



**MICHAEL JAY GREEN AND ASSOCIATES, INC.**

841 Bishop Street, Suite 2201  
Honolulu, Hawai'i 96813  
Tel: (808) 521-3336  
Fax: (808) 566-0347

June 21, 2023

**VIA HAND DELIVERY**

Ms. Dawn N. S. Chang  
DLNR Main Office, Kalanimoku Building  
1151 Punchbowl Street  
Honolulu, Hawaii 96813

Re: Notice of Default and Settlement Demand for Lessor Under General Lease S-5844 ("Lease") by and between State of Hawaii, and its Board of Land and Natural Resources ("Lessor") and WHR, LLC ("Lessee")

Dear Chairman Chang:

Glenn H. Uesugi, Esq. and I represent WHR LLC and Tower Development, Inc. in the above referenced matter. Enclosed please find WHR, LLC's Notice of Default and Settlement Demand for Lessor Under General Lease S-5844 ("Lease") by and between State of Hawaii, and its Board of Land and Natural Resources ("Lessor") and WHR, LLC ("Lessee").

There is a board meeting scheduled for Friday, June 23, 2023 regarding reasonable consent request for the new replacement mortgage to pay off the existing mortgage. We sincerely feel that the State of Hawaii's approval of this new mortgage is in the best interests of all parties, including but not limited to the State of Hawaii. It is reasonable for the State of Hawaii to consent to the replacement loan, especially since there is absolute zero downside risk in approving the replacement \$50 million loan for the existing \$50 million loan.

My client stands ready and willing to come to a reasonable resolution of this matter. Please contact me at your earliest convenience to discuss.

Ms. Dawn N. S. Chang  
June 21, 2023  
Page 2

Thank you for your attention to this matter. We look forward to hearing from you soon.

Very truly yours,



~~MICHAEL JAY GREEN~~

MJG: ka  
Enclosure

cc: Governor Joshua Green (w/ enclosure)

## NOTICE OF DEFAULT

June 21, 2023

State of Hawaii  
Department of Land and Natural Resources  
PO Box 621  
Honolulu Hawaii 96809  
Attn: Administrator R. Tsuji

Re: Notice of Default of Lessor Under General Lease S-5844 ("Lease") by and between State of Hawaii and its Board of Land and Natural Resources (collectively "Lessor") and WHR, LLC ("Lessee")

Dear Governor and Chair Chang,

This office has been retained by WHR, LLC ("Lessee"), which is the owner of the Grand Naniloa Resort, a DoubleTree by Hilton located in Hilo, Hawaii ("Naniloa"). Time is of the essence for resolution of the Naniloa new \$50,000,000 Mortgage consent request to the DLNR as Lessor ("Lessor") since the foreclosure sale date has been set for July 26, 2023. The Chairperson and BLNR have been asked by Lessee and ownership of the Naniloa for more than 12 months to approve a new \$50M replacement Mortgage to pay off the existing \$50M Mortgage. The State has not a single downside risk in approving this replacement Mortgage. This new Mortgage will avoid the foreclosure sale of the Naniloa and allow the successful ownership group to continue its good works in the Hilo community and the State of Hawaii. However, there seems to be a mess created by certain staff members within DLNR that have resulted in a Default of Lessor. Thus, please address the Defaults identified herein promptly:

1. **Notice of Default.** Pursuant to the rights granted to WHR LLC, as "Lessee" under General Lease S-5844 ("Lease"), the State and DLNR are hereby served with this Notice of Default dated June 20, 2023 ("Notice of Default") with respect of Lessor's numerous defaults as identified herein. This Notice of Default outlines specifically the bad faith actions of Mr. Tsuji's that have resulted in Lessor's default for failure to comply with Sections 20.a. and Sections 37 of the Lease.

- a. Section 20.a. expressly obligates a process for a "**written consent of the Chairperson, which consent shall not be unreasonably withheld**" relating to new mortgage requested by Lessee.
- b. Section 37 expressly obligates DLNR to act timely for mortgages, since the Lease states, "**Time is of the essence in all provisions of this lease.**"

2. **Respectfully Request DLNR and Chairperson Comply With Sections 20.a and 37 of the Lease and Take Immediate Steps to Cure Past Defaults.** Lessee respectfully requests and demands the following actions be taken in order to avoid (x) the foreclosure sale on July 26, 2023, and (y) the filing of a lawsuit by Lessee against Lessor for damages and losses caused by Lessor's default, which are in excess of \$50,000,000. Unless the following actions are implemented to avert a lawsuit on or before 3:00 p.m. June 23, 2023, Lessee will have no alternative but to protect its interests and take legal action:

- a. **Immediate Settlement Meeting.** Lessee respectfully requests an immediate settlement meeting with Attorney General on or before June 22, 2023, between Attorney General and Michael Greene to discuss a resolution and cure of the Lessor's numerous defaults identified herein and the Notice of Default attached hereto as Exhibit "A".

- b. Require Disclosure to BLNR of The Governing Lease Terms For “Reasonable Consent” and “Factors That Determine Reasonable Consent” for New Mortgages. Lessee respectfully requests DLNR staff advise both BLNR and Chairperson of the Lease terms that govern “reasonable” consent of any new Mortgage for the Naniloa (note, Mr. Tsuji has intentionally ignored complying with and in fact has not even explained in the Reports to BLNR and Chair the governing Lease Sections 20.a and 37. Moreover, Mr. Tsuji has failed to identify the factors of a “reasonable Mortgage” that are standard in the industry and have been fully explained in communications to Mr. Tsuji but ignored 100%. The reasonableness factors set forth in Section 4 below clearly indicate Lessee’s Mortgage is reasonable. However, Mr. Tsuji ignores all of these applicable factors and does not even analyze or explain them in any denial reports to the BLNR. Thus, the Chairperson has received inaccurate reports and false reports (by the omissions). Thus, DLNR has failed to comply with the Lease obligations for over a year due to Mr. Tsuji’s intentional omissions of the reasonableness factors related to Lessee’s consent request.
- c. Immediate removal and replacement of Russell Tsuji. Lessee demands the immediate removal and replacement of Russell Tsuji from any oversight or involvement of Lessor consent requests for any new Naniloa Mortgage or BLNR hearings until a complete investigation is completed as to his involvement in interfering with the Naniloa’s consent applications to refinance the Naniloa with a new reasonable Mortgage. There is an appearance that Mr. Tsuji has self-interests to cause (x) a foreclosure and (y) a denial of the consent requests (as seen in his reports to BLNR), based on these self-interests. It is our hope we do not need to explore this in future litigation. Mr. Tsuji has also blatantly and intentionally misinformed the BLNR, intentionally omitted the governing Lease provisions from BLNR Reports, intentionally omitted positive facts that would allow for reasonable approval by BLNR, intentional made misrepresentations to the BLNR regarding known facts and has shown he is incapable of being impartial or objective (and is frankly personally biased against the ownership) and unable to act in the best interests of Hilo, Island of Hawaii and this great State of Hawaii.
- d. Appoint Big Island/Hilo Representative Gordon Height or alternative staff that has the ability to act impartial and unbiased in the best interest of the State. Lessee believes replacement staff, whether Gordon Height or otherwise, will have the ability to act impartial and look at the expert factors and easily conclude the new Mortgage is reasonable and should be consented to by the Chairperson.
- e. Immediate Investigation for Intentional Interference by Russell Tsuji, and/or other Staff That Have Intentionally Misled Chairperson, DLNR and BLNR and Interfered with respect to Lessee’s New Mortgage Consent Request for the Naniloa From January 1, 2022, until the present. Based on information and belief, it is our understanding that certain staff within DLNR have omitted positive information that would support approval of the New Mortgage and/or provided false information to Chairperson, BLNR and DLNR including Russell Tsuji, to interfere with the success of Lessee in gaining consent of the new replacement Mortgage.

