America or any state thereof, it shall, prior to the date on which any interest or fees are payable hereunder or under any of the other Loan Documents for its account, deliver to Borrower and Agent certification as to its exemption from deduction or withholding of any United States federal income taxes.

(c) Anything contained in this section to the contrary notwithstanding, any Lender may at any time pledge all or any portion of its interest and rights under this Agreement to any of the Federal Reserve Banks organized under § 4 of the Federal Reserve Act, 12 U.S.C. § 341. No such pledge or the enforcement thereof shall release the pledgor Lender from its obligations hereunder or under any of the other Loan Documents.

**11.5 Non-U.S. Lenders.** Each Lender (or substituted Lender) that is organized under the laws of a jurisdiction other than the United States, any State thereof or the District of Columbia (a "Non-U.S. Lender") shall deliver to Borrower and Agent two copies of either United States Internal Revenue Form 1001 or Form 4224, or, in the case of a Non-U.S. Lender claiming exemption from U.S. Federal withholding tax under Section 871(h) or 881(c) of the Internal Revenue Code with respect to payments of "portfolio interest," a Form W-8, or any subsequent versions thereof or successors thereto, properly completed and duly executed by such Non-U.S. Lender claiming complete exemption from, or reduced rate of, U.S. Federal withholding tax on payments by Borrower under this Agreement and the other Loan Documents.

Such forms shall be delivered by each Non-U.S. Lender on or before the date it becomes a party to this Agreement and on or before the date, if any, such Non-U.S. Lender changes its applicable lending office by designating a different lending office.

*(Remainder of page intentionally left blank.  
See the following pages for signatories.)*

**"LENDER"**

**U.S. BANK NATIONAL ASSOCIATION,**  
a national banking association

By: Theresa McKinley  
Name: Theresa McKinley  
Title: Vice President


Address for notices to Agent and Lender:

U.S. Bank National Association  
101 North First Avenue, Suite 1600  
Phoenix, AZ 85003  
Attention: Commercial Real Estate

IN WITNESS WHEREOF, Borrower and Agent have executed this Agreement as of the date first above written.

**"BORROWER"**

**OPUS WEST CORPORATION,**  
a Minnesota corporation

By:   
Name: Charles Vogel  
Title: Senior Vice President

Address for notices to Borrower:

Opus West Corporation  
2555 East Camelback Road, Suite 800  
Phoenix, AZ 85016  
Attention: Senior Vice President,  
Real Estate Sales and Finance

**EXHIBIT A**

**LEGAL DESCRIPTION**

PARCEL 1 OF PARCEL MAP NO. 8345, IN THE CITY OF RANCHO CUCAMONGA, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER PLAT RECORDED IN BOOK 91 IN PARCEL MAPS, PAGES 27 AND 28, RECORDS OF SAID COUNTY.

**EXHIBIT B**

**COSTS BREAKDOWN**

Opus West Corporation - Haven Point						
	Retail Cost	Office Cost	Bank Cost	Total Cost	%	Initial Borrower Equity
						Gross Loan Amount
<b>LAND</b>						
	\$24,916	\$5,747	\$65,188	\$95,851	13.6%	\$2,197,955
<b>HARD CONSTRUCTION COSTS</b>						
On-Site Improvements	\$0	\$0	\$250,093	\$250,093	0.5%	\$250,093
Off-Site Improvements	\$158,948	\$476,843	\$53,213	\$689,004	1.5%	\$689,004
Buildings	\$3,149,039	\$17,551,953	\$750,000	\$21,450,992	47.1%	\$21,450,992
General Contractors Fee	\$188,942	\$1,053,117	\$0	\$1,242,059	2.7%	\$0
Interior Corridor	\$0	\$400,000	\$0	\$400,000	0.9%	\$400,000
Tenant Improvements	\$800,000	\$5,200,026	\$0	\$6,000,026	13.2%	\$6,000,026
<b>Total Hard Construction Costs</b>	<b>\$442,885</b>	<b>\$17,681,935</b>	<b>\$803,293</b>	<b>\$18,928,113</b>		<b>\$2,197,955</b>
<b>SOFT CONSTRUCTION COSTS</b>						
Permits, Fees & Impact Fees	\$224,489	\$966,239	\$77,662	\$1,268,390	2.8%	\$1,268,390
Architecture & Engineering				\$0	0.0%	\$0
Developer Fee	\$199,070	\$973,387	\$55,234	\$1,227,691	2.7%	\$1,227,691
Construction Loan Fee	\$71,137	\$346,796	\$20,164	\$438,097	1.0%	\$438,097
Survey, Soil & Environmental Testing	\$0	\$10,000	\$0	\$10,000	0.0%	\$10,000
Leasing Commissions	\$224,000	\$1,200,006	\$100,000	\$1,524,006	3.3%	\$1,524,006
Tenant Rep Commissions				\$0	0.0%	\$0
Legal & Accounting	\$50,000	\$50,000	\$20,000	\$120,000	0.3%	\$120,000
Taxes & Insurance	\$17,084	\$60,403	\$5,702	\$83,189	0.2%	\$83,189
Marketing & Administration	\$5,000	\$10,000	\$0	\$15,000	0.0%	\$15,000
<b>Total Soft Construction Costs</b>	<b>\$630,689</b>	<b>\$2,516,431</b>	<b>\$152,766</b>	<b>\$3,300,086</b>	<b>0.5%</b>	<b>\$3,300,086</b>

**Exhibit B - Page 1**

HAVEN\_CONSTRUCTION LOAN AGR\_CA  
#120507V5F (REV. 12/12/07)

BORROWER: OPUS WEST CORPORATION  
PROJECT: HAVEN POINT, RANCHO CUCAMONGA, CA

CONTINGENCIES & FEES				
Contingency @ % of Soft Costs	\$73,766	\$196,299	\$29,979	\$300,044
Contingency @ % of Hard Costs	\$223,766	\$596,299	\$79,979	\$900,044
Other Loan Fees				\$0
Construction Period Interest	\$373,094	\$1,618,813	\$89,314	\$2,081,221
<b>Total Contingencies &amp; Fees</b>	<b>\$670,627</b>	<b>\$2,411,411</b>	<b>\$199,272</b>	<b>\$3,281,309</b>
<b>Total</b>	<b>\$7,493,251</b>	<b>\$3,744,921</b>	<b>\$2,136,531</b>	<b>\$40,900,000</b>
<b>Loan Amount</b>	<b>\$6,700,000</b>	<b>\$32,300,000</b>	<b>\$1,900,000</b>	<b>\$40,900,000</b>
	89%	90%	89%	

BORROWER: OPUS WEST CORPORATION  
PROJECT: HAVEN POINT, RANCHO CUCAMONGA, CA

Exhibit B -- Page 2

HAVEN\_CONSTRUCTION LOAN AGR\_CA  
#120507V5F (REV. 12/12/07)

**EXHIBIT C**

**COMPLIANCE CERTIFICATE**

The undersigned, **OPUS WEST CORPORATION**, a Minnesota corporation (the "Borrower"), hereby certifies to **U.S. BANK NATIONAL ASSOCIATION**, a national banking association, its successors and assigns, individually and as a lender and Agent, and each of the lending institutions listed on the Schedule of Lenders, as such may be modified from time to time (Agent, as a lender, and each such lending institution, and their respective successors and assigns, referred to individually or collectively, as the context shall infer, the "Lender") as follows:

1. This certificate (the "Compliance Certificate") is being provided pursuant to **Section 3.11** of that certain Construction Loan Agreement (the "Loan Agreement") dated as of December 13, 2007, by and between Lender and Borrower. One or more loans or other credit facilities (each, a "Loan," and collectively the "Loans," as the context may require) have been made by Lender to Borrower pursuant to the Loan Agreement and the other Loan Documents. All capitalized terms not otherwise defined herein shall have the meanings set forth in the Loan Agreement.
2. As of the effective date set forth below, the undersigned has no knowledge of any event which constitutes, or which, with the giving of notice or the passage of time, or both, would constitute a Default or an Event of Default under any of the Loan Documents.
3. As of the effective date set forth below, (a) no Material Adverse Effect has occurred in the financial condition of Borrower, and (b) no Material Adverse Effect has occurred that materially affects any collateral securing the Loan or Borrower's ability to repay the Loan pursuant to the terms of the Loan Documents.
4. As of the effective date set forth below, Borrower is in compliance with the financial covenants set forth in the Loan Agreement, including the Adjusted Net Worth requirement, the Minimum Liquidity requirement, and the Debt to Adjusted Net Worth Ratio requirement set forth in **Section 3.30** of the Loan Agreement. The following financial covenant compliance information set forth on **Schedule 1** attached hereto, which shows Borrower's calculation of such financial covenants, is true, accurate, and complete on and as of the effective date of this Compliance Certificate set forth below, and such information is consistent with the financial statements and other financial information delivered to Lender in accordance with the terms of the Loan Agreement for the applicable reporting periods.
5. As of the effective date set forth below, Borrower has no claim against Lender, or defenses or offsets to payment of any Loan or any other amounts due under the Loan Documents.
6. As of the effective date set forth below, the representations and warranties contained in the Loan Agreement and the other Loan Documents are true and correct in all material respects as of the date of this Compliance Certificate to the same extent as though made on and as of such date, except to the extent such representations and warranties specifically relate to an earlier date.

*(Remainder of page intentionally left blank.  
See the following page for signatory.)*

IN WITNESS WHEREOF, this Certificate has been executed to be effective as of \_\_\_\_\_.

**"BORROWER"**

**OPUS WEST CORPORATION,**  
a Minnesota corporation

Address for notices to Borrower:

Opus West Corporation  
2555 East Camelback Road, Suite 800  
Phoenix, AZ 85016  
Attention: Senior Vice President,  
Real Estate Sales and Finance

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

Exhibit C – Page 2

**SCHEDULE 1**

(Please attach calculation here.)

**EXHIBIT D**

**ASSIGNMENT AND ASSUMPTION**

This Assignment and Assumption (this "Assignment") is dated as of the Effective Date set forth below and is entered into by and between \_\_\_\_\_ ("Assignor") and \_\_\_\_\_ ("Assignee"). Capitalized terms used but not defined herein shall have the meanings given to them in the Construction Loan Agreement identified below (the "Loan Agreement"), receipt of a copy of which is hereby acknowledged by Assignee. The Standard Terms and Conditions set forth in Annex 1 attached hereto are hereby agreed to and incorporated herein by reference and made a part of this Assignment as if set forth herein in full.

For an agreed consideration, Assignor hereby irrevocably sells and assigns to Assignee, and Assignee hereby irrevocably purchases and assumes from Assignor, subject to and in accordance with the Standard Terms and Conditions and the Loan Agreement, as of the Effective Date inserted by Administrative Agent as contemplated below, (i) all of Assignor's rights and obligations as a Lender under the Loan Agreement and any other documents or instruments delivered pursuant thereto to the extent related to the amount and percentage interest identified below of all of such outstanding rights and obligations of Assignor under the respective facilities identified below (including, without limitation any guaranties, and (ii) to the extent permitted to be assigned under applicable law, all claims, suits, causes of action and any other right of Assignor (in its capacity as a Lender) against any person, whether known or unknown, arising under or in connection with the Loan Agreement, any other documents or instruments delivered pursuant thereto or in any way based on or related to any of the foregoing, including, but not limited to, contract claims, tort claims, malpractice claims, statutory claims and all other claims at Law or in equity, related to the rights and obligations sold and assigned pursuant to clause (i) above (the rights and obligations sold and assigned pursuant to clauses (i) and (ii) above being referred to herein collectively as the "Assigned Interest"). Such sale and assignment is without recourse to Assignor and, except as expressly provided in this Assignment, without representation or warranty by Assignor.

1. Assignor: \_\_\_\_\_
2. Assignee: \_\_\_\_\_ [Is an Affiliate/Approved Fund of  
\_\_\_\_\_]
3. Borrower(s): **OPUS WEST CORPORATION**, a Minnesota corporation
4. Agent: **U.S. BANK NATIONAL ASSOCIATION**, a national banking association, as the agent under the Loan Agreement
5. Loan Agreement: The Construction Loan Agreement, dated as of December 13, 2007, among **OPUS WEST CORPORATION**, a Minnesota corporation, and **U.S. BANK NATIONAL ASSOCIATION**, a national banking association, its successors and assigns, as Agent for the Lenders (as such terms are described therein), and their respective successors and assigns (individually or collectively, as the context shall infer, the "Lender").

6. Assigned Interest:

Aggregate Amount of Commitment/Loans for all Lenders	Amount of Commitment/Loans Assigned	Percentage Assigned of Commitment/Loans
\$ _____	\$ _____	_____ %

Effective Date: \_\_\_\_\_, 20\_\_ [TO BE INSERTED BY AGENT AND WHICH SHALL BE  
THE EFFECTIVE DATE OF RECORDATION OF TRANSFER IN THE REGISTER THEREFOR.]

The terms set forth in this Assignment are hereby agreed to:

ASSIGNOR:

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

ASSIGNEE:

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

[Consented to and] Accepted:

\_\_\_\_\_  
as Agent

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

[Consented to:]

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

Exhibit D – Page 2

**ANNEX 1 TO ASSIGNMENT AND ASSUMPTION**

**STANDARD TERMS AND CONDITIONS FOR  
ASSIGNMENT AND ASSUMPTION**

**1. Representations and Warranties.**

1.1. Assignor. Assignor (a) represents and warrants that (i) it is the legal and beneficial owner of the Assigned Interest, (ii) the Assigned Interest is free and clear of any lien, encumbrance or other adverse claim, and (iii) it has full power and authority, and has taken all action necessary, to execute and deliver this Assignment and to consummate the transactions contemplated hereby; and (b) assumes no responsibility with respect to (i) any statements, warranties or representations made in or in connection with the Loan Agreement, any other Loan Document or the Environmental Agreement, (ii) the execution, legality, validity, enforceability, genuineness, sufficiency or value of the Loan Documents, or any collateral thereunder, or the Environmental Agreement, (iii) the financial condition of Borrower, any of its Subsidiaries or Affiliates or any other Person obligated in respect of any Loan Document or the Environmental Agreement, or (iv) the performance or observance by Borrower, any of its Subsidiaries or Affiliates or any other Person of any of their respective obligations under any Loan Document or the Environmental Agreement.

1.2. Assignee. Assignee (a) represents and warrants that (i) it has full power and authority, and has taken all action necessary, to execute and deliver this Assignment and to consummate the transactions contemplated hereby and to become a Lender under the Loan Agreement, (ii) it meets all requirements of an Eligible Assignee under the Loan Agreement (subject to receipt of such consents as may be required under the Loan Agreement), (iii) from and after the Effective Date, it shall be bound by the provisions of the Loan Agreement as a Lender thereunder and, to the extent of the Assigned Interest, shall have the obligations of a Lender thereunder, (iv) it has received a copy of the Loan Agreement, together with copies of the most recent financial statements delivered pursuant to Section 3.9 thereof, as applicable, and such other documents and information as it has deemed appropriate to make its own credit analysis and decision independently and without reliance on Administrative Agent or any other Lender to enter into this Assignment and to purchase the Assigned Interest on the basis of which it has made such analysis and decision, and (v) if it is a Foreign Lender, attached hereto is any documentation required to be delivered by it pursuant to the terms of the Loan Agreement, duly completed and executed by Assignee; and (b) agrees that (i) it will, independently and without reliance on Administrative Agent, Assignor or any other Lender, and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under the Loan Documents and the Environmental Agreement, and (ii) it will perform in accordance with their terms all of the obligations which by the terms of the Loan Documents and the Environmental Agreement are required to be performed by it as a Lender.

