

Conventional Loan Workouts

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J. Cary Barton is a graduate of Baylor University (B.A. 1962) and Harvard Law School (LL.B. 1965) and was admitted to the State Bar of Texas in 1965.

He worked for the Federal Power Commission and the U.S. Tax Court in Washington, D.C., following his graduation from law school and served in the United States Air Force during the U.S.S. Pueblo crisis in Korea. He has been engaged in the private practice of law in Texas since 1969, consisting of six (6) years in Corpus Christi, 13 years in Austin and the period since 1988 in San Antonio.

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Mr. Barton is a member of the Council of the Real Estate, Probate and Trust Law Section of the State Bar of Texas and the American College of Real Estate Lawyers. He is also a member of the Commission of the Texas Board of Legal Specialization that administers the annual examinations for board certification of real estate legal assistants. He has been a member of the Real Estate Forms Committee of the State Bar of Texas since 1986.

Texas Lawyer named Mr. Barton as one of five Go To/Top Notch real estate attorneys in Texas in 2007. He was selected as a Texas Super Lawyer 2003-2009 by Texas Monthly and Law & Politics Magazine, including recognition as one of the Top 50 Lawyers in Central and South Texas in 2006 and 2007 and one of the Top 50 Lawyers in Central and West Texas in 2009 and recognition as one of the Top 100 Texas Super Lawyers in 2007. He was listed as one of San Antonio's Best Attorneys in Scene in SA Monthly in 2004-2009. He has been included for many years in The Best Lawyers in America (Real Estate).

Mr. Barton received the fourth annual lifetime achievement award for contributions by a distinguished Texas real estate lawyer from the Real Estate, Probate and Trust Law Section of the State Bar of Texas in 2003.

He received the Best Speaker Award for the 2004 Advanced Real Estate Law Course of the State Bar of Texas for his presentation entitled "Feasibility Issues/Can I Do the Deal?"

He was one of four Texas lawyers granted a "Standing Ovation" award in 2009 for his contributions to continuing legal education programs sponsored by the State Bar of Texas.

He received the Ralph A. Mock Award from Texas Lawyers Concerned for Lawyers in 2009 in recognition of his assistance to impaired lawyers in Texas.

He is the editor of Texas Practice Guide: Business Entities, Volumes 1-4 (Thomson-Reuters, 2009).

Mr. Barton has made numerous presentations to lawyers and other professional groups pertaining to commercial real estate financing issues and related subjects.

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Reid attended the University of Texas and received a Bachelor of Business Administration in Finance in the Business Honors Program, and a Doctor of Jurisprudence.

Reid is active in providing professional education to the commercial real estate and legal industries. He is a member of the State Bar's CLE committee. Conferences chaired include:

- UT Law School's Leasing Institute (2 years) – co-founder
- South Texas College of Law's and Texas Real Estate Center at Texas A&M's Commercial Real Estate Course (6 years) – co-founder
- South Texas College of Law's Commercial Real Estate Law Conference
- State Bar's Advanced Real Estate Drafting Course
- CLE International's Land Use Conference
- State Bar's Advance Real Estate Law Course (2007)

Reid is a frequent speaker and author on real estate and land use topics and has been published and quoted in many forums, including three articles published in *Tierra Grande* (Tx. RE Center at Tx. A&M University). He is a contributing editor to *Texas Municipal Zoning Law* (Lexis Legal Publication) and author of its Subdivision Law Appendix.

Reid originated and heads the Houston Bar Association Pro-Bono Deed Restriction project which provides free lawyers to lower income neighborhoods seeking to create, modify or extend deed restrictions.

Reid is listed in Chambers USA - LawDragon 500, Best Lawyers in America – Woodward/White, "Texas Super Lawyers" - Texas Monthly, "Top Lawyers" – H Texas Magazine. He is a Member of the Houston Real Estate Lawyers Council, Chair of the Urban Land Institute- Houston District Counsel, State Bar Real Estate Probate and Trust Law Section Council, American College of Real Estate Lawyers (ACREL) and Counselors of Real Estate (CRE).

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Reid lives in West University Place with wife Kim, daughter Katherine (now at TCU), and son Palmer, where he has been active as chairman of the Planning and Zoning Commission and a member of boards/committees relating to comprehensive planning, the City Charter and parks.

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Conventional Loan Workouts

I. Introduction

This presentation addresses the purpose and structure of a conventional loan workout. It should be noted that the authors represent both lenders and borrowers involved in the workout process and that efforts have been made to reflect the perspectives of both parties in this discussion. The primary goals of this presentation are to identify the circumstances when a workout would be an appropriate solution for the parties and how to implement such a workout when that decision has been made.

In addition to the personal experiences of the authors, various resources have been utilized in preparing this presentation. Some of these resources are cited in the text of the paper. Other more general resources are cited in a selected bibliography attached as Appendix A.

II. Loan Workouts

A. General

Difficult economic times surround us today and are adding an immeasurable amount of stress to businesses and commercial real estate. As the economy continues to struggle, many borrowing entities will experience significant deterioration in their financial positions, making the need to negotiate the terms and conditions of their loans inevitable. The purpose of a loan workout is to prevent default and maximize recovery in times of economic adversity. There are few "market" standards in terms of a workout and each situation is heavily negotiated. Workouts are agreed upon because there are incentives for both the borrower and the lender. The borrower wants to save as much as possible of its equity investment and business opportunity while the lender wants to avoid foreclosure and receive payment of as much as possible of the principal and interest of its loan. Rather than compelling another default in an already brutal economy, a successful workout can produce some damage control for all parties involved.

A "Top 10 List" of suggested guidelines that both parties should keep in mind as they approach the task of negotiating a loan workout is attached as Appendix B.

Keep in mind that a loan workout is a high stakes negotiation. Each party has an alternative to pursue if the negotiation is unsuccessful. Often, neither party's first choice is the non-workout option. Nonetheless, many loan workouts are unsuccessful. Why? Like any negotiation, the parties must know their best alternative to a successful workout, understand the other party to the negotiation (including personalities, goals, limitation and timing), have the facts, know the law and apply traditional negotiating techniques. The failure of a loan workout is often bankruptcy, usually foreclosure with loss of any potential equity in a property, possible deficiency judgment and lots of other, non-legal consequences, adverse to both the lender and the borrower. Therefore, the pressure on both parties to reach a successful loan workout is significant. The lawyers typically lead the negotiation process and it is up to them to get to the best resolution possible in the hope that BOTH sides agree that such resolution is superior to each of their best alternative option. In that event, the negotiation is successful and the project's life is extended.

B. Typical Scenario

Every commercial real estate loan has stipulations in the loan documents to cover the legal and equitable remedies of the lender in the event of a default by the borrower. A default occurs when the borrower falls behind on payments or violates debt coverage ratios or other loan covenants. When these circumstances occur and the borrower's cure rights have been exhausted, the lender is entitled to impose an increased default rate of interest, accelerate the indebtedness and commence foreclosure or other loan enforcement proceedings. During stable economic times this course of action might make sense. The foreclosed collateral is quickly sold for whatever the market will pay, the lender takes a loss (perhaps a small one), and the deficiency is paid out over time (or ignored by the lender since the loss has already been recognized and there are profits to offset it). Under the current economic conditions, however, declaring a default and proceeding with foreclosure may not be the best solution. Negotiating a workout may be the more prudent way to maximize recovery.

A hypothetical fact scenario which the authors have prepared to illustrate the kinds of

conditions and issues may be encountered in a typical loan workout scenario is attached as [Appendix C](#). It is not likely, of course, that all of these circumstances will be present in every loan workout situation, but many of them may occur in connection with a number of cases.

C. Lender

A lender doesn't want to have to report that any of its loans is in default. Ideally, a lender would prefer for the borrower to continue to own and operate the property in accordance with modified loan document covenants, especially when the lender is negotiating in a very limited recourse environment. In order to negotiate a loan workout successfully, the lender must have an understanding of the facts and details existing at the project level and fully comprehend the risks they are potentially assuming. When beginning a loan workout, the first step is to review the lender's documentation of the original transaction. This review should include loan documents, title policy and correspondence. The purpose of this review is to identify any problems with the documentation or servicing of the loan that might create defenses for the borrower and to summarize all provisions relevant to a workout. Next, the lender should review the borrower's collateral, including verification of the collateral lien condition and value and inspection of the loan collateral conducted. The lender will want to determine whether the borrower is "in good standing" in its state of formation and in the State of Texas, gather information on the borrower's financial condition, identify any issues with respect to outstanding liens against the collateral and determine the source of funds for a workout.

A sample checklist that a lender might use in preparing to negotiate a loan workout is attached as [Appendix D](#).

D. Borrower

A borrower should always be open and honest with the lender and notify the lender of potential problems before a default occurs. A loan default is a serious event and foreclosure is usually not a desirable result for either party. When defaults or potential defaults occur, the borrower must evaluate its situation and decide whether to attempt to workout the loan or to negotiate an agreed foreclosure or deed in lieu of foreclosure

with as little deficiency liability as possible. In making this decision, the borrower should read all loan documents, determine the recourse liabilities of the borrower and any guarantors, alert any guarantors to a possible call on the loan guaranty and the need to consider contributing to a workout of the loan, determine whether there are other funds available to pay off all or part of the loan, evaluate the financial prospects of the collateral realistically, determine whether any title issues exist that may complicate the workout or foreclosure process, consider the potential tax issues that are discussed in further detail below and evaluate the relative costs and benefits from the borrower's perspective of a workout arrangement or an agreed foreclosure.

E. Guarantor

Any loan guarantors should be involved from the outset in the analysis and negotiation of the workout agreement or agreed foreclosure. The willingness and ability of the guarantors to perform under the guaranty agreement should be confirmed. The general financial status of the guarantors should also be evaluated.

F. Sample Pre-negotiation Agreement

Most lenders require that the borrower execute a pre-negotiation agreement before commencing substantive discussions of the terms of a possible loan workout. A sample pre-negotiation agreement is attached as [Appendix E](#). The purpose of this agreement is to eliminate the possibility that workout discussions could be used against either party in subsequent litigation. Without this prohibition, open discussion is unlikely and a successful workout is more difficult.

III. Further Investigative Processes

A. General

Most workouts differ greatly and depend on the circumstances of the particular situation. There are several different analyses that should be done to ensure a thorough understanding of the project.

B. Real Estate Analysis

In preparing for a workout scenario, the lender and its lawyer should analyze the underlying real estate collateral and financial

information. This process would include the review of updated financial statements for the property, the borrower and any guarantor; a current certified rent roll and other information regarding existing tenants and leasing activities and prospects; management and service agreements; and any other agreements and information which may affect the underwriting of the continued viability of the real estate collateral. Reviewing these items may also be necessary and important in analyzing litigation considerations involved in determining the merits of available equitable remedies or insolvency proceedings. The lender should inspect the collateral.

C. Due Diligence and Title Analysis

In regards to the general investigation process, just as in the initial closing of the loan transaction, various searches and litigation reviews should be completed in order to understand whatever else may be on the workout and litigation landscape for the borrower. These types of searches include the financing statement records of the county where the property is located, the secretaries of state of where the obligor is located and where it was organized. A litigation search should be completed where it appears to have an appropriate venue for litigation against or for the borrower and also a review of bankruptcy filings and any possible locale for bankruptcy filing for the borrower and guarantor. A title search should be completed to see if there are subsequent mortgages, mechanics or tax liens. The local appraisal district records should be checked to determine tax status.

D. Bankruptcy Analysis in General

As in any workout scenario, the lender must contemplate a bankruptcy filing by the borrower and/or guarantor and plan in accordance with an analysis of those issues. Similarly, with respect to other issues such as borrower's defenses and delays in the forbearance agreement, the lender should use this agreement as an opportunity to prepare for the possibility of the borrower's bankruptcy. The three bankruptcy considerations which may need to be addressed in a forbearance or modification agreement would be the perfection of collateral, identifying the cash collateral, and drafting a "springing guaranty", "in terrorem clause", or other attempted waivers or restrictions related to the filing of bankruptcy in the event that the loan is non-recourse or limited recourse as to

the borrower or the guarantors. In regards to the perfection of collateral, if any collateral is taken or if the lender is cleaning up problems of prior perfection on existing collateral, the forbearance period offers the opportunity to wait through the 90-day preference period.

In regards to the cash collateral, one objection of the lender should be the establishment of control over the cash proceeds of the collateral so that there is no cash collateral identification problem if bankruptcy proceedings are initiated by or against the borrower. In order to achieve this goal, the parties should identify all the borrower's accounts, wherever located, so that none are overlooked and attempt to minimize the number of accounts that are being utilized by the borrower. Also, the lender should impose a dominion account agreement for each account identified. Also in regard to income stream collateral, the lender should consider imposing a lockbox and cash management agreement program in order to capture all of the income from the property during the forbearance period.

The lender will want to determine whether if the borrower files bankruptcy, it would be considered a single asset real estate bankruptcy (which is just what it says). If so, the borrower's rights in bankruptcy are significantly limited.

E. Ipsa Facto Clauses

Lenders have long been troubled by the constitutional right of a borrower or guarantor to petition for bankruptcy relief. Thus, it is understandable that loan documents attempt to eliminate or abrogate an obligor's ability to file bankruptcy. The Bankruptcy Code invalidates any document or law which is conditioned upon the bankruptcy of a debtor. *See* 11 U.S.C. §541(c). These clauses are commonly known as *ipso facto* clauses and, as such, are generally unenforceable.

F. Bankruptcy Remote Structures

The commercial mortgage backed securities capital market was premised on the rating agencies' assumption that a bankruptcy filing could be avoided by the requirement that the debtor be a single-purpose, single-loan borrower whose corporate governing provisions provided that such borrower could not file bankruptcy without the unanimous consent of the governing body. In conjunction with this requirement, the

borrower was required to have an "independent director" who the lender assumes will not vote for filing bankruptcy. It appears that this "bankruptcy remote structure" mechanism does work. *In re: Kingston Square Associates*, 214 B.R. 713 (Bankr. S.D.N.Y. 1997). The validity of these structures was challenged in the *General Growth Properties, Inc.* (Case No. 09-11977, in the Bankruptcy Court for the Southern District of New York) bankruptcy, wherein the debtor proposed to ignore the independent status of single-purpose borrowing entities so that funds of all of the borrowing entities could be used in support of the parent's bankruptcy plan. The Mortgage Banker's Association opposed the debtor's request, warning of disastrous consequences for the commercial mortgage industry. It appears that settlements have been reached with a number of creditors which allowed the parties to avoid confronting this issue in a definitive manner.

G. Stay Waivers

Lenders also typically draft clauses where the borrower agrees to waive the effect of the automatic stay upon the filing of a bankruptcy petition. These clauses, known as "stay waivers" have been inconsistently enforced by bankruptcy courts. Michael St. Patrick Baxter, *Prepetition Waivers of the Automatic Stay: A Secured Lender's Guide*, 52 Business Law 577 (1997). Upon a borrower's filing of bankruptcy, the automatic stay immediately takes effect. *See* 11 U.S.C. §362. The automatic stay prohibits all actions that may be taken against a borrower or its assets. *Id.* This effect increases the costs and fees and dramatically delays a lender from foreclosing on the loan's collateral.

One commentator groups the case law concerning the enforceability of such clauses into the three categories of (i) cases upholding broad waivers, (ii) cases holding that such clauses are a violation of public policy and (iii) those inconsistent cases whose holdings are based on the debtor's likelihood of reorganization. Pamela Dunlop Gate, *Drafting Considerations in Anticipation of Insolvency or Bankruptcy*, University of Houston Law Foundation, Real Estate Documents, Closings and Workouts (2001). Although the case law is inconclusive, it is clear that a stay waiver may be enforceable in a single asset one creditor case where the loan-to-value

approximates 100%. Also, in the case of a negotiated workout context involving a lender's concession, there is a significant possibility of such a stay waiver being enforced, on the theory that the lender's concession constituted separate consideration for the stay waiver.

H. Carveouts and In Terrorem Clauses

As previously discussed, a number of commercial loan transactions are structured such that the lender's recourse is limited to the collateral and recourse carveout exceptions to the general non-recourse nature of the loans. This structure may encourage the borrower to file bankruptcy or contest a foreclosure. In addition to a stay waiver provision, many lenders believe it is advisable that an "in terrorem" clause should be included in the documents evidencing and securing such loans. These types of clauses provide that, in the event that the borrower files for bankruptcy or contests a foreclosure, then the loan is deemed full recourse. There appears to be no reason that this type of clause is unenforceable. In fact, Section 1111(b)(1)(A) of the Bankruptcy Code relates to a similar concept of non-recourse to full recourse. 11 U.S.C. 1111(b)(1)(A). *See* Craig H. Averch and Michael J. Collins, *Bankruptcy Code §1111(b) and Its Impact on Financial Obligations of Nondebtor General Partners of Partnership That Is a Debtor Under Chapter 11*, Norton Bankr. L. Advisor, May 1993, at 3-8.