3. **Background.** In April, 2022, Lessee started the request for consent of a new Mortgage, to solve a foreclosure risk arising from Covid shutdowns. If the Mortgage subject to the consent request is "reasonable," the Chairperson is required to consent to the new Mortgage. Due to continued recommended denials by Russell Tsuji and BLNR, when in fact the new Mortgages are reasonable, ownership is now faced with a foreclosure sale date of July 26, 2023. A foreclosure would be
4. catastrophic with over \$50M in damages and losses to ownership. A foreclosure would be caused solely due to Lessor's Defaults of the Lease, primarily **Lessor's obligation to reasonably consent to Lessor's/Naniloa's new Mortgage requests in a timely fashion.** Notwithstanding the obvious Defaults of Lessor, it is absolutely bad faith that "reasonable consent" has not yet recommended by Lessor, staff and specifically Mr. Russell Tsuji.
5. **Reasonableness Factors.** WHR submitted reasonable factors (received from Colliers as an expert), as shown in graph below. This graph compares (a) the Naniloa 2018 Mortgage consented to by Chair Case to (b) the current 2023 proposed Mortgage. The chart indicates it is the same lender as 2018--Wells Fargo, b) it is the same loan amount as 2018--\$50M, c) it is the same term loan as 2018--5 years and (d) the Naniloa Net Income is at a record \$7.8M in 2022 versus \$4.9M pre-covid in 2018, more than \$2M higher. Yet, Mr. Tsuji concludes the new Mortgage "is not sustainable". ***Mr. Tsuji needs to answer the question: "How was a \$50M Mortgage sustainable in 2018, but is not in 2023 when there is more than \$2M more income in 2022 and 2023?"*** Mr. Tsuji's avoided all of this discussion and merely recommends "denial" of the Naniloa new Mortgage because "it is not sustainable" without any factual support. In all of his reports, Mr. Tsuji doesn't analyze any of the expert/reasonable factors—he usurps his public duty to be impartial and ignores the reasonableness factors.

If Mr. Tsuji were to analyze the reasonableness factors for a new Mortgage in the best interest of the State, he would be required to admit to the Chairperson and BLNR the new Mortgage that have been proposed by Lessee are "reasonable." He would also have to disclose to the Chairperson and BLNR that the key factors are the new Mortgage has less than a 60% Loan-to-Value ("LTV") and 1.4 Debt Service Coverage Ratio ("DSCR") which easily dictate the new Mortgage proposed by the Naniloa is "clearly reasonable". This would then necessitate the Chairperson to consent to the new Mortgage. Wells Fargo, and prior proposed lenders such as UBS in May 2023 and Sculptor in June 2022, should have had their loans approved as well and the failure to approve prior new Mortgage requests constitute defaults under the Lease. These prior Mortgage consent requests were easily sustainable by the Naniloa and clearly the industry factors mandated they were "reasonable". Thus, Mr. Tsuji intentionally ignored the expert factors in his possession.

Had Mr. Tsuji acted impartial and in the best interest of the State since May 2022, through the hearing on May 12, 2023, through the present proposed hearing scheduled for June 23, 2023, we would not be subject to a foreclosure sale. Had anyone impartial reviewed the facts of our applications of a new Mortgage, we would have, by now, received a consent to a new Mortgage from the Chairperson.

Notice of Default  
 State of Hawaii/DLNR  
 June 20, 2023

**REASONABLE FACTORS OF EXPERTS 2018 MORTGAGE V. 2023 MORTGAGE**

Colliers International - Factors to Determine if a Hotel Loan/Mortgage is Reasonable & Sustainable					
	Reasonableness Factors	2023 New Loan (DLNR Reviewing)	2018 Loan (DLNR Approved)	Reasonable?	Comments
1	Wells Fargo Lender Qualifications?	Wells Fargo	Wells Fargo	Very Reasonable	A Very Qualified CMBS Lenders and Same as 2018
2	Loan Structure?	CMBS	CMBS	Very Reasonable given CMBS structure is the standard often used for hotels	2023 proposed loan has the Exact Same CMBS Loan structure: 5 Year, Fixed Rate Loan (Note: CMBS Loans have the Highest Level of Underwriting B/C the loan is in a Securitized Pool and Subject to Rating Agency Review)
3	Term of the Loan	5 Years	5 Years	Reasonable	80% of all commercial hotel are 5 years or less. The loan approved in 2018 has the same term as 2023.
4	Loan to Value (LTV) ?	52.85% = \$50M/\$94.6M	49.5% = \$50M/101M	Very Reasonable given anything under 60% is very conservative	Hotel Loans Historically Average 70%+/- LTV and are "reasonable", but the 2018 and 2023 Loan are both lower than 60% LTV, which makes them more than reasonable.
5	Debt Coverage Ratio (DCR)	1.40	1.40	Very Reasonable given 1.25 is rough standard in the industry	A DCR of 1.25 is known by Mr. Tsuji to be a reasonable norm, as stated in DLNR Meeting Minutes on 6.9.2022 (7 hours 23 minutes). Mr. Tsuji omits to disclose this the 6/23/23 Report. Why? Because Mr. Tsuji would have to then admit the Mortgage is sustainable and reasonable. The higher the ratio over 1.25, the more sustainable the loan/mortgage is. Our loan is at least a 1.4 DCR meaning the hotel income is 140% greater than the total annual loan payments, and thus better than the market and higher than the 1.25 Mr. Tsuji testified in the past as a norm. The 2022 Income evidences the income coverage over the debt service is at or above a DCR of 1.4 and, thus, easily sustainable. Why doesn't Russell advise the BLNR to very positive fact that proves the loan is sustainable? In fact, Russell does not provide a single factor showing the Mortgage is not sustainable by the Hotel.
6	Does the Income support the Loan Payments	Yes	Yes	Very Reasonable given \$7.7M 2022 Net Income covers the approximate \$4M annual loan payments	There is Annual Net Income of approx. \$2-3M per year surplus over the loan payments during the loan term. Both UBS and Wells Fargo would not approve a loan that does not have income to support loan payments.
7	Is the Interest Rate Reasonable?	Yes, the SOFR 5 year swap interest rate index is the market norm	5.72%	Reasonable given the market. Any rate between 7-8% is reasonable in this market	As of June 21, 2023, the Index of 5 Year Swap is at 3.737 plus 415 equals 7.887%, which is higher than 2018 due to the market interest rate changes, but the interest rate is the market rate today. Wells Fargo interest rate proposal is a very reasonable given the market and given we lost the UBS loan due BLNR taking us off of the June 9 agenda.
8	Is the Interest Rate Fixed?	Yes	Yes	Very Reasonable	This is a 5 year SOFR Swap rate. Mr. Tsuji's prior report illustrates confusion of a SOFR and SOFR Swap rate. What is a SOFR Swap: "SOFR Swap rate is a swap where a counterparty pays a fixed-rate on an annual basis... This rate is a common benchmark for pricing fixed-rate CMBS and other fixed-rate loans" (Source: Chatham Financial).
9	Appraiser Qualifications	HVS	HVS	Very Reasonable—especially given same appraiser as 2018	Same Institutional Qualified Appraiser in 2018 and 2023. Independently hired by UBS and Wells Fargo due to HVS's market expertise.
10	Manager of WHR Experience	Yes	Yes	Very Reasonable	WHR has been a leader in taking Naniloa to \$7.7M in revenues post Covid. WHR is now appointing Benjamin Rafter and Springboard to take the Naniloa to even greater heights.
11	Cash Commitment to Cure the Foreclosure	Yes	NA	Very Reasonable	WHR has committed to fund difference between the loan amount and payoff of Rialto \$64M, which means the Naniloa company owners are willing to invest \$15M+ to close the new Wells Fargo Loan/Mortgage. Moreover, Ben Rafter testified, he will backstop this amount. Thus, the ownership is behind the Naniloa 100%.
12	Russell Tsuji Term: Is the loan sustainable?	Yes	Yes	Very Reasonable	Russell Tsuji has not evidence in his 6/23/23 Report any fact that contests a single factor in items 1-11 or demonstrates these factors are unreasonable. Thus, he can't opine that the Mortgage is unreasonable. Based on the reasonableness factors 1-11 herein, the Mortgage and Wells Fargo loan are clearly reasonable and clearly sustainable. Moreover, any commercial mortgage expert would opine the Wells Fargo mortgage is clearly sustainable and reasonable.