1.3 Assignee's Address for Notices, etc. Attached hereto as Schedule 1 is all contact information, address, account and other administrative information relating to Assignee.

2. Payments. From and after the Effective Date, Administrative Agent shall make all payments in respect of the Assigned Interest (including payments of principal, interest, fees and other amounts) to Assignee whether such amounts have accrued prior to or on or after the Effective Date. Assignor and Assignee shall make all appropriate adjustments in payments by Administrative Agent for periods prior to the Effective Date or with respect to the making of this Assignment directly between themselves.

Exhibit D (Annex - Page 1)

3. General Provisions. This Assignment shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns. This Assignment may be executed in any number of counterparts, which together shall constitute one instrument. Delivery of an executed counterpart of a signature page of this Assignment by telecopy shall be effective as delivery of a manually executed counterpart of this Assignment. This Assignment shall be governed by, and construed in accordance with, the Law of the State of Arizona.

**SCHEDULE 1 TO ASSIGNMENT AND ASSUMPTION**

**ADMINISTRATIVE DETAILS**

*(Assignee to list names of credit contacts, addresses, phone and facsimile numbers, electronic mail addresses and account and payment information)*

**(a) LIBOR Lending Office:**

Assignee Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Mail Code: \_\_\_\_\_  
Attn.: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_  
Electronic Mail: \_\_\_\_\_

**(b) Domestic Lending Office:**

Assignee Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Mail Code: \_\_\_\_\_  
Attn.: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_  
Electronic Mail: \_\_\_\_\_

**(c) Notices:**

Assignee Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Mail Code: \_\_\_\_\_  
Attn.: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_  
Electronic Mail: \_\_\_\_\_

**(d) Payment Instructions:**

Account No.: \_\_\_\_\_  
Attn.: \_\_\_\_\_  
Reference: \_\_\_\_\_

Exhibit E

SCHEDULE OF LENDERS

1. U.S. Bank National Association  
101 North First Avenue, Suite 1600  
Phoenix, AZ 85003  
Attention: Commercial Real Estate

Exhibit F

DRAW REQUEST CERTIFICATION

Borrower hereby certifies as follows: (all terms herein having the meanings set forth in the Construction Loan Agreement ("Construction Loan Agreement") dated December 13, 2007, between Borrower and U.S. Bank National Association ("Lender")):

(a) To the best of Borrower's knowledge and belief, at the date hereof no suit or proceeding at law or in equity, and no investigation or proceeding of any governmental body, has been instituted or, to the knowledge of Borrower, is threatened, which in either case would materially affect the condition or business operations of Borrower, except the following:

(b) At the date hereof, no default or event of default under the Construction Loan Agreement or under any of the other Loan Documents has occurred and is continuing, and no event has occurred which, upon the service of notice and/or the lapse of time, would constitute an event of default thereunder, except the following:

(c) The representations and warranties set forth in the Construction Loan Agreement are hereby reaffirmed and restated, and Borrower represents and warrants to Lender that the same are true, correct and complete on the date hereof, except as to the following:

(d) No Material Adverse Effect has occurred with respect to Borrower or the Project that would adversely effect the ability of Borrower to perform under the Loan Documents, except the following:

(e) The progress of construction of the Project is such that it can be completed on or before the Completion Date specified in the Construction Loan Agreement for the cost originally represented to Lender, except for the following:

(f) The Loan, as of the date hereof, is in balance as required by the Construction Loan Agreement, and the undisbursed proceeds of the Loan, including the advance requested herein, are adequate and sufficient to pay for all labor, materials, equipment, work, services and supplies necessary for the completion of the Project, including the installation of all fixtures and equipment required for the operation of the Project, except for the following Project cost increases:

(g) The labor, materials, equipment, work, services and supplies described herein have been performed upon or furnished to the Project in substantial accordance with the Plans, which have not been amended except as expressly permitted by the Construction Loan Agreement.

(h) There have been no changes in the costs of the Project from those set forth on the Sworn Construction Cost Statement, as amended by any amendment thereto heretofore delivered by Borrower to Lender and approved by Lender, if such approval is required by the Construction Loan Agreement.

(i) All bills for labor, materials, equipment, work, services and supplies furnished in connection with the Project, which could give rise to a mechanic's lien if unpaid, have been paid or will be paid out of the requested advance.

(j) All claims for mechanics' liens which shall have arisen or could arise for labor, materials, equipment, work, services or supplies furnished in connection with the Project through the last day of the period covered by the requested advance have been effectively waived in writing, or will be effectively

waived in writing when payment is made, and such written waivers shall be delivered to Lender or its disbursing agent.

(k) All funds advanced under the Construction Loan Agreement to date have been utilized as specified in the Draw Requests pursuant to which the same were advanced, exclusively to pay costs incurred for or in connection with acquiring, constructing and developing the Land and the Project, and Borrower represents that no part of the Loan proceeds have been paid for labor, materials, equipment, work, services or supplies incorporated into or employed in connection with any project other than the Project, as that term is defined in the Construction Loan Agreement. Borrower further represents that all funds covered by this Draw Request are for payment for labor, materials, equipment, work, services or supplies furnished solely in connection with said Project.

Borrower authorizes and requests Lender to charge the total amount of this Draw Request against Borrower's Loan account and to advance from the proceeds of the Loan the funds hereby requested, and to make or authorize disbursement of said funds to or for the account of the persons or firms and in amounts up to, but not exceeding, the amounts listed herein, subject to the requirements of and in accordance with the procedures provided in the Construction Loan Agreement and/or any separate disbursing agreement relating to the Loan. The advance made pursuant to this Draw Request is acknowledged to be an accommodation to Borrower and is not a waiver by Lender of any defaults or events of default under the Loan Documents or any other claims of Lender against Borrower, or the Contractor.

The advances and disbursements on the attached sheets are hereby approved and authorized.

**"BORROWER"**

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

**OPUS WEST CORPORATION,**  
a Minnesota corporation

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

Officially Recorded in Office  
San Bernardino, County of San Bernardino12/14/2007  
10:26 AM  
FV**LARRY WALKER**  
Auditor/Controller - Recorder

729 Chicago Title Company - CIS

**CHICAGO TITLE COMPANY**Recording Requested By  
And When Recorded Mail To:U.S. Bank National Association  
101 North First Avenue, Suite 1600  
Phoenix, AZ 85003-1902  
Attention: Commercial Real Estate

Doc #: 2007-0695793



<b>Titles:</b>	<b>1</b>	<b>Pages:</b>	<b>30</b>
Fees		97.00	
Taxes		.00	
Other		.00	
<b>PAID</b>		<b>97.00</b>	

Space Above For Recorder's Use

603823381-M19/  
602084648-K32**CONSTRUCTION DEED OF TRUST,  
with Assignment of Rents, Security Agreement,  
and Fixture Filing  
(California)**THIS DEED OF TRUST SERVES AS A FIXTURE FILING UNDER THE CALIFORNIA UNIFORM  
COMMERCIAL CODE.

TRUSTOR'S ORGANIZATIONAL IDENTIFICATION NUMBER IS: MN-8Z-83.

THIS DEED OF TRUST SECURES ALL PRESENT AND FUTURE LOAN  
DISBURSEMENTS MADE IN ACCORDANCE WITH THE TERMS OF THE  
PROMISSORY NOTE AND THE LOAN AGREEMENT BETWEEN TRUSTOR AND  
BENEFICIARY.THIS DEED OF TRUST SECURES A VARIABLE RATE PROMISSORY NOTE WHICH  
VARIES ACCORDING TO CHANGES IN CERTAIN CONTRACT RATES OF INTEREST  
IN ACCORDANCE WITH THE TERMS OF THE PROMISSORY NOTE AND THE LOAN  
AGREEMENT BETWEEN TRUSTOR AND BENEFICIARY.

The parties to this Construction Deed of Trust, with Assignment of Rents, Security Agreement, and Fixture Filing (this "Deed of Trust"), dated for reference purposes as of December 13, 2007, are **OPUS WEST CORPORATION**, a Minnesota corporation, as trustor (the "Trustor"), whose mailing address is: 2555 East Camelback Road, Suite 800, Phoenix, Arizona 85016, Attention: Senior Vice President, Real Estate Sales and Finance, **CHICAGO TITLE INSURANCE**, whose mailing address is 560 E. Hospitality Lane, San Bernardino, California 92408, Attention: Title Department, as trustee (the "Trustee"), and **U.S. BANK NATIONAL ASSOCIATION**, a national banking association, its successors and assigns, individually and as a Lender and as Agent for the Lenders (as such terms are described and defined in the Loan Agreement referred to in subsection 1.2 below) and their respective successors and assigns (individually or collectively, as the context shall infer, the "Beneficiary") whose mailing address is 101 N. First Avenue, Suite 1600, Phoenix, Arizona 85003-1902, Attention: Commercial Real Estate, as beneficiary and secured party. Trustee is an affiliate of Beneficiary.

This Deed of Trust secures, among other things, repayment of a loan (the "Loan") described in Section 1.2(a) below, which Loan is made pursuant to a certain loan agreement, entered into by Trustor and Beneficiary (the "Loan Agreement") dated as of the date hereof. This Deed of Trust and the Loan Agreement, together with all of their exhibits, and all other documents which evidence, secure, or otherwise pertain to the Loan, collectively constitute the "Loan Documents." Capitalized terms used above and elsewhere in this Deed of Trust without definition have the meanings given them in the Loan

HAVEN CONSTRUCTION DEED OF TRUST\_CA  
#111207V4F (REV. 12/12/07)BORROWER: OPUS WEST CORPORATION  
PROJECT: HAVEN POINT, RANCHO CUCAMONGA, CA

Exhibit C

Agreement referred to and defined below. All terms not defined herein or in the Loan Agreement shall have the meaning given them in the Uniform Commercial Code, as enacted in the State of California, or under the Uniform Commercial Code in any other state to the extent the same is applicable law (collectively, as amended, recodified, and in effect from time to time, the "UCC"). If a term is defined differently in Article 9 of the UCC than in another Article, Article 9 shall control.

1. **Grant In Trust and Secured Obligations.**

1.1 **Grant In Trust.** In consideration and for the purpose of securing payment and performance of the Secured Obligations (as defined below), Trustor hereby irrevocably and unconditionally grants, bargains, conveys, sells, transfers, and assigns to Trustee, in trust for the benefit of Beneficiary, with power of sale and right of entry and possession, all estate, right, title, and interest which Trustor now has or may later acquire in and to the following property (all or any part of such property, or any interest in all or any part of it, as the context may require, the "Property"):

(a) The real property located in Bernardino County, California, as more fully described in **Exhibit A** attached hereto and made a part hereof, together with all rights, privileges, easements, appurtenances, tenements, hereditaments, rights of way, appendages, projections, water rights including riparian and littoral rights and whether or not appurtenant, streets, ways, alleys, and strips and gores of land, now or hereafter in any way belonging, adjoining, crossing or pertaining to such real property (the "Land"); together with

(b) All buildings, structures and improvements now located or later to be constructed on the Land (the "Improvements"); together with

(c) All articles of personal property (including those specified below) and any software imbedded therein, now owned or hereafter acquired by Trustor and attached to, placed upon for an indefinite term, or used in connection with the Land and/or Improvements, together with all goods and other property that are, or at any time become, so related to the Property that an interest in them arises under real estate law, or they are otherwise a "fixture" under applicable law (each a "Fixture," collectively "Fixtures"); together with

(d) All existing and future as-extracted collateral produced from or allocated to the Land, including, all minerals, oil, gas, other hydrocarbons and associated substances, sulphur, nitrogen, carbon dioxide, helium and any other commercially valuable substances which may be in, under or produced from any part of the Land, and all products processed or obtained therefrom, and the proceeds thereof, and all development rights and credits, air rights, water, water courses, water rights (whether riparian, appropriative or otherwise, and whether or not appurtenant) and water stock, easements, rights-of-way, gores or strips of land, and any land lying in the streets, ways, alleys, passages, roads or avenues, open or proposed, in front of or adjoining the Land and Improvements; together with

(e) All existing and future leases, subleases, subtenancies, licenses, occupancy agreements, concessions, and other agreements of any kind relating to the use or occupancy of all or any portion of the Property, whether now in effect or entered into in the future (each a "Lease," collectively, the "Leases") relating to the use and enjoyment of all or any part of the Land and Improvements, all amendments, extensions, renewals, or modifications thereof (subject to Beneficiary's right to approve same pursuant to the terms of the Loan Documents), and any and all guaranties of, and security for, lessees' performance under any and all Leases, and all other agreements relating to or made in connection with any of such Leases; together with

(f) All rents (and payments in lieu of rents), royalties, issues, profits, income, proceeds, payments, and revenues of or from the Property, and/or at any time payable under any and all

Leases, including all rent loss insurance proceeds, prepaid rents and any and all security deposits received or to be received by Trustor pursuant to any and all Leases, and all rights and benefits accrued, or to accrue, to Trustor under any and all Leases (some or all collectively, as the context may require, "Rents"); together with

(g) All rights to the name, signs, trade names, trademarks, trademark applications, service marks, licenses, software, and symbols used in connection with the Land and Improvements; together with

(h) All goods, materials, supplies, chattels, furniture, fixtures, machinery, apparatus, fittings, equipment, and articles of personal property of every kind and nature whatsoever, including consumable goods, now or hereafter located in or upon the Property or any part thereof, or to be attached to or placed in or on, or used or useable in connection with any present or future use, enjoyment, occupancy or operation of all or any part of the Land and Improvements, whether stored on the Land or elsewhere, including by way of description but without limiting the generality of the foregoing, all computer systems, telephone and telecommunication systems, televisions and television systems, pumps or pumping plants, tanks, motors, conduits, engines, pipes, ditches and flumes, and also all gas and electrical apparatus (including, but not limited to, all electrical transformers, switches, switch boxes, and equipment boxes), cooking, heating, cooling, air conditioning, sprinkler equipment, lighting, power equipment, ventilation, incineration, refrigeration and plumbing apparatus, fixtures and equipment, screens, storm doors and windows, stoves, wall beds, refrigerators, attached cabinets, partitions, ovens, ranges, disposals, dishwashers, carpeting, plants and shrubbery, ground maintenance equipment, ducts and compressors; together with all building materials, goods and personal property on or off the Property intended to be affixed to or incorporated in the Property but not yet affixed to or incorporated in the Property, all which shall be considered to the fullest extent of the law to be real property for purposes of this Deed of Trust; together with

(i) All building materials, equipment, work in process or other personal property of any kind, whether stored on the Land or elsewhere, which have been or later will be acquired for the purpose of being delivered to, incorporated into or installed in or about the Land or Improvements; together with

(j) All deposit accounts of Trustor, including but not limited to, the Account (if any), the Borrower's Funds Account (if any), the Replacement Reserve Account (if any), the Operating Reserve Account (if any), and all Loan funds deposited into any such account, whether disbursed or not, and Trustor's own funds now or later to be held on deposit in all such accounts; together with