I. Tax Issues

The borrower should also consider tax issues that may arise in connection with a loan workout. The tax consequences that may be created by a modification of loan terms can be serious. If there is a reduction or cancellation of all or a portion of the loan and available exceptions do not apply, then the borrower will incur taxable income in the amount of the reduction under Section 108 of the Internal Revenue Code of 1986, as amended (the "Code") for what is technically called "cancellation of indebtedness income", but commonly called "forgiveness of debt income."

There is a partial exception to this rule for some loans which satisfy the requirements of "Qualified Real Property Business Indebtedness" ("QRPBI") under Section 108(a)(1)(D) and (c) of the Code. To be QRPBI, the indebtedness must be

secured by real property acquired for use in a trade or business and must have either been incurred before January 1, 1993, or incurred or assumed after that date for the purpose of acquiring, constructing, reconstructing or substantially improving the real property. A refinancing of QRPBI also qualifies as QRPBI but only to the extent of the debt being refinanced. The portion of any debt forgiveness which may be realized without generating income is limited to the lesser of (i) the amount by which the QRPBI prior to the reduction exceeds the fair market value of the encumbered real property; and (ii) the aggregate depreciable basis of all real property owned by the taxpayer. The amount of debt forgiveness that is not recognized as income under these criteria is taken into account by reducing the taxable basis of the taxpayer in the real property owned by the taxpayer, so that the income will eventually be recognized by means of either reduced depreciation deductions or increased gain on the sale of the property. See, Robert J. Dudzinsky, New exclusion for income from discharge of real property business debt: partners v. partnership, The Tax Adviser, May 1, 1994.

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the "Act"). Among other provisions, the Act added a new Section 108(i) to the Code which makes available a deferral of income realized with respect to cancellation of indebtedness income during 2009 and 2010 with respect to debt issued by C corporations or issued by other taxpayers in connection with the conduct of a trade or business. An election to defer the income is irrevocable. The deferral is for a period of five years in the case of debt forgiven in 2009 and for a period of four years in the case of debt forgiven in 2010. When the applicable deferral period has expired, the income attributable to the forgiven indebtedness must be taken into account ratably over each of the next five years. An election to defer the income under Section 108(i) will preclude an election to permanently cancel the income in the event that a bankruptcy or insolvency exception would have otherwise been available. See, Thomas A. Humphreys, Stephen L. Feldman, Robert A. N. Cudd and Shane M. Shelley, United States: Temporary Deferral of Cancellation-Of-Indebtedness Income Under The Recovery And

Reinvestment Act Of 2009, available at www.Mondaq.com Taxation, February 20, 2009.

Another exception being attempted by borrower's counsel is the "contested liability" exception, which "rests on the premise that if a taxpayer disputes the original amount of a debt in good faith, a subsequent settlement of that dispute 'is treated as the amount of debt cognizable for tax purposes.'" *Preslar v. Commissioner*, 167 F.3d 1323, 1327 (10th Cir. 1999) (quoting *Zarin v. Commissioner*, 916 F.2d 110, 115 (3rd Cir. 1990)). As such, the difference between the original debt and the amount determined to be due is disregarded for income tax purposes. When the borrower repays the agreed amount, they are considered to have paid the full amount of the originally disputed debt. However, as the court in *Preslar* noted, "[t]he few decisions that have interpreted this doctrine have generated considerable controversy." *Id.* In *Preslar*, a \$1 million ranch loan was negotiated to be paid by assigning lot sales contracts to the lender at a set discount. The FDIC refused to accept the assignments and the borrowers sued for breach of contract. The FDIC settled for a \$350,000 cash payment and roughly \$200,000 credited for the assignment of the contracts. The 10th Circuit held that the borrowers realized roughly \$450,000 of cancellation of indebtedness income (\$1 million original debt obligation – \$550 thousand total settlement). *Preslar* confirmed that a taxpayer may exclude debt cancelled in settlement of a bona fide dispute over a debt's validity. However, the issue of whether the debt was unliquidated was essential to the court's holding. According to the court, "the whole theory behind requiring that the amount of a debt be disputed before the contested liability exception can be triggered is that only in the context of disputed debts is the [IRS] unaware of the exact consideration initially exchanged in a transaction." *Id.* at 1328. Under *Preslar*, a taxpayer's good faith challenge of the enforceability of a debt does not mean they are shielded from cancellation of debt income upon the resolution of the dispute. *Id.* Rather, "[t]o implicate the contested liability doctrine, the original amount of the debt must be unliquidated ... [a] total denial of liability is not a dispute touching upon the amount of the underlying debt." *Id.* The exception did not apply in *Preslar* because the borrowers' underlying indebtedness,

the \$1 million note, was liquidated at all times. A dissenting opinion in *Preslar* maintained that when there is a legitimate dispute concerning the existence of a liability, and a compromise is reached, no discharge of indebtedness income arises as to the unpaid portion of the original liability. *Id.* at 1333. According to the dissent, the contested liability doctrine is not limited to instances where the taxpayer disputes only the amount of the debt and the original amount was unliquidated. *Id.* The dissent believed the majority's view was "mistakenly narrow" and "ignores the fact that an original amount of a debt is necessarily disputed and may be unliquidated under a good faith dispute over liability 'that can be traced to the circumstances in existence at the time of the debt's creation.'" *Id.* at 1334. Citing existing case law, the dissent noted that the settlement of a dispute over the enforceability of a debt traceable to its origin does not result in a windfall. These settlements merely establish the original amount of liability, rather than discharge any amount of the original liability. *Id.* See also, Michael L. Cook, Federal Tax Treatment of Debt Workouts, University of Texas Taxation Conference (2008), available at www.reptl.org; IRS Publication 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments*, <http://www.irs.gov/pub/irs-pdf/p4681.pdf> (providing general information on cancellation of debt income).

IV. Loan Modification Agreements

A. Typical Business Terms of Loan Modifications

A renewal and extension agreement or loan modification agreement is one of the most common means of effectuating a loan workout. Such an agreement typically involves modifying the maturity date, payment terms, interest rate, or reporting requirements of the loan. The modifications can include factual changes, evolving case law, new or revised statutes, business term changes, the addition of collateral and the remedy of mistakes in the existing loan documents. Such modification agreements are useful both before and after acceleration of a loan, but prior to foreclosure. Most loan modification negotiations will involve consideration or

utilization of some or all of the following terms and conditions:

- (1) Extending (or shortening) the loan maturity date;
- (2) Capitalizing (or forgiving) delinquent interest;
- (3) Raising (or lowering) interest rates temporarily or permanently;
- (4) Imposing a "floor" or minimum floating interest rate;
- (5) Increasing applicable interest rate in payments in default;
- (6) Changing or postponing payment dates or amounts of payments;
- (7) Permitting assumption of loan by buyer with or without release of borrower and guarantor from liability;
- (8) Providing for additional principal reductions;
- (9) Partially releasing property being sold or refinanced to raise funds for the workout;
- (10) Supplementing or modifying the terms of the loan documents to correct missing or incorrect terms;
- (11) Requiring additional security for loan (additional property, personal guaranty of borrower or third parties, etc.). Note: The receipt of additional security by the lender for an antecedent debt may constitute a preferential transfer under sec. 547 of Bankruptcy Code if borrower files bankruptcy within 90 days thereafter);
- (12) Eliminating any limitation on Guarantor's obligations;
- (13) Confirming outstanding principal and interest owned to eliminate later disputes on the amount owed;
- (14) Inserting Jury Waivers, if not in the original loan documents; and
- (15) Requiring broad "Lender Liability" waivers.

Lenders are typically requiring a 10% principal reduction for loan extensions, imposing a floor on any variable interest rate, increasing the interest rate and offering 1 year renewal terms.

B. Legal Considerations

Representation of the parties in a workout by experienced legal counsel is essential. An extensive review of the records of the borrower and guarantors should be performed, and the legal representatives should have a thorough understanding of the ownership and history of the collateral property by reviewing the organizational documents of all entities. The legal representatives should assess the borrower's potential recourse liability and define the objectives of negotiations depending on which party they represent. Defining the negotiating objectives in a workout will depend on, among other considerations, the type of property, the parties involved, the nature of the default and the structure of the original transaction. The general legal considerations that will usually be taken into account in such negotiations include the following factors:

- (1) A title search (including federal tax liens and UCC filings) should be conducted to determine if there are any other liens on the property.
- (2) The general rule is that the priority of a first lien will be lost to extent that a loan modification prejudices or impairs the security of subordinate lienholders, unless the subordinate lienholders consent and formally subordinate to the loan modification. This may be modified by contract and often there are Intercreditor Agreements between the different lenders which address this issue.
- (3) Some courts are now holding that the entire priority of the first lien will be lost and subordinated as a result of a loan modification that is implemented without the consent of a subordinate lienholder (usually in connection with subordinated purchase-money loans), because of the inability to determine the exact extent of the prejudice to subordinate lienholders.
- (4) Some courts are suggesting that virtually any change in the terms of a first lien mortgage loan (other than, perhaps, a decrease in the interest rate), e.g., even an extension of maturity date, may prejudice subordinate lienholders. Any change that makes an increased demand on a borrower's cash flow could be interpreted

as prejudicing such lien claimants. Similarly, any change that increases the likelihood of the borrower's default or encourages a lack of financial responsibility by the borrower (e.g., large balloon payment) may also be viewed as having such a prejudicial effect.

(6) A written modification agreement containing all of the terms of the loan workout should be executed and recorded.

(7) If subordinate lien claimants exist, their executed written consent and subordination to the terms of the modification agreement should be obtained and recorded.

(8) An endorsement of the existing lender's title insurance policy should be obtained, usually at the expense of the borrower, insuring continuing priority, validity and enforceability of the first mortgage lien after the recording of the modification agreement.

(9) The executed written consent of any guarantors of the original loan should be obtained in conjunction with the loan modification, in order to avoid a claim that the guarantors were released by such modification. However, many guaranty forms have contractual waivers which address this issue.

(10) If the present owner of the collateral property is not the original mortgagor and the original mortgagor has not been released from liability for the loan, the original mortgagor must also sign modification agreement to preserve their personal liability to the lender.

(11) Lender's legal counsel should provide in the original loan documents for the right to subsequently amend and modify note and mortgage. If a subordinate lienholder requests an estoppel agreement, the lender should preserve the right to modify the first mortgage as part of agreement. If subsequent encumbrances are permitted in loan documents, make them conditional upon execution of subordination agreements by the subordinate lienholders at time of each such encumbrance, with the subordinate lienholder agreeing to subordinate

automatically to the liens securing the first mortgage loan as the terms of the first mortgage loan may be subsequently amended. If the original mortgage contemplates future disbursement, modification or assumption, insert a clause in the mortgage requiring title endorsement to original policy insuring that no such future modification adversely affects the priority, validity or enforceability of the first mortgage lien.

C. Sample Loan Modification Agreement

A sample loan modification agreement (adapted from materials generously supplied by Niles Holmes) is attached to this presentation as Appendix G. This type of agreement is almost always drafted by lender's counsel.

V. Forbearance Agreements

A. General

A forbearance agreement is a conditional agreement of the lender to not exercise its rights against the borrower or the collateral for a specific period of time, despite default under the loan documents. Under such an agreement, for a defined period of time, the lender can not institute foreclosure proceedings on loan collateral, accelerate a note's maturity or institute suit for collection of the note against the borrower, provided the borrower complies with the terms and conditions of the forbearance. A forbearance agreement may also include additional borrower covenants, modified payment terms and a release by the borrower of claims against the lender.

B. Terms

- (1) Acknowledgement of the debt and the liability of the borrower and any guarantor;
- (2) Acknowledgement that the borrower has defaulted under terms of the note and other loan documents and that the loan has been accelerated or matured according to its terms;
- (3) Acknowledgement that the lender has instructed its trustee to proceed with the non-judicial foreclosure as provided in the deed of trust;

- (4) Acknowledgement that the borrower and/or guarantor have requested that the lender forbear from exercising its remedies (i) to allow the borrower time to secure refinancing or to sell property in order to pay the indebtedness and/or (ii) to accept payment from the borrower of a partial payment as a forbearance fee and/or as payments due and owing on the loan;
- (5) Confirmation that the lender can charge a non-refundable "Forbearance Fee;"

- (6) Confirmation that the lender can charge a debt payment which is a stated amount to be applied to lender's cost of collection, any expenses incurred incident to the loan and collateral, accrued interest, and/or principal payments;

- (7) Stipulation by the borrower of the remaining amount due and owing on the note after application of the debt payment;

- (8) Agreement by the lender to forbear exercising its rights and to instruct its trustee not to proceed with the scheduled foreclosure sale upon payment of the forbearance fee and/or debt payment;

- (9) Making of the following representations, warranties and covenants by the borrower:

- (a) Acknowledgement that there has been no waiver by lender of any right, remedy, claim, demand or cause of action that lender has under the loan documents and any time after the agreed upon forbearance date, lender can proceed to exercise any of its rights and remedies under the loan documents, including posting the property for foreclosure;

- (b) Acknowledgement that borrower's payments do not cure the default and the default continues and the entire principal balance remains matured, due and owing;

- (c) Acknowledgement that, if the borrower breaches any of the provisions of the forbearance agreement or the loan documents,

the lender may immediately proceed to enforce any right or remedy available to it without giving notice to borrower or guarantor, it being agreed that any such notices or cure periods are waived and released;

(d) Acknowledgement that borrower agrees to toll the statute of limitations governing enforcement of the note and loan documents until an agreed upon date, notwithstanding the acceleration or maturity date of the note;

(e) Acknowledgment that borrower and guarantor jointly waive and agree not to assert any claims or defenses to the enforcement of the note and loan documents; and

(f) Acknowledgement that borrower and guarantor reaffirm the loan documents and the enforceability thereof.

C. Conditions

- (1) Payment of the forbearance fee and/or debt payment;
- (2) Confirmation that there are no additional liens on property;
- (3) Delivery of certified updated financial statements for borrower and guarantor;
- (4) An opinion of legal counsel for borrower and guarantor that the forbearance agreement is a legally binding and enforceable obligation of borrower and guarantor;
- (5) Delivery of appropriate resolutions or consents for the borrower and guarantor; and
- (6) An agreement by borrower and guarantor to deliver all other documents reasonably required by lender.

D. Sample Forbearance Agreement

A sample forbearance agreement (also adapted from materials generously provided by Niles Holmes) is attached to this presentation as Appendix H. This type of agreement is almost always drafted by lender's counsel.

VI. Loan Sale

Another option for the lender would be a loan sale. A loan sale involves the lender selling the loan to a third party on a discounted basis, without recourse or warranty by the original lender. If the borrower and guarantor have good relationships with the third-party buyer, this type of arrangement may provide an opportunity for the original lender to receive the maximum amount available with respect to its loan and for the borrower and guarantor to obtain concessions from the new lender that will satisfy their workout objectives. The original lender will most likely require a release of claims from the borrower and guarantor and the third-party buyer, upon purchasing the note and other related loan documents and will often request the borrower and guarantor to enter into a renewal and extension agreement, or replacement loan documents setting forth the modified terms of the new lending arrangement. There are significant transactional savings (loan documentation and title insurance) if a lender will sell its loan rather than require a payoff by a new loan.

VII. Conclusion

Loan workouts are highly negotiated transactions involving a high degree of both due diligence and creativity in an effort to identify terms that will allow each party to achieve as many of its negotiating objectives as possible while still permitting the other party to achieve a sufficient portion of its negotiating objectives to be willing to agree to a compromise loan workout arrangement.

See William H. Locke, Jr. & Ralph Martin Novak, Jr., State Bar of Texas Foreclosure Manual, Second Edition (2006) Form 43.

Appendix A

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William H. Locke, Jr. & Ralph Martin Novak, Jr., State Bar of Texas Foreclosure Manual, Second Edition (2006).

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Appendix B**Top 10 List****LOAN WORKOUT TOP 10 LIST**

10. **KNOW THE LOAN** - Review the documents.
9. **KNOW THE COLLATERAL** - What is it worth / what options are available to complete/market it?
8. **KNOW THE OTHER PARTY** - Trustworthy? Experienced? Capable? Focused? Solvent?
7. **KNOW THE MARKET** - How long will it take for the market to rescue this distressed project?
6. **KNOW YOUR TIMELINE** - How quickly do you need to have results? Are there 3rd parties who control your ability to have necessary time to work a reasonable deal?
5. **GET REALISTIC** - Don't waste time on wishes, it's time for hard choices.
4. **STOP POSTURING** - Instead, share meaningful information about your goals and limitations.
3. **BE FORTHRIGHT** - False and misleading statements kill the deal.
2. **USE PROPER PROFESSIONALS** - Lenders - sometimes the loan officer who made the loan is not the best one to workout. Borrowers - a CFO or trusted advisor often is able to provide a "new face" for the borrower. New 3rd party consultants (appraiser/lawyer/brokers) can bring fresh perspective and workout experience.
1. **UNDERSTAND YOUR BEST ALTERNATIVE TO A SUCCESSFUL WORKOUT (LIKE ANY OTHER NEGOTIATION)** - If you fail, this is where you will likely be (and it won't be your first choice!).