Notice of Default  
State of Hawaii/DLNR  
June 20, 2023

6. **No Negative Factors of the New Mortgage Cited by Staff or DLNR.** Lessee has asked Mr. Tsuji to identify any factors that would indicate the new Mortgage is unreasonable in order that Lessee may address them. To date, not a single negative factor has been pointed out by Mr. Tsuji that justifies denial of our consent request. Mr. Tsuji clearly can't find a factor that justifies a conclusion the new Mortgage is "unreasonable", especially given there is not a single downside to the State in approving a replacement \$50M Mortgage. However, Mr. Tsuji, with legal support, concludes the new Mortgage should be denied upon every Lessor request.
7. **Experts Conclude the Naniloa's new Mortgage is Reasonable.** Experts have opined that the new Mortgage proposed by Lessee is reasonable, including the Receiver George Van Buren, Colliers International Jordi deHoyas, Colliers International Mark Bratton and other hotel industry experts that have extensive mortgage experience including Ben Rafter (CEO and President of Springboard Hospitality) and Michael Paulin (founder and CEO of Aqua Hotels). Even after the experts opined that a \$54M new Mortgage was reasonable, Lessee made a good faith gesture to lower the new Mortgage to \$50M. Thus it is more reasonable today than before. Yet Mr. Tsuji doesn't acknowledge any of the expert opinions or factors they list in support of their expert opinions.
8. **Conclusion.** Mr. Tsuji's intentional disregard of the Lease terms has resulted in numerous and repeated Lease defaults by Lessor during 2022 and 2023 for failing to consent based on the reasonable standard in the Lease. He has single handedly caused a foreclosure sale of the Naniloa to be set for July 26, 2023, unless the State and Chairperson step in and consent to the new \$50M replacement mortgage. A reasonable consent recommendation by Mr. Tsuji in the reports could have solved all Covid impacted issues and eliminated all existing outstanding loan amounts that went into default based on Hawaii State Covid shutdown.
9. **State Support of Ownership.** As the State, DLNR, Mayor Roth, and entire Hilo community is aware, the Naniloa ownership is an example of community driven leadership with a focus on helping the community of Hilo at every turn. The Naniloa ownership has made significant contributions to the Hilo community including revitalizing Banyan Drive with its 30M+ restoration of the Naniloa, bringing Hilton to Hilo, supporting Merrie Monarch and the Polynesian Voyaging Society in many of the community driven endeavors in addition to many other cultural and community contributions over the past 10 years. Isn't it about time the State and DLNR act in good faith to assist the Naniloa to refinance the hotel with a new Mortgage consistent with the Lease terms and conditions?
10. **Demand.** Demand is hereby made for the State and DLNR, and specifically Chairperson (as required in Section 20.a of the Lease) to cure the Default and further consent to the new \$50M replacement Mortgage and complete the consent in a timely manner to allow the Chairperson to provide a consent in respect of the proposed new mortgage on or before June 23, 2023, which will allow the ownership to avert a foreclosure sale scheduled for July 26, 2023.

Lessor's failure to cure the defaults will result in a claim for damages and losses in excess of \$50M.

We endeavor to reach a mutually acceptable resolution and timely consent of Lessee's New Mortgage.

WHR LLC, as Lessee under General Lease S-5844

**From:** [Matthew A. Cohen](#)  
**To:** [Tsuji, Russell Y](#); [DLNR.BLNR.Testimony](#); [Chang, Dawn](#)  
**Cc:** [Lau, Colin J](#); [Moore, Kevin E](#); [Hirokawa, Ian C](#); [Heit, Gordon C](#); [Michael Lam](#); [Edwina R. Hoover](#); ["Terrence M. Lee"](#); [China, Julie H](#)  
**Subject:** [EXTERNAL] Naniloa/General Lease S-5844: Consent Request With Conditional Approval of Consent of Mortgage of General Lease S-5844 (June 23, 2023 Meeting)  
**Date:** Wednesday, June 14, 2023 4:43:37 PM  
**Attachments:** [Exhibits to 2023.06.14 Consent Request With Specific Agreed Upon Conditional Approval of Consent of Mortgage of General Lease S-5844 \(June 23, 2023 Meeting\).pdf](#)  
[2023.06.14 Consent Request With Specific Agreed Upon Conditional Approval of Consent of Mortgage of General Lease S-5844 \(June 23, 2023 Meeting\).pdf](#)  
[2023.06.14 Cover Letter Consent Request With Specific Agreed Upon Conditional Approval of Consent of Mortgage of General Lease S-5844 \(June 23, 2023 Meeting\) \(1\).pdf](#)

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Chairperson Chang, Administrator Tsuji, and BLNR/DLNR Staff: In anticipation of inclusion on the June 23, 2023 agenda, I am delivering Lessee WHR LLC's Consent Request With Specific Agreed Upon Conditional Approval of Consent of Mortgage of General Lease S-5844, together with a cover letter, and a separate pdf of exhibits.

Please let me know if I can provide additional information.

**Matthew A. Cohen**

Case Lombardi | [Director](#)

Pacific Guardian Center, Mauka Tower Suite 2600

737 Bishop Street, Honolulu, HI 96813

office (808) 547-5400

direct (808) 547-5468

mobile (808) 218-3000

[mac@caselombardi.com](mailto:mac@caselombardi.com)

*Please note that our firm name changed as of January 1, 2023.*

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CASE LOMBARDI  
A LAW CORPORATION

David G. Brittin  
Lisa K. Broulik  
Michelle J. Chapman  
Matthew A. Cohen  
Stacey W.E. Foy  
Adelbert Green

Michael L. Lam  
Dennis M. Lombardi†  
Jon M.H. Pang  
Lauren R. Sharkey  
Mark G. Valencia

† A Law Corporation  
Daniel H. Case (1925-2016)

PACIFIC GUARDIAN CENTER, MAUKA TOWER  
737 BISHOP STREET, SUITE 2600  
HONOLULU, HAWAII 96813-3283

TELEPHONE: (808) 547-5400  
FACSIMILE: (808) 523-1888  
E-mail: info@caselombardi.com  
http://www.caselombardi.com

Ka'ōnohiokalā J. Aukai IV  
Madlaine N. Farmer  
Kenneth V. Go  
Samuel W. King, II  
James W. Rooney  
Steven E. Tom

Of Counsel  
Gregory M. Hansen  
Michael R. Marsh  
Frederick W. Rohlfing III

June 14, 2023

State of Hawaii  
Board of Land and Natural Resources  
Chairperson, Dawn N.S. Chang  
Board Members  
Administrator Russell Y. Tsuji  
Kalanimoku Building  
1151 Punchbowl St. Room 132  
Honolulu, Hawaii 96813

**Via email to:**  
*dawn.chang@hawaii.gov*  
*russell.y.tsuji@hawaii.gov*  
*blnr.testimony@hawaii.gov*

Re: June 23, 2023 Meeting Agenda Item TBD  
**Consent Request With Specific Agreed Upon Conditional Approval of Consent of Mortgage of General Lease S-5844**, WHR LLC, Lessee; Waiakea, South Hilo, Hawaii, Tax Map Keys: (3) 2-1-01:012 and 2-1-05:013, 016, 017, 027, 032, and 046

Dear Chairperson Chang, Board Members, and Mr. Tsuji:

On behalf of WHR LLC ("Lessee"), as Lessee under the above-referenced Lease ("Lease"), we deliver to you Lessee's **Consent Request With Specific Agreed Upon Conditional Approval of Consent of Mortgage of General Lease S-5844**, in accordance provision of the Lease, including Section 20.a. (indicating that the Chair is held to a reasonable consent standard) and Section 37 (reciting that time is of the essence for all provisions).