(k) All rights to the payment of money and all guaranties thereof and judgments therefor, and all accounts, accounts receivable, reserves, deferred payments, refunds of real property and personal property taxes and other refunds, cost savings, payments and deposits, whether now or later to be received from third parties (including all earnest money sales deposits) or deposited by Trustor with third parties (including all utility deposits), warranty rights, contract rights, management contracts, service contracts, construction and architectural contracts, contracts for the purchase and sale of the Property or any part thereof, end-loan or other financing commitments, development and use rights, governmental permits and licenses, applications, architectural and engineering plans, specifications and drawings, as-built drawings, chattel paper, instruments, documents, promissory notes, drafts, letters of credit (other than letters of credit in favor of Beneficiary), letter of credit rights (whether or not the letter of credit is evidenced by a writing), supporting obligations, and general intangibles, including payment intangibles, whether any of the foregoing are tangible or electronic, which arise from or relate to construction on the Land or to any business now or later to be conducted on it, or to the Land and Improvements generally; together with

(l) All insurance policies (and the unearned premiums therefor) and bonds required by the Loan Documents and all proceeds thereof, and all proceeds (including all claims to and demands for them) of the voluntary or involuntary conversion of any of the Land, the Improvements, or the other property

described above into cash or liquidated claims, including proceeds of all present and future fire, hazard or casualty insurance policies and all condemnation awards or payments now or later to be made by any public body or decree by any court of competent jurisdiction for any taking or in connection with any condemnation or eminent domain proceeding, and all causes of action and their proceeds for any damage or injury to, or defect in, the Land, the Improvements, or the other property described above or any part of them, or breach of warranty in connection with the construction of the Improvements, including causes of action arising in tort, contract, fraud, misrepresentation, or concealment of a material fact; together with

(m) All books, records, and all recorded data of any kind or nature (regardless of the medium of recording) pertaining to any and all of the property described above, including records relating to tenants under any leases, and the qualification of such tenants, and all certificates, vouchers, and other documents in any way related thereto, and all records relating to the application and allocation of any federal, state, and local tax credits or benefits, including computer-readable memory and any computer hardware or software necessary to access and process such memory (collectively, the "Books and Records"); together with

(n) All commercial tort claims Trustor now has or hereafter acquires relating to any of the property described above; together with

(o) All software embedded within or used in connection with any of the property described above; together with

(p) All products, accounts, and proceeds (cash or non-cash) of, additions, betterments, extensions, accessions and accretions to, substitutions, renewals and replacements for, and changes in any of the property described above, including all proceeds of any voluntary or involuntary disposition or claim respecting any such property (arising out of any judgment, condemnation or award, or otherwise arising) and all supporting obligations ancillary to or arising in connection therewith, general intangibles (including payment intangibles) arising in connection therewith, and all goods, accounts, instruments, documents, promissory notes, chattel paper, deposit accounts, supporting obligations, and general intangibles (including payment intangibles) (whether any of the foregoing are tangible or electronic), wherever located, acquired with cash proceeds of any of the foregoing or its proceeds.

Trustor shall and will warrant and forever defend the above-bargained Property in the quiet and peaceable possession of Trustee, its successors and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof. Trustor agrees that any greater title to the Property hereafter acquired by Trustor during the term hereof shall be subject hereto.

## 1.2 Secured Obligations.

(a) Trustor makes the grant, bargain, conveyance, sale, transfer, and assignment set forth above and grants the security interest set forth in Section 3 below for the purpose of securing the following obligations (the "Secured Obligations") in such order of priority as Beneficiary may determine:

(i) Payment of all obligations at any time owing under a promissory note (the "Note") dated as of December 13, 2007, payable by Trustor as maker to the order of Beneficiary in the stated principal amount of Forty Million Nine Hundred Thousand and No/100 Dollars (\$40,900,000.00) to the order of Beneficiary; and

(ii) Payment and performance of all obligations of Trustor under this Deed of Trust; and

(iii) Payment and performance of all obligations of Trustor under the Loan Agreement, under any Loan Documents, and under any rate lock agreement or interest rate protection agreement (such as any rate lock agreement, interest rate swap agreement, International Swaps and Derivatives Association, Inc. Master Agreement, or similar agreement or arrangements now existing or hereafter entered into by Trustor and Beneficiary in connection with the Loan evidenced by the Note to hedge the risk of variable rate interest volatility or fluctuations in interest rates as any such agreement or arrangement may be modified, supplemented and in effect from time to time); provided, however, that this Deed of Trust does not secure any Loan Document or other document, or any provision of any Loan Document or other document, that is expressly stated to be unsecured; and

(iv) Payment and performance of all future advances and other obligations that Trustor, or any successor in interest to Trustor, and/or any other obligor (if different than Trustor), or any successor in ownership of all or part of the Property, may agree to pay and/or perform (whether as principal, surety, or guarantor) for the benefit of Beneficiary, when a writing evidences the parties' agreement that the advance or obligation be secured by this Deed of Trust; and

(v) Payment and performance of all modifications, amendments, extensions, and renewals, however evidenced, of any of the Secured Obligations, including any successor agreements or instruments which restate and supersede any agreements or instruments evidencing the Secured Obligations.

(b) All persons who may have or acquire an interest in all or any part of the Property will be considered to have notice of, and will be bound by, the terms of the Secured Obligations and each other agreement or instrument made or entered into in connection with each of the Secured Obligations. Such terms include any provisions in the Note or the Loan Agreement which permit borrowing, repayment, and reborrowing, or which provide that the interest rate on one or more of the Secured Obligations may vary from time to time.

2. **Assignment of Lessor's Interest In Leases and Assignment of Rents.**

2.1 **Absolute Assignment.** Effective upon the recordation of this Deed of Trust, Trustor hereby irrevocably, absolutely, presently, and unconditionally assigns, transfers, and sets over to Beneficiary:

(a) All of Trustor's right, title, and interest in, to, and under any and all Leases, all amendments, extensions, renewals, or modifications thereof (subject to Beneficiary's right to approve same pursuant to the terms of the Loan Documents), and any and all guaranties of, and security for, lessees' performance under any and all Leases, and all other agreements relating to or made in connection with any of such Leases; and

(b) All Rents.

In the event that anyone establishes and exercises any right to develop, bore for, or mine for any water, gas, oil, or mineral on or under the surface of the Property, any sums that may become due and payable to Trustor as bonus or royalty payments, and any damages or other compensation payable to Trustor in connection with the exercise of any such rights, shall also be considered Rents assigned under this Section.

**THIS IS AN ABSOLUTE ASSIGNMENT, NOT AN ASSIGNMENT FOR SECURITY ONLY.**

2.2 **Grant of License.** Beneficiary hereby confers upon Trustor a license (the "License") to collect and retain the Rents as they become due and payable, so long as no Event of Default (as such term

is defined below) shall exist. Upon the occurrence of an Event of Default, the License shall terminate (automatically and without notice or demand of any kind and without regard to the adequacy of Beneficiary's security under this Deed of Trust).

**2.3**

**Collection and Application of Rents and Enforcement of Leases.** Subject to the License granted to Trustor above and the other provisions of this Section, Beneficiary has the right, power, and authority to collect any and all Rents and enforce the provisions of any Lease. In connection with the provisions of this Section, Trustor hereby constitutes and irrevocably appoints Beneficiary its attorney-in-fact, with full power of substitution, to perform any and all of the following acts, if and at the times after the occurrence of an Event of Default when Beneficiary in its sole and absolute discretion may so choose:

- (a) Demand, receive, and enforce payment of any and all Rents, and endorse all checks and other payment instruments related thereto;
- (b) Give receipts, releases, and satisfactions for any and all Rents;
- (c) Sue either in the name of Trustor or in the name of Beneficiary for any and all Rents;
- (d) Enforce the provisions of any and all Leases;
- (e) Enter into Leases; and/or
- (f) Perform and discharge any and all undertakings of Trustor or otherwise under any Lease.

The appointment granted in this Section shall be deemed to be a power coupled with an interest. Beneficiary's rights under this Section do not depend on whether or not Beneficiary takes possession of the Property as permitted under this Deed of Trust. In Beneficiary's sole and absolute discretion, Beneficiary may choose to collect Rents or enforce any and all Leases either with or without taking possession of the Property and either in person or through a court-appointed receiver. Beneficiary's rights and powers under this Section are in addition to the other remedies herein provided for upon the occurrence of an Event of Default and may be exercised independently of or concurrently with any other such remedies.

**2.4**

**Notice.** All lessees under any and all Leases are hereby irrevocably authorized and notified by Trustor to rely upon and to comply with (and will be fully protected in so doing) any notice or demand by Beneficiary for the payment to Beneficiary of any rental or other sums which may at any time become due under the Leases, or for the performance of any of lessees' undertakings under the Leases, and lessees have no right or duty to inquire whether any Event of Default has actually occurred or is then existing hereunder or to obtain Trustor's consent.

**2.5**

**Proceeds.** Beneficiary has the right to apply all amounts received by it pursuant to this assignment to pay any of the following in the amounts and in the order Beneficiary deems appropriate: (a) any and all Secured Obligations, in any order and proportions as Beneficiary in its sole and absolute discretion may choose, and (b) the costs and expenses of operation of the Property and collection of Rents and other sums that may be incurred by Trustee, Beneficiary, and/or any receiver, including but not limited to reasonable attorneys' fees and any and all expenses of leasing, operating, maintaining, and managing the Property, and all other costs and charges incident to the Property; including, without limitation, (i) salaries, fees, commissions and wages of a managing agent, and other employees, agents, or independent contractors; (ii) taxes, charges, claims, assessments, any other liens, and premiums for all insurance; and (iii) the cost of all alterations, renovations, repairs or replacements, and all expenses incident to taking and retaining possession of the Property. In addition, Beneficiary may hold the same as

security for the payment of the Secured Obligations. Beneficiary shall have no liability for any funds which it does not actually receive.

**2.6 Beneficiary Not Responsible.** Under no circumstances shall Beneficiary have any duty to produce Rents from the Property. Regardless of whether or not Beneficiary, in person or by agent, takes actual possession of the Land and the Improvements, Beneficiary is not and shall not be deemed to be:

- (a) A "mortgagee in possession" for any purpose;
- (b) Responsible for performing any of the obligations of the Trustor as lessor under any lease;
- (c) Responsible for any waste committed by lessees or any other parties, any dangerous or defective condition of the Property, or any negligence in the management, upkeep, repair or control of the Property; or
- (d) Liable in any manner for the Property or the use, occupancy, enjoyment or operation of all or any part of it.

**2.7 Leasing.** Trustor shall not accept any deposit or prepayment of Rents for any rental period exceeding one (1) month without Beneficiary's express prior written consent. Trustor shall not lease the Property or any part of it except strictly in accordance with the Loan Agreement. Trustor shall apply all Rents received by it in the manner required by the Loan Agreement.

**3. Grant of Security Interest.**

**3.1 Security Agreement.** The parties intend for this Deed of Trust to create a lien on the Property, and an absolute assignment of the Rents and Leases, all in favor of Beneficiary. The parties acknowledge that some of the Property and some of the Rents and Leases may be determined under applicable law to be personal property or fixtures. To the extent that any Property, Rents, or Leases may be or be determined to be personal property, Trustor, as debtor, hereby grants to Beneficiary, as secured party, a security interest in all such Property, Rents, and Leases, to secure payment and performance of the Secured Obligations. This Deed of Trust constitutes a security agreement under the UCC, covering all such Property, Rents, and Leases. To the extent such Property, Rents, or Leases are not real property encumbered by the lien granted above, and are not absolutely assigned by the assignment set forth above, it is the intention of the parties that such Property, Rents, and/or Leases shall constitute "proceeds, products, offspring, rents, or profits" (as defined in and for the purposes of Section 552(b) of the United States Bankruptcy Code, as such section may be modified or supplemented) of the Land and Improvements.

**3.2 Financing Statements; Authorization to File; Power of Attorney.** Trustor hereby authorizes Beneficiary, at any time and from time to time, to file any initial financing statements, amendments thereto, and continuation statements, with or without the signature of Trustor, as authorized by applicable law, as applicable to the Property or any part thereof. Trustor shall pay all fees and costs that Beneficiary may incur in filing such documents in public offices and in obtaining such record searches as Beneficiary may reasonably require and all other reasonable fees and costs Beneficiary incurs in connection with perfection of its security interests. For purposes of such filings, Trustor agrees to promptly furnish any information requested by Beneficiary. Trustor also ratifies its authorization for Beneficiary to have filed any like initial financing statements, amendments thereto, or continuation statements if filed prior to the date of this Deed of Trust. Trustor hereby irrevocably constitutes and appoints Beneficiary, with full power of substitution, as its true and lawful attorneys-in-fact with full irrevocable power and authority in the place and stead of Trustor to execute in Trustor's name any such documents and to otherwise carry out the purposes of this Section, to the extent that Trustor's

authorization above is not sufficient. Such power is deemed to be coupled with an interest, and is therefore irrevocable. If any financing statement or other document is filed in the records normally pertaining to personal property, that filing shall never be construed as in any way derogating from or impairing this Deed of Trust or the rights or obligations of the parties under it.

Everything used in connection with the Property and/or adapted for use therein and/or which is described or reflected in this Deed of Trust is, and at all times and for all purposes and in all proceedings both legal or equitable shall be regarded as part of the real estate encumbered by this Deed of Trust regardless of whether (i) any such item is physically attached to the Improvements, (ii) serial numbers are used for the better identification of certain equipment items capable of being thus identified in a recital contained herein or in any list filed with Beneficiary or (iii) any such item is referred to or reflected in any such Financing Statement so filed at any time. Similarly, the mention in any such Financing Statement of (1) rights in or to the proceeds of any fire and/or hazard insurance policy, or (2) any award in eminent domain proceedings for a taking or for lessening of value, or (3) Trustor's interest as lessor in any present or future lease or rights to income growing out of the use and/or occupancy of the property conveyed hereby, whether pursuant to lease or otherwise, shall never be construed as in any way altering any of the rights of Beneficiary as determined by this instrument or impugning the priority of Beneficiary's lien granted hereby or by any other recorded document. Such mention in the Financing Statement is declared to be solely for the protection of Beneficiary in the event any court or judge shall at any time hold, with respect to the matters set forth in the foregoing clauses (1), (2), and (3), that notice of Beneficiary's priority of interest is required in order to be effective against a particular class of persons, including but not limited to the federal government and any subdivisions or entity of the federal government, shall be filed in the UCC records.

**4. Effective as a Financing Statement; Fixture Filing and Construction Mortgage.**

This Deed of Trust constitutes a financing statement filed as a fixture filing under the applicable section of the UCC, covering any Property which now is or later may become fixtures attached to the Land or Improvements. This Deed of Trust shall also be effective as a financing statement covering as-extracted collateral (including oil and gas), accounts, and general intangibles under the UCC, which will be financed at the wellhead or minehead of the wells or mines located on the Land and is to be filed of record in the real estate records of each county where any part of the Land is situated. This Deed of Trust shall also be effective as a financing statement covering any other Property and may be filed in any other appropriate filing or recording office. The mailing address of Trustor is the address of Trustor set forth at the end of this Deed of Trust, and the address of Beneficiary from which information concerning the security interests hereunder may be obtained is the address of Beneficiary set forth at the end of this Deed of Trust. A carbon, photographic, or other reproduction of this Deed of Trust or of any financing statement related to this Deed of Trust shall be sufficient as a financing statement for any of the purposes referred to in this Section. This Deed of Trust is also a "Construction Mortgage," as defined in the UCC to the extent it secures an obligation incurred for the construction of an improvement on the Land (including the acquisition cost of the Land), or the refinancing of an obligation incurred for the construction of an improvement on the Land (including the acquisition cost of the Land).