Appendix C**Fact Scenario****Traditional Loan Workouts****Hypothetical Loan Workout Situation****I. Fact Scenario**

Borrower: A single-purpose entity controlled by Gary Goodtime ("Gary") and owned by Gary and a group of his investors.

Gary's Background- 45-year old former star retail tenant rep. broker.

Financial Capacity- Gary's 2007 financial (last available)- \$20,000,000 net worth(\$2,000,000 liquid assets). Today- Liquid assets are gone and net worth, if any, questionable. Gary's CFO and Gary's wife's uncle, Eddy X. Bankexaminer worries about the draconian penalties for fraud of a federally regulated financial institution and won't prepare an updated financial.

Gary's Problem Tenants- Linens N Things, Circuit City, and Bennigan's are out of business, and others credit tenants such as Pier 1 have aggressively renegotiated rents.

Family- Gary's 3 kids are beneficiaries of trusts established 12/31/08 holding Gary's last significant, unencumbered assets.

Gary's wife, Ivana Trump Goodtime, is independently wealthy from prior marriage. Although not active in Gary's business, Eddy put her (disguised through entities) in the last few deals to "fill the investor gap". She signed no guaranties.

Gary's Contingent guaranties- \$100,000,000.00.

Reputation- Honest, Party guy- doesn't sweat the details. Relies upon his staff (ever changing and motley crew of young aggressive broker types), but the rock of the organization is his CFO Eddy.

Current Condition: No liquidity. No access to loans or capital. Eddy just tendered his resignation. Gary is too proud to consider bankruptcy.

Bank: Bank of Real Estate ("BRE")

BRE Background - Established in 2000 by Perry President, a 45 year old MBA graduate of UT and lifetime banker/real estate lender. Conservative. Perry owns 10% and senior management/directors own an aggregate 25%. BRE has significant RE exposure and recent losses.

BRE Current Condition- Marginally capitalized (6%). Regulators respect Perry and his team, but asked him to raise capital to 10%. Perry is optimistic IF losses are stopped and the RE loan portfolio stabilizes.

The Project: Ivana Plaza is a mixed use project in Austin, Texas, with 100,000 sf high-end retail and 200 Class A condominiums.

Background – New Yorker Andy Awardwinning Architect(recommended by Ivana) designed an award winning project, busting the budget. The two junior anchor spaces are un-leased. The Condos are a first for Gary. The development is delayed for many reasons including Gary’s lack of experience, the City of Austin and the architects.

Current Condition - The retail center shell is almost complete and 50% pre-leased with quality tenants, but co-tenancy requirements of 20% are tied to luxury tenants in the Jr. Anchor spaces. Another 20% had been pre-leased, but the tenants flaked out. The two Jr. Anchor spaces represent 40% of the center (20% each) and are in the corners. The Condos are permitted

The Loan: \$40,000,000.00 loan to a SPE, with 50/50 allocation between the 2 project phases. Gary executed a 50% guaranty.

LTV - Supposed to be 90%, but now 110%.

Terms - 18 mo. interest only, at 1 month LIBOR + 300 bp
36 mo. mini-perm, at 3 month LIBOR, plus 200 bp, 30 yr. amort. IF LTV at conversion is 70%+, and 1.3:1 debt service coverage. Gary’s guaranty is released at conversion.

Interest carry - sufficient through conversion (due to the drop in rates).

Retail Budget- \$3,000,000 short
Condo Budget- \$1,000,000 short

The Market:

Retail- Luxury retail is dead. The Wal-Mart across the street (a deterrent to luxury retailers sought by Gary), is booming. Several creditworthy “value” retailers are interested, but would “bust” the co-tenancy of some signed luxury tenants. However, “down scaling” the center, has two benefits: (1) value engineering of architectural elements would save \$1,000,000.00, (2) the anchors will attract other value tenants (who are still in the market for space), and (3) the project would cash flow and pay the mini-perm loan upon 85% lease up.

Gary is dead-set on a luxury award winner. Eddy is supportive of the value center conversion. Perry President was originally drawn to the award winning project proposal, but only cares about cash flow now.

Condos- Luxury Condo sales are dead. Apartment demand is steady, though rents are down. Gary just received an unsolicited offer from a local apartment developer to acquire the apartment land, plans and building permit for an amount equal to Gary’s actual cost of those items if BRE will finance the apartment developer with a market rate 80% loan to cost loan. The apartment developer is a good credit and has a good reputation. The plans can be used with value engineering of the luxury details.

The Feds:

The FDIC’s criticized the Loan and Project. A \$2,000,000.00 loan loss reserve was established, but Perry knows the loan loss reserve will increase dramatically if the Loan is not worked out.

Technical defaults:

- outdated financials
- inadequate pre-leasing for the retail center
- loan is “out of balance” due to cost overruns- \$5,000,000.00
- M&M liens

Borrower’s Allegations:

Gary’s new lawyer, Cary Barton, asserts the following (obviously seeking leverage for a loan workout):

- (1) The bank’s original loan officer, Larry Loosie-Goosey, made a number of misrepresentations to Gary regarding how the bank would administer the loan (all contrary to the terms of the loan documents);
- (2) The bank mismanaged the loan advances, resulting in \$1,000,000.00 in improperly advanced funds; and
- (3) BRE required Gary to hire a particular engineer who was Larry’s brother in law, and he was incompetent resulting in a \$1,000,000 cost overrun

Mr. Barton then requests \$5,000,000.00 more loan proceeds, 1 yr extra construction term, reduced interest rate and waiver of the requirements for conversion to the mini-perm.

Bank's Demands:

BRE’s new lawyer, Reid Wilson, responds with a demand letter asserting:

- (1) the numerous technical defaults listed above;
- (2) demand for \$5,000,000.00 equity injection to be expended before the bank will advance any more funds to rectify the “out of balance”;
- (3) no possible “lender liability” (citing the many cases favorable to lenders decided in the 1980s and 1990s); and
- (4) If each literal term of the loan documents is not satisfied, BRE will accelerate the loan and enforce its remedies, specifically including collection on Gary’s personal guaranty.

Thereafter, Reid and Cary, who have known each other for years from their participation in the UT Mortgage Lending Institute, talk and agree that they and their clients should meet to engage in a “last chance” opportunity to reach a mutually beneficial workout. Reid provides to Cary a form negotiation letter agreement which prevents the parties from relying upon or introducing into evidence any of the statements made during the workout discussions. Cary agrees to have his client’s team sign the letter in order to invite an opportunity for open, frank conversation.

They agree that the meeting will be attended by all necessary decision-makers, as well as their support staff with adequate information so that there will be no misplaced assumptions. Both agree that they will each meet with their client team in advance of the meeting to prepare them for a productive negotiation.

II. Each Party's Concerns/IssuesBank:

- Loan Loss Reserve - Without a successful workout, the \$2,000,000.00 reserve will increase dramatically, which is bad for BRE. A loan loss reserve offsets the bank's earnings and the bank wants to maximize its earnings so it is more attractive as it seeks new capital. To make the workout, BRE is prepared to forgive up to \$2,000,000 of the loan.
- Incomplete Project - BRE is not in the business of developing retail centers and has previous bad experience trying to act in that capacity. BRE does not want to foreclose unless the project is completed. As a last option, BRE will facilitate a sale to creditworthy developer, finance it and take a \$2,000,000 loan write off.
- Cash Flow - Awards do not impress BRE or the FDIC, only monthly cash flow, and long term appreciation (if any) is secondary. A well-performing center without regards to its architectural appearance or the nature of its tenants is marketable. BRE believes that the only way the retail center will ever be refinanced or sold is for it to be completed as a value center.
- Limited Ability to Increase Loan Amount- BRE can't justify advancing more funds, without inviting harsh criticism from the regulators. BRE is making no more RE loans. Instead, BRE would consider concessions to encourage the borrower to invest its own funds or obtain more funds. The concessions would include loosening financial covenants, extended term, etc. BRE assumes that Gary has a stash somewhere (he loves going to Grand Cayman Island).
- Cancellation of Residential Component-BRE is scared of Gary attempting the residential development. Instead, BRE wants Gary to sell for whatever is current market. BRE will consider financing the purchase on "reasonable" terms, so that Gary's loan can be reduced in amount.
- Larry Loosie-Goosey- Perry is worried that Larry, a big mistake to hire, did not properly manage the whole loan relationship and is possibly adverse after his firing. He is now working on an oil rig in Alaska. BRE wants a lender liability release.
- Bankruptcy- BRE is not particularly worried about bankruptcy, other than the prospect of delay. It has experience in bankruptcy and believes that it will, ultimately, prevail. The delay is a concern, as it prolongs the resolution of the problem loan.

Borrower:

- No Cash - Gary is broke and his investors hate him. He has no stash. Bills are piling up and he does not have a war chest for litigation. However, Ivana recently said she would advance whatever he needed to keep out of bankruptcy, which she finds personally offensive (even more than Gary). She has plenty of funds. Gary is reluctant to call on his wife (not knowing she has been an investor in his last deals), but will do so as a last resort.
- Hope - Gary recognizes the bad economy and does know the Project won't be as profitable as he originally hoped, but he is an optimist and he thinks that if he can stick with it, it will have value. His investors would have more hope if the Bank would be willing to give relief on financial issues, such as waiving past due interest, reducing interest or forgiving debt. Gary would sell those benefits to his investors.

- Vanity - Gary desperately wants to complete Ivana Plaza as an award winning project. He has boasted about it so much that it has become an obsession. Eddy's resignation is due to this single minded commitment. Eddy is the only one who can convince Gary to give up on the dream and go with the value approach.
- Completion - Gary is willing to complete the Project even if it makes no money for many reasons, including protection of his investors. He never wants someone else to finish one of his projects. He does not want a foreclosure.
- No Bankruptcy - Gary will never file bankruptcy (and Ivana won't let him).
- Lender Liability - Gary can't prove up the lender liability claims due to bad records, his murky memory and the fact that some of the allegations came from employees now on bad terms and out of state.
- Other Loans - Gary believes he can manage the rest of his loans/projects if he can just get this one resolved. It is the linchpin to his survival. He is highly motivated to resolve this loan.

III. Each Party's Leverage Points/Sticking Points/Goal:

Bank:

- \$2,000,000 to "forgive" without taking a current loss (due to existing loan loss reserve)
- Willing to "give" on most loan terms to insure the following occur:
 - Retail Center is completed
 - Value Jr. Anchors are signed
 - No bankruptcy
 - No foreclosure
 - No lender liability
 - Prompt resolution (end of next fiscal quarter)
- Willing to finance legitimate buyer of residential land(on reasonable terms)
- Eddy's staying will cause Bank to be more flexible and his leaving will cause Bank to be more strict
- Concerned the Borrower is too committed to the Project as a "monument" rather than a capitalistic venture
- Wants to see Borrower/Investor equity infusion

Goal: Prompt resolution w/o litigation/bankruptcy/foreclosure for the Borrower to complete the retail center as proposed with the existing loan amount and additional equity, and/or sell the residential component and reduce the loan, and/or value engineer the retail center and lease as value center - Up to \$2,000,000 forgiveness available to incentivize the Borrower.

Borrower:

- Needs some financial assistance to make the long term numbers look better and keep his investors in the game.
- Wants to complete the Retail Center as an award winning project-won't give up unless "absolutely" necessary, but has agreed privately with Eddy that unless the Bank will agree to increase the loan to fully fund all deficits per the conservative budget Eddy just gave Gary, Gary

will abandon the luxury model and pursue the value model. Gary made Eddy swear that he would tell no one, as Gary wants to “push the Bank to the wall” on the luxury model.

- Has no cash or equity to invest, but does have a “last resort” funding from Ivana (but at an emotional cost)
- Feels unsure about the Bank and its commitment to the Project and the Borrower
- Wants to prevent foreclosure and bankruptcy
- Won’t really play the “lender liability” card
- Wants prompt resolution

Goal: Prompt resolution without litigation/bankruptcy/foreclosure for the Borrower to complete the retail center as proposed with additional funding from the Bank, retain the right to develop the residential component in the future, but to sell it if Borrower gets a “good enough” price. Bank needs to extend the loan since no other loans are available on reasonable terms and waive all covenants which are no longer reasonably attainable, in order that Borrower can have the time for the economy and market to settle.

IV. Best Alternative to a Negotiated Settlement

Bank:

Foreclosure (possibly after Borrower Bankruptcy delays it), completing the retail project and leasing it to 80% stabilized before selling with Bank financing, selling residential land with Bank financing, suing Gary on his guaranty, defending lender liability claim to likely successful conclusion (but painful and expensive), possible negative impact on capital raising efforts and regulator relationship- Bank’s estimate is it will take over \$2,000,000 loss and will take 2 yrs to complete

Borrower:

Get bailed out by Ivana (probably diluting existing investors), find another lender to take out the loan, litigate with BRE simply to delay foreclosure (without material expectation of success on the merits), possible litigation from unhappy investors, retains the hope that Ivana Plaza will be award winning and, long term, an acceptable investment, and will probably bailout of the residential, at least in the near term.

V. Strategy Considerations

What to tell the other side? (and when)?

How far to “push” the other side to insure you are getting the “best deal”?

When to stop the posturing and “get real”?

Do we play “Good Guy/Bad Guy”?

What is the best role for the Attorney?

Should there be a deadline for resolution, or should you “take it as it comes”?

Appendix D**Lender's Checklist****LOAN WORKOUTS**Lender Preparation for Loan Workout.

1. Loan Documentation -
 - a. Gather/consolidate all Loan files - Files to locate include: Loan documentation, credit/underwriting, collateral, any involved officer's "desk" file.
 - b. Review all Loan files - Internally, and perhaps by outside counsel -
 - Complete?
 - Compliance with rules, regulations and laws applicable to Lender?
 - Compliance with bank policies - at origination and now?
 - Compliance with loan approval and loan agreement?
 - Important Issues in Loan documents review -
 - (1) Cross default and cross collateral paragraphs.
 - (2) Do terms reflect accurately the original agreement and how the deal has really been handled?
 - (3) Unconditional, unlimited guaranties by key players? Where are the terms modified from your standard form (if any)?
 - (4) Specific nonmonetary default clauses. Are they sufficient so that the Loan could be called even when payments are current?
 - Organize the files.
 - The review process is particularly important whenever (i) primary loan officer leaves employment of Lender, (ii) Loan is transferred to new loan officer, and (iii) Loan is in monetary default.
 - Consider conducting an exit interview with the loan officer giving up a file.
 - c. Correct deficiencies - Get signatures, file documents, obtain copies, etc. - get your secured status perfected as soon as possible.
 - d. Give Borrower an extension in return for curing document problems.
2. Collateral -
 - a. What is the collateral?
 - List what you think you have.
 - List what the loan documents show - Cross collateralized?
 - List what Borrower shows you have.
 - Inspect what Borrower has.
 - Figure out the discrepancies between the foregoing.
 - Cure lien deficiencies – File, obtain subordinations from other lenders – get your secured status perfected as soon as possible.
 - b. What is its value?

- Value what the Borrower has which you have validly encumbered - Consider obtaining New appraisals (Consider applicable regulations and effect of low appraisal). Check whether Loan documents require Borrower to obtain and pay for new appraisals.
 - Consider condition of collateral - Is repair needed, desirable, do Loan documents mandate certain levels of maintenance/ condition by Borrower?
 - What direction is value of collateral moving and what are your future expectations as to value - Consider both near and long term.
 - Relationship of collateral value to Loan balance - What is Loan to value ratio?
- c. Extension - Give extension in return for additional collateral or curing lien problems.
3. Borrower/Guarantor -
- a. Financial condition - Obtain current signed financial statements with cash flow history and projections, last 3 years tax returns, audited statements available for any recent years. Re-underwrite the Borrower/Guarantors.
 - b. Consider the Borrower's ability to reduce expenses - reduce overhead, reduce employees, sell nonproducing assets, etc. Would the Borrower agree? However, the Lender should not dictate the Borrower's actions.
 - c. Commitment of Borrower to the "Project" which is the subject of the Loan - Is the line of business/real estate deal/piece of equipment, etc. meaningful to the Borrower? Will the Borrower want to keep it? Does the Borrower really believe in it?
 - d. Ability of Borrower to work out problems - Remember that getting out of a problem is different than making money in the good times. Financial/managerial skills are required in a workout mode rather than slick salesmanship. Specific written plans with modest, achievable goals are more desirable than grandiose schemes and vague promises "to take care of things". Honesty, integrity, communication skills, detailed orientation and goal setting, are necessary characteristics.
 - e. Is the Borrower Realistic? - The Borrower must realize his circumstances, accept it and have reasonable, realizable goals.
4. Reasons for Current Problem -
- a. Borrower problems - Broke Borrower, "temporary" cash flow crunch (watch out for this one), poor management, and bad business decisions.
 - b. Project problems - Cost overruns, catastrophe, poor management, poor planning/marketing, a bad concept (i.e., it wouldn't work even in the good times).
 - c. "Robbing Peter to pay Paul" - Other projects/other problems/litigation - your good loan/collateral is paying for other bad loans/problems.
 - d. Economy - Overall economy, regional economy, a particular market, etc.
 - e. Others - (Make your own list from experience).