Thank you for your consideration. Please contact us if you have any further questions. We remain willing to meet with Mr. Tsuji and/or the AG to discuss the pending request and/or to provide additional information.

Very truly yours,  
CASE LOMBARDI

*/s/ Matthew A. Cohen*  
**Michael L. Lam**  
**Matthew A. Cohen**

MAC  
3922111

Enclosures: Consent Request With Specific Agreed Upon Conditional Approval of Consent of Mortgage of General Lease S-5844, Exhibits A - E

**Consent Request With Specific Agreed Upon Conditional Approval of Consent to Mortgage of General Lease S-5844**

**A** **New Mortgage Consent Request:** Lessee WHR LLC ("Lessee" under General Lease S-5844 hereby requests Consent of the Mortgage based on the requirement in the General Lease in accordance provision of the Lease, including Section 20.a. (indicating that the Chair is held to a reasonable consent standard) and Section 37 (reciting that time is of the essence for all provisions).

**B** **Need for New Lender due to not approving UBS by June 9.** Because this consent item was not included on the BLNR Agenda for June 9, 2023, the previously-proposed UBS loan has been terminated and Lessee is now in emergency mode to have a loan closed before the foreclosure in July, 2023. In order to prevent harm to the Naniloa Hotel, Lessee has asked its existing lender Wells Fargo to finance a replacement new Mortgage. Wells Fargo has indicated it will do so if Lessee can obtain a conditional consent on June 23, 2023. Wells Fargo will then process the Mortgage in July for a closing on July 21, 2023. The new Well Fargo Mortgage allows for an easy consent of new Mortgage by BLNR since it is the same format of loan approved by BLNR in 2018.

As a result of not being included on the June 9, 2023, Lessee also lost its \$125,000 deposit previously delivered to UBS.

**C** **Documentation in connection with Consent Request:**

**Exhibit A:** Real Estate Capital Markets Application Letter, dated June 13, 2023 ("**Term Sheet**"). Generally, the Term Sheet sets the following terms for the proposed new loan:

- \$50M Maximum Loan Consent Request, and Wells Fargo will decide between \$48M and \$50M upon Closing – same as 2018;
- 5 Year Loan Term – same as 2018;
- Fixed Interest Rate for entire 5 Year Loan Term – same as 2018, subject to higher market interest rates based on the Term Sheet; and
- Annual Payments Amortized over 30 Years (clarified in this Term Sheet not to allow any “interest only payments”)

**Exhibit B:** **Mortgage Consent** form that was approved in 2018.

**Exhibit C:** **Mortgage** (substantially same as existing Wells Fargo Mortgage modified for the New Term Sheet and subject to AG review for consistency between the Term Sheet and Mortgage)

**Exhibit D:** **Loan Agreement** (substantially same as existing Wells Fargo Loan Agreement modified for the New Term Sheet and subject to AG review for consistency between the Term Sheet and Loan Agreement). Section 11.6,

regarding Lender's right to restructure the loan with "mezzanine loans" will not be included.

**Exhibit E:** **Promissory Note** (substantially same as existing Wells Fargo Promissory Note modified for the New Term Sheet and subject to AG review for consistency between the Term Sheet and Promissory Note).

**D. Recommendation for Motion for Conditional Approval of consent of Mortgage of Lease:**

The proposed mortgage of General Lease S-5844 should be approved, subject to the following conditions:

1. The State's "Consent Form" will be in the form consistent with the State requirements and subject to the AG approving such form consistent with State applicable governance and requirements.
2. The State's consent shall be subject to the AG approving the Mortgage as consistent with the Term Sheet and State applicable governance and requirements.
3. Upon payment of approximately \$64 Million to existing lender, the existing mortgage shall be fully released and there shall be no other rights of the existing Mortgagee, Rialto, or any other party to have ability to lien or secure any interest against the Lessee Ground Lease interests.
4. Lender will not have the option to restructure the loan with a mezzanine option, and Borrower shall not permit any mezzanine borrowing.
5. The mortgage will be the only loan-security encumbrance on the Lease, and will not encumber the State's underlying fee interest.
6. The loan shall not exceed FIFTY MILLION DOLLARS (\$50,000,000).
7. The interest rate shall be fixed at loan closing for the five year term of the loan.
8. Loan payments will be fixed principal and interest payments, as provided in the Term Sheet.

Annual Loan Payments are estimated at \$4,402,587 (based on fully amortized annual payments using the fixed interest rate calculation of 7.95% using SOFR 5-year Swap Rate based on the index rate as of June 14, 2023, being 3.79 for the 5-year SOFR Swap Rate plus 415 points as stated in the Term Sheet)

Estimated Loan Balance Upon Maturity: \$47,534,928

9. Resolution and prompt dismissal of all pending litigation with the existing lender, Wilmington Trust National Association as Trustee for the Benefit of the Holders of Bank 2018-BNK14, Commercial Mortgage Pass-Through Certificates, Series 2018-BNK14, by and through its Special Servicer Rialto Capital Advisors, LLC.

10. The members of Lessee will provide the funding to make up the difference between the payoff required to satisfy the existing loan and the amount of the proposed new loan.

11. A Benjamin Rafter-owned and controlled Hawaii limited liability company will be the controlling manager of Lessee WHR LLC, as set forth in the Operating Agreement of WHR.

12. The Operating Agreement shall be subject to the review and approval of the AG as being consistent with the Consent granted herein.

13. Such other reasonable conditions as may be required by the AG in processing the legal documents of the new Mortgage.

14. Approval will be conditioned on Attorney General review and approval of the final Mortgage, Loan Agreement, Promissory Note, and Operating Agreement of WHR LLC for consistency with the foregoing conditions.

*-End -*

**Exhibit A**  
**to Consent Request With Specific Agreed Upon Conditional Approval of Consent to  
Mortgage of General Lease S-5844 dated June 14, 2023**

Term Sheet dated June 13, 2023



**REAL ESTATE CAPITAL MARKETS APPLICATION LETTER**

June 13, 2023

Wells Fargo Bank, N.A.  
333 S. Grand Avenue, Suite 900  
Los Angeles, CA 90071  
Attn: James Ko

Ladies and Gentlemen:

Applicant hereby applies for a commercial mortgage loan (“Loan”) from the Real Estate Capital Markets Group of Wells Fargo Bank, N.A. (“WFB”) in accordance with the indicative terms and conditions of this Application Letter, the exhibits attached hereto and any related materials. Your application request was received via email.

A. Principal Business Terms.

***Applicant:*** WHR, LLC

***Borrower:*** A recycled or to-be-formed single purpose entity formed exclusively for the purpose of owning and operating the Property (an “SPE”), which must be organized and structured in a manner acceptable to WFB (including, without limitation, and subject to the approval of WFB, an Amended and Restated Operating Agreement for WHR, LLC with Ben Rafter added as a Manager). Borrower shall qualify as a bankruptcy remote entity, including but not limited to having either a “two tiered” SPE ownership structure or being an acceptable SPE single member Delaware limited liability company with a “springing member” having one acceptable independent director and the delivery of a non-consolidation opinion at closing. Any required independent directors shall be professional directors provided by a nationally recognized corporate services company.

***Property (address):*** 93 Banyan Drive, Hilo, Hawaii

***Property Description:*** A 388-key hotel located in Hilo, Hawaii.

***Loan Amount:*** Not to exceed the lowest of the following:

- (a) \$48,000,000 - \$50,000,000 depending upon final underwriting and approval of all conditions of this Application;
- (b) 55% of the appraised value of Property based upon an acceptable MAI appraisal conforming to FIRREA standards and ordered by WFB;
- (c) an amount such that WFB’s underwritten cash flow will cover debt service at a coverage ratio of 1.40:1.0 (“DSCR”) using the actual 30 year amortizing loan constant at the time of funding; or
- (d) an amount such that WFB’s underwritten cash flow will cover debt service at a DSCR of 1.3:1.0 using a loan constant of 10% (i.e. a 13.00% NCF Debt Yield).