**5. Rights and Duties of the Parties.**

**5.1 Representations and Warranties.** Trustor represents and warrants that, except as previously disclosed to Beneficiary in writing:

(a) Trustor is indefeasibly seized of and lawfully possesses and holds good and marketable fee simple title to all of the Land and the Improvements, unless any portion of Trustor's present interest in the Land is described in Exhibit A as a leasehold interest, in which case Trustor lawfully possesses and holds a leasehold interest in such portion of the Land as stated in Exhibit A; and Trustor and its successors and assigns warrant and shall forever defend title to the Property, subject only to such

exceptions and conditions to title as Beneficiary has approved in its sole and absolute discretion (the "Permitted Title Exceptions") (and any later such encumbrances approved by Beneficiary in writing), unto Trustee and Trustee's successors and assigns against the claims and demands of all persons claiming or to claim the same or any part thereof;

(b) Trustor has the full and unlimited power, right, and authority to encumber the Property and assign the Rents;

(c) This Deed of Trust creates a first and prior lien on the Property free and clear of all liens, encumbrances, and claims whatsoever, subject only to the Permitted Title Exceptions;

(d) The Property includes all property and rights which may be reasonably necessary or desirable to promote the present and any reasonable future beneficial use and enjoyment of the Land and the Improvements;

(e) Trustor owns any Property which is personal property free and clear of all liens, encumbrances, and claims whatsoever, as well as any security agreements, reservations of title, or conditional sales contracts, and there is no presently effective financing statement affecting such personal property on file in any public office nor is any of such personal property subject to a security interest having priority over Beneficiary's priority to the same except with respect to junior indebtedness, if any, approved and permitted by Beneficiary as a Permitted Title Exception and Trustor has the right to convey and encumber such property and will warrant and defend such property against the claims of all persons and parties;

(f) The Property has frontage on and direct access for ingress and egress to publicly dedicated streets;

(g) Electricity (and gas, if available), water facilities, sewer facilities and any other necessary utilities are available, or will be available upon completion of the Improvement in accordance with Section 3.1(b) of the Loan Agreement, and will thereafter be available, in sufficient capacity to service the Property satisfactorily and any easements necessary to the furnishing of such utilities are or will be granted and duly recorded; and

(h) Trustor's exact legal name, and, if Trustor is not an individual, organizational identification number (if any assigned by Trustor's state of incorporation or organization) are correctly set forth in this Deed of Trust. If Trustor is an individual, Trustor's principal residence has for the preceding four months been and will continue to be (unless Trustor notifies Beneficiary of any change in writing at least thirty (30) days prior to the date of such change) the address of the principal residence of Trustor as set forth at the end of this Deed of Trust. If Trustor is not an individual, Trustor is an organization of the type and (if not an unregistered entity) is incorporated in or organized under the laws of the state specified in the introductory paragraph of this Deed of Trust. If Trustor is an unregistered entity (including a general partnership), it is organized under the laws of the state specified in the introductory paragraph of this Deed of Trust. Trustor's principal place of business and chief executive office and the place where it keeps its Books and Records has for the preceding four months (or, if less, the entire period of the existence of Trustor) been and will continue to be (unless Trustor notifies Beneficiary of any change in writing at least thirty (30) days prior to the date of such change) the address of Trustor set forth at the end of this Deed of Trust.

(i) To the best of Trustor's knowledge and belief, Trustor has no presently currently existing commercial tort claims relating to any of the Property. If Trustor later acquires any such commercial tort claims relating to any of the Property, Trustor shall promptly provide to Beneficiary a detailed description of any such claim and shall execute all documents necessary for Beneficiary to perfect its security interest therein.

**5.2 Taxes and Assessments.**

(a) Trustor shall pay prior to delinquency all taxes, levies, charges and assessments, including assessments on appurtenant water stock (individually and collectively, an "Imposition"), imposed by any public or quasi-public authority or utility company that are (or if not paid, may become) a lien on all or part of the Property or any interest in it, or that, if not paid, may cause any decrease in the value of the Property or any part of it. If any Imposition becomes delinquent, Beneficiary may require Trustor to present evidence that it has been paid in full, on ten (10) days' written notice by Beneficiary to Trustor. Notwithstanding the foregoing provisions of this Section, Trustor may, at its expense, contest the validity or application of any Imposition by appropriate legal proceedings promptly initiated and conducted in good faith and with due diligence, provided that (i) Beneficiary is reasonably satisfied that neither the Property nor any part thereof or interest therein will be in danger of being sold, forfeited, or lost as a result of such contest, and (ii) Trustor shall have posted a bond or furnished other security as may be reasonably required from time to time by Beneficiary; and provided further that if at any time payment of any obligation imposed upon Trustor by this Section becomes necessary to prevent a lien foreclosure sale or forfeiture or loss of the Property, or any part thereof, then Trustor must pay the same in sufficient time to prevent such sale, forfeiture, or loss.

(b) Following an Event of Default (as such term is defined below), Trustor shall, upon demand of Beneficiary, pay monthly to Beneficiary an amount sufficient, as estimated by Beneficiary, to accumulate the sum required to pay thirty (30) days prior to the due date thereof the annual cost of any real property taxes and any assessments and the estimated next premiums for hazard and other required insurance on the Property. These funds will be held by Beneficiary (and may be commingled with other funds of Beneficiary) without interest and will be released to Trustor for payment of Impositions and insurance premiums, or directly applied to such costs by Beneficiary, as Beneficiary may elect.

**5.3 Performance of Secured Obligations.** Trustor shall promptly pay and perform each Secured Obligation in accordance with its terms.

**5.4 Liens, Charges, and Encumbrances.** Trustor shall immediately discharge any lien on the Property that Beneficiary has not expressly consented to in writing. Trustor shall pay when due each obligation secured by or reducible to a lien, charge, or encumbrance which now does or later may encumber all or part of the Property or any interest in it, whether the lien, charge, or encumbrance is or would be senior or subordinate to this Deed of Trust. This Section is subject to any right granted to Trustor in the Loan Agreement to contest in good faith claims and liens for labor done and materials and services furnished in connection with construction of the Improvements. Trustor shall pay, perform and observe all obligations under any Permitted Title Exceptions, and will not modify or permit modification of them without Beneficiary's prior written consent.

**5.5 Damages and Insurance and Condemnation Proceeds.**

(a) Trustor hereby absolutely and irrevocably assigns to Beneficiary, and authorizes the payor to pay to Beneficiary, the following claims, causes of action, awards, payments, and rights to payment (whether awarded or to be awarded or which may be awarded because of judicial action, private action, settlement, or compromise):

(i) All awards of damages and all other compensation payable directly or indirectly because of a condemnation, proposed condemnation or taking for public or private use which affects all or part of the Property or any interest in it; and

(ii) All other awards, claims, and causes of action, arising out of any warranty affecting all or any part of the Property, or for damage or injury to or decrease in value of all or part of the Property or any interest in it; and

(iii) All proceeds of any insurance policies payable because of loss sustained to all or part of the Property, whether or not such insurance policies are required by Beneficiary; and

(iv) All interest which may accrue on any of the foregoing.

(b) Trustor shall immediately notify Beneficiary in writing if:

(i) Any damage occurs or any injury or loss is sustained to all or any part of the Property, or any action or proceeding relating to any such damage, injury, or loss is commenced; or

(ii) Any offer is made, or any action or proceeding is threatened or commenced, which relates to any actual or proposed condemnation or taking of all or part of the Property.

(c) If Beneficiary chooses to do so, Beneficiary may in its own name appear in or prosecute any action or proceeding to enforce any cause of action based on warranty, or for damage, injury, or loss to all or part of the Property, and Beneficiary may make any compromise or settlement of the action or proceeding with respect to its rights and interests to the extent that such rights and interest are separate from the rights and interest of Trustor. Beneficiary, if it so chooses, may participate in any action or proceeding relating to condemnation or taking of all or part of the Property, and may join Trustor in adjusting any loss covered by insurance, and in connection therewith, Beneficiary shall have the right to be represented by counsel of its choice.

(d) All proceeds of these assigned claims and all other property and rights which Trustor may receive or be entitled to shall be paid to Beneficiary. In each instance, Beneficiary shall apply such proceeds first toward reimbursement of all of Beneficiary's costs and expenses of recovering the proceeds, including reasonable attorneys' fees. If, in any instance, each and all of the following conditions are satisfied in Beneficiary's reasonable judgment, Beneficiary shall permit Trustor to use the balance of such proceeds (the "Net Claims Proceeds") to pay costs of repairing or reconstructing the Property in the manner described below:

(i) The plans and specifications, cost breakdown, construction contract, construction schedule, contractor and payment and performance bond for the work of repair or reconstruction shall all be reasonably acceptable to Beneficiary; and

(ii) Beneficiary shall receive evidence reasonably satisfactory to it that after repair or reconstruction, the Property would be at least as valuable as it was immediately before the damage or condemnation occurred, and in this regard and notwithstanding any other provisions of the Loan Documents, Beneficiary may order an appraisal from an appraiser acceptable to Beneficiary, the cost of which shall be borne by Trustor; and

(iii) The Net Claims Proceeds (together with the net proceeds of any rental interruption insurance and reasonably projected rental receipts during the repair or reconstruction period) shall be sufficient in Beneficiary's determination to pay for the total cost of repair or reconstruction, including all associated development costs and interest and other sums projected to be payable on the Secured Obligations until the repair or reconstruction is complete; or Trustor shall provide its own funds in an amount equal to the difference between the Net Claims

Proceeds and a reasonable estimate, made by Trustor and found acceptable by Beneficiary, of the total cost of repair or reconstruction; and

(iv) Unless otherwise agreed to by Beneficiary, Beneficiary shall receive evidence satisfactory to it that, after the repair or reconstruction is complete, (1) all non-residential leases acceptable to Beneficiary will continue (or a replacement therefor reasonably satisfactory to Beneficiary immediately commences); and (2) the Property will continue to operate in substantially the same manner, and will generate the same debt service coverage as immediately before the damage or condemnation occurred; and

(v) Beneficiary shall be satisfied that the repair or reconstruction can be completed prior to the maturity date of the Note; and

(vi) No default or Event of Default (as defined in the applicable document, subject to applicable notice and cure periods) shall have occurred and be continuing under this Deed of Trust, the Note, the Loan Agreement or any other Loan Document.

If Beneficiary finds that such conditions have been met, Beneficiary shall hold the Net Claims Proceeds, and any funds which Trustor is required to provide, in an account and shall disburse them to Trustor to pay costs of repair or reconstruction upon presentation of evidence reasonably satisfactory to Beneficiary that repair or reconstruction has been completed satisfactorily and lien-free, including partial progress payments of Net Claims Proceeds from time to time, in accordance with a cost breakdown approved by Beneficiary and the same procedures and subject to the same conditions as are set forth in the Loan Agreement for Loan disbursements. However, if Beneficiary finds that one or more of such conditions have not been satisfied, Beneficiary may apply the Net Claims Proceeds to pay or prepay some or all of the Secured Obligations in such order and proportions as Beneficiary may determine, all without affecting the lien and security interest created by this Deed of Trust.

(e) Notwithstanding the foregoing, in the event any governmental agency or authority shall require, or commence any proceedings for, the demolition of any buildings or structures comprising a substantial part of the Improvements, or shall commence any proceedings to condemn or otherwise take pursuant to the power of eminent domain a material portion of the Land or Improvements, Beneficiary may, at its option, declare the Secured Obligations to be immediately due and payable and apply any condemnation awards or proceeds to the Secured Obligations.

(f) Trustor hereby specifically, unconditionally, and irrevocably waives all rights of a property owner granted under any applicable law that provides for allocation of condemnation proceeds between a property owner and a lienholder, and any other law or successor statute of similar import.

#### **5.6 Surety Bond Proceeds.**

(a) Trustor hereby absolutely and irrevocably assigns to Beneficiary, and authorizes the payor to pay to Beneficiary, all payments, rights to payment, and all other compensation payable, directly or indirectly, under any payment, performance, or other bond (each a "Surety Bond") related to, or issued in connection with, the construction of any Improvements or the performance of any acts, related to the Property or any interest in it, whether or not such Surety Bonds are required by Beneficiary.

(b) Trustor shall immediately notify Beneficiary in writing of:

(i) Any threatened or actual default or breach of any obligation under any Surety Bond; or

(ii) Any action or inaction, including a breach by any contractor under their contract (if applicable), which would give rise to the obligation of the payor/surety to pay any sums or perform any acts pursuant to the terms of any Surety Bond.

(c) If Beneficiary chooses to do so, after the occurrence of an Event of Default under the Loan Documents, Beneficiary may in its own name appear in or prosecute any action or proceeding to enforce any cause of action based on any claim under a Surety Bond, and Beneficiary may make any compromise or settlement of any such action or proceeding.

(d) All proceeds of these assigned payments, rights to payment, and compensation payable, directly or indirectly, under any Surety Bond which Trustor may receive or be entitled to, shall be paid to Beneficiary. In each instance, Beneficiary shall apply such proceeds first toward reimbursement of all of Beneficiary's costs and expenses of recovering the proceeds, including reasonable attorneys' fees. If Trustor desires to use the balance of such proceeds (the "Net Bond Proceeds") to pay the costs of completing all or a part of the construction of certain of the Improvements, and each and all of the following conditions are satisfied in Beneficiary's reasonable judgment, Beneficiary shall permit Trustor to pay such costs of construction, in the manner described below:

(i) The plans and specifications, cost breakdown, construction contract (including any replacement contract), construction schedule (including all revisions thereto), contractor (including any replacement contractor), and, if required by Beneficiary, any replacement payment and performance bond for the construction work, shall all be acceptable to Beneficiary; and

(ii) To the extent allowed pursuant to the terms of the Surety Bond, Beneficiary shall have approved any replacement contractor(s); and

(iii) Beneficiary shall receive evidence satisfactory to it that after the construction is complete, the Property would be at least as valuable as it would have been if completed pursuant to the original construction contract, and in this regard and notwithstanding any other provisions of the Loan Documents, Beneficiary may order an appraisal from an appraiser acceptable to Beneficiary, the cost of which shall be borne by Trustor; and

(iv) The Net Bond Proceeds shall be sufficient in Beneficiary's determination to pay for the total cost of the applicable construction, including all associated development costs and interest and other sums projected to be payable on the Secured Obligations until the applicable construction is complete; or Trustor shall provide its own funds in an amount equal to the difference between the Net Bond Proceeds and a reasonable estimate, made by Trustor and found acceptable by Beneficiary, of the total cost of such construction; and

(v) Beneficiary shall be satisfied that the repair or reconstruction can be completed prior to the maturity date of the Note; and

(vi) No default or Event of Default (as defined in the applicable document, subject to applicable notice and cure periods) shall have occurred and be continuing under this Deed of Trust, the Note, the Loan Agreement or any other Loan Document.

If Beneficiary finds that such conditions have been met, Beneficiary shall hold the Net Bond Proceeds, and any funds which Trustor is required to provide, in a non-interest-bearing account and shall disburse them to Trustor to pay costs of construction upon presentation of evidence reasonably satisfactory to Beneficiary that the construction has been completed satisfactorily and lien-free, including partial progress payments of Net Bond Proceeds from time to time, in accordance with a cost breakdown

approved by Beneficiary and the same procedures and subject to the same conditions, as are set forth in the Loan Agreement for Loan disbursements. However, if Beneficiary finds that one or more of such conditions have not been satisfied, Beneficiary may apply the Net Bond Proceeds to pay or prepay some or all of the Secured Obligations in such order and proportions as Beneficiary may choose, all without affecting the lien and security interest created by this Deed of Trust.