5. Participated Loans -

a. Documentation Review - A complete review and analysis of the Loan Participation Agreement, the status of compliance with the Loan Participation Agreement by the participants, and who the Loan participants are is immediately necessary. If the Loan Participation Agreement is specific regarding workouts and clearly provides the Lead Lender all rights to negotiate, renew, modify and extend the Loan, the Lead Lender should proceed and handle the Loan in a workout status no different than any other Loan in its portfolio which it owns in whole. Lead Lender should never exercise any less diligence with a participated Loan even if its own ownership interest is minimal. If the Loan Participation Agreement is not precise and specific in delineating the rights of the Lead Lender and the participants in a workout scenario, the Loan Participation Agreement should be modified to specifically set forth the extent of the Lead Lender's rights.

b. Communication with Participants - Participants should be kept notified promptly on all significant action regarding the Loan and the Borrower's status, whether or not specifically required by the Loan Participation Agreement. The Lead Lender may consider periodic meetings with the participants to answer questions and receive input. However, the Lead Lender should not accept direction from the participants where the decisions regarding Loan workouts are left solely to the Lead Lender in the Loan Participation Agreement. The Lead Lender should make decisions based on its own best judgment regarding what is in the best interest of all participants. To do otherwise is to open the Lender to arguments that the Lead Lender's conduct modified the terms of the Loan Participation Agreement regarding control of Loan workout decisions and the Lead Lender will receive increasing amounts of advice and interference from the participants.

Appendix E

Sample Pre-negotiation Agreement

[Letterhead of Borrower]

[date]

[Bank]

Re: Loan Modification Discussions regarding \$_____ Loan (the “**Loan**”) from _____ Bank (“**Bank**”) to _____ (“**Borrower**”) for development of the _____ (the “**Project**”) evidenced/secured by, among others, the documents listed on the attached **Schedule “A”** (the “**Loan Documents**”)

Dear _____:

We have asked the Bank to engage in discussions (the “**Discussions**”) with us and various other parties representing us and/or investing in the Project (the “**Borrower Group**”) concerning the Loan, the Loan Documents, and the Project and a proposed modification of the Loan. The Borrower Group executes this letter agreement (“**Agreement**”) to confirm the understanding of the parties with respect to the Discussions.

The Borrower Group agrees to the following for the benefit of the Bank:

1. No Expression of Intent. No party will be bound by, and no liabilities will arise from, any past, present or future statement, oral agreement, draft document, term sheet, letter or anything else prepared or communicated prior to or as part of the Discussions, short of a fully executed and delivered written agreement among the parties, approved by the Bank and its Senior Loan Committee. Because the Discussions may not result in such an executed and delivered agreement, no party should rely upon any such statements, oral agreements, draft documents, term sheets, letters or other items (except for such an executed and delivered agreement) made or prepared during the Discussions. Without in any way limiting the rights or remedies of the Bank under the Loan Documents arising out of any default of any member of the Borrower Group, the Borrower Group on behalf of itself and their respective related and affiliated parties, covenants and agrees not to assert any claims, institute any actions or proceedings against the Bank hereto for damages, injunctive relief or otherwise, or assert any defense or counterclaim, as a result of, in connection with or arising out of the Discussions or otherwise, or assert any defense or counterclaim, as a result of, in connection with or arising out of the Discussions.

2. Termination of Discussions. Any party may terminate their participation in the Discussions at any time for any or no reason whatsoever without obligation or liability to any other party.

[date]

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3. No Waiver. Neither the failure nor delay by the Bank to exercise any remedies, nor the acceptance of any interest, principal or other payments, nor the Discussions (whether before or after the date of this Agreement), nor any provisions of this Agreement, will be deemed or construed to amend, modify, supplement, extend, delay, renew, terminate, waive, release or otherwise limit or prejudice any rights and remedies of the Bank or the obligations of the Borrower Group under the Loan Documents, except as specifically provided in a written agreement fully executed and delivered by the Borrower Group, which is approved by the Bank and its Senior Loan Committee. In particular, nothing shall prohibit, restrict or otherwise inhibit the Bank from exercising any right or remedy under the Loan Documents before, during or after the Discussions.

4. Confidentiality; Inadmissibility. The Discussions and all documents prepared in connection therewith shall not be disclosed by the Borrower Group or any affiliated party (except for this Agreement and any written agreement fully executed and delivered by the Borrower Group or the Bank) and may not be introduced in any litigation or other proceeding involving the Bank and the Borrower Group or any related party. They are privileged in the same manner as a settlement offer in litigation.

5. Advice from Independent Counsel. The Borrower Group understands that this is a legally binding agreement that may affect its rights. The Borrower Group represents to the Bank that it has received legal advice from counsel of its choice in connection with this Agreement and that it is satisfied with its legal counsel and the advice received from it.

6. Binding Effect. When executed by each person or entity comprising the Borrower Group, this Agreement shall be effective as to and for the benefit of the Bank and shall be binding upon the Borrower Group. This Agreement may be amended only by a written amendment, fully executed and delivered by all members of the Borrower Group and the Bank. This Agreement shall be governed by and strictly construed in accordance with the laws of the State of Texas. We recognize the Bank is relying upon this Agreement in agreeing to engage in the Discussions.

Very truly yours,

Borrower

By: _____
Name: _____
Title: _____

Other participants in the Discussions

Name:
Organization:
Relationship to Borrower:

[date]
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Name:
Organization:
Relationship to Borrower:

Name:
Organization:
Relationship to Borrower:

Schedule "A"

List of Loan Documents

(non-exclusive)

Appendix F

Sample Loan Modification Agreement

(see attached)

Modification Agreement

This MODIFICATION AGREEMENT ("Agreement") is made as of the ____ day of _____, 200__ by and between [_____] ("Lender"), a [_____] [and] _____ "Borrower"), a _____ [and] _____ ([whether one or more, the] "Guarantor").

A. Lender made a loan ("Loan") to Borrower on _____, 200__, in the maximum principal amount of _____ AND NO/100 DOLLARS (\$_____); and

[LOAN AGREEMENT INSERT:]

B. Lender and Borrower executed that certain Loan Agreement ("Loan Agreement") dated _____, 200__, pertaining to the Loan; and

C. the Borrower executed and delivered to Lender that certain Promissory Note (as same may have been heretofore amended, the "Note") dated _____, 200__, payable to the order of Lender in the amount of and evidencing the Loan; and

D. the Borrower executed and delivered that certain [**Deed of Trust, Security Agreement and Assignment of Rents**] (as same may have been heretofore amended, the "Lien Instrument") dated of even date with the Note to _____, as trustee ("Trustee"), for the benefit of the Lender, recorded in [**Volume _____, Page _____, of the Real Property Records of _____ County, Texas**] [**the Office of the Clerk of _____ County, Texas under Clerk's File No. _____**], covering the real property described in Exhibit A attached hereto and incorporated herein for all purposes, together with all improvements, appurtenances, other properties (whether real or personal), rights and interests described in and encumbered by the Lien Instrument ("Property"), to secure the payment of the Note and performance by Borrower of the other obligations set forth in the Loan Documents (as herein defined); and

[FURTHER INDEBTEDNESS: Use further indebtedness insert when a specific, broad Further Indebtedness Provision is contained in Lien Instrument and do not use the granting language insert.]

E. Paragraph ____ (the "Further Indebtedness Provision") of the Lien Instrument contemplates that other debts or obligations of Borrower to Lender, whensoever or howsoever incurred and of whatever nature, would be secured by the Lien Instrument; and

[ASSIGNMENT OF RENTS INSERT:]

F. the Borrower executed and delivered to Lender that certain Assignment of Rents and Leases (as same may have been heretofore amended, the "Assignment") dated of even date with the Note, assigning to Lender all rents, leases, income, revenues, issues and profits which may arise from the operation or ownership of the Property, to secure the payment of the Note and performance by Borrower of the other obligations set forth in the Loan Documents; and

G. the Borrower caused to be issued by _____ ("Title Company") that certain [**Mortgagee Policy of Title Insurance**] [**Mortgagee Title Policy Binder on Interim Construction Loan**] ("Policy") No. _____, dated _____, 200__, in the amount of the Note, insuring the dignity and priority of the lien created and evidenced by the Lien Instrument [**and the Assignment**]; and

[GUARANTY INSERT:]

H. the Borrower caused _____ the Guarantor to execute and deliver to Lender that certain Guaranty ("Guaranty") dated of even date with the Note guaranteeing payment of the Note and all the other monetary obligations contained in the Loan Documents and performance by Borrower of the other obligations as set forth in the Loan Documents; and

I. the Lender[,] **[and]** Borrower **[and Guarantor]** now propose to modify certain of the terms and provisions of **[the Loan Agreement] [, the Assignment]** the Note, the Lien Instrument and the other related documents executed by Borrower or third parties pertaining to, evidencing or securing the Loan (collectively, the "Loan Documents").

For and in consideration of the premises and the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Lender[,] **[and]** Borrower **[and Guarantor]** hereby agree as follows:

1. Recitals. The above recitals serve as the basis for this Agreement, and are incorporated herein and made a part hereof for all purposes. Borrower and Lender each hereby acknowledge the above recitals to be true and correct as of the date hereof are incorporated herein and made a part hereof for all purposes. The recitals are a substantive, contractual part of this Agreement.

[REINSTATEMENT INSERT:]

2. Reinstatement. Notwithstanding the prior acceleration of the maturity of the Note, all of the Loan Documents (including, without limitation, the Note) are reinstated and are deemed to be continuing in full force and effect (and are not extinguished) as if the default or defaults which precipitated the acceleration of the maturity of the Note had not occurred. All monies due and payable under the Note shall be due and payable as if the maturity thereof had not been accelerated, and the final maturity of the Note is reaffirmed and reinstated to be _____, 200____. Nothing herein contained shall effect or impair the validity or priority of the lien and security interests under the Lien Instrument or under any of the other Loan Documents.

[DELINQUENT CHARGES INSERT:]

3. Delinquent Charges. Contemporaneously with the execution and delivery of this Agreement, Borrower shall remit to Lender cash funds sufficient to pay (i) all accrued but unpaid interest on the Note through and including **[the date hereof]** [_____, 200____] and (ii) all other charges due to Lender under the Loan Documents. Lender hereby agrees not to enforce Lender's available remedies with respect to any default or defaults which heretofore occurred because of Borrower's failure to pay when due the interest and charges described in this section.

[EXTENSION FEE INSERT:]

4. Payment of Extension Fee. Contemporaneously with the execution and delivery of this Agreement, Borrower shall remit to Lender cash funds in the amount of _____ AND NO/100 DOLLARS (\$_____), which sum shall be in payment of an extension fee due to Lender as additional consideration for the extension of the maturity date of the Note as set forth herein.

[LOAN INCREASE INSERT: next two paragraphs]

5. Increase of Note and Loan. The stated principal amount of the Note is increased [, **pursuant to the Further Indebtedness Provision,**] by the amount of _____ AND NO/100 DOLLARS (\$_____), to the

stated principal amount of _____ AND NO/100 DOLLARS (\$_____). Borrower hereby promises to pay to the order of Lender the principal sum of the Note, as hereby increased, or so much thereof as may be advanced, less any repayments of the principal thereof heretofore made, together with interest thereon at the rate, on the dates and in the manner specified in the Note as modified hereby.

[GRANTING LANGUAGE INSERT: Use if there is no Further Indebtedness Provision in the Lien Instrument or the existing Further Indebtedness Provision is vague or questionable in scope.]

6. Grant. If the increase in the Note and Loan pursuant hereto is ever deemed or construed not to constitute a debt or obligation which is included within the scope of the Further Indebtedness Provision, the Borrower and Lender hereby agree that, from and after the date hereof, the lien of the Lien Instrument shall secure the payment of the aggregate amount of the Loan and Note as increased hereby. To effectuate same, Borrower by these presents does hereby GRANT, BARGAIN, SELL and CONVEY, in trust, under and pursuant to the terms and provisions of the Lien Instrument, unto the Trustee, as trustee, and unto Trustee's successors or assigns in the trust hereby created, for the benefit of Lender and Lender's **[heirs, executors, administrators, personal representatives,]** successors and assigns, forever, all and singular, the Property, TO HAVE AND TO HOLD the Property unto such Trustee, forever, upon and subject to each and every term and provision contained in the Lien Instrument, all of which are incorporated herein by reference to secure the repayment of the Note, as herein increased and modified, and the performance by the Borrower and other parties of the terms, covenants and provisions of the Loan Documents, as hereby modified.

[NEW NOTE INSERT:]

7. Renewal Promissory Note. Contemporaneously with the execution and delivery of this Agreement, Borrower shall execute and deliver to Lender that certain Renewal Promissory Note ("Renewal Note") in the principal amount of _____ AND NO/100 DOLLARS (\$_____) to evidence the indebtedness originally evidenced by the Note. The Renewal Note shall be in renewal and restatement of the terms and provisions governing the repayment of the indebtedness evidenced by the Note. Notwithstanding such renewal and restatement, Borrower acknowledges that the indebtedness originally evidenced by the Note shall be renewed by and continued in full force and effect (and shall not be extinguished) in accordance with the terms and conditions of the Renewal Note, and the Renewal Note shall be secured by the liens and security interests of the Loan Documents as modified herein. The Note shall be retained by Lender with a notation placed on the face thereof indicating that the Note has been renewed and restated by the Renewal Note. **[NOTE: EXECUTION OF RENEWAL NOTE WILL REQUIRE THE CHANGING OF CERTAIN DEFINITIONAL REFERENCES HEREIN.]**

[NOTE BALANCE INSERT:]

8. Current Note Balance. Prior to the execution hereof, the aggregate amount advanced by Lender under the Note was _____ AND NO/100 DOLLARS (\$_____). As of the date hereof, principal payments have been received from Borrower in the aggregate amount of _____ AND NO/100 DOLLARS (\$_____), thereby reducing the current outstanding principal balance of the Note to _____ AND NO/100 DOLLARS (\$_____). There are committed funds remaining in the amount of _____ AND NO/100 DOLLARS (\$_____) to be disbursed in accordance with the Loan Documents. **[Lender has contemporaneously herewith advanced the sum of _____ AND NO/100 DOLLARS (\$_____), and, therefore, the current outstanding principal balance of the Note after execution hereof shall be _____ AND NO/100 DOLLARS (\$_____).]**

[EXTENSION OF MATURITY INSERT:]

9. Extension of Maturity. The maturity date of the Note is hereby extended until _____, 200____, when the unpaid principal balance of the Note, together with all accrued but unpaid interest thereon, shall be due and payable. The Borrower hereby renews, but does not extinguish, the Note and the liens, security interests and assignments created and evidenced by the Lien Instrument and other Loan Documents, and in this regard all of the Loan Documents are hereby renewed and modified by extending the maturity date thereof as set forth above. Borrower covenants to observe, comply with and perform each of the terms and provisions of the Loan Documents, as modified hereby.

[INTEREST RATE INSERT - FIXED RATE OPTION:]

10. Interest Rate. Commencing on _____, 200____, interest on the principal balance of the Note, as modified hereby, from time to time remaining unpaid prior to maturity shall accrue and be payable at _____ percent (____%) per annum. Interest on the Note shall be calculated at a daily rate based on a **[360-day year]** **[365- or 366-day year, as applicable]**, but never in excess of the Maximum Lawful Rate. As used herein the term "Maximum Lawful Rate" means at any time the highest rate of interest permitted by applicable law, including as to Chapter 303 of the Texas Finance Code, but otherwise without limitation, that rate based upon the weekly rate ceiling, calculated on the basis of a 365- or 366-day year, as applicable, after taking into consideration all sums paid or agreed to be paid to Lender outside the provisions of the Note for the use, forbearance or detention of the indebtedness evidenced by the Note, and all other charges constituting interest on the indebtedness evidenced by the Note.