**Interest Rate:** Fixed annual rate set by WFB over the telephone (with Applicant on the telephone agreeing to the Interest Rate) on the morning of Loan funding, to be calculated on the basis of a 360-day year and charged on the basis of actual days elapsed (“Actual/360 Basis”). The Interest Rate shall be (a) 415 basis points (“Spread”) plus (b) the 5-year offer side U.S. SOFR Swap Rate, as determined by WFB (“Index”), but in no event shall the Index be less than 3.35%.

Applicant acknowledges that WFB intends to securitize the proposed Loan and understands the Commercial Mortgage Backed Securities (“CMBS”) market is in a period of price volatility. The Spread stated above is reflective of current conditions and should be viewed as a “spot” price. Applicant understands and agrees the final Spread will be subject to market movements during the processing of the Application and may be higher or lower than the current estimate stated above.

**Term:** 5 years, plus any partial accrual period at the beginning of the Loan term.

**Amortization:** Principal and interest amortized over 30 years, with a balloon payment due at maturity. Notwithstanding that interest accrues on an Actual/360 Basis, equal monthly payments of principal and interest (prior to balloon payment due at maturity) shall be determined using a 360-day year consisting of 12 months of 30 days each (“30/360 Basis”). Applicant acknowledges that interest calculated and charged on an Actual/360 Basis exceeds that which would be calculated and charged on a 30/360 Basis.

**Deposit Account:** At closing, Borrower will establish a restricted deposit account (“Deposit Account”) with WFB or another bank reasonably acceptable to WFB. During the Loan term, Borrower (or property manager) will collect all cash revenue from the property and deposit such funds into the Deposit Account. At closing, Borrower will direct any commercial tenants and credit card companies to pay all amounts due with respect to the Property directly into the Deposit Account. Prior to a Trigger Event, all cleared funds in the Deposit Account will be transferred without deduction to Borrower’s operating account on a daily basis. After a Trigger Event occurs, funds in the Deposit Account will be transferred to WFB to be applied in accordance with the loan documents

For purposes hereof, a Trigger Event Period will mean a period commencing upon (a) an event of default has occurred under the loan documents or (b) the DSCR at the Property (based on 30-year amortization) falls below 1.25x based on actual TTM net cash flow, tested quarterly and expiring upon (i) with respect to a Trigger Event Period commenced in connection with clause (a) above, upon the cure of the related event of default, (ii) with respect to a Trigger Event Period commenced in connection with clause (b) above, upon the date that the DSCR shall have been equal to or greater than 1.30x for two (2) consecutive calendar quarters.

**Prepayment:** Prohibited during the earlier of (a) three years after the first payment date or (b) two years after securitization of the Loan (“Lockout Period”). Thereafter, the Loan will be subject to defeasance as described below. Prepayment in full will be permitted at par on any date during the last three months of the Loan term (the “Open Period”) provided that interest is paid through the end of the accrual period in which such prepayment occurs. Note: Borrower may elect for 6 months open for a add-on to spread of [+9] basis points.

**Defeasance:** Following the Lockout Period, Borrower shall be permitted to release the Property from the lien of the mortgage by paying to WFB a defeasance deposit (in an amount sufficient to defease the Loan as determined by WFB in accordance with the terms of the Loan documents) in lieu of a prepayment thereof. The defeasance deposit must be an amount sufficient to purchase direct, non-callable U.S. obligations that provide for payments at least equal to the amount of each monthly installment under the note to and including the maturity date (together with the applicable balloon payment).

**Limited Recourse:** Non-recourse, except for fraud, misappropriation of funds, willful misconduct, waste, bankruptcy, prohibited transfers, SPE violations, environmental matters and other non-recourse carve-out items customarily required by WFB for transactions of the type described herein. Additional deal-specific items

may be required after completion of WFB's due diligence and underwriting. Liability for these exceptions will be borne by Borrower, Edward Bushor, Stuart Miller, Michael Paulin, Benjamin Rafter (CEO and President of Springboard Hospitality), and one or more persons or entities acceptable to WFB (each a "Guarantor"). If any Guarantor is an entity, such Guarantor may be required to maintain a minimum net worth and liquidity acceptable to WFB throughout the term of the Loan.

**Assumption:** Up to two (2) loan assumptions will be permitted by a qualified buyer acceptable to WFB for a fee equal to 1% of the then outstanding principal balance (but not less than \$15,000) per assumption and payment of WFB's internal and external costs, including, without limitation, credit, title, legal, rating agency, appraisal, environmental and structural report costs. No assumptions will be permitted during the 60 day period prior to or after a securitization.

**Security/Priority:** The Loan will be secured by, among other things, a first mortgage lien on Borrower's fee interest in the Property, first priority assignment of rents and leases and first lien security interest in personal property collateral, including all equipment, fixtures, goods and all tangible and intangible personal property used in the operation of the Property and all management, licenses and other agreements for the Property.

**Ground Lease:** As a condition to the closing of the Loan, the Borrower must provide WFB with (a) a certified copy of the ground lease for the Property (and all amendments) between the Borrower and the fee owner (the "Ground Lease") and (b) an estoppel certificate and recognition agreement from the fee owner in form and substance acceptable to WFB. The Ground Lease must contain provisions acceptable to WFB including, but not limited to having a minimum remaining term extending at least 10 years beyond the date on which the Loan would have fully amortized based on the "Amortization" set forth herein. During the Loan term, all ground rent payments must be made from the restricted account associated with the Lockbox described above. In addition, (i) Borrower and Guarantor will be liable for losses resulting from any failure to pay ground rent as required under the Ground Lease and (ii) the Loan will become fully recourse to Borrower and Guarantor if the Ground Lease terminates or expires for any reason during the Loan term.

**Other Financing:** No other financing, whether secured or unsecured, and no mezzanine loans, no pledge of any direct or indirect ownership interest in the borrowing entity, shall be permitted.

**Liability and Property**

**Insurance:** Borrower shall be required to provide coverage that is satisfactory to WFB and is consistent with the following general coverage requirements: (a) "All Risk", "Special Perils" or "Special Cause of Loss" hazard insurance in an amount equal to the full replacement cost of the Property, (b) Public liability insurance, in amounts satisfactory to WFB; (c) Business interruption insurance for a period of 12 months and in an amount equal to 12 months' gross revenues (NOTE: Loans \$30 million and above will be required to have 18 months of business interruption coverage); (d) Flood insurance, if the Property is in a special flood hazard area; (e) Earthquake insurance if the Property is in a seismic zone 3 or 4 and the probable maximum loss is 20% or more; (f) Terrorism insurance in an amount satisfactory to WFB; and (g) such other insurance as may be reasonably required by WFB. Insurance companies shall be rated per WFB's insurance requirements and deductibles shall not exceed \$25,000. For loans where any tenant is providing all or a portion of the required insurance, any deficiencies in the coverage in regard to WFB requirements may require additional coverage to be purchased by the Borrower.

As a federally regulated financial institution, WFB is required to strictly comply with the provisions of the Flood Disaster Protection Act ("FDPA") (regardless of whether the Property is located in a "Special Flood Hazard Area"), and will not be able to close the Loan until all FDPA due diligence has been completed and approved. Borrower's timely delivery of all items requested by WFB in connection with FDPA compliance is essential to avoid delays in closing.

**Tax and Insurance**

**Impounds:** Required monthly, along with a "catch-up" deposit at closing. Funds will be held in an account at WFB.



Notwithstanding the foregoing, the insurance impound shall be suspended provided the Property is covered by an acceptable blanket policy, there is no event of default, and Borrower provides ongoing evidence of acceptable renewals and timely-paid premiums.