(e) Notwithstanding anything herein to the contrary, to the extent that any of the terms of this Section conflict with the terms of any Surety Bond which has been approved in writing by Beneficiary, the terms of such Surety Bond shall control.

**5.7 Maintenance and Preservation of Property.**

(a) Trustor shall insure the Property as required by the Loan Agreement and keep the Property in good condition and repair.

(b) Trustor shall not remove or demolish the Property or any part of it, or alter, restore or add to the Property, or initiate or allow any change in any zoning or other land use classification which affects the Property or any part of it, except as permitted or required by the Loan Documents or with Beneficiary's express prior written consent in each instance.

(c) If all or part of the Property becomes damaged or destroyed, Trustor shall promptly and completely repair and/or restore the Property in a good and workmanlike manner in accordance with sound building practices and notwithstanding the unavailability (for whatever reason) of insurance proceeds from any Property insurer; provided, however, this subsection is subject to the provisions of Sections 5.5 and 5.6 above.

(d) Trustor shall not commit or allow any act upon or use of the Property which would violate: (i) any applicable law or order of any governmental authority, whether now existing or later to be enacted and whether foreseen or unforeseen; or (ii) any public or private covenant, condition, restriction or equitable servitude affecting the Property. Trustor shall not bring or keep any article on the Property or cause or allow any condition to exist on it, if that could invalidate or would be prohibited by any insurance coverage required to be maintained by Trustor on the Property or any part of it under the Loan Documents.

(e) Trustor shall not commit or allow waste of the Property, including those acts or omissions characterized under the Loan Documents as waste that arise out of Hazardous Substances (as such term is defined in the Loan Documents).

(f) Trustor shall perform all other acts which from the character or use of the Property may be reasonably necessary to maintain and preserve its value and utility.

(g) If any part of Trustor's interest in the Property is a leasehold interest, Trustor shall observe and perform all obligations of Trustor under any such lease or leases and shall refrain from taking any actions prohibited by any lease or leases, and Trustor shall preserve and protect such leasehold estate and its value.

(i) If any easement or right of way appurtenant to, or recorded agreement which benefits, the Property exists or is hereafter entered into, Trustor shall perform its obligations and duties under such easement, right of way, or agreement, and shall take all such actions as may be necessary to prevent such easement, right of way, or agreement from being terminated for Trustor's non-performance. Effective upon the occurrence of an Event of Default, Trustor irrevocably appoints Beneficiary its attorney-in-fact, with full power of substitution, for the purpose of performing any act to be performed by Trustor

under any such easement, right of way, or agreement, such power deemed to be coupled with an interest and therefore irrevocable.

5.8 **Trustee's Acceptance of Trust.** Trustee accepts this trust when this Deed of Trust is recorded.

5.9 **Releases, Extensions, Modifications, and Additional Security.**

(a) From time to time, Beneficiary may perform any of the following acts without incurring any liability or giving notice to any person:

- (i) Release any person liable for payment of any Secured Obligation; or
- (ii) Extend the time for payment, or otherwise alter the terms of payment, of any Secured Obligation; or
- (iii) Accept additional real or personal property of any kind as security for any Secured Obligation, whether evidenced by deeds of trust, mortgages, security agreements or any other instruments of security; or
- (iv) Alter, substitute or release any property securing the Secured Obligations.

(b) From time to time, when requested to do so by Beneficiary in writing, Trustee may perform any of the following acts without incurring any liability or giving notice to any person:

- (i) Consent to the making of any plat or map of the Property or any part of it; or
- (ii) Join in granting any easement or creating any restriction affecting the Property; or
- (iii) Join in any subordination or other agreement affecting this Deed of Trust or the lien of it; or
- (iv) Reconvey the Property or any part of it without any warranty.

5.10 **Reconveyance; Release.** When all of the Secured Obligations have been paid and performed in full, and no further commitment to extend credit continues under the Secured Obligations, then (except to the extent expressly provided herein with respect to the survival of any indemnifications, representations, warranties, and other rights which are to continue following the release or reconveyance hereof) Trustee shall reconvey the Property from the liens, security interests, conveyances and assignments herein, and this Deed of Trust and all promissory notes and instruments evidencing the Secured Obligations shall be returned to the appropriate party or parties. Any such reconveyance shall be without warranty to the person or persons legally entitled to it. Such person or persons shall pay any costs of recordation. Neither Beneficiary nor Trustee shall have any duty to determine the rights of persons claiming to be rightful grantees of any reconveyance.

5.11 **Compensation, Exculpation, Indemnification.**

(a) Trustor agrees to pay fees in the maximum amounts legally permitted, or reasonable fees as may be charged by Beneficiary and Trustee when the law provides no maximum limit,

for any services that Beneficiary or Trustee may render in connection with this Deed of Trust, including Beneficiary's providing a statement of the Secured Obligations or Trustee's rendering of services in connection with a release or reconveyance (full or partial). Trustor shall also pay or reimburse all of Beneficiary's and Trustee's costs and expenses which may be incurred in rendering any such services. Trustor further agrees to pay or reimburse Beneficiary for all costs, expenses, and other advances which may be incurred or made by Beneficiary or Trustee in any efforts to enforce any terms of this Deed of Trust, including the exercise of any rights or remedies afforded to Beneficiary or Trustee or both of them under the remedies section below, whether any lawsuit is filed or not, or in defending any action or proceeding arising under or relating to this Deed of Trust, including reasonable attorneys' fees and other legal costs (which shall include reimbursement for the allocated costs of in-house counsel used by Beneficiary and/or Trustee to the extent not prohibited by law), costs of any Trustee's Sale (as described below), any judicial foreclosure of this Deed of Trust, and any cost of evidence of title. If Beneficiary chooses to dispose of Property through more than one Trustee's Sale or judicial foreclosure, Trustor shall pay all costs, expenses, or other advances that may be incurred or made by Trustee or Beneficiary in each of such Trustee's Sales or judicial foreclosure actions.

(b) Beneficiary shall not be directly or indirectly liable to Trustor or any other person as a consequence of any of the following:

- (i) Beneficiary's exercise of or failure to exercise any rights, remedies or powers granted to Beneficiary in this Deed of Trust;
- (ii) Beneficiary's failure or refusal to perform or discharge any obligation or liability of Trustor under any agreement related to the Property or under this Deed of Trust;
- (iii) Any waste committed by lessees of the Property or any other parties, or any dangerous or defective condition of the Property; or
- (iv) Any loss sustained by Trustor or any third party resulting from Beneficiary's failure to lease the Property, or from any other act or omission of Beneficiary in operating or managing the Property, after an Event of Default, unless the loss is caused solely by the gross negligence or willful misconduct of Beneficiary.

Trustor hereby expressly waives and releases all liability of the types described above, and agrees that no such liability shall be asserted against or imposed upon Beneficiary.

(c) Trustor agrees to indemnify, defend, and hold Trustee and Beneficiary harmless, for, from, and against, and reimburse them for, all losses, damages, liabilities, claims, causes of action, judgments, penalties, court costs, reasonable attorneys' fees and other legal expenses and expenses of professional consultants and experts, cost of evidence of title, cost of evidence of value, and other costs and expenses, including the settlement of any such matter, excepting those arising out of, or resulting, solely from Beneficiary's or Trustee's, as the case may be, gross negligence or willful misconduct, which either may suffer or incur:

- (i) In performing any act required or permitted by this Deed of Trust or any of the other Loan Documents or by law;
- (ii) Because of any failure of Trustor to perform any of Trustor's obligations; or
- (iii) Because of any alleged obligation of or undertaking by Beneficiary to perform or discharge any of the representations, warranties, conditions, covenants, or other obligations in any document relating to the Property other than the Loan Documents.

This agreement by Trustor to indemnify Trustee and Beneficiary shall survive payoff, termination, or the release and cancellation of any or all of the Secured Obligations, and the full or partial release and/or reconveyance of this Deed of Trust.

(d) Trustor shall pay all obligations to pay money arising under this Section immediately upon written demand by Trustee or Beneficiary. Each such obligation shall be added to, and considered to be part of, the principal of the Note, and shall bear interest from the date the obligation arises at the Default Rate (as such term may be defined in the Note), or if no Default Rate is specified, at five percent (5%) in excess of the Stated Rate. For purposes hereof, "Stated Rate" means the stated interest rate in effect from time to time under the Note and/or other debt instrument evidencing the Loan; provided that if more than one rate of interest is in effect, the highest rate shall be used.

**5.12 Defense and Notice of Claims and Actions.** At Trustor's sole expense, Trustor shall protect, preserve and defend the Property and title to and right of possession of the Property, and the security of this Deed of Trust and the rights and powers of Beneficiary and Trustee created under it, against all adverse claims. Trustor shall give Beneficiary and Trustee prompt notice in writing if any claim is asserted which does or could affect any of such matters, or if any action or proceeding is commenced which alleges or relates to any such claim.

**5.13 Subrogation.** Beneficiary shall be subrogated to the liens of all encumbrances affecting the Property, whether released or not, which are discharged in whole or in part by Beneficiary in accordance with this Deed of Trust or with the proceeds of any loan secured by this Deed of Trust.

**5.14 Site Visits, Observation and Testing.** Beneficiary and its agents and representatives and the other Indemnified Parties (as such term is defined in the Loan Agreement), and their agents and representatives, shall have the right at any reasonable time to enter and visit the Property for the purposes of observing the Property, performing appraisals, taking and removing soil or groundwater samples, and conducting tests on any part of the Property. The Indemnified Parties have no duty, however, to visit or observe the Property or to conduct tests, and no site visit, observation, or testing by any Indemnified Party shall impose any liability on any Indemnified Party. In no event shall any site visit, observation, or testing by any Indemnified Party be a representation that Hazardous Substances (as such term is defined in the Loan Documents) are or are not present in, on, or under the Property, or that there has been or shall be compliance with any law, regulation, or ordinance pertaining to Hazardous Substances or any other applicable governmental law. Neither Trustor nor any other party is entitled to rely on any site visit, observation, or testing by any Indemnified Party. The Indemnified Parties owe no duty of care to protect Trustor or any other party against, or to inform Trustor or any other party of, any Hazardous Substances or any other adverse condition affecting the Property. The Indemnified Parties may in their discretion disclose to Trustor or any other party any report or findings made as a result of, or in connection with, any site visit, observation, or testing by the Indemnified Parties. Trustor understands and agrees that the Indemnified Parties make no representation or warranty to Trustor or any other party regarding the truth, accuracy, or completeness of any such report or findings that may be disclosed. Trustor also understands that, depending on the results of any site visit, observation, or testing by any Indemnified Party which are disclosed to Trustor, Trustor may have a legal obligation to notify one or more environmental agencies of the results. Any Indemnified Party shall give Trustor reasonable notice before entering the Property. Such Indemnified Party shall make reasonable efforts to avoid interfering with Trustor's use of the Property in exercising any rights provided in this Section. In connection with any such site visit, observation, or testing, Trustor shall have any rights with respect to the release and/or disclosure of environmental reports as set forth in the Loan Documents. Notwithstanding anything herein to the contrary, any Indemnified Party or its agents and representatives conducting tests upon the Property pursuant to this Section shall be liable to repair any material damage to the Property caused by the conducting of such tests upon the Property, except (a) where (i) the damage is not reasonably avoidable in the performance of such testing; and (ii) such testing results in the discovery of Hazardous Substances or any other adverse condition affecting the Property in

violation of the Borrower's Indemnity, or which Borrower must correct pursuant to the terms of this Deed of Trust or the other Loan Documents; or (b) if such testing is done when a Default or an Event of Default (subject to applicable notice and cure periods) has occurred and is continuing under this Deed of Trust, the Borrower's Indemnity, or any of the other Loan Documents, or (c) when such testing is required by law or regulation.

**5.15 Notice of Change.** Trustor will not cause or permit any change to be made in (a) its name, identity, or corporate, partnership, limited liability company, or other entity structure, (b) its jurisdiction of organization (c) its organizational identification number, (d) its place of business or, if more than one, its chief executive office, (e) its mailing address, or (f) any change in the location of any Property, unless Trustor shall have notified Beneficiary in writing of such change at least thirty (30) days prior to the effective date of such change, and shall have first taken all action required by Beneficiary for the purpose of further perfecting or protecting the lien and security interest of Beneficiary in the Property. Unless otherwise approved by Beneficiary in writing, all Property that consists of personal property (other than Books and Records) will be located on the Land and all Books and Records will be located at Trustor's place of business or chief executive office if Trustor has more than one place of business.

**5.16 Further Assurances.** Trustor shall, promptly on request of Beneficiary, (a) correct any defect, error or omission which may be discovered in the contents, execution, or acknowledgment of this Deed of Trust or any other Loan Document; (b) execute, authenticate, acknowledge, deliver, procure, and record and/or file and/or authorize the filing of such further documents (including, without limitation, further deeds of trust, security agreements, financing statements, financing statement amendments, continuation statements, and assignments of rents or leases) and do such further acts as may be necessary, desirable, or proper (i) to carry out more effectively the purposes of this Deed of Trust and the other Loan Documents, (ii) to more fully identify and subject to the liens and security interests hereof any property intended to be covered hereby (including specifically, but without limitation, any renewals, additions, substitutions, replacements, or appurtenances to the Property), or (iii) as deemed advisable by Beneficiary to protect the lien or security interest hereunder against the rights or interests of third persons; and (c) provide such certificates, documents, reports, information, affidavits and other instruments and do such further acts as may be necessary, desirable or proper to enable Beneficiary to comply with the requirements or requests of any agency having jurisdiction over Beneficiary or any examiners of such agencies with respect to the Secured Obligations, the Trustor, or the Property. Trustor shall pay all costs connected with any of the foregoing within five (5) days after the written demand by Trustee or Beneficiary. If not paid when due, such costs shall be added to, and considered to be part of, the principal of the Note, and shall bear interest from the date of such written demand at the Default Rate (as such term may be defined in the Note), or if no Default Rate is specified, at three percent (3%) in excess of the Stated Rate.

**6. Accelerating Transfers, Default and Remedies.**

**6.1 Accelerating Transfers.**

(a) "Accelerating Transfer" means any sale, contract to sell, conveyance, encumbrance, pledge, mortgage, lease not expressly permitted under this Deed of Trust or the Loan Agreement, or other transfer of all or any material part of the Property or any interest in it, whether voluntary, involuntary, by operation of law, or otherwise. If Trustor is a corporation, "Accelerating Transfer" also means any transfer or transfers of shares possessing, in the aggregate, more than fifty percent (50%) of the voting power or more than fifty percent (50%) of the direct or indirect beneficial ownership of Trustor. If Trustor is a partnership, "Accelerating Transfer" also means withdrawal or removal of any general partner, dissolution of the partnership under applicable law, or any transfer or transfers of, in the aggregate, more than fifty percent (50%) of the partnership interests. If Trustor is a limited liability company, "Accelerating Transfer" also means withdrawal or removal of Opus West Corporation ("OWC") as a member (unless replaced by an

affiliate of OWC acceptable to Beneficiary), termination of the limited liability company, or any transfer or transfers of, in the aggregate, more than fifty percent (50%) of the voting power or, in the aggregate, more than fifty percent (50%) of the ownership interests in Trustor.