11. Title Insurance. Contemporaneously with the execution and delivery hereof, the Borrower shall cause the Title Company to issue with respect to the Policy, the standard Texas Form T-38 Endorsement pursuant to Rule P-9b(3) of the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas ("Title Manual") **[NOTE: ALSO USE FOLLOWING FOR ADJUSTABLE RATE LOAN: and the standard Texas Form T-33 Endorsement pursuant to Rule P-9b(6) of the Title Manual]** acceptable to Lender, confirming that the Policy has not been reduced or terminated by virtue of the terms and provisions hereof.

12. Title Insurance. Contemporaneously with the execution and delivery hereof, the Borrower shall cause the Title Company to issue to Lender a standard Texas form **[Mortgagee Policy of Title Insurance]** **[Mortgagee Title Policy Binder on Interim Construction Loan]**, insuring the dignity and priority of the lien of the Lien Instrument **[and Assignment]**, as modified by the terms and provisions hereof, and subject only to (i) the exceptions and encumbrances specified in Schedule B of the Policy, (ii) such other exceptions as may have been approved in writing by Lender at the time of execution hereof, and (iii) taxes on the Property for the current and subsequent years, but not yet due and payable. **[NOTE: MORTGAGEE TITLE BINDER MUST BE RENEWED ON OR BEFORE 1 YEAR FOLLOWING ISSUANCE AND MAY ONLY BE RENEWED FOR A MAXIMUM OF 6 CONSECUTIVE 6-MONTH PERIODS.]**

13. Acknowledgment by Borrower. Except as otherwise specified herein, the terms and provisions hereof shall in no manner impair, limit, restrict or otherwise affect the obligations of Borrower or any third party to Lender, as evidenced by the Loan Documents. Borrower hereby acknowledges, agrees and represents that (i) Borrower is indebted to Lender pursuant to the terms of the Note as **[reinstated and]** modified hereby; (ii) the liens, security interests and assignments created and evidenced by the Loan Documents are, respectively, valid and subsisting liens, security interests and assignments of the respective dignity and priority recited in the Loan Documents; (iii) there are no claims or offsets against, or defenses or counterclaims to, the terms or provisions of the Loan Documents, and the other obligations created or evidenced by the Loan Documents; (iv) Borrower has no claims, offsets, defenses or counterclaims arising from any of Lender's acts or omissions with respect to the Property, the Loan Documents or Lender's

performance under the Loan Documents or with respect to the Property; (v) the representations and warranties contained in the Loan Documents are true and correct representations and warranties of Borrower and third parties, as of the date hereof; and (vi) Lender is not in default and no event has occurred which, with the passage of time, giving of notice, or both, would constitute a default by Lender of Lender's obligations under the terms and provisions of the Loan Documents. To the extent Borrower now has, or in the future possesses, any claims, offsets, defenses or counterclaims against Lender or the repayment of all or a portion of the Loan, whether known or unknown, fixed or contingent, same are hereby forever irrevocably waived and released in their entirety.

14. No Waiver of Remedies. Except as may be expressly set forth herein, nothing contained in this Agreement shall prejudice, act as, or be deemed to be a waiver of any right or remedy available to Lender by reason of the occurrence or existence of any fact, circumstance or event constituting a default under the Note or the other Loan Documents.

15. Joinder of Guarantor. By its execution hereof, Guarantor hereby (i) acknowledges and consents to the terms and provisions hereof; (ii) ratifies and confirms the Guaranty, including all interest and costs of collection, to or for the benefit of Lender; (iii) agrees that the Guaranty is and shall remain in full force and effect and that the terms and provisions of the Guaranty cover and pertain to the Loan, Note, Lien Instrument and other Loan Documents as modified hereby; (iv) acknowledges that there are no claims or offsets against, or defenses or counterclaims to, the terms and provisions of the Guaranty or the other obligations created and evidenced by the Guaranty; (v) certifies that the representations and warranties contained in the Guaranty remain true and correct representations and warranties of Guarantor as of the date hereof; and (vi) acknowledges that Lender has satisfied and performed its covenants and obligations under the Guaranty and the other Loan Documents, and that no action or failure to act by or on behalf of, Lender has or will give rise to any cause of action or other claim against Lender for breach of the Guaranty or other Loan Documents or otherwise.

16. Interest Limitation. The Loan Documents shall be governed by and construed according to the laws of the State of Texas from time to time in effect except to the extent preempted by United States federal law. If the Note recites that the real property subject to the Loan Documents is "residential real property" and the indebtedness evidenced by the Note as modified herein, and secured by the Loan Documents ("Indebtedness"), is secured by a first lien on residential real property within the meaning of Part A, Title V of the Depository Institutions Deregulation and Monetary Control Act of 1980, as amended, and the regulations promulgated thereunder, then, the following provisions of this paragraph shall be inapplicable. However, if, for any reason, the provisions of Part A, Title V of the Act shall be found not to exempt any and all interest and other charges payable in connection with the Indebtedness from any limitation otherwise applicable, then the following provisions shall apply. It is expressly stipulated and agreed to be the intent of Borrower and Lender at all times to comply with applicable Texas law governing the highest lawful rate or amount of interest payable on the Indebtedness (or applicable United States federal law to the extent that it permits Lender to contract for, charge, take, reserve or receive a greater amount of interest than under Texas law). If (i) the applicable law is ever judicially interpreted so as to render usurious any amount called for under the Note as modified herein, or under any of the other Loan Documents, or contracted for, charged, taken, reserved or received with respect to the Indebtedness; or (ii) Lender's exercise of the option to accelerate the maturity of the Note results in Borrower having paid or Lender having charged or received any interest in excess of that permitted by applicable law; or (iii) any prepayment by Borrower results in Borrower having paid or Lender having charged or received any interest in excess of that permitted by applicable law, then, in any such event, it is Borrower's and Lender's express intent that (a) all excess amounts theretofore collected by Lender be credited on the principal balance of the Indebtedness (or, if the Indebtedness has been or would thereby be paid in full, refunded to Borrower), and (b) the provisions of the Note as modified herein, and the other Loan Documents immediately be deemed

reformed and the amounts thereafter collectible hereunder and thereunder reduced, without the necessity of the execution of any new documents, so as to comply with the applicable law, but so as to permit the recovery of the fullest amount otherwise called for hereunder or thereunder not in excess of the highest lawful amount of interest on the Indebtedness. All sums paid or agreed to be paid to Lender for the use, forbearance or detention of the Indebtedness shall, to the extent permitted by applicable law, be amortized, prorated, allocated and spread throughout the full term of the Indebtedness until payment in full of the Indebtedness so that the rate or amount of interest on account of the Indebtedness does not exceed the usury ceiling from time to time in effect and applicable to the Indebtedness for so long as the Indebtedness is outstanding. To the extent that Lender is relying on Chapter 303 of the Texas Finance Code to determine the Maximum Lawful Rate payable on the Indebtedness, Lender will utilize the weekly rate ceiling from time to time in effect as provided in such Chapter 303 after taking into consideration all sums paid or agreed to be paid to Lender outside the provisions of the Note for the use, forbearance or detention of the Indebtedness, and all other charges constituting interest on the Indebtedness. To the extent United States federal law permits Lender to contract for, charge or receive a greater amount of interest, Lender will rely on United States federal law instead of such Chapter 303 for the purpose of determining the Maximum Lawful Rate. Additionally, to the extent permitted by applicable law now or hereinafter in effect, Lender may, at its option and from time to time, implement any other method of computing the Maximum Lawful Rate under such Chapter 303 or under other applicable law by giving notice, if required, to Borrower as provided by applicable law now or hereafter in effect. In no event shall the provisions of Chapter 346 of the Texas Finance Code (which regulates certain revolving credit loan accounts and revolving triparty accounts) apply to the Indebtedness or Loan Documents. Notwithstanding anything to the contrary contained herein or in any of the other Loan Documents, it is not the intention of Lender to accelerate the maturity or demand payment of any interest that has not accrued at the time of such acceleration or to collect unearned interest at the time of such acceleration.

17. Notices. Any notices or other communications required or permitted under this Agreement or the Loan Documents shall be provided in accordance with the requirements therefor as set forth in the Loan Documents; provided, however, from and after the date hereof the addresses of the parties hereto shall be as follows:

Lender:

Borrower:

Guarantor:

[NOTICES INSERT: Insert if no notice paragraph in original Loan Documents] Notices. All notices or other communications required or permitted to be given pursuant to this Agreement shall be in writing and shall be considered as properly given if (i) mailed by first class United States mail, postage prepaid, registered or certified with return receipt requested; (ii) by delivering same in person to the intended addressee; or (iii) by delivery to an independent third party commercial delivery service for same day or next day delivery and providing for evidence of receipt at the office of the intended addressee. Notice so mailed shall be effective upon its deposit with the United States Postal Service or any successor thereto; notice sent by a commercial delivery service shall be effective upon delivery to such commercial delivery

service; notice given by personal delivery shall be effective only if and when received by the addressee; and notice given by other means shall be effective only if and when received at the office or designated address of the intended addressee. For purposes of notice, the addresses of the parties shall be as set forth below; provided, however, that either party shall have the right to change its address for notice hereunder to any other location within the continental United States by the giving of thirty (30) days notice to the other party in the manner set forth herein.

Lender:

Borrower:

Guarantor:

Either party shall have the right to change its address and facsimile or telephone for notice hereunder and under the other Loan Documents to any other location within the continental United States by notice to the other party of such new address at least (30) days prior to the effective date of such new address.

18. Costs and Expenses. Contemporaneously with the execution and delivery hereof, Borrower shall pay, or cause to be paid, all costs and expenses incident to the preparation, execution and recordation hereof and the consummation of the transaction contemplated hereby, including, but not limited to, recording fees, title insurance policy or endorsement premiums or other charges of the Title Company, and reasonable fees and expenses of legal counsel to Lender.

19. Additional Documentation. From time to time, Borrower shall execute or procure and deliver to Lender such other and further documents and instruments evidencing, securing or pertaining to the Loan or the Loan Documents as shall be reasonably requested by Lender so as to evidence or effect the terms and provisions hereof. Upon Lender's request, Borrower shall cause to be delivered to Lender an opinion of counsel, satisfactory to Lender as to form, substance and rendering attorney, opining to (i) the validity and enforceability of this Agreement and the terms and provisions hereof, and any other agreement executed in connection with the transaction contemplated hereby; (ii) the authority of Borrower, and any constituents of Borrower, to execute, deliver and perform its or their respective obligations under the Loan Documents, as hereby modified; and (iii) such other matters as reasonably requested by Lender.

20. Effectiveness of the Loan Documents. Except as expressly modified by the terms and provisions hereof, each of the terms and provisions of the Loan Documents are hereby ratified and shall remain in full force and effect; provided, however, that any reference in any of the Loan Documents to the Loan, the amount constituting the Loan, any defined terms, or to any of the other Loan Documents shall be deemed, from and after the date hereof, to refer to the Loan, the amount constituting the Loan, defined terms and to such other Loan Documents, as modified hereby.

21. Governing Law. **THE TERMS AND PROVISIONS HEREOF SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN.**

22. Time. Time is of the essence in the performance of the covenants contained herein and in the Loan Documents.

23. Binding Agreement. This Agreement shall be binding upon the [**heirs, executors, administrators, personal representatives,**] successors and assigns of the parties hereto; provided, however, the foregoing shall not be deemed or construed to (i) permit, sanction, authorize or condone the assignment of all or any part of the Property or any of Borrower's rights, titles or interests in and to the Property [**or any rights, titles or interests in and to Borrower**], except as expressly authorized in the Loan Documents, or (ii) confer any right, title, benefit, cause of action or remedy upon any person or entity not a party hereto, which such party would not or did not otherwise possess.

24. Headings. The section headings hereof are inserted for convenience of reference only and shall in no way alter, amend, define or be used in the construction or interpretation of the text of such section.

25. Construction. Whenever the context hereof so requires, reference to the singular shall include the plural and likewise, the plural shall include the singular; words denoting gender shall be construed to mean the masculine, feminine or neuter, as appropriate; and specific enumeration shall not exclude the general, but shall be construed as cumulative of the general recitation.

26. Severability. If any clause or provision of this Agreement is or should ever be held to be illegal, invalid or unenforceable under any present or future law applicable to the terms hereof, then and in that event, it is the intention of the parties hereto that the remainder of this Agreement shall not be affected thereby, and that in lieu of each such clause or provision of this Agreement that is illegal, invalid or unenforceable, such clause or provision shall be judicially construed and interpreted to be as similar in substance and content to such illegal, invalid or unenforceable clause or provision, as the context thereof would reasonably suggest, so as to thereafter be legal, valid and enforceable.

27. Counterparts. To facilitate execution, this Agreement may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature and acknowledgment of, or on behalf of, each party, or that the signature and acknowledgment of all persons required to bind any party, appear on each counterpart. All counterparts shall collectively constitute a single instrument. It shall not be necessary in making proof of this Agreement to produce or account for more than a single counterpart containing the respective signatures and acknowledgment of, or on behalf of, each of the parties hereto. Any signature and acknowledgment page to any counterpart may be detached from such counterpart without impairing the legal effect of the signatures and acknowledgments thereon and thereafter attached to another counterpart identical thereto except having attached to it additional signature and acknowledgment pages.

28. Notice of Final Agreement. THIS MODIFICATION AND THE OTHER LOAN DOCUMENTS EMBODY THE FINAL, ENTIRE AGREEMENT AMONG THE PARTIES HERETO AND THERETO AND SUPERSEDE ANY AND ALL PRIOR COMMITMENTS, AGREEMENTS, REPRESENTATIONS, AND UNDERSTANDINGS, WHETHER WRITTEN OR ORAL, RELATING TO THE SUBJECT MATTER HEREOF AND THEREOF AND MAY NOT BE CONTRADICTED OR VARIED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OR DISCUSSIONS OF THE PARTIES HERETO OR THERETO. THERE ARE NO ORAL AGREEMENTS AMONG THE PARTIES HERETO OR THERETO. THE PROVISIONS OF THIS MODIFICATION AND THE OTHER LOAN DOCUMENTS MAY BE AMENDED OR WAIVED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY THE RESPECTIVE PARTIES TO SUCH DOCUMENTS.

29. **Release and Covenant Not to Sue.** BORROWER (IN ITS OWN RIGHT AND ON BEHALF OF ITS RESPECTIVE DIRECTORS, OFFICERS, EMPLOYEES, INDEPENDENT CONTRACTORS, ATTORNEYS AND AGENTS) AND GUARANTORS (IN THEIR OWN RIGHT AND ON BEHALF OF THEIR RESPECTIVE ATTORNEYS AND AGENTS) (THE "RELEASING PARTIES") JOINTLY AND SEVERALLY RELEASE, ACQUIT, AND FOREVER DISCHARGE LENDER AND ITS DIRECTORS, OFFICERS, EMPLOYEES, INDEPENDENT CONTRACTORS, ATTORNEYS AND AGENTS, AND ATTORNEYS (THE "RELEASED PARTIES"), TO THE FULLEST EXTENT PERMITTED BY APPLICABLE STATE AND FEDERAL LAW, FROM ANY AND ALL ACTS AND OMISSIONS OF THE RELEASED PARTIES, AND FROM ANY AND ALL CLAIMS, CAUSES OF ACTION, COUNTERCLAIMS, DEMANDS, CONTROVERSIES, COSTS, DEBTS, SUMS OF MONEY, ACCOUNTS, RECKONINGS, BONDS, BILLS, DAMAGES, OBLIGATIONS, LIABILITIES, OBJECTIONS, AND EXECUTIONS OF ANY NATURE, TYPE, OR DESCRIPTION WHICH THE RELEASING PARTIES HAVE AGAINST THE RELEASED PARTIES, INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE, GROSS NEGLIGENCE, USURY, FRAUD, DECEIT, MISREPRESENTATION, CONSPIRACY, UNCONSCIONABILITY, DURESS, ECONOMIC DURESS, DEFAMATION, CONTROL, INTERFERENCE WITH CONTRACTUAL AND BUSINESS RELATIONSHIPS, CONFLICTS OF INTEREST, MISUSE OF INSIDER INFORMATION, CONCEALMENT, DISCLOSURE, SECRECY, MISUSE OF COLLATERAL, WRONGFUL RELEASE OF COLLATERAL, FAILURE TO INSPECT, ENVIRONMENTAL DUE DILIGENCE, NEGLIGENT LOAN PROCESSING AND ADMINISTRATION, WRONGFUL SETOFF, VIOLATIONS OF STATUTES AND REGULATIONS OF GOVERNMENTAL ENTITIES, INSTRUMENTALITIES AND AGENCIES (BOTH CIVIL AND CRIMINAL), RACKETEERING ACTIVITIES, SECURITIES AND ANTITRUST LAWS VIOLATIONS, TYING ARRANGEMENTS, DECEPTIVE TRADE PRACTICES, BREACH OR ABUSE OF ANY ALLEGED FIDUCIARY DUTY, BREACH OF ANY ALLEGED SPECIAL RELATIONSHIP, COURSE OF CONDUCT OR DEALING, ALLEGED OBLIGATION OF FAIR DEALIN GOOD FAITH AND FAIR DEALING, WHETHER OR NOT IN CONNECTION WITH OR RELATED CONTRACT IN TORT, OR OTHERWISE, KNOWN OR UNKNOWN, SUSPECTED OR UNSUSPECTED UP TO AND INCLUDING THE DATE OF THIS AGREEMENT (THE "RELEASED CLAIMS"). THE RELEASING PARTIES FURTHER AGREE TO LIMIT ANY DAMAGES THEY MAY SEEK IN CONNECTION WITH ANY CLAIM OR CAUSE OF ACTION, IF ANY, TO EXCLUDE ALL PUNITIVE AND EXEMPLARY DAMAGES, DAMAGES ATTRIBUTABLE TO LOST PROFITS OR OPPORTUNITY, DAMAGES ATTRIBUTABLE TO MENTAL ANGUISH, AND DAMAGES ATTRIBUTABLE TO PAIN AND SUFFERING, AND THE RELEASING PARTIES DO HEREBY WAIVE AND RELEASE ALL SUCH DAMAGES WITH RESPECT TO ANY AND ALL CLAIMS OR CAUSES OF ACTION WHICH MAY ARISE AT ANY TIME AGAINST ANY OF THE RELEASED PARTIES. THE RELEASING PARTIES REPRESENT AND WARRANT THAT NO FACTS EXIST WHICH COULD PRESENTLY OR IN THE FUTURE COULD SUPPORT THE ASSERTION OF ANY OF THE RELEASED CLAIMS AGAINST THE RELEASED PARTIES. THE RELEASING PARTIES FURTHER COVENANT NOT TO SUE THE RELEASED PARTIES ON ACCOUNT OF ANY OF THE RELEASED CLAIMS, AND EXPRESSLY WAIVE ANY AND ALL DEFENSES THEY MAY HAVE IN CONNECTION WITH THEIR DEBTS AND OBLIGATIONS UNDER THE LOAN PAPERS AND THIS AGREEMENT. THIS PARAGRAPH IS IN ADDITION TO AND SHALL NOT IN ANY WAY LIMIT ANY OTHER RELEASE, COVENANT NOT TO SUE, OR WAIVER BY THE RELEASING PARTIES IN FAVOR OF THE RELEASED PARTIES.