***Other Impounds:*** May be required at closing or monthly, or both, in a total amount equal to 125% of the estimated costs and expenses, as determined by WFB-approved engineering and environmental studies, of (a) any immediately needed repair and maintenance items and (b) any environmental and seismic remediation requirements. Funds will be held in an account at WFB.

***FF&E Reserves:*** The Loan will require a monthly reserve for furniture, fixtures and equipment, the amount is estimated at 4.0% of EGI and will be determined by WFB after WFB's evaluation of the engineering report and at the completion of WFB's underwriting of the Loan. Funds in this reserve will be released to Borrower for reimbursement of the cost of certain furniture, fixtures and equipment.

***Seasonality Reserve:*** A seasonality reserve may be required based upon WFB's underwriting of the Property.

***PIP Reserve:*** An escrow shall be required at closing in an amount equal to 115% of the estimated costs with regard to any outstanding Property Improvement Plan ("PIP") items, based upon WFB's underwriting and review of the PIP. In addition, Guarantor will be liable for any losses resulting from Borrower's failure to comply with the PIP.

***Hotel Franchise Agreement:*** The Property must at all times be operated under a franchise agreement approved by WFB which must be satisfactorily assigned to WFB at closing. At closing, Borrower will be required to deliver to WFB a satisfactory "comfort letter" from the franchisor in form and substance satisfactory to WFB. In addition, if the franchise agreement terminates or expires, the Loan will become fully recourse to Borrower and Guarantor until Borrower enters into a replacement franchise agreement satisfactory to WFB.

***Hotel Management Agreement:*** The management agreement for the Property must be acceptable to WFB in all respects. It shall be a condition to closing that manager shall enter into a subordination agreement with WFB that is acceptable to WFB in all respects.

***Reporting:*** A current STR Report and certified historical operating statements will be required 5 days prior to Loan closing, which must be satisfactory to WFB in all respects. After closing, ongoing reporting will include periodic STR Reports and operating statements as well as certain other periodic reports including annual financial statements, operating statement, balance sheet and budget.

***Title Insurance:*** At closing, WFB must be provided title insurance in form and substance satisfactory to WFB. Title and escrow must be coordinated through a nationally recognized title insurer satisfactory to WFB.

***Survey:*** Prior to closing, Borrower must provide an as-built survey in form and substance satisfactory to WFB. The survey must be prepared to ALTA standards and must conform to WFB's standard survey criteria.

***Governing Law; Forum:*** The Application shall be governed by, and construed in accordance with, California law, without regard to principles of conflicts of laws. Any action, suit, proceeding or litigation arising out of or relating in any way to this Application shall commence and be maintained exclusively in the state or federal courts of the State of California. Each party hereto hereby waives its right to a trial by jury in any action, suit, proceeding or litigation arising out of or relating in any way to this Application. Applicant shall be responsible for WFB's legal fees in the event Applicant is unsuccessful in any action, suit, proceeding or litigation brought against WFB.

***Sale or Syndication:*** WFB may sell, assign, transfer, encumber, pledge or otherwise dispose of, participate, syndicate and/or securitize all or a portion of its interest in the Loan at any time and WFB may disclose information related to the Loan, Applicant, Borrower, Sponsor and Guarantor and the key principals of such parties to actual or prospective buyers, investors, rating agencies and other participants in connection therewith.

***Standby Deposit:*** A deposit of (a) \$10,000 in immediately available funds (certified check made payable to “Wells Fargo Bank, N.A.” or wire sent per attached wire instructions) must be submitted along with a signed copy of this Application Letter and (b) \$90,000 in immediately available funds (certified check made payable to “Wells Fargo Bank, N.A.” or wire sent per attached wire instructions) must be submitted within 24 hours of receipt of approval of this Application Letter from the State of Hawaii Department of Land and Natural Resources, but in no event not later than June 23, 2023 (collectively, the “Standby Deposit”). The Standby Deposit will be used in connection with the costs and expenses incurred by WFB relating to the Loan, including a \$15,000 fee (“Processing Fee”) in consideration of WFB’s processing of the Loan.

***Loan Fee:*** 1.00%.

***DLNR Approval and Proposed Closing:*** Upon DLNR consenting to the contemplated Mortgage in connection with this Term Sheet on or before June 23, 2023 (which shall remain subject to the State of Hawaii Attorney General approving all Mortgage related documents and terms and conditions in connection with the contemplated Mortgage), the parties shall continue to process this Loan Application for a contemplated closing estimated to occur in July 2023. If DLNR fails to provide consent by June 23, 2023, by voting for “denial” of the consent of the proposed Mortgage, this Term Sheet shall terminate.

Applicant acknowledges that the complete terms of the Loan will be set forth in detail in WFB’s standard loan documents

B. Applicant’s Agreement. In order to induce WFB to accept the Application for processing, Applicant hereby agrees to the Principal Business Terms set forth above and acknowledges and agrees as follows:

1. Third Party Reports. Applicant hereby authorizes WFB to engage outside consultants (“Third Party Providers”), at Applicant’s sole cost and expense, to provide an appraisal (“Appraisal”), an environmental assessment (“Phase I”), a property condition report, which may include the results of an inspection for toxic mold (“Property Condition Report”), a probable maximum loss assessment (if applicable), a full seismic report (if applicable), an insurance review, a credit analysis and a zoning review. The reports of such consultants (collectively, “Third Party Reports”) and the internal reviews and site inspections by WFB personnel (at Applicant’s cost) shall be subject to the approval of WFB. Applicant shall facilitate or otherwise provide access to the Property for WFB, its agents and consultants. The Third Party Providers shall not be agents or employees of WFB and WFB shall have no liability for any losses incurred by Applicant as a result of the presence of the Third Party Providers at the Property.
2. Standby Deposit. The Standby Deposit described above must be submitted along with a signed copy of this Application Letter. Applicant shall be responsible for all costs and expenses incurred by WFB relating to the Loan (regardless of whether or not the Loan closes), including costs relating to Third Party Reports, legal fees and the Processing Fee. After payment of all costs and expenses incurred by WFB (including the Processing Fee), the balance of the Standby Deposit shall be refunded to Applicant (i) at closing or (ii) if the Loan does not close despite Applicant’s good faith efforts. If WFB’s costs and expenses exceed the Standby Deposit, Applicant shall promptly pay such difference to WFB upon demand.
3. Closing Costs. Applicant shall pay all escrow, title, survey, zoning reporting, credit reporting, legal, site inspection and any other closing-related costs whether or not the Loan closes.
4. Indemnity. Applicant shall pay any brokerage or finder’s fees, commissions or other compensation which may be or become due in connection with the Application or the Loan arising out of or related to any mortgage banker, mortgage broker, or similar party claiming to have been engaged to assist Applicant in locating an appropriate lender, or gathering or packaging due diligence information, or similar tasks. Applicant shall defend, indemnify and hold WFB and its affiliates, employees, officers, directors, and agents harmless from and against any and all claims, liabilities, costs or expenses which WFB or any such affiliate, employee, officer, director or agent may incur by reason of the assertion of any claim for any such compensation. This indemnity shall survive the closing of the Loan.