(b) Trustor acknowledges that Beneficiary is making one or more advances under the Loan Documents in reliance on the expertise, skill, and experience of Trustor; thus, the Secured Obligations include material elements similar in nature to a personal service contract. In consideration of Beneficiary's reliance, Trustor agrees that Trustor shall not make any Accelerating Transfer, other than a transfer allowed pursuant to the express terms of the Loan Documents, unless the transfer is preceded by Beneficiary's express written consent to the particular transaction and transferee. Beneficiary may withhold such consent in its sole and absolute discretion. If any Accelerating Transfer occurs, an Event of Default will occur under the Loan Agreement, and Beneficiary may implement available rights and remedies under the Loan Agreement and the other Loan Documents including declaration of all of the Secured Obligations to be immediately due and payable, and Beneficiary and Trustee may invoke any rights and remedies under this Deed of Trust. Trustor acknowledges the materiality of the provisions of this Section as a covenant of Trustor, given individual weight and consideration by Beneficiary in entering into the Secured Obligations, and that any Accelerating Transfer in violation of the prohibited transfer provisions herein set forth shall result in a material impairment of Beneficiary's interest in the Property and be deemed a breach of the foregoing covenant.

(c) Notwithstanding the foregoing, Beneficiary acknowledges and agrees that any transfer permitted or allowed by and made in accordance with the terms of the Loan Agreement or any other Loan Document specifically permitting a particular transfer, including if any, shall not be an Accelerating Transfer under this Section.

**6.2 Events of Default.** Trustor will be in default under this Deed of Trust upon the occurrence of any one or more of the following events (some or all collectively, "Events of Default;" any one singly, an "Event of Default"):

(a) Trustor fails to perform any obligation to pay money which arises under this Deed of Trust, and does not cure that failure within ten (10) days after written notice from Beneficiary or Trustee; or

(b) Trustor fails to perform any obligation arising under this Deed of Trust other than one to pay money; provided, however, that as to any such failure that is curable (i.e., can be cured within the applicable cure period if such cure period is given), so long as (i) the collateral for the Loan, and the Beneficiary's rights with respect thereto, is not materially impaired during any cure period, and (ii) Trustor promptly and in good faith undertakes the curing of such failure and diligently thereafter in good faith pursues the curing to completion, such failure shall not be an Event of Default hereunder if cured by Trustor within thirty (30) days after written notice from Beneficiary; or

(c) A default or Event of Default (as such term is defined in the applicable document, subject to any applicable notice and cure periods) has occurred under the Loan Agreement or any other Loan Document or any other Secured Obligation; or

(d) Trustor makes or permits the occurrence of an Accelerating Transfer; or

(e) Any default (subject to any applicable notice and cure period) occurs under any other mortgage, deed of trust, security deed, or other security instrument on all or any part of the Property, or under any obligation secured by such security instrument, whether such security instrument is prior to or subordinate to this Deed of Trust.

**6.3 Remedies.** Except as otherwise expressly set forth in the Loan Agreement or any other Loan Document, at any time after an Event of Default, Beneficiary and Trustee shall be entitled to invoke any and all of the rights and remedies described below or permitted by applicable law or in equity. All of such rights and remedies shall be cumulative, and the exercise of any one or more of them shall not constitute an election of remedies.

(a) **Acceleration.** Beneficiary may declare any or all of the Secured Obligations to be due and payable immediately and may terminate any Loan Document in accordance with its terms.

(b) **Receiver.** Beneficiary may apply to any court of competent jurisdiction for, and obtain appointment of, a receiver for the Property. Trustor hereby consents to such appointment.

(c) **Entry.** Beneficiary, in person, by agent or by court-appointed receiver, may enter, take possession of, manage and operate all or any part of the Property, and in its own name or in the name of Trustor sue for or otherwise collect any and all Rents, including those that are past due, and may also do any and all other things in connection with those actions that Beneficiary may in its sole and absolute discretion consider necessary and appropriate to protect the security of this Deed of Trust. Such other things may include: taking and possessing all of Trustor's or the then owner's Books and Records; entering into, enforcing, modifying, or cancelling leases on such terms and conditions as Beneficiary may consider proper; obtaining and evicting tenants; fixing or modifying Rents (but not in excess of any applicable maximum low income rents for residential tenants); collecting and receiving any payment of money owing to Trustor; completing any unfinished construction; contracting for and making repairs and alterations; and/or performing such acts of cultivation or irrigation as necessary to conserve the value of the Property. If Beneficiary so requests, Trustor shall assemble all of the Property that has been removed from the Land and make all of it available to Beneficiary at the site of the Land. Trustor hereby irrevocably constitutes and appoints Beneficiary as Trustor's attorney-in-fact, with full power of substitution, to perform such acts and execute such documents as Beneficiary in its sole and absolute discretion may consider to be appropriate in connection with taking these measures, including endorsement of Trustor's name on any instruments. The appointment granted in this Section shall be deemed to be a power coupled with an interest. Regardless of any provision of this Deed of Trust, or any other Loan Document, Beneficiary shall not be considered to have accepted any property other than cash or immediately available funds in satisfaction of any obligation of Trustor to Beneficiary, unless Beneficiary has given express written notice of Beneficiary's election of that remedy in accordance with applicable law. Trustor agrees to deliver to Beneficiary all Books and Records pertaining to the Property, including computer-readable memory and any computer hardware or software necessary to access or process such memory, as may reasonably be requested by Beneficiary in order to enable Beneficiary to exercise its rights under this Section.

(d) **Cure; Protection of Security.** Either Beneficiary or Trustee may cure any breach or default of Trustor, and if it chooses to do so in connection with any such cure, Beneficiary or Trustee may also enter the Property and/or do any and all other things that it may in its sole and absolute discretion consider necessary and appropriate to protect the security of this Deed of Trust. Such other things may include: appearing in and/or defending any action or proceeding that purports to affect the security of, or the rights or powers of Beneficiary or Trustee under, this Deed of Trust; paying, purchasing, contesting or compromising any encumbrance, charge, lien or claim of lien that in Beneficiary's or Trustee's sole judgment is or may be senior in priority to this Deed of Trust; obtaining insurance and/or paying any premiums or charges for insurance required to be carried under the Loan Documents; otherwise caring for and protecting any and all of the Property; and/or employing counsel, accountants, contractors and other appropriate persons to assist Beneficiary or Trustee. Beneficiary and Trustee may take any of the actions permitted under this Section either with or without giving notice to any person.

(e) **UCC Remedies.** Beneficiary may exercise any or all of the remedies granted to a secured party under the UCC.

(f) Judicial Action. Beneficiary may bring an action in any court of competent jurisdiction to foreclose this Deed of Trust in the manner provided by law for the foreclosure of deeds of trusts or mortgages on real property and/or to obtain specific enforcement of any of the covenants or agreements of this Deed of Trust. If Beneficiary brings such an action, Trustor agrees to pay Beneficiary's reasonable attorneys' fees (including the allocated costs of in-house counsel to the extent not prohibited by applicable law) and court costs as determined by the court.

(g) Power of Sale. Under the power of sale hereby granted, Beneficiary shall have the discretionary right to cause some or all of the Property, including any Property which constitutes personal property, to be sold or otherwise disposed of in any combination and in any manner permitted by applicable law.

(i) Sales of Personal Property.

(A) For purposes of this power of sale, and to the extent not prohibited by applicable law, Beneficiary may elect to treat as personal property any Property which is intangible or which can be severed from the Land or Improvements without causing structural damage. If it chooses to do so, Beneficiary may dispose of any personal property separately from the sale of real property, in any manner permitted by the UCC, including any public or private sale, or in any manner permitted by any other applicable law. Any proceeds of any such disposition shall not cure any Event of Default or reinstate any Secured Obligation.

(B) In connection with any sale or other disposition of such personal property disposed of separately from the sale of the real property, Trustor agrees that the following procedures constitute a commercially reasonable sale. Beneficiary shall mail written notice of the sale to Trustor not later than ten (10) days prior to the date of public sale of the Property or prior to the date after which a private sale of the Property will be made, and such notice shall constitute reasonable notice; provided that, if Beneficiary fails to comply with this subsection in any respect, its liability for such failure shall be limited to the liability, if any, imposed on it as a matter of law under the UCC. Upon receipt of any written request, Beneficiary will make the personal property available to any bona fide prospective purchaser for inspection during reasonable business hours. Notwithstanding, Beneficiary shall be under no obligation to consummate a sale if, in its judgment, none of the offers received by it equal the fair value of the personal property offered for sale. The foregoing procedures do not constitute the only procedures that may be commercially reasonable.

(ii) Trustee's Sales of Real Property or Mixed Collateral.

(A) Beneficiary may choose to dispose of some or all of the Property which consists solely of real property in any manner then permitted by applicable law. In its sole and absolute discretion, and to the extent not prohibited by applicable law, Beneficiary may also or alternatively choose to dispose of some or all of the Property, in any combination consisting of both real and personal property, together in one sale to be held in accordance with the law and procedures applicable to real property, as may be permitted by the UCC. Trustor agrees that such a sale of personal property together with real property constitutes a commercially reasonable sale of the personal property. For purposes of this power of sale, either a sale of real property alone, or a sale of both real and personal property together in accordance with the UCC, will sometimes be referred to as a "Trustee's Sale."

(B) Before any Trustee's Sale, Beneficiary or Trustee shall give such statement of breach or nonperformance, notice of sale, and/or notice of default as may then be required by applicable law. When all time periods then legally mandated have expired, and after such notice of sale and/or other notice as may then be legally required has been given, Trustee shall sell the property being sold at a public auction to be held at the time and place specified in the notice of sale. Neither Trustee nor Beneficiary shall have any obligation to make demand on Trustor before any Trustee's Sale. From time to time in accordance with then applicable law, Trustee may, and in any event at Beneficiary's request shall, postpone any Trustee's Sale by public announcement at the time and place noticed for that Trustee's Sale, unless otherwise required by applicable law.

(C) At any Trustee's Sale, Trustee shall sell to the highest bidder at public auction for cash in lawful money of the United States, payable at the time of sale unless otherwise required by applicable law. Trustee shall execute and deliver to the purchaser(s) a deed or deeds conveying the property being sold without any covenant or warranty whatsoever, express or implied. The recitals in any such deed of any matters or facts, including any facts bearing upon the regularity or validity of any Trustee's Sale, shall be conclusive proof of their truthfulness, absent manifest error. Absent manifest error, any such deed shall be (1) conclusive against all persons as to the facts recited in it; and (2) conclusive evidence in favor of purchasers and encumbrancers for value and without actual notice, that all requirements of this Deed of Trust and all requirements of law were met relating to the exercise of the power of sale and the Trustee's Sale of the Property conveyed by such deed. Knowledge of the Trustee shall not be imputed to the Beneficiary.

(h) Attorney-in-Fact. Trustor hereby irrevocably constitutes and appoints Beneficiary as Trustor's attorney-in-fact, with full power of substitution, to perform such acts and execute such documents as Beneficiary in its sole and absolute discretion may consider to be appropriate (1) to effect the purpose of this Deed of Trust after the occurrence of an Event of Default; and (2) in connection with taking the measures described in this Section, including endorsement of Trustor's name on any instruments. This appointment granted in this Section shall be deemed to be a power coupled with an interest, and is therefore irrevocable.

(i) Single or Multiple Foreclosure Sales. Unless prohibited by applicable law, Beneficiary may elect to dispose of the Property, or any portion thereof, including but not limited to lots, parcels, and/or items through a single consolidated sale or disposition to be held or made under the power of sale granted above, or in connection with judicial proceedings, or by virtue of a judgment and decree of foreclosure and sale; or through two or more such sales or dispositions; or in any other manner Beneficiary may deem to be in its best interests (any such sale or disposition, a "Foreclosure Sale;" any two or more, "Foreclosure Sales"). If the Property consists of more than one lot, parcel or item of property, Beneficiary may designate the order in which the lots, parcels and/or items shall be sold or disposed of or offered for sale or disposition. If Beneficiary chooses to have more than one Foreclosure Sale, Beneficiary at its option may cause the Foreclosure Sales to be held simultaneously or successively, on the same day, or on such different days and at such different times and in such order as Beneficiary may deem to be in its best interests. No Foreclosure Sale shall terminate or affect the lien of this Deed of Trust on any part of the Property which has not been sold, until all of the Secured Obligations have been paid and performed in full.

**6.4 Personal Property.** It shall not be necessary that Beneficiary take possession of all or any part of the Property that is personal property or fixture property prior to the time that any sale pursuant to the provisions of this Section is conducted, and it shall not be necessary that such Property or any part thereof be present at the location of such sale. With respect to application of proceeds from disposition of such Property, the costs and expenses incident to disposition shall include the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and the reasonable

attorneys' fees and legal expenses (including, without limitation, the allocated costs for in-house counsel to the extent not prohibited by applicable law) incurred by Beneficiary. Any and all statements of fact or other recitals made in any bill of sale or assignment or other instrument evidencing any foreclosure sale hereunder as to nonpayment of the Secured Obligations or as to the occurrence of any default or Event of Default, or as to Beneficiary having declared all of such indebtedness to be due and payable, or as to notice of time, place, and terms of sale, and of the properties to be sold having been duly given, or as to any other act or thing having been duly done by Beneficiary, shall be taken as prima facie evidence of the truth of the facts so stated and recited (absent manifest error). Beneficiary may appoint or delegate any one or more persons as agent to perform any act or acts necessary or incident to any sale held by Beneficiary, including the sending of notices and the conduct of the sale, but in the name and on behalf of Beneficiary. Beneficiary may comply with any applicable state or federal law or regulatory requirements in connection with a disposition of the Property or any part thereof, and such compliance will not be considered to affect adversely the commercial reasonableness of any sale of such Property. Beneficiary may sell all or any portion of the Property without giving any warranties as to such Property, and may specifically disclaim any warranties of title, merchantability, fitness for a specific purpose, or the like, and this procedure will not be considered to affect adversely the commercial reasonableness of any sale of such Property. Trustor acknowledges that a private sale of all or any part of the Property may result in less proceeds than a public sale, and Trustor acknowledges that the Property may be sold at a loss to Trustor, and that, in such event, Beneficiary shall have no liability or responsibility to Trustor for such loss. In addition to the rights granted elsewhere in this Deed of Trust, after the occurrence of any default or Event of Default, Beneficiary may at any time notify the account debtors or obligors of any accounts, chattel paper (whether tangible or electronic), general intangibles (including payment intangibles), negotiable instruments, promissory notes, or other evidences of indebtedness included in the Property to pay Beneficiary directly.

**6.5 Credit Bids.** At any Trustee's Sale, Foreclosure Sale, or any sale of personal property collateral under this Deed of Trust, any person, including Trustor, Trustee or Beneficiary, may bid for and acquire the Property being sold or any part of it to the extent not expressly prohibited by then applicable law. Instead of paying cash for such property, Beneficiary shall have the benefit of any applicable law permitting credit bids.

**6.6 Application of Trustee's Sale or Foreclosure Sale Proceeds.** Except as may be otherwise required by law, Beneficiary and Trustee shall apply the proceeds of any Trustee's Sale, Foreclosure Sale, or any other sale of personal property collateral under this Deed of Trust, in the following manner:

- (a) First, to pay the portion of the Secured Obligations attributable to the expenses of sale, including all costs and expenses of exercising the power of sale and other costs of sale, including, but not limited to, trustee's fees and reasonable attorneys' fees, the costs of any action, and any other sums for which Trustor is obligated to reimburse Beneficiary or Trustee under this Deed of Trust; and
- (b) Second, to pay the portion of the Secured Obligations attributable to any sums expended or advanced by Beneficiary or Trustee under the terms of this Deed of Trust which then remain unpaid; and
- (c) Third, to pay all other Secured Obligations, to the extent not expressly prohibited by applicable law, in any order and proportions as Beneficiary in its sole and absolute discretion may choose; and
- (d) Fourth, to remit the remainder, if any, to the person or persons entitled to it, or, if permitted or required by applicable law, to the clerk of the court of the county in which the Trustee's Sale, Foreclosure Sale, or any other sale of personal property collateral under this Deed of Trust, took place.