EXECUTED effective as of the date first above written.

LENDER:

[], a

By:
Name:
Title:

BORROWER:

[], a

By:
Name:
Title:

GUARANTOR:

[], a

By:
Name:
Title:

[NOTE: THIS AGREEMENT MUST BE RECORDED TO ESTABLISH LIEN PRIORITY AS TO ADDITIONAL AMOUNTS OR MAINTAIN LIEN PRIORITY BEYOND THE LIMITATION PERIOD ON THE DEBT INSTRUMENT]

STATE OF _____ §
 §
COUNTY OF _____ §

This instrument was ACKNOWLEDGED before me, on the _____ day of _____, 200____, by _____, the _____ of [_____], a _____, on behalf of said banking association.

[S E A L]

Notary Public, State of _____
My Commission Expires:
Printed Name of Notary Public

STATE OF _____ §
 §
COUNTY OF _____ §

This instrument was ACKNOWLEDGED before me, on the _____ day of _____, 200____, by _____, the _____ [_____], a _____, on behalf of said _____.

[S E A L]

Notary Public, State of _____
My Commission Expires:
Printed Name of Notary Public

STATE OF _____ §
 §
COUNTY OF _____ §

This instrument was ACKNOWLEDGED before me, on the _____ day of _____, 200____, by _____, the _____ [_____], a _____, on behalf of said _____.

[S E A L]

Notary Public, State of _____
My Commission Expires:
Printed Name of Notary Public

SUPPLEMENTAL PROVISIONS TO MODIFICATION AGREEMENT

This Supplement includes optional provisions which may be used in a Modification Agreement, but which are not normally included.

[INTEREST RATE INSERT - PAY/ACCRUE OPTION:]

1. Interest Rate. Commencing on _____, 200____, interest on the principal amount of the Note remaining from time to time unpaid shall accrue at a per annum rate equal to the lesser of (a) the Maximum Lawful Rate (as defined herein); or (b) a floating rate (the "Accrual Rate") equal to the sum of _____ percent (____%) plus the Base or Prime commercial rate of interest most recently established from time to time by _____, for commercial loans, and in effect on the date of initial determination or adjustment of the Accrual Rate, as described below; provided, however, if at any time a rate of interest specified in clause (b) above would exceed the Maximum Lawful Rate, thereby causing the interest accruing on the indebtedness evidenced by the Note to be limited to the Maximum Lawful Rate, then any subsequent reduction in such base or prime commercial rate shall not reduce the Accrual Rate below the Maximum Lawful Rate until the amount of interest accrued on the indebtedness evidenced by the Note equals the amount of interest which would have accrued on the indebtedness evidenced by the Note if the rate specified in clause (b) above had at all times been in effect. For purposes hereof the Accrual Rate shall be determined initially as of _____, and shall thereafter be adjusted _____, commencing _____. As used herein, the term "Maximum Lawful Rate" means at any time the maximum rate of interest permitted by applicable law, including as to Chapter 303 of the Texas Finance Code, but otherwise without limitation, that rate based upon the weekly rate ceiling, calculated on the basis of a 365- or 366-day year, as applicable, after taking into consideration all sums paid or agreed to be paid to Lender outside the provisions of the Note for the use, forbearance or detention of the indebtedness of Borrower evidenced by the Note and all other charges constituting interest on the indebtedness of Borrower evidenced by the Note.

Commencing on _____, 200____, interest on the principal balance of the Note from day to day outstanding shall be payable at a per annum payment rate (the "Payment Rate") equal to the lesser of (a) the Maximum Lawful Rate or (b) _____ percent (____%) provided, however, if at any time the rate of interest specified in clause (b) would exceed the Maximum Lawful Rate, thereby causing the interest payable on the Note to be limited to the Maximum Lawful Rate, then any subsequent reduction in the Index shall not reduce the Payment Rate below the Maximum Lawful Rate until the total amount of interest paid on the Note equals the amount of interest which would have been paid on the Note if the rate specified in clause (b) above had at all times been in effect. All interest (the "Deferred Interest") which accrues on the Note in excess of the amount paid shall be due and payable on the earlier to occur of (i) maturity (whether by Lender's acceleration of the debt or otherwise) of the Note; (ii) the sale or other transfer (including foreclosure) of the Property, or any part thereof; or (iii) refinancing or prepayment of the Note. Deferred Interest shall not be capitalized and added to the principal balance of the Note and no interest shall accrue thereon until the same shall be due and payable and shall not have been paid. Thereafter, such Deferred Interest shall bear interest to the same extent as principal evidenced by the Note.

Interest computed at the Payment Rate shall be due in consecutive monthly installments commencing _____, 200____, and continuing on the first day of each successive month thereafter. The outstanding principal balance of the Note, together with all accrued but unpaid interest thereon (including Deferred Interest), shall be fully and finally due and payable on _____.

[INTEREST RATE INSERT - CASH FLOW OPTION. INSERT THE FOLLOWING TWO SECTIONS:]

2. Interest Rate and Payment. Commencing on _____, 200____, and continuing on the _____ day of each consecutive Calendar Period (hereinafter defined) thereafter until maturity, this Note shall bear interest at a rate ("Accrual Rate") equal to the lesser of (i) _____ percent (____%) per annum or (ii) the Maximum Lawful Rate (hereinafter defined). As used herein the term "Maximum Lawful Rate" means at any time the highest rate of interest permitted by applicable law, including as to Chapter 303 of the Texas Finance Code, but otherwise without limitation, that rate based upon the weekly rate ceiling calculated on the basis of a 365- or 366-day year, as applicable, after taking into consideration all sums paid or agreed to be paid to Lender outside the provisions of the Note for the use, forbearance or detention of the indebtedness evidenced by the Note, and all other charges constituting interest on the indebtedness evidenced by the Note.

Commencing on _____, 200____, a payment ("Net Cash Flow Payment") for each Calendar Period shall be due and payable on this Note in an amount equal to the Net Cash Flow (hereinafter defined) generated from the Property for the immediately preceding Calendar Period. Net Cash Flow Payments shall be due and payable on or before the last day of the month immediately succeeding the applicable Calendar Period. An Operating Statement (as herein defined) for each Calendar Period shall be submitted to Lender on or before the last day of the month immediately succeeding the applicable Calendar Period.

All Net Cash Flow Payments made hereunder shall be applied in the following order of priority: (i) interest for the applicable Calendar Period calculated at the Accrual Rate; (ii) Deferred Interest; (iii) the outstanding principal balance of the Note; and (iv) any and all other sums secured or evidenced by the Loan Documents. If for any Calendar Period, the Net Cash Flow Payment is insufficient to pay, in full, interest at the Accrual Rate then the Deferred Interest (as herein defined) shall be deferred and shall become due and payable on the Maturity Date. Deferred Interest shall not bear interest, and shall not be capitalized or added to the principal balance of the Note. **[NOTE: IF DEFERRED INTEREST IS TO BE CAPITALIZED AND BEAR INTEREST, THE STRUCTURE MUST BE CAREFULLY REVIEWED TO AVOID USURY.]**

3. Definitions. As used in this Agreement, the following terms shall have the meanings indicated:

(a) "Approved Budget" shall mean the budget for the operation and maintenance of the Property, including specific line items for capital improvements, for each Calendar Period, as approved by Lender, in its sole and absolute discretion.

(b) "Calendar Period" shall mean each [**calendar month**] [**calendar quarter ending on the last day of March, June, September and December**] [**three successive calendar months ending on the last day of _____, _____, _____, and _____**] [**calendar year**] [**fiscal year ending on the last day of the month of _____**] during the term hereof. For purposes hereof, the last Calendar Period shall be deemed to have ended upon the payment in full of the Note, and the first Calendar Period shall be deemed to have commenced upon the date hereof.

(c) "Deferred Interest" shall mean the sum of (i) _____ AND ____/100 DOLLARS (\$_____), which Borrower acknowledges is the amount of interest accrued and outstanding on the indebtedness evidenced by the Note as of [_____, 200____] [**the date hereof**]; and (ii) all interest accruing on the Note at the Accrual Rate for each Calendar Period in excess of the amount of interest for the applicable Calendar Period actually paid to and received by Lender pursuant hereto.

(d) "Expenditures" for each Calendar Period shall mean all reasonable expenses in an amount equal to the lesser of those specific sums set forth in the Approved Budget, or those amounts actually incurred and paid by Borrower with respect to the ownership, operation, management, leasing and occupancy of the Property, determined on a cash basis, including, but not limited to, any and all of the following (but without duplication of any item):

- (i) general real estate taxes to the extent not included in Expenditures by reason of item (xv) of this paragraph;
- (ii) foreign, U.S., state and local taxes other than taxes measured by net income;
- (iii) special assessments or similar charges;
- (iv) personal property taxes;
- (v) costs of utilities, air conditioning and heating for the Property to the extent not paid by lessees or tenants;
- (vi) maintenance and repair costs;
- (vii) management fees, provided, however, the amount of such management fees which may be charged hereunder shall not exceed the sum of _____ percent (___%) of the Gross Revenues (hereinafter defined) for each applicable Calendar Period and, further, such management fee shall not be calculated on units occupied on a rent-free basis by on-site employees of Borrower or any affiliate of Borrower;
- (viii) all salaries, wages and other benefits to "on-site" employees of the Borrower (excluding all salaries, wages and other benefits of officers and supervisory personnel, and other general overhead expenses of Borrower or any other professional manager of the Property) employed in connection with the leasing, maintenance and management of the Property;
- (ix) premiums payable for insurance carried on or with respect to the Property or its operation to the extent not already included in Expenditures by reason of item (xv) of this paragraph;
- (x) costs, including leasing commissions, advertising and promotion costs, to obtain new leases or to extend or renew existing leases, and the costs of work performed and materials provided to ready tenant space in the Property for new or renewal occupancy under leases;
- (xi) outside accounting and audit fees and costs and partnership administrative expenses in each case reasonably incurred by Borrower in connection with the direct operation and management of the Property;
- (xii) principal and interest payable on indebtedness secured by the Property and the existence of which has been approved by Lender in writing, other than the Note;
- (xiii) any payments, and any related interest thereon, to lessees or tenants of security deposits or other deposits required to be paid to tenants but only to the extent any such deposits have been previously included in Gross Revenues;

(xiv) replacements or improvements of a capital nature either set forth in the Approved Budget or as otherwise approved by Lender in its sole and absolute discretion; and

(xv) to the extent not previously provided for in calculating Expenditures with respect to the Property reserves (impounds) for taxes and insurance on the Property required by the Lien Instrument and actually paid to the Lender for such purpose.

Notwithstanding anything to the contrary as being included in the definition of Expenditures, there shall be excluded from Expenditures the following: (i) depreciation, amortization and any other non-cash deduction allowed to Borrower for income tax purposes; (ii) any compensation or fees paid to managing agents, leasing agents, brokers or other third parties or affiliates of Borrower which are in excess of reasonable and necessary compensation or fees which would be payable to unrelated third parties in arms' length transactions for similar services in the area in which the Property is located; and (iii) all salaries, wages and other benefits to "off-site" employees and all other general "off-site" overhead expenses of Borrower or other professional manager of the Property. **[NOTE: REVIEW EACH OF THE ABOVE-REFERENCED CATEGORIES, WHICH ARE SUGGESTIONS ONLY, FOR APPLICABILITY TO THE LOAN BEING MODIFIED.]**

(e) "Gross Revenues" for each Calendar Period shall mean rentals, revenues and other cash forms of consideration, received by, or paid to or for the account of or for the benefit of, Borrower resulting from or attributable to the operation, leasing and occupancy of the Property, determined on a cash basis, including, but not limited to, the following:

(i) Rents by any lessees or tenants of the Property;

(ii) Rents and receipts received by or for the benefit of Borrower with respect to furniture, cable television, licenses, concessions, vending machines and similar items relating to the Property;

(iii) Proceeds received by or for the benefit of Borrower in connection with any rental loss or business interruption insurance with respect to the Property;

(iv) Fair market rent, being substantially the same rental rates as is paid by the lessees or tenants pursuant to subparagraph (e) above, for any portion of the Property that may be used by Borrower or an affiliate of Borrower, excluding therefrom the fair rental value of any reasonable amount of space used by Borrower or any affiliate of Borrower in the maintenance, management or leasing of the Property; it being understood that, without the prior written consent of Lender, the space currently utilized for such purposes shall not be increased;

(v) Any other fees or rents collected by, for or on behalf of Borrower with respect to leasing and operating the Property;

(vi) Any refunds of monies from tax escrows or impounds established, maintained or relating to the Property;

(vii) Any refunds of deposits for obtaining, using or maintaining utility services for all or any portion of the Property;

(viii) Interest, if any, earned by Borrower on security and other type deposits of and advance rentals paid by, any lessees or tenants of the Property; and

(ix) The amount of any security and other type deposits and advance rentals relating to the Property which have been forfeited.

Notwithstanding anything included within the above definition of Gross Revenues, there shall be excluded from Gross Revenues the following: (i) any security or other deposits of lessees and tenants, unless and until the same actually are either applied to actual rentals owed or other charges or fees or forfeited; (ii) the proceeds of any financing or refinancing with respect to all or any part of the Property which has been previously approved in writing by Lender; (iii) the proceeds of any sale or other capital transaction (excluding leases for occupancy purposes only) of all or any portion of the Property; (iv) any insurance or condemnation proceeds paid with respect to the Property to the extent such proceeds are available and are used to restore or rebuild the Property as may be permitted in accordance with the terms of the Lien Instrument, except for rental loss or business interruption insurance; and (v) any insurance and condemnation proceeds applied in reduction of the principal of the Note in accordance with the terms of the Lien Instrument, the Note or the other Loan Documents; provided, however, nothing set forth herein shall in any manner imply Lender's consent to a sale, refinancing or other capital transaction. **[NOTE: REVIEW EACH OF THE ABOVE-REFERENCED CATEGORIES, WHICH ARE SUGGESTIONS ONLY, FOR APPLICABILITY TO THE LOAN BEING MODIFIED.]**

(f) "Net Cash Flow" for each Calendar Period for which a Net Cash Flow Payment is determined shall mean all Gross Revenues for such Calendar Period less all Expenditures for such corresponding Calendar Period, determined on a cash basis.

(g) "Operating Statement" shall mean for each Calendar Period, a report in form satisfactory to Lender in Lender's sole discretion setting forth the calculation of Net Cash Flow for such Calendar Period.