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5. Exclusive Right. Applicant hereby grants Wells Fargo's Real Estate Capital Markets Group the exclusive right to underwrite and provide commercial mortgage financing on the Property for a period ("Exclusivity Period") commencing on the date of WFB's receipt of this signed and dated Application Letter and continuing until the Outside Closing Date or the date WFB disapproves the Application (if such disapproval occurs prior to the Outside Closing Date). Accordingly, no application by Applicant, Applicant's affiliates or Borrower for a commercial mortgage loan or loan commitment on the Property shall be pending with any other lender at the time of WFB's receipt of this signed and dated Application Letter and neither Applicant, Applicant's affiliates nor Borrower shall apply for or accept any such loan or loan commitment from any other lender during the Exclusivity Period. This section shall not apply if Receiver disapproves of this Loan.
6. Days. All references in this Application Letter to a "day" or a "date" shall be to a calendar day unless specified as a business day.
7. No Loan Commitment. Neither this Application Letter nor WFB's receipt of a Complete Application (as hereinafter defined) constitutes a contract or commitment by WFB to provide financing with respect to the Property. WFB is under no obligation to fund the Loan. No agreement (whether written, oral or otherwise) that may be reached during negotiations with respect to financing the Property, nor any course of dealing between the parties, shall constitute a commitment by WFB to lend or otherwise be binding upon the parties unless a binding commitment letter and/or final binding loan documents have been executed, delivered and accepted by all parties (in which case such agreements shall be binding only to the extent set forth therein and in the case of final loan documents only to the extent the Loan actually closes). In WFB's sole discretion, WFB may decline to proceed with a financing of the Property or may change the proposed terms of the Loan as set forth in this Application Letter (including, without limitation, the Interest Rate and Loan Amount), including in the event that WFB determines in its sole discretion that adverse changes have occurred in the condition of (a) the Property, any material tenant, Applicant, Borrower, Sponsor, Guarantor or any of their affiliates or (b) the financial, banking, real estate or capital markets (or any regulatory requirements imposed on WFB with respect thereto) that could impair the viability, sale or profitability of the Loan. If your application for business credit is denied, you have the right to a written statement of the specific reasons for the denial. To obtain the statement, please write to Derek Kilburn, Real Estate Capital Markets, Wells Fargo Bank, N.A., 301 S. College Street, Charlotte, NC 28202 within 60 days from the date you are notified of our decision. We will send you a written statement of reasons for the denial within 30 days of receiving your request for the statement.
8. Loan Approval. The Loan is subject to WFB's approval in its sole discretion in accordance with WFB's credit policy and credit approval process following completion of WFB's due diligence. The due diligence process includes but is not limited to receipt, review and approval in WFB's sole discretion of all items required in the Loan Application (ie. the Application Letter, the exhibits attached hereto and any related materials) and any other required underwriting and legal due diligence and documentation.
9. Legal Diligence. Loan documentation will be prepared and legal review will commence after receipt by WFB of a signed Application and applicable deposits. Loan closing is subject to satisfactory legal due diligence by WFB and its counsel and to the satisfaction by Borrower of all legal requirements of WFB and its counsel.

C. Completion and Return of Application.

1. Complete Application. For WFB to formally consider Applicant's loan request, Applicant must deliver (a) this Application Letter, signed and dated where indicated, together with the Standby Deposit, to WFB within 3 business days after the date of this letter; and (b) all items requested by WFB within a reasonable timeframe prior to closing. The items described in clauses (a) and (b) of the immediately preceding sentence are collectively referred to herein as the "Complete Application". If WFB does not receive such items within the time periods indicated, WFB may not be able to close by the Outside Closing Date (defined below) or may consider the loan request withdrawn and take no further action regarding it.

Any change by Applicant to the terms hereof shall be deemed a rejection of this Application Letter by Applicant and shall not be enforceable against WFB, its successors and/or assigns unless WFB shall have given its express written consent to such change. Failure by WFB to respond to any such change shall not be deemed to constitute acceptance by WFB. No oral modifications of this Application Letter shall be effective or binding upon WFB.

2. Outside Closing Date. The Loan must close on or before July 28, 2023 ("Outside Closing Date"). At WFB's sole and absolute discretion, WFB may extend the Outside Closing Date, but, in no event later than 90 days from the date hereof, unless extended by Lender in its sole discretion (which may be evidenced by written communications between Borrower and

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Lender regarding the ongoing processing of the Loan following the Outside Closing Date). However, WFB may first require Applicant to deposit additional funds with WFB to be added to the Standby Deposit.

D. Special Conditions. The terms herein are subject to the following:

1. Satisfactory site inspection.
2. Appraisal support of underwritten net cash flow assumptions, including ADR, occupancy, RevPAR and operating expenses.
3. Satisfactory review of sponsor credit and financials.

## Commercial Real Estate Notices

### **Appraisal Notices**

In connection with an application for credit that is to be secured by a first lien on a "dwelling" (as defined in 12 CFR Section 1002.14(b)(2)), which is defined as a residential structure that contains one to four family units whether or not that structure is attached to real property, including but not limited to an individual condominium, cooperative unit, mobile home or other manufactured home, you as an applicant have a right under 12 CFR Section 1002.14(a), to receive a copy of all written appraisals or other written valuations developed in connection with the application. The appraisal or valuation must be provided to you promptly upon completion, or the earlier of three business days prior to consummation of the transaction for closed-end credit, or at account opening for open-end credit. You may waive these timing requirements and agree to receive a copy of the appraisal or valuation at or before consummation of an extension of credit, except where prohibited by law, provided such waiver is obtained at least three business days prior to consummation of an extension of credit. If you provide such a waiver and consummation or an extension of credit does not occur, you must be provided a copy of the appraisal or valuation no later than 30 calendar days after it is determined that consummation will not occur or the extension of credit will not be made. For credit requests secured by a first lien on a "dwelling", Wells Fargo may charge you a reasonable fee to reimburse the bank's costs of appraisals or valuations, but must timely deliver copies to you whether or not the costs are paid. Wells Fargo may not charge for photocopy, postage, or other costs incurred in providing a copy of an appraisal or other written valuation to you, and the permitted reasonable fee for appraisal or valuation costs may not include such copy and/or delivery costs.

In connection with an application for credit that is to be secured by nonresidential real property in California, you have a right under California Business and Professions Code Section 11423(c) to receive a copy of the written appraisal used in connection with the application, upon satisfaction of the following conditions precedent: (i) your submittal of a written request for such copy to your Relationship Manager, at the address where the application was submitted, not more than 90 days after: (a) delivery to you of notice of the action taken on the application, including a notice of incompleteness; or (b) your withdrawal of the application; and (ii) your payment of all appraisal fees and other costs incurred in producing the appraisal and all actual copying costs.

### **USA Patriot Act Customer Identification Program (CIP) Disclosure Notice:**

To help the government fight the funding of terrorism and money laundering activities, U. S. Federal law requires financial institutions to obtain, verify, and record information that identifies all parties defined as a "customer" as well as, in certain cases, individuals or entities who have control over or are associated with an account. What this means for you: When you open an account or add any additional service for an institution, we will ask for the entity's name, address, tax identification number, affiliations and ownership. We may ask to see certified articles of incorporation or other identifying documents on the entity. Additionally, we may request identifying information on the individuals or entities that have control over or are associated with an account.

### **Equal Credit Opportunity Act – Notice (Regulation B)**

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the Applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency, which administers compliance with this law concerning Wells Fargo Bank, N.A. is the Consumer Financial Protection Bureau (CFPB), 1700 G Street NW., Washington, DC 20006. <http://www.consumerfinance.gov>.

If your application for business credit is denied, you have the right to a written statement of the specific reasons for the denial. To obtain the statement, please notify Wells Fargo in writing within 60 days from the date you are notified of our decision. We will send you a written statement of the reasons for the denial within 30 days of receiving your request for the statement.

### **CALIFORNIA PROPERTIES ONLY: California Hazard Insurance Requirements (California Civil Code 2955.5)**

In accordance with California Civil Code §2955.5(b) which requires that a lender provide this disclosure to a borrower, you are hereby notified that Civil Code §2955.5(a) states that "no lender shall require a borrower, as a condition of receiving or maintaining a loan secured by real property, to provide hazard insurance coverage against risks to the improvements on that real property in an amount exceeding the replacement value of the improvements on the property". The amount of replacement or insurable value coverage required by Wells Fargo will be determined upon completion of an appraisal and costing or other evaluation documentation or information for the subject loan.

The following Disclosure Notice will be provided to customers when applicable:

- [Loans in Areas Having Special Flood Hazards \(Flood Disaster Protection Act of 1973 et seq.: 12 CFR 22\)](#)

### **Credits Secured by Real Property in Florida - Insurance**

The following Statement of Anti-Coercion (Florida Regulations 69B-124.013) is required under Rule 69B-124.002, F.A.C., of the rules and regulations promulgated by the Chief Financial Officer relative to anti-coercion:

The Insurance Laws of this state provide that the lender may not require the borrower to take insurance through any particular insurance agent or company to protect the mortgaged property.