If the Secured Obligations include more than one loan or line of credit, by cross-collateralization or otherwise, it is specifically agreed that the proceeds of any Trustee's Sale or other foreclosure action shall not be applied pro-rata unless such application is directed by Beneficiary, but instead shall be applied to all such Secured Obligations in any order, proportions and manner as Beneficiary in its sole and absolute discretion may choose.

**6.7 Application of Rents and Other Sums.** Beneficiary shall apply any and all Rents collected by it in such order as set forth in Section 2.5 above, and any and all other sums, other than proceeds of a Trustee's Sale or a judicial foreclosure sale under this Deed of Trust, which Beneficiary may receive or collect under this Section, in the following manner:

(a) First, to pay the portion of the Secured Obligations attributable to the costs and expenses of operation of the Property and collection of Rents and other sums that may be incurred by Trustee, Beneficiary, and/or any receiver, including but not limited to reasonable attorneys' fees and any and all expenses of leasing, operating, maintaining, and managing the Property, and all other costs and charges incident to the Property; and

(b) Second, to pay all other Secured Obligations in any order and proportions as Beneficiary in its sole and absolute discretion may choose; and

(c) Third, to remit the remainder, if any, to the person or persons entitled to it.

Beneficiary shall have no liability for any funds which it does not actually receive.

**7. Miscellaneous Provisions.**

**7.1 Additional Provisions.** The Loan Documents fully state all of the terms and conditions of the parties' agreement regarding the matters mentioned in or incidental to this Deed of Trust. The Loan Documents also grant further rights to Beneficiary and certain of them contain further agreements and affirmative and negative covenants by Trustor which apply to this Deed of Trust and to the Property.

**7.2 No Waiver or Cure.**

(a) Each waiver by Beneficiary or Trustee shall be in writing, and no waiver shall be construed as a continuing waiver. No waiver shall be implied from any delay or failure by Beneficiary or Trustee to take action on account of any default of Trustor. Consent by Beneficiary or Trustee to any act or omission by Trustor shall not be construed as a consent to any other or subsequent act or omission or to waive the requirement for Beneficiary's or Trustee's consent to be obtained in any future or other instance. Reinstatement after an Event of Default shall not constitute a waiver of any Event of Default then existing or subsequently occurring, nor impair the right of Beneficiary to declare other Events of Default, nor otherwise affect this Deed of Trust or any of the Loan Documents, or any of the rights, obligations, or remedies of Beneficiary or Trustee under this Deed of Trust or any of the Loan Documents.

(b) If any of the events described below occurs, that event alone shall not: cure or waive any breach, Event of Default, or notice of default under this Deed of Trust or invalidate any act performed pursuant to any such default or notice; or nullify the effect of any notice of default or sale (unless all Secured Obligations then due have been paid and performed and all other defaults under the Loan Documents have been cured); or impair the security of this Deed of Trust; or prejudice Beneficiary, Trustee, or any receiver in the exercise of any right or remedy afforded any of them under this Deed of Trust; or be construed as an affirmation by Beneficiary of any tenancy, lease or option, or a subordination of the lien of this Deed of Trust.

- (i) Beneficiary, its agent, or a receiver takes possession of all or any part of the Property in the manner provided this Deed of Trust; or
- (ii) Beneficiary collects and applies Rents and enforces any Lease provision as permitted under this Deed of Trust, either with or without taking possession of all or any part of the Property; or
- (iii) Beneficiary receives and applies to any Secured Obligation any proceeds of any Property, including any proceeds of insurance policies, condemnation awards, surety bond proceeds, or other claims, property or rights assigned to Beneficiary under this Deed of Trust; or
- (iv) Beneficiary makes a site visit, observes the Property, and/or conducts tests as permitted under this Deed of Trust; or
- (v) Beneficiary receives any sums under this Deed of Trust or any proceeds of any collateral held for any of the Secured Obligations, and applies them to one or more Secured Obligations; or
- (vi) Beneficiary, Trustee, any agent of either of them, or any receiver performs any act which it is empowered or authorized to perform, or invokes any right or remedy provided under this Deed of Trust.

**7.3 Powers of Beneficiary and Trustee.**

- (a) Trustee shall have no obligation to perform any act which it is empowered to perform under this Deed of Trust unless it is requested to do so in writing and is reasonably indemnified against loss, cost, liability and expense.
- (b) If either Beneficiary or Trustee performs any act which it is empowered or authorized to perform under this Deed of Trust, that act alone shall not release or change the personal liability of any person for the payment and performance of the Secured Obligations then outstanding or the lien of this Deed of Trust on all or the remainder of the Property for full payment and performance of all outstanding Secured Obligations. The liability of the original Trustor shall not be released or changed if Beneficiary grants any successor in interest to Trustor any extension of time for payment, or modification of the terms of payment, of any Secured Obligation. Beneficiary shall not be required to comply with any demand by the original Trustor that Beneficiary refuse to grant such an extension or modification to, or commence proceedings against, any such successor in interest.
- (c) Beneficiary may take any of the actions permitted under this Deed of Trust, including without limitation appointment of a receiver, regardless of the adequacy of the security for the Secured Obligations, or whether any or all of the Secured Obligations have been declared to be immediately due and payable, or whether notice of default and election to sell has been given under this Deed of Trust.
- (d) From time to time, Beneficiary or Trustee may apply to any court of competent jurisdiction for aid and direction in executing the trust and enforcing the rights and remedies created under this Deed of Trust. Beneficiary or Trustee may from time to time obtain orders or decrees directing, confirming, or approving acts in executing this trust and enforcing such rights and remedies.

**7.4 Merger.** No merger shall occur as a result of Beneficiary's acquiring any other estate in or any other lien on the Property unless Beneficiary consents to a merger in writing.

**7.5 Joint and Several Liability.** If more than one person has executed this Deed of Trust as Trustor, each shall be jointly and severally liable for the faithful performance of all of Trustor's obligations under this Deed of Trust

**7.6 Governing Law and Jurisdiction.** The creation, perfection, enforcement, termination and release of the liens and security interests created pursuant to the Deed of Trust and the conveyance of any right, title, and interest in and to any of the Property shall be governed by and construed in accordance with the laws of the State of California, which is the state where such Property is located. Subject to the foregoing, irrespective of the place of execution and/or delivery, in all respects, including all matters of construction, validity, and performance, this Deed of Trust shall be governed by, and construed and enforced in accordance with, the laws of the State of Arizona, except to the extent that any of such laws may now or hereafter be preempted by Federal law. Trustor hereby consents to the jurisdiction of any Federal or State court within (a) the state in which the Property is located, and (b) the State of Arizona, submits to venue in each such state, and also consents to service of process by any means authorized by Federal law or the law of each such state. Without limiting the generality of the foregoing, each Trustor hereby waives and agrees not to assert by way of motion, defense, or otherwise in such suit, action, or proceeding, any claim that (i) such Trustor is not subject to the jurisdiction of the courts of the above-referenced states or the United States District Court for each such state; or (ii) such suit, action, or proceeding is brought in an inconvenient forum; or (iii) the venue of such suit, action, or proceeding is improper. Nothing in this agreement shall preclude lender from bringing a proceeding in any other jurisdiction nor will the bringing of a proceeding in any one or more jurisdictions preclude the bringing of a proceeding in any other jurisdiction. Trustor further agrees and consents that, in addition to any methods of service of process provided for under applicable law, all service of process in any proceeding in any Federal or State court within (a) the state in which the Property is located, or (2) the State of Arizona, may be made by certified or registered mail, return receipt requested, directed to each such Trustor at the address indicated below, and service so made shall be complete upon receipt; except that if any such Trustor shall refuse to accept delivery, service shall be deemed complete five (5) days after the same shall have been so mailed. Except to the extent prohibited by applicable law, Trustor hereby unconditionally waives any claim to assert that the law of any other jurisdiction governs this Deed of Trust.

**7.7 Waiver of Jury Trial.** TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW, TRUSTOR WAIVES TRIAL BY JURY IN ANY ACTION OR PROCEEDING TO WHICH TRUSTOR AND BENEFICIARY MAY BE PARTIES, ARISING OUT OF, IN CONNECTION WITH OR IN ANY WAY PERTAINING TO, THIS DEED OF TRUST OR THE OTHER LOAN DOCUMENTS. IT IS AGREED AND UNDERSTOOD THAT THIS WAIVER CONSTITUTES A WAIVER OF TRIAL BY JURY OF ALL CLAIMS AGAINST ALL PARTIES TO SUCH ACTIONS OR PROCEEDINGS, INCLUDING CLAIMS AGAINST PARTIES WHO ARE NOT PARTIES TO THIS DEED OF TRUST. THIS WAIVER IS KNOWINGLY, WILLINGLY AND VOLUNTARILY MADE BY TRUSTOR, AND TRUSTOR HEREBY REPRESENTS THAT NO REPRESENTATIONS OF FACT OR OPINION HAVE BEEN MADE BY ANY INDIVIDUAL TO INDUCE THIS WAIVER OF TRIAL BY JURY OR TO IN ANY WAY MODIFY OR NULLIFY ITS EFFECT. TRUSTOR FURTHER REPRESENTS AND WARRANTS THAT IT HAS BEEN REPRESENTED IN SIGNING THIS DEED OF TRUST AND IN THE MAKING OF THIS WAIVER BY INDEPENDENT LEGAL COUNSEL OR HAS HAD THE OPPORTUNITY TO BE REPRESENTED BY INDEPENDENT LEGAL COUNSEL SELECTED OF ITS OWN FREE WILL AND THAT IT HAS HAD THE OPPORTUNITY TO DISCUSS THIS WAIVER WITH COUNSEL.

**7.8 Successors in Interest.** The terms, covenants, and conditions of this Deed of Trust shall be binding upon and inure to the benefit of the heirs, and permitted successors, and assigns of the parties; provided, however, that this Section shall not waive or modify the provisions of Section 6.1 above.

**7.9 Statute of Limitations.** To the extent not expressly prohibited by law, Trustor hereby waives (a) the right to plead the statute of limitations as a defense to any and all obligations secured by this Deed of Trust, and (b) any homestead exemption and other exemption rights that Trustor may have or acquire under applicable law.

**7.10 Substitution of Trustee.** From time to time, Beneficiary may substitute a successor to any Trustee named in or acting under this Deed of Trust in any manner now or later to be provided at law, or by a written instrument executed and acknowledged by Beneficiary and recorded in the office(s) of the recorder(s) of the county or counties where the Land and the Improvements are situated. Any such instrument shall be conclusive proof of the proper substitution of the successor Trustee, who shall automatically upon recordation of the instrument succeed to all estate, title, rights, powers and duties of the predecessor Trustee, without conveyance from it.

**7.11 Time of Essence.** Time is of the essence of this Deed of Trust and each and every term hereof.

**7.12 Interpretation.**

(a) Whenever the context requires, all words used in the singular will be construed to have been used in the plural, and vice versa, and each gender will include any other gender. The captions of the sections of this Deed of Trust are for convenience only and do not define or limit any terms or provisions. The word "include(s)" means "include(s), without limitation," and the word "including" means "including, but not limited to."

(b) The word "obligations" is used in its broadest and most comprehensive sense, and includes all primary, secondary, direct, indirect, fixed, and contingent obligations. It further includes all principal, interest, prepayment fees, late charges, loan fees, and any other fees and charges accruing or assessed at any time, as well as all obligations to perform acts or satisfy conditions.

(c) No listing of specific instances, items, or matters in any way limits the scope or generality of any language of this Deed of Trust. The exhibits, and any rider or addendum, to this Deed of Trust are hereby incorporated by reference in this Deed of Trust.

(d) No course of prior dealing, usage of trade, or parol or extrinsic evidence of any nature shall be used to supplement, modify, or vary any of the terms hereof.

**7.13 Attorneys Fees.** In any lawsuit, reference, or arbitration arising out of or relating to this Deed of Trust the prevailing party will be entitled to recover from each other party such sums as the court, referee, or arbitrator adjudges to be reasonable attorneys' fees in the action, reference, or arbitration, in addition to costs and expenses otherwise allowed by law. Whenever Trustor is obligated to pay or reimburse Beneficiary or Trustee for any attorneys' fees, those fees shall include the allocated costs for services of in-house counsel to the extent not prohibited by applicable law.

**7.14 Waiver of Marshaling.** Trustor waives all rights, legal and equitable, it may now or hereafter have to require marshaling of assets or to direct the order in which any of the Property will be sold in the event of any sale under this Deed of Trust. Each successor and assign of Trustor, including any holder of a lien subordinate to this Deed of Trust, by acceptance of its interest or lien agrees that it shall be bound by the above waiver, as if it had given the waiver itself.

**7.15 Severability.** If any provision of this Deed of Trust should be held unenforceable or void, that provision shall be deemed severable from the remaining provisions and shall in no way affect the

validity of this Deed of Trust, except that if such provision relates to the payment of any monetary sum, then Beneficiary may, at its option, declare all Secured Obligations immediately due and payable.

**7.16 Notices.** Trustor hereby requests that a copy of any notice of default, notice of sale, and/or other notices prescribed by applicable law, be mailed to it at the address set forth below. If any Trustor fails to insert an address, that failure will constitute a designation of Trustor's last known address as the address of such notice. That address is also the mailing address of Trustor as debtor under the UCC. Beneficiary's address given below is the address for Beneficiary as secured party under the UCC.

**7.17 Partial Releases.** Trustor may, regardless of consideration, cause the release of any part of the Property from the lien of this Deed of Trust without in any manner affecting or impairing the lien or priority of this Deed of Trust as to the remainder of the Property. Notwithstanding anything contained herein to the contrary, this Deed of Trust is subject to any partial release provisions set forth in the Loan Agreement.

**7.18 Reporting Compliance.** Trustor agrees to comply with any and all reporting requirements applicable to Secured Obligations which are set forth in any law, statute, ordinance, rule, regulation, order, or determination of any governmental authority, and further agrees to furnish Beneficiary with evidence of such compliance upon the request of Beneficiary.

**7.19 Release Fee.** Unless expressly prohibited by applicable law, Trustor shall pay to Beneficiary, at the time of each partial or complete release of the lien of this Deed of Trust, a reasonable release fee, as determined by Beneficiary.

**7.20 CCP Section 726.5.** In the event that any portion of the Property is determined to be 'environmentally impaired' (as 'environmentally impaired' is defined in California Code of Civil Procedure Section 726.5(e)(3)) or to be an 'affected parcel' (as 'affected parcel' is defined in California Code of Civil Procedure Section 726.5(e)(1)), then, without otherwise limiting or in any way affecting Beneficiary's or Trustee's rights and remedies under this Deed of Trust, Beneficiary may elect to exercise its right under California Code of Civil Procedure Section 726.5(a) to (1) waive its lien on such environmentally impaired or affected portion of the Property and (2) exercise (i) the rights and remedies of an unsecured creditor, including reduction of its claim against Trustor to judgment, and (ii) any other rights and remedies permitted by law. For purposes of determining Beneficiary's right to proceed as an unsecured creditor under California Code of Civil Procedure Section 726.5(a), Trustor shall be deemed to have willfully permitted or acquiesced in a release or threatened release of hazardous materials, within the meaning of California Code of Civil Procedure Section 726.5(d)(1), if the release or threatened release of hazardous materials was knowingly or negligently caused or contributed to by any lessee, occupant or user of any portion of the Property and Trustor knew or should have known of the activity by such lessee, occupant or user which caused or contributed to the release or threatened release. All costs and expenses, including, but not limited to, attorneys' fees, incurred by Beneficiary in connection with any action commenced under this Section, including any action required by California Code of Civil Procedure Section 726.5(b) to determine the degree to which the Property is environmentally impaired, plus interest thereon at the rate specified in the Note until paid, shall be added to the indebtedness secured by this Deed of Trust and shall be due and payable to Beneficiary upon its demand made at any time following the conclusion of such action.