[INTEREST RATE INSERT - PRIME RATE OPTION:]

4. Rate of Interest. Commencing on _____, 200____, interest on the unpaid principal balance from day to day remaining shall be payable at a rate of interest which shall from day to day be at the annual rate equal to the lesser of (a) the Maximum Lawful Rate (as defined herein); or (b) the sum of _____ percent (____%) plus Bank Prime (hereinafter defined), calculated on the basis of a 360-day year; provided, however, if at any time a rate of interest specified in clause (b) above would exceed the Maximum Lawful Rate, thereby causing the interest on the indebtedness evidenced by the Note to be limited to the Maximum Lawful Rate, then any subsequent reduction in Bank Prime shall not reduce the rate of interest on the indebtedness evidenced by the Note below the Maximum Lawful Rate until the total amount of interest accrued on the indebtedness evidenced by the Note equals the amount of interest which would have accrued on the indebtedness evidenced by the Note if the rate specified in clause (b) above had at all times been in effect. Each change in the rate of interest charged hereunder shall become effective, without notice to Maker, on the effective date of each change in the Bank Prime or Maximum Lawful Rate. As used herein, the term "Maximum Lawful Rate" means at any time the maximum rate of interest permitted by applicable law, including as to Chapter 303 of the Texas Finance Code, but otherwise without limitation, that rate based upon the weekly rate ceiling, calculated on the basis of a 365- or 366-day year, as applicable, after taking into consideration all sums paid or agreed to be paid to Lender outside the provisions of the Note for the use, forbearance or detention of the indebtedness of Borrower evidenced by the Note, and all other charges constituting interest on the indebtedness of Borrower evidenced by the Note. As used herein, the term "Bank Prime" means at any time the rate of interest per annum then most recently established by _____ ("Bank") as its prime rate on commercial loans. The term Bank Prime is not intended nor shall it be implied to mean the lowest rate of interest available to the most creditworthy borrowers of Bank. Unpaid principal and interest, after maturity thereof, shall bear interest at

the Maximum Lawful Rate until paid or, if no such rate is designated under applicable law then at the annual rate equal to the sum of five percent (5%) plus Bank Prime, calculated on the basis of a 360-day year.

[PRIOR LIENHOLDER INSERT:]

5. Joinder of Prior Lienholder. _____ ("Prior Lienholder") is the owner and holder of a lien (the "Prior Lien") on all or a portion of the Property, which lien is prior and superior to the lien created by the Lien Instrument. The Prior Lien was created by that certain Lien Instrument dated as of _____, 200__ securing a loan (the "Prior Loan") evidenced by that certain Promissory Note from Borrower [_____] to Prior Lienholder in the principal amount of _____ AND NO/100 DOLLARS (\$_____). [**Contemporaneously with**] [**within ____ days from**] the execution and delivery hereof, Borrower shall cause the Prior Lienholder to execute and deliver to Lender a Consent of Prior Lienholder in form and substance acceptable to Lender in its sole discretion, acknowledging and consenting to the modification of the Loan and Loan Documents in accordance with the terms hereof, and agreeing that the execution hereof by Borrower shall not constitute an event of default under any of the documents evidencing, securing or relating to the Prior Loan.

[SUBORDINATE LIENHOLDER INSERT:]

6. Joinder of Subordinate Lienholder. Lender previously consented to the creation of a lien on all or a portion of the Property, which lien, in favor of _____ ("Subordinate Lienholder"), is expressly subordinate and inferior in all respects to the lien and security interest of the Lien Instrument and Loan Documents. [**Contemporaneously with**] [**within ____ days from**] the execution and delivery hereof, Borrower shall cause the Subordinate Lienholder to execute and deliver to Lender a Consent of Subordinate Lienholder in form and substance acceptable to Lender in its sole discretion, acknowledging and consenting to the modification of the Loan and the Loan Documents in accordance with the terms hereof, and agreeing that the lien and security interest of the Lien Instrument and Loan Documents as modified are and shall remain in all respects superior and prior to the liens and security interests held by the Subordinate Lienholder.

Appendix G

Sample Forbearance Agreement

(see attached)

Forbearance Agreement

THIS FORBEARANCE AGREEMENT (this "Agreement") dated to be effective as of _____, 200____ (the "Effective Date"), is executed and delivered by and between _____ ("Borrower"), a _____ organized under the laws of the State of _____, and [**Lender**] _____ ("Lender"), a _____ organized under the laws of the State of _____,

RECITALS:

A. Lender made a loan (the "Loan") to Borrower on or about [**Loan Date**] _____, _____, in the original principal amount of \$[**Loan Amount**] _____; and

B. Borrower executed and delivered that certain [**Promissory Note**] _____ ("Note") dated _____, _____, payable to the order of Lender, in the original principal amount of \$[**Loan Amount**] _____, evidencing the Loan; and

C. Borrower executed and delivered that certain [**Deed of Trust/Mortgage**] ("Lien Instrument") dated of even date with the Note to [**Original Trustee**] _____, Trustee, for the benefit of Lender, recorded in the Real Property Records of [**County**] _____ County, Texas in Volume _____, Page _____, covering certain property more particularly described therein (the "Property"), to secure the payment of the Note and performance by Borrower of the other obligations set forth in the Note and the Lien Instrument (the Note, the Lien Instrument and all other documents evidencing the Loan or delivered in connection with the Loan are collectively referred to as the "Loan Documents"); and

D. Lender is the current owner of the Loan Documents; and

E. Borrower is currently indebted and obligated to Lender pursuant to the terms of the Loan Documents; and

F. Borrower is currently in default under the Loan Documents as a result of Borrower's failure to pay certain amounts now due and payable to Lender thereunder (the "Specified Default"), without implying that there are no other existing defaults under the Loan Documents, and without implying any waiver by Lender of any such other existing defaults, and Lender has properly accelerated the maturity of the indebtedness evidenced by the Loan Documents; and

G. Borrower has requested Lender to suspend the foreclosure of the Property scheduled for _____, _____, and Lender has agreed to so suspend such foreclosure, subject to the terms and conditions more particularly described in this Agreement.

For and in consideration of the foregoing recitals, the covenants and agreements contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed, Lender and Borrower covenant and agree as follows:

1. Recitals. The above recitals serve as the basis for this Agreement, and are incorporated herein and made a part hereof for all purposes. Borrower and Lender each hereby acknowledge the above recitals to be true and correct as of the date hereof are incorporated herein and made a part hereof for all purposes. The recitals are a substantive, contractual part of this Agreement.

2. Payments by Borrower.

(a) On or before the execution and delivery of this Agreement by Borrower, Borrower shall pay to Lender the amount of \$_____, [**to be applied for the benefit of Borrower in accordance with the Note and Lien Instrument**] [**which amount shall evidence the following:**

- (i) Accrued and unpaid interest on the Note through _____, _____, in the amount of \$ _____; and
- (ii) A fee in the amount of \$ _____.]

[The fee described in clause (ii) in the preceding sentence shall not be applied to any of the indebtedness evidenced by the Note, but shall constitute consideration for the covenants and agreements of Lender under this Agreement.]

(b) On or before the execution and delivery of this Agreement by Borrower, Borrower shall pay to Lender the additional amount of \$ _____, representing Lender's estimate, as of _____, _____, of **[(i) ad valorem taxes, and penalties and interest associated therewith, in respect of the Property for the calendar year _____, plus (ii) the sum due governmental authorities in relation to weed abatement or mowing of the Property]**. On Lender's receipt of such \$ _____ amount, Lender will use reasonable diligence to apply such amount toward such taxes, penalties, interest and other sum in such manner as Lender determines, in its sole discretion. In the event such \$ _____ amount is insufficient to satisfy all of such taxes, penalties, interest and other sum, Borrower agrees that Borrower shall promptly pay and fully satisfy, prior to _____, _____, any and all of such taxes, penalties, interest and other sum that remain unpaid. In the event any portion of such \$ _____ amount is held by Lender following the full payment of such taxes, penalties, interest and other sum by Lender, such portion shall be held in suspense by Lender and applied from time to time, in Lender's sole discretion, to any accrued and unpaid interest on the Note and any other sums due Lender under the Loan Documents and this Agreement. Borrower shall not be entitled to any interest on any of such \$ _____ amount held by Lender. In the event any portion of such \$ _____ amount is held by Lender following the full and final satisfaction of all sums due Lender under the Loan Documents and this Agreement, Lender shall return such portion to Borrower upon Borrower's request.

(c) On or before the execution and delivery of this Agreement by Borrower, Borrower shall pay to **[Lender's Law Firm]** _____ the amount of \$ _____, which amount shall evidence the estimated attorney's fees and disbursements incurred on behalf of Lender in the collection of the indebtedness evidenced by the Note through _____, _____.

(d) On or before _____, _____, Borrower shall pay to Lender the amount of all accrued and unpaid interest on the Note through _____, _____.

All of such payments by Borrower pursuant to this paragraph shall be made by wire transfer of good federal funds or by cashier's check payable to Lender and **[Lender's Law Firm]** _____, as applicable.

3. Performance by Borrower.

(a) On or before the execution and delivery of this Agreement by Borrower, Borrower may provide to Lender written evidence satisfactory to Lender, in its sole discretion (such as a receipt), of the full and final payment in satisfaction of all ad valorem taxes, and any penalties and interest associated therewith, in respect of the Property for the calendar year _____.

(b) On or before the execution and delivery of this Agreement by Borrower, Borrower may provide to Lender written evidence satisfactory to Lender, in its sole discretion (such as a receipt), of the full and final payment in satisfaction of any and all sums due any governmental authority in relation to weed abatement or mowing of the Property.

(c) To the extent Borrower satisfies Borrower's obligation under Paragraph 3(a) or 3(b) above, the sums paid by Borrower in satisfaction of such obligations may be deducted by Borrower from the \$ _____ amount to be paid to Lender in accordance with Paragraph 2(b) above, and all references

in Paragraph 2(b) above to such \$_____ amount shall be deemed to be references to the amount that results from subtracting the amount of such deduction from such \$_____ amount.

4. Suspending Foreclosure. Notwithstanding the continued existence of the Specified Default and any other existing defaults under the Loan Documents, Lender agrees to forbear from foreclosing the Property on _____, _____ and at any time during the Forbearance Period (defined below), in consideration of Borrower's agreements, covenants, releases and waivers contained in this Agreement. Notwithstanding the foregoing, (i) such forbearance by Lender is not intended, shall not constitute and shall not be construed or interpreted to constitute a waiver of the Specified Default, or of any other default which may now or hereafter exist under the Loan Documents, (ii) this Agreement and such forbearance by Lender shall not constitute a reinstatement of the indebtedness evidenced by the Note and secured by the Lien Instrument, and (iii) this Agreement and such forbearance by Lender shall not constitute an amendment or modification of the Loan Documents. All other rights of the Lender contained in the Loan Documents shall remain in full force and effect.

5. Forbearance Period. The Forbearance Period (herein so called) shall commence on the Effective Date of this Agreement, and shall automatically terminate or expire, without notice, on the earlier to occur of (i) a Termination Event, or (ii) _____, _____.

6. Note Balance. Borrower acknowledges and agrees that [as of _____, _____, **immediately following the application of the payment of the accrued interest described in Paragraph 2(a)(i) above: (a) the principal indebtedness outstanding under the Note is \$_____;** (b) **there is no interest accrued but unpaid on the Note, but interest shall continue to accrue after _____, _____, as provided in the Note;** and (c)] all interest charged, paid or received on the Loan Documents is not in excess of the maximum legal amount of interest that can be charged on the Loan Documents under all applicable laws. Borrower acknowledges and agrees that all costs incurred by Lender in connection with this Agreement, any further posting of the Property for a nonjudicial foreclosure, and any other costs incurred by Lender in connection with the collection of the indebtedness evidenced by the Loan Documents shall be added to and included in the indebtedness evidenced by the Loan Documents.

7. Foreclosure. Notwithstanding any provision hereof to the contrary, Lender may take all actions necessary or reasonably appropriate, in Lender's discretion, to prepare for a _____, _____ nonjudicial foreclosure of the Property, or any subsequent foreclosure, including, without limitation, the Property (or any portion thereof) for foreclosure and cause notices of foreclosure to be sent at any time prior to _____, _____.

8. Waiver of Stay and Bankruptcy. Borrower acknowledges and stipulates that: (i) the Specified Default exists under the Note and the Lien Instrument; (ii) the Borrower has received all notices in accordance with the Loan Documents and the Texas Property Code; (iii) the maturity of the indebtedness evidenced by the Note and secured by the Lien Instrument has been properly accelerated, (iv) except as specifically and expressly provided in this Agreement to the contrary, Lender is fully entitled to foreclose its lien under the Lien Instrument; (v) Borrower has at all times been represented by competent counsel of its own choosing in the negotiation, execution and delivery of this Agreement including the provisions set forth below regarding relief from the automatic stay in bankruptcy; (vi) Borrower understands its rights under Title 11 of the United States Code, as amended, and applicable common law, and voluntarily and intentionally agrees to the provisions of this Agreement that relinquish or limit such rights in exchange for the consideration of Lender entering into this Agreement; (vii) upon any filing of bankruptcy by Borrower, Lender shall be entitled to immediate termination of the automatic stay provisions of 11 U.S.C. §362, granting Lender complete relief in allowing Lender to exercise all of its legal rights and remedies, including without limitation, the right to foreclose the lien created in the Lien Instrument, judicially or nonjudicially, or any other right or remedy afforded under the Loan Documents, at law, in equity or otherwise, and Borrower agrees not to directly or indirectly oppose or otherwise defend against Lender's efforts to gain relief from the automatic stay or to foreclose the Property subsequent to the Forbearance Period; (viii) Lender shall be entitled as aforesaid to the lifting of the automatic stay without the necessity of an evidentiary hearing, without the necessity or requirement of Lender to establish or prove the value of the Property covered by the Lien Instrument, or the necessity to prove the lack of adequate protection of Lender's interest in the Property covered by the Lien Instrument; and (ix) the lifting of the

automatic stay pursuant hereto by an appropriate bankruptcy court shall be deemed for cause pursuant to §362(d)(1) of the Bankruptcy Code.

9. Termination Event. Lender may declare a "Termination Event" in the event Borrower shall fail to perform, observe and/or comply with any covenant, agreement or term contained in this Agreement. In addition, a "Termination Event" shall be automatically deemed to have occurred if, during the Forbearance Period, Borrower shall commence (a) a voluntary proceeding, or if an involuntary proceeding shall be commenced against Borrower (by one or more creditors other than Lender), seeking liquidation, reorganization, or other relief with respect to Borrower or its debts under any bankruptcy, insolvency, or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, custodian, or other similar official of it or a substantial part of its property, or (b) any other judicial proceeding against Lender.

10. Rights and Remedies upon Expiration or Termination. In addition to the other provisions of this Agreement, upon the expiration or termination of the Forbearance Period, Lender shall have the right to immediately cease or terminate Lender's forbearance hereunder, without notice or demand, whereupon Lender shall be entitled to immediately exercise any and all rights and remedies available to Lender under the Loan Documents, at law, in equity or otherwise, without further notice, demand, notice of intent to accelerate, notice of acceleration, presentment, protest or other formalities of any kind, all of which are hereby expressly waived by Borrower.

11. Notices. All future notices to Borrower in connection with the Loan may delivered by certified mail return receipt requested, or by Federal Express delivery or by facsimile delivery with machine confirmation of delivery) at the following address:

 Fax No. (____) ____ - _____

12. No Amendment or Modification. Nothing contained herein shall in any manner be construed to amend or modify the terms and provisions of the Loan Documents, including, without limitation, any terms and provisions relating to the accrual of any interest on any outstanding and unpaid amounts due and payable under the Note and/or the Lien Instrument, or the amount of any payments due and payable under the terms of the Note.

13. Representation and Waiver. Borrower hereby represents and warrants to Lender that Borrower does not have any claims or offsets against, or defenses or counterclaims to, the terms and provisions of the Loan Documents. Nevertheless, to the extent any determination or assertion is hereafter made that Borrower has any such claims, offsets, defenses or counterclaims, Borrower hereby waives and hereby releases Lender, its predecessors, successors and assigns, its parents, subsidiaries and affiliates, agents, counsel, trustees, servicers, beneficiaries, certificate holders of Lender, and the officers, directors, shareholders, partners, employees, attorneys and agents of each of the foregoing (collectively, the "Released Parties") from, any and all such claims, offsets, defenses and counterclaims, such waiver and release being with full knowledge and understanding of the circumstances and effects of such waiver and release and after having consulted counsel with respect thereto.