*(Remainder of page intentionally left blank.  
See the following page for signatory and notary jurat.)*

IN WITNESS WHEREOF, Trustor has executed this Deed of Trust the date first above written.

"TRUSTOR"

OPUS WEST CORPORATION,  
a Minnesota corporation

Address of Trustor's chief executive office  
for notices to Trustor:

By:

Name: Charles Vogel

Title: Senior Vice President

Opus West Corporation  
2555 East Camelback Road, Suite 800  
Phoenix, AZ 85016  
Attention: Senior Vice President,  
Real Estate Sales and Finance

Address for notice to Trustee:

Chicago Title Insurance  
560 E. Hospitality Lane  
San Bernardino, CA 92408  
Attention: Title Department

Address for notices to Beneficiary:

U.S. Bank National Association  
101 North First Avenue, Suite 1600  
Phoenix, AZ 85003  
Attention: Commercial Real Estate

STATE OF ARIZONA ) ss.

County of Maricopa )

On this 12th day of December, 2007, before me, Janis Greathouse,  
personally appeared Charles Vogel, the Senior Vice President  
of **OPUS WEST CORPORATION**, a Minnesota corporation, personally known to me (or proved to me on  
the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within  
instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized  
capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon  
behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature: Janis Greathouse



Exhibit A to DEED OF TRUST dated for reference purposes as of December 13, 2007, by  
OPUS WEST CORPORATION, a California corporation, as "Trustor", CHICAGO TITLE COMPANY, as  
"Trustee" for the benefit of U.S. BANK NATIONAL ASSOCIATION, a national banking association, as  
"Beneficiary."

Description of Property

PARCEL 1 OF PARCEL MAP NO. 8345, IN THE CITY OF RANCHO CUCAMONGA, COUNTY OF SAN  
BERNARDINO, STATE OF CALIFORNIA, AS PER PLAT RECORDED IN BOOK 91 IN PARCEL MAPS,  
PAGES 27 AND 28, RECORDS OF SAID COUNTY.

**Commercial Real Estate**  
BC-MN-H03A  
800 Nicollet Mall, 3rd Floor  
Minneapolis, MN 55402

March 13, 2009

***VIA OVERNIGHT RECEIPTED COURIER – UPS***

Opus West Corporation  
2555 East Camelback Road  
Suite 800  
Phoenix, AZ 85016-9267  
Attention: Senior Vice President,  
Real Estate Sales and Finance

***Re: Defaults under Construction Loan Agreement – Haven Point***

Ladies and Gentlemen:

This notice is given pursuant to that Construction Loan Agreement dated December 13, 2007, as amended, among Opus West Corporation ("Borrower"), U.S. Bank National Association ("Agent") and certain other banks parties thereto (the "Loan Agreement") with respect to the Haven Point project in Rancho Cucamonga, California. Unless the context otherwise indicates, capitalized terms used herein and not defined herein shall have the meanings provided such terms in the Loan Agreement.

Borrower failed to commence construction of the Improvements within 30 days after the date of recordation of the Deed of Trust (recorded December 14, 2007) and to continue such construction diligently to completion. Construction of the Improvements was never commenced in any significant respect; no work has ever been performed on the site. This is a Default under Sections 3.1(a) and 7.1(z) of the Loan Agreement. Completion of construction of the Improvements is required to occur by not later than April 1, 2009 pursuant to Section 3.1(a) of the Loan Agreement. By reason of such imminent deadline, such Default is not susceptible of cure and pursuant to Section 7.1(z) of the Loan Agreement an Event of Default has therefore occurred.

Further, by reason of Borrower's failure to commence and diligently continue construction to completion, the work has been abandoned for a period in excess of twenty (20) days. This is an Event of Default under Section 7.1(i) of the Loan Agreement (collectively, all such Events of Default are the "Existing Events of Default").

While any Events of Default exist, pursuant to Section 1.1(r) of the Loan Agreement, Lenders have no obligation to make any disbursements of the Loan funds. By reason of the Existing Events of Default, Agent hereby declares that the outstanding principal balance, all accrued and unpaid interest, fees and other amounts due to Agent and Lenders pursuant to the



Exhibit D

Loan Documents are immediately due and payable in full. By reason of such Existing Events of Default, Agent reserves the right to exercise any one or more remedies available to it pursuant to the Loan Documents or at law or equity, at any time and in such order as Agent may determine.

From and after the date hereof, and until all Defaults and Events of Default have been cured to the satisfaction of Agent, interest accrues and shall be payable to the Agent on the outstanding principal balance at the Default Rate.

Agent expressly reserves all of its rights and remedies under the Loan Agreement with respect to the Existing Events of Default and with respect to any other existing or future Default or Event of Default (including, without limitation, any Default that is related to the same subject matter as the Existing Events of Default). Any delay by Agent in enforcing any right and remedy with respect to the Existing Events of Default or with respect to any other existing or future Default or Events of Default (including, without limitation, any Default that is related to the same subject matter as the Existing Events of Default) does not constitute, and any future delay will not constitute, and no such delay may be construed as, (i) a waiver of any of Agent's rights and remedies or of any such Default or Event of Default or (ii) a course of conduct on the part of Agent on which Borrower may rely at any time, and none of the foregoing will impair Agent's ability to exercise its rights and remedies now or in the future. Further, any single or partial exercise by Agent of any of its rights or remedies does not preclude any other or future exercise by Agent of any available rights and remedies hereunder.

Pursuant to the Loan Agreement, Agent and Lenders have the right to payment by Borrower of all costs and expenses (including attorneys' fees) incurred in the exercise of its rights, powers and remedies granted under the Loan Agreement.

Very truly yours,

U.S. BANK NATIONAL ASSOCIATION,  
as Agent

By: Kelly Armstrong  
Name: Kelly Armstrong  
Its: Vice President

cc: Trustee: Chicago Title Insurance  
560 E. Hospitality Lane  
San Bernardino, CA 92408  
Attention: Title Department

VIA OVERNIGHT RECEIPTED COURIER (UPS)

Opus West Corporation  
2555 East Camelback Road, Suite 800  
Phoenix, AZ 85016  
Attention: Senior Vice President,  
Real Estate Sales and Finance

April 14, 2009

Re: Construction Loan Agreement – Haven Point

Ladies and Gentlemen:

This notice is given pursuant to the Construction Loan Agreement dated December 13, 2007 (the "Loan Agreement," which term shall include any amendment, modification, supplement, extension, renewal, replacement, or restatement thereof), among Opus West Corporation ("Borrower"), U.S. Bank National Association ("Agent"), and certain other Lenders party thereto (collectively, "Lenders") with respect to the Haven Point project in Rancho Cucamonga, California. Unless the context otherwise indicates, capitalized terms used herein and not defined herein shall have the meanings provided such terms in the Loan Agreement.

By letter from Agent to Borrower dated as of November 12, 2008 (the "November 2008 Default Letter"), and by letter from Agent to Borrower dated as of March 13, 2009 (the "March 2009 Default and Acceleration Letter," and, together with the November 2008 Default Letter, the "Default Letters"), Agent has notified Borrower of certain Defaults and Events of Default, described in more detail in the Default Letters, existing under the Loan Agreement and the other Loan Documents. Pursuant to the March 2009 Default and Acceleration Letter, Agent declared, on behalf of the Lenders, all of the outstanding principal balance, all accrued and unpaid interest, fees, and other amounts owing to Agent and Lenders pursuant to the Loan Documents immediately due and payable in full. Since the date of the March 2009 Default and Acceleration Letter, Agent has received no payments or monies on account of the amounts owing under the Loan Documents. The Defaults and Events of Default described in more detail in the Default Letters, together with the failure to make payments on account of the amounts owing under the Loan Documents following the March 2009 Default and Acceleration Letter are referred to herein collectively as the "Existing Defaults."

Demand is again hereby made for the payment in full of all of the outstanding principal balance, all accrued and unpaid interest, fees, and other amounts owing to Agent and Lenders pursuant to the Loan Documents. Pursuant to Section 3.10 of the Loan Agreement, Borrower is obligated to pay Agent's and each Lenders' costs and expenses (including reasonable legal fees and expenses) incurred in connection with revisions, extensions, renewals, "workouts" of the Loan, and the exercise of their rights or remedies thereunder. Interest at the Default Rate continues to accrue on all amounts owing to Agent and Lenders pursuant to the Loan Documents.

Exhibit E

Note that, by reason of the Existing Defaults, Agent and Lenders are entitled, in their sole discretion, to exercise certain rights and remedies under the Loan Documents. Agent and Lenders expressly reserve all of their rights and remedies under the Loan Agreement and the other Loan Documents with respect to the Existing Defaults and with respect to any other existing or future Defaults or Events of Default (including, without limitation, any Defaults or Events of Default that are related to the same subject matter as the Existing Defaults), including, without limitation, Agent's right to pursue foreclosure and execution under the Deed of Trust. Any delay by Agent or Lenders in enforcing rights and remedies with respect to any of the Existing Defaults or with respect to any other existing or future Defaults or Events of Default (including, without limitation, any Defaults or Events of Default that are related to the same subject matter as any of the Existing Defaults) does not constitute, and any future delay will not constitute, and no such delay may be construed as, (i) a waiver of any of Agent's or Lenders' rights and remedies or of any such Defaults or Events of Default or (ii) a course of conduct on the part of Agent or Lenders on which Borrower may rely at any time, and none of the foregoing will impair Agent's or Lenders' ability to exercise their rights and remedies now or in the future. Further, any single or partial exercise by Agent or Lenders of any of their rights and remedies does not preclude any other or further exercise by Agent or Lenders of any available rights and remedies.

Should you have any questions regarding the amount due or the information required from you, please contact Ziad W. Amra, telephone (612) 303-4517.

Very truly yours,

U.S. BANK NATIONAL ASSOCIATION,  
as Agent

By:   
Name: Ziad W. Amra  
Its Vice President

cc: Trustee: Chicago Title Insurance  
560 E. Hospitality Lane  
San Bernardino, CA 92408  
Attention: Title Department

Midfirst Bank  
3030 East Camelback Road  
Phoenix, Arizona 85016  
Attention: Scott Willits

Regions Bank  
13535 Feather Sound Drive, Building 1, Suite 610  
Clearwater, Florida 33762  
Attention: Robert Kramer

**SUMMARY NARRATIVE APPRAISAL REPORT**

**COMMERCIAL LAND**

8310 Haven Avenue  
Rancho Cucamonga, California 91730  
RETECHS File No.: 09-002612-01

---

**SUMMARY NARRATIVE APPRAISAL REPORT**

**COMMERCIAL LAND**  
8310 Haven Avenue  
Rancho Cucamonga, California 91730  
RETECHS File No.: 09-002612-01

---

**SUBMITTED TO**

Mr. Thomas V. Borlund  
Vice President - Review Appraiser  
***U.S. BANK***  
633 West Fifth Street, 29th Floor  
Los Angeles, California 90071

**SUBMITTED BY**

***THE RENKEN COMPANY***  
John H. Renken, MAI  
492 West Foothill Boulevard  
Claremont, California 91711

File No. TRC090157

**DATE OF "AS IS" VALUE**

June 8, 2009

**DATE OF REPORT**

June 12, 2009

June 12, 2009

Mr. Thomas V. Borlund  
Vice President - Review Appraiser  
**U.S. BANK**  
633 West Fifth Street, 29th Floor  
Los Angeles, California 90071

RE: Summary Narrative Appraisal of Commercial Land located at  
8310 Haven Avenue  
Rancho Cucamonga, California 91730  
RETECHS File No.: 09-002612-01

Dear Mr. Borlund:

In accordance with your request, an examination has been made of the above-referenced commercial land, for the purpose of estimating the Market Value As-Is of the Fee Simple Estate as of June 8, 2009.

According to the provided parcel map, the subject property consists of one legal parcel containing 430,191 square feet of land (9.88 acres). On the date of inspection, the subject property consisted of vacant commercial land. For visualization purposes, attention is directed to the subject property photographs contained in this report.

**DEFINITION OF APPRAISAL ASSIGNMENT AND REPORT FORMAT**

This is a summary narrative appraisal report which has been prepared in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"), Federal Regulatory Appraisal Regulations, the Office of the Comptroller of the Currency, the Office of Thrift Supervision ("OTS"), Federal Deposit Insurance Corporation ("FDIC") and the appraisal requirements of the client.

Mr. Borlund  
Page 2  
June 12, 2009

As a result of this investigation and an analysis of matters pertinent to the property value, I have concluded that the Market Value As-Is, of the fee simple estate, in terms of cash or on financing terms equivalent to cash, thereof, as of June 8, 2009, is as follows:

<b>MARKET VALUE "AS IS"</b>
<b>THREE MILLION SIX HUNDRED SIXTY THOUSAND DOLLARS</b>
<b>\$3,660,000</b>

This letter of transmittal is not a complete appraisal report and is only intended to summarize the value estimate of the subject property. Your attention is invited to the accompanying report, where is set out the assumptions, limiting conditions, descriptions, factual data, computations, photographs, analyses, and discussions from which the valuation conclusion was derived.

The estimated exposure and marketing periods required to obtain the concluded Market Values are eighteen to twenty-four months from the date of value.

No personal property, fixtures or equipment are included in the Market Value estimates.

Respectfully submitted,  
**THE RENKEN COMPANY**

John H. Renken, MAI  
Certified General #AG014453  
Expiration: December 15, 2010

# Northern District of Texas Claims Register

09-34356-hdh11 Opus West Corporation

**Judge:** Harlin DeWayne Hale

**Chapter:** 11

**Office:** Dallas

**Last Date to file claims:** 11/09/2009

**Trustee:**

**Last Date to file (Govt):**

<i>Creditor:</i> (12454608) U.S. Bank Attention: Commercial Real Estate BC-MN-H22A 800 Nicollet Mall Minneapolis, MN 55402	<b>Claim No: 51</b> <i>Original Filed</i> <i>Date:</i> 11/09/2009 <i>Original Entered</i> <i>Date:</i> 11/09/2009 <i>Last Amendment</i> <i>Filed:</i> 11/09/2009 <i>Last Amendment</i> <i>Entered:</i> 11/09/2009	<i>Status:</i> <i>Filed by:</i> AT <i>Entered by:</i> Degeyter, Angela <i>Modified:</i>
--	---	--

Secured claimed: \$5832288.12

**Total claimed: \$5832288.12**

**History:**

Details    51-1    11/09/2009 Claim #51 filed by U.S. Bank, total amount claimed: \$5832288.12 (Degeyter, Angela )

Details    51-2    11/09/2009 Amended Claim #51 filed by U.S. Bank, total amount claimed: \$5832288.12 (Degeyter, Angela )

*Description:* (51-1) Haven Point Project  
(51-2) Haven Point

*Remarks:* (51-2) Revised to add remainder of exhibits

## Claims Register Summary