14. Indemnity. **Borrower hereby indemnifies the Released Parties from, and holds each of them harmless against, any and all losses, liabilities, claims, damages, costs and expenses (including reasonable attorneys' fees) to which any of them may become subject which arise from or relate to this Agreement, any of the Loan Documents, any action or alleged action or effort taken or alleged to have been taken by Borrower in connection with the use, operation, or management of the Property, or any action or forbearance in action contemplated hereunder. The obligations of Borrower under this paragraph shall survive the repayment of the indebtedness and the performance of its obligations under the Loan Documents.**

15. Exculpation. By execution hereof, Borrower hereby expressly acknowledges and agrees that Lender shall not be deemed or construed to have assumed any responsibility or liability for the Property, or the management, operations or leasing thereof. Borrower acknowledges and agrees that no Released Party has done anything in connection with the use, operation, or management of the Property which caused any harm or damage to

the Property, Borrower, any tenant, occupant, visitor, or employee of Borrower or the Property. Lender shall not be deemed or construed to be a mortgagee in possession as a result of this Agreement, or any actions taken by Lender or Borrower pursuant hereto.

16. Further Assurances. Borrower hereby agrees to execute, acknowledge, deliver, file and record such further certificates, instruments and documents and do all other acts and things, as may be reasonably necessary or advisable to carry out the intents and purposes of this Agreement.

17. No Waiver; Strict Performance. Borrower hereby expressly acknowledges and agrees that (i) no failure or delay by Lender in exercising any right, power or remedy under this Agreement or under any of the Loan Documents shall operate as a waiver thereof, (ii) no failure or delay by Lender to insist upon the strict performance by Borrower of any term, condition, covenant or agreement or to exercise any right, power or remedy as a result of the breach thereof shall constitute a waiver of any such term, condition, covenant or agreement or of any breach thereof or preclude Lender from insisting on the strict performance thereof, (iii) no single or partial exercise of any right, power or remedy of Lender shall preclude further exercise of any right, power or remedy, and (iv) the acceptance by Lender of a partial payment of any amount due under the terms hereof shall not preclude Lender from requiring the full and timely payment of any and all amounts due under the terms hereof or any of the Loan Documents.

18. Advice of Counsel; Inducement. The parties hereto acknowledge that they have been advised of the facts bearing on the matters set forth in this Agreement and that each of them has been advised of their legal rights by an attorney of their choice and selection. Each party acknowledges that he, she or its duly authorized officer has read this Agreement in its entirety and fully understands its content and effect. Each party hereto acknowledges that this Agreement is being made as a free choice of each of the parties.

19. Relationship. The relationship between Lender and Borrower is solely that of debtor and creditor, and Lender has no fiduciary or other special relationship with the Borrower, and is not a partner or joint venturer with Borrower, and no term or condition of any of the Loan Documents shall be construed so as to deem the relationship between Borrower and Lender to be other than that of debtor and creditor.

20. Applicable Law. THE TERMS AND PROVISIONS OF THIS AGREEMENT, SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF _____. COURTS WITHIN THE STATE OF _____ SHALL HAVE JURISDICTION OVER ANY AND ALL DISPUTES BETWEEN THE PARTIES HERETO, WHETHER IN LAW OR IN EQUITY, INCLUDING, BUT NOT LIMITED TO, ANY AND ALL DISPUTES ARISING OUT OF OR RELATING TO THIS AGREEMENT; AND VENUE IN ANY SUCH DISPUTE WHETHER IN FEDERAL OR STATE COURT SHALL BE LAID IN _____ COUNTY, _____.

21. Headings. The section or paragraph headings hereof are inserted for convenience of reference only and shall in no way alter, amend, define or be used in the construction or interpretation of the text of such section or paragraph. 22. Successors and Assigns. This Agreement is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, legal and personal representatives, successors and assigns, provided, however, that the foregoing shall not be construed to confer any right, title, benefit, cause of action or remedy upon any person or entity not a party hereto, which such party would not or did not otherwise possess.

22. Successors and Assigns. This Agreement is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, legal and personal representatives, successors and assigns, provided however, that the foregoing shall not be construed to confer any right, title, benefit, cause of action or remedy upon any person or entity not a party hereto, which such party would not or did not otherwise possess.

23. Construction. Whenever the context hereof so requires, reference to the singular shall include the plural and likewise, the plural shall include the singular; words denoting gender shall be construed to mean the masculine, feminine or neuter, as appropriate; and specific enumeration shall not exclude the general, but shall be construed as cumulative of the general recitation.

24. Amendment. The provisions of this Agreement may be amended or waived only by an instrument in writing signed by the parties hereto.

25. Severability. If any clause or provision of this Agreement is or should ever be held to be illegal, invalid or unenforceable under any present or future law applicable to the terms hereof, then and in that affected thereby, and that in lieu of each such clause or provision of this Agreement that is illegal, invalid or unenforceable, such clause or provision shall be judicially construed and interpreted to be as similar in substance and content to such illegal, invalid or unenforceable clause or provision, as the context thereof would reasonably suggest, so as to thereafter be legal, valid and enforceable.

26. Counterparts. To facilitate execution, this Agreement may be executed in as many counterparts as may be convenient or required, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. It shall not be necessary in making proof of this Agreement to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, each of the parties hereto.

27. No Oral Agreements. Lender and Borrower each acknowledge that Lender has no obligation to reinstate the Loan and Lender also will have no obligation to deal with Borrower in good faith. Borrower acknowledges that Borrower is not relying on any agreement, representation or warranty of Lender or any representative of Lender in entering into this Agreement, other than the agreements of Lender expressly and specifically set forth in this Agreement. THIS AGREEMENT AND ALL OTHER DOCUMENTS RELATING TO THE LOAN AND TO THIS AGREEMENT CONSTITUTE A WRITTEN AGREEMENT WHICH REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES RELATING TO THIS AGREEMENT OR ANY OF THE LOAN DOCUMENTS.

28. Facsimile Signature Binding. In order to expedite the transaction contemplated herein, telecopied signatures may be used in place of original signatures on this Agreement. Lender and Borrower intend to be bound by the signatures on the telecopied document, are aware that the other party will rely on the telecopied signatures, and hereby waive any defenses to the enforcement of the terms of this Agreement based on the form of signature.

29. Time is of Essence. Time is of the essence of each and every covenant, condition and provision of this Agreement to be performed by the Borrower.

30. Release and Covenant Not to Sue. **BORROWER (IN ITS OWN RIGHT AND ON BEHALF OF ITS RESPECTIVE DIRECTORS, OFFICERS, EMPLOYEES, INDEPENDENT CONTRACTORS, ATTORNEYS AND AGENTS) AND GUARANTORS (IN THEIR OWN RIGHT AND ON BEHALF OF THEIR RESPECTIVE ATTORNEYS AND AGENTS) (THE "RELEASING PARTIES") JOINTLY AND SEVERALLY RELEASE, ACQUIT, AND FOREVER DISCHARGE LENDER AND ITS DIRECTORS, OFFICERS, EMPLOYEES, INDEPENDENT CONTRACTORS, ATTORNEYS AND AGENTS, AND ATTORNEYS (THE "RELEASED PARTIES"), TO THE FULLEST EXTENT PERMITTED BY APPLICABLE STATE AND FEDERAL LAW, FROM ANY AND ALL ACTS AND OMISSIONS OF THE RELEASED PARTIES, AND FROM ANY AND ALL CLAIMS, CAUSES OF ACTION, COUNTERCLAIMS, DEMANDS, CONTROVERSIES, COSTS, DEBTS, SUMS OF MONEY, ACCOUNTS, RECKONINGS, BONDS, BILLS, DAMAGES, OBLIGATIONS, LIABILITIES, OBJECTIONS, AND EXECUTIONS OF ANY NATURE, TYPE, OR DESCRIPTION WHICH THE RELEASING PARTIES HAVE AGAINST THE RELEASED PARTIES, INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE, GROSS NEGLIGENCE, USURY, FRAUD, DECEIT, MISREPRESENTATION, CONSPIRACY, UNCONSCIONABILITY, DURESS, ECONOMIC DURESS, DEFAMATION, CONTROL, INTERFERENCE WITH CONTRACTUAL AND BUSINESS RELATIONSHIPS, CONFLICTS OF INTEREST, MISUSE OF INSIDER INFORMATION, CONCEALMENT, DISCLOSURE, SECRECY, MISUSE OF COLLATERAL, WRONGFUL RELEASE OF COLLATERAL, FAILURE TO INSPECT, ENVIRONMENTAL DUE DILIGENCE, NEGLIGENT LOAN PROCESSING AND ADMINISTRATION,**

WRONGFUL SETOFF, VIOLATIONS OF STATUTES AND REGULATIONS OF GOVERNMENTAL ENTITIES, INSTRUMENTALITIES AND AGENCIES (BOTH CIVIL AND CRIMINAL), RACKETEERING ACTIVITIES, SECURITIES AND ANTITRUST LAWS VIOLATIONS, TYING ARRANGEMENTS, DECEPTIVE TRADE PRACTICES, BREACH OR ABUSE OF ANY ALLEGED FIDUCIARY DUTY, BREACH OF ANY ALLEGED SPECIAL RELATIONSHIP, COURSE OF CONDUCT OR DEALING, ALLEGED OBLIGATION OF FAIR DEALIN GOOD FAITH AND FAIR DEALING, WHETHER OR NOT IN CONNECTION WITH OR RELATED CONTRACT IN TORT, OR OTHERWISE, KNOWN OR UNKNOWN, SUSPECTED OR UNSUSPECTED UP TO AND INCLUDING THE DATE OF THIS AGREEMENT (THE "RELEASED CLAIMS"). THE RELEASING PARTIES FURTHER AGREE TO LIMIT ANY DAMAGES THEY MAY SEEK IN CONNECTION WITH ANY CLAIM OR CAUSE OF ACTION, IF ANY, TO EXCLUDE ALL PUNITIVE AND EXEMPLARY DAMAGES, DAMAGES ATTRIBUTABLE TO LOST PROFITS OR OPPORTUNITY, DAMAGES ATTRIBUTABLE TO MENTAL ANGUISH, AND DAMAGES ATTRIBUTABLE TO PAIN AND SUFFERING, AND THE RELEASING PARTIES DO HEREBY WAIVE AND RELEASE ALL SUCH DAMAGES WITH RESPECT TO ANY AND ALL CLAIMS OR CAUSES OF ACTION WHICH MAY ARISE AT ANY TIME AGAINST ANY OF THE RELEASED PARTIES. THE RELEASING PARTIES REPRESENT AND WARRANT THAT NO FACTS EXIST WHICH COULD PRESENTLY OR IN THE FUTURE COULD SUPPORT THE ASSERTION OF ANY OF THE RELEASED CLAIMS AGAINST THE RELEASED PARTIES. THE RELEASING PARTIES FURTHER COVENANT NOT TO SUE THE RELEASED PARTIES ON ACCOUNT OF ANY OF THE RELEASED CLAIMS, AND EXPRESSLY WAIVE ANY AND ALL DEFENSES THEY MAY HAVE IN CONNECTION WITH THEIR DEBTS AND OBLIGATIONS UNDER THE LOAN PAPERS AND THIS AGREEMENT. THIS PARAGRAPH IS IN ADDITION TO AND SHALL NOT IN ANY WAY LIMIT ANY OTHER RELEASE, COVENANT NOT TO SUE, OR WAIVER BY THE RELEASING PARTIES IN FAVOR OF THE RELEASED PARTIES.

31. Tolling of Statutes of Limitation. The parties hereto agree that all applicable statutes of limitations in respect to the Loan Papers shall be tolled and not begin running until **[end of Forbearance Period]**.

32. Arms-Length/Good Faith. This Agreement has been negotiated at arms-length and in good faith by the parties hereto.

33. Covenants. In consideration of Lender's agreement to forebear as provided for in this Agreement, Borrower covenants and agrees to do the following:

(a) Contemporaneously with the execution and delivery of this Agreement, engage in writing a nationally recognized real estate sale broker reasonably acceptable to Lender to broker the sale or refinancing of the Property.

(b) On or before _____, execute and deliver to Lender an Agreement to Transfer Collateral (the "Transfer Agreement") in form, scope and substance satisfactory to Lender pursuant to which Borrower grants and conveys to Lender or its designee the Property in deed-in-lieu of foreclosure upon the occurrence of a Termination Event.

34. Termination Event. Each of the following shall be defined as a "Termination Event":

(a) Borrower shall fail to strictly perform, observe and/or comply with any covenant, agreement or term contained in this Agreement, time being of the essence, including Borrower's failure to execute and deliver the Transfer Agreement; or (b) Any default or Event of Default (as defined in the Lien Instrument) shall occur after the date hereof under the terms of any of the Loan Documents, without regard to any requirement for grace, notice and/or an opportunity to cure; or

(c) Borrower shall commence a voluntary proceeding, or an involuntary proceeding shall be commenced against Borrower, seeking liquidation, reorganization, or other relief with respect to Borrower or its debts under any bankruptcy, insolvency, or other similar law now or hereafter in effect, or seeking the

appointment of a trustee, receiver, liquidator, custodian, or other similar official of it or a substantial part of its property; or

35. Relationship. The relationship between Lender and Borrower is solely that of debtor and creditor, and Lender has no fiduciary or other special relationship with the Borrower, and is not a partner or joint venturer with Borrower, and no term or condition of any of the Loan Documents shall be construed so as to deem the relationship between Borrower and Lender to be other than that of debtor and creditor.

36. Confidentiality. Borrower recognizes and acknowledges that the terms and provisions of this Agreement are nonpublic and confidential in nature and, therefore, Borrower covenants and agrees that the terms and provisions of this Agreement shall be kept confidential and shall not, without the prior written consent of Lender, be disclosed, directly or indirectly, in whole or in part, by Borrower or any of Borrower's agents or employees; provided, in the event that Borrower or any of Borrower's agents or employees becomes legally compelled to disclose any term or provision of this Agreement, Borrower shall provide Lender with prompt written notice thereof.

37. Limitation of Liability. Reference hereby is made to the Note for certain terms and provisions limiting the liability and obligations of Borrower and its partners under the Loan Documents.

38. Banks' Contingent Covenant not to Sue. In the event that the Lender receives (and applies to the Loan) net proceeds of at least _____ and no/100 dollars (\$_____) from the sales of _____ during the Forbearance Period, then, and only in that event, the Lender hereby covenants that it will not sue or bring any legal action or proceeding against Borrower or Guarantor asserting any nonpayment of the Loan; provided, however, that such covenant not to sue shall be, and is hereby made, subject to and contingent upon the following conditions, to-wit: (a) no Event of Default shall have occurred or thereafter occur; and (b) none of the representations, warranties or certifications made by any Borrower or any Guarantor herein or in any reports or materials delivered to the Lender pursuant hereto shall be false or misleading in any material respect, and in the event of the occurrence of either of the events in said subparts a or b, the covenant by Lender not to sue set forth in this Paragraph shall be automatically revoked and of no further force or effect, without further notice, and the Lender shall be entitled to thereafter pursue and enforce any and all rights and remedies available to the Lender at law or in equity without any constraints or limitations by virtue of this Paragraph. The provisions of this Paragraph shall not however (i) constitute a waiver, release or impairment of any obligation evidenced or secured by any of the Loan Documents; or (ii) constitute a waiver of the right of the Lender to enforce the liabilities and obligations of Borrower or Guarantor, by money judgment or otherwise, to the extent of any loss, damage, cost, expense, liability, claim or other obligation incurred by the Lender (including reasonable attorneys' fees and costs reasonably incurred) arising out of or in connection with any fraud or intentional misrepresentation by Borrower or Guarantor in connection with the Loan, this Agreement, or any financial reports required under Paragraph of this Agreement or otherwise delivered, made or given by either of the Borrower or Guarantor to or for the benefit of the Lender.

39. Notice Requirements Satisfied. The Borrower and Guarantor each acknowledge that all notice requirements embodied in the Loan Documents and imposed upon the Lender in connection with the Specific Default, and the exercise of Lender's remedies therefore (together with all applicable cure and/or grace periods), have been satisfied (or shall be deemed to have been satisfied by this Agreement) without exception, including the acceleration of the Note, and that upon the expiration of the Forbearance Period, the Lender shall, with respect to the Specific Default, have the full right and power to exercise all remedies granted to it there under without further notice to Borrower, Guarantor or any of them and subject to no other conditions precedent.

40. Agreement in the Nature of Forbearance Only. The Borrower and Guarantor each hereby acknowledge that the Lender's obligations under this Agreement are in the nature of a conditional forbearance only, and that the Lender has made no agreement or commitment to reinstate, modify or extend the Loan Documents, and that, upon the termination of the Forbearance Period, the Lender shall have the immediate and unconditional right to exercise its remedies under the Loan Documents.

[SIGNATURES APPEAR ON NEXT PAGE]

EXECUTED effective as of the Effective Date.

LENDER:

_____,
a _____

By: _____
Name: _____
Title: _____

BORROWER:

By: _____
Name: _____
Title: _____