The borrower, subject to the rules adopted by the Chief Financial Officer, has the right to have the insurance placed with an insurance agent or company of its choice, provided the company meets the requirements of the lender. The lender has the right to designate reasonable financial requirements as to the company and the adequacy of the coverage.

I have read the foregoing statement or the Rules of the Chief Financial Officer relative thereto, and understand my rights and privileges and those of the lender relative to the placing of such insurance.

*For information regarding Wells Fargo's privacy and security policies, please visit <https://www.wellsfargo.com/privacy-security>*

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**Real Estate Capital Markets - CMBS Origination  
Notice of Incomplete Application**

RE: Request for Extension of Credit from Real Estate Capital Markets

Dear Applicant,

This notice is provided in order to comply with the Equal Credit Opportunity Act. We thank you for your interest in pursuing financing with Wells Fargo. We are in receipt of your initial application for business credit. Please find below the information needed to make a credit decision on your application, as applicable. Additional items may be requested at a later date in order to render a final credit decision. We need to receive the information below within 120 calendar days from the date of the term sheet. If we do not receive the items listed on the following pages by this date, we will give no further consideration to your credit request.

Sincerely,

Relationship Manager

**Please Note: After Review of Information Received, Additional Information May Be Required. Not all items below may be applicable to subject transaction.**

1. Organizational Chart (please detail ownership percentage interests down to the underlying individuals as well as identify all managers/control parties of Borrower.)
2. W-9 Form for Borrowing Entity (October 2018 form version) (Please fill out with EXACT borrowing entity name, including any punctuation, tax ID Number, and physical address, as we cannot accept a PO Box address on this form)
3. Customer Information Form for Borrowing Entity (form to be provided)
4. Executed Copy of Certification of Beneficial Owner Form (form to be provided)
5. Operating Agreement for Borrowing Entity (or draft, if newly formed entity)
6. Certificate of Formation, Certificate of Good Standing, Certificate of Incorporation, Articles of Organization or other equivalent evidencing filing for Borrowing Entity
7. Certification & Credit Investigation Authorization (to be provided)
8. Customer Activity Prescreening Form (to be provided)
9. Application Form – Exhibit A (to be provided)
  
10. Sources & Uses Statement for Loan Proceeds
11. Detailed cost basis (refinance)
12. Existing loan payments history (refinance)
13. Property Management Company Resume (even if property is not managed by a third party)
14. Property Management Agreement (fully executed)
15. Ground Lease
16. Alta Survey
17. Site Plan
18. Purchase & Sale Agreement (if deal is an Acquisition)
19. Real Estate Tax Analysis
20. Information on Real Estate Tax Abatements
21. Historical Tax and Insurance Bills for the last 3 years
22. Current Property Tax Bill Evidencing Payment (Online confirmations are acceptable)
23. Current Property Insurance Premium Bill Evidencing Payment
24. Full contact information for borrower's insurance broker (name, firm, email address, phone and fax numbers) and for any
25. Executed Leases and All Amendments and/or Assignments for ALL Tenants
26. Tenant that is insuring their leased space, evidence of property and liability coverage
27. Tenant Estoppels (form to be provided)
28. SNDAs for Tenants with Purchase Options/ROFR to Purchase
  
29. Borrower tax returns (refinance only, should include income statement and balance sheet)
30. Borrower financials including balance sheet - Signed and Dated by the Manager of the Borrowing Entity
31. Borrower's bank statements (past 12 months for multifamily/MHC/self-storage)
32. Guarantor Financial Statement – within 6 months (within 3 months for Small Loans) - certified, signed, and dated
33. Guarantor's Current Real Estate Schedule
34. Guarantor tax returns
35. Guarantor Resume (including paragraph(s) summarizing Real Estate Owned)
36. Verification of liquid assets for Guarantor

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37. Current Rent Roll
38. Most Recent Operating Budget or Proforma
39. Current Capital Budget
40. Property Improvement Plan or description of the proposed construction/renovation, proposed construction/renovation costs, proposed construction/renovation
41. Historical Capital Expenditures for the past 5 years
42. Average Annual Occupancy for last 10 years (or 5 years if 10 years is not available)
43. Occupancy Statistics Report (self-storage only)
44. Current Aged Receivables Report
45. Breakout Other Income (if not detailed on operating statements)
46. Breakout Percentage/Overage Rent by Tenant (if Property type is Retail)
47. Expense Reimbursements Reconciliations/Tenant CAM reconciliation reports for last 3 years and current month billing
48. Trailing 12 Month Operating Statement (may also request 3 recent years)
49. Unit Mix summary (multifamily/MHC/self-storage) (if applicable)
50. Sample Lease (multi-family / mobile home park / self-storage)
51. Historical Tenant Improvements and Leasing Commissions (TI/LCs) (office, retail, and industrial) for last 3 years and current year to date.
52. Tenant Sales Information for Tenants Required to Report Sales for last 3 years and current year to date- (Retail only)
53. Tenant Financial Statements for last 3 years and current year to date (Only for tenants that submit financial statements and are greater than 20% of the NRA)
  
54. Please summarize how the subject property has been impacted by the COVID-19 pandemic (occupancy declines, collection issues, closures, rent re-structures; any other pertinent information)
55. Please provide full summary of tenant rent relief or abatements relating to Covid including (i) rent relief requests/inquiries; (ii) rent relief granted (temporary or permanent); and (iii) tenant delinquencies / any tenants not paying rent.
56. Has the Borrower (not the Sponsor) received a PPP loan?

**Hotel Only**

57. Franchise Agreement
58. Last Two Guest Satisfaction/ Franchise Inspection/Quality Assurance Reports
59. Most Recent STR Report
60. Corporate Account Breakdown
61. Market segmentation reports
62. Forward Group Bookings (PACE) Report
63. Comfort Letter

**Small Loans / Multifamily Express Only:**


64. Existing Environmental reports
65. First page of trust documents
66. Reliance Letters for all borrower ordered third party reports – Wells Fargo to provide form after internal review has been complete
67. Existing Operations & Maintenance (O&M) program for asbestos-containing materials (ACM) if property was built prior to 1981 (if not available, borrower will need to engage a vendor to complete and O&M report or provide verification that they've done a full survey and all ACM has been properly removed)
68. Existing Operations & Maintenance (O&M) program for lead-based paint (LBP) if property was built prior to 1979 (if not available, borrower will need to engage a vendor to complete an O&M report or provide verification that they've done a full survey and all LBP has been properly removed)
69. Radon verification (if located in Zone 1, borrower must provide evidence of satisfactory radon testing or verification that a radon mitigation system has been installed)
70. Auto Draft Authorization Form

RETAIN A COPY FOR YOUR RECORDS

**By its signature below, Applicant certifies and acknowledges that Applicant has read the Federal Equal Credit Opportunity Act, Appraisal, and U.S.A Patriot Act Disclosure Notices above and further certifies and acknowledges that Applicant has reviewed all the terms and conditions of this Application and that all information contained in this Application (including all exhibits, forms and information submitted with the Application) is true, complete and correct. Applicant acknowledges that WFB is relying on the truthfulness, completeness and accuracy of all documents, representations, statements and other communications and information made in connection with the proposed loan, whether provided by Applicant or any other party, and agrees to immediately notify WFB in writing of any change with regard to the truth, completeness or accuracy of any such information.**

Sincerely,

WHR, LLC, a Hawaii limited liability company

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

Name: Edward Bushor

Title: CEO

Date: June 13, 2023



RETAIN A COPY FOR YOUR RECORDS

**WIRE INSTRUCTIONS:**

BANK: WELLS FARGO BANK, N.A.  
ABA: 121000248

CREDIT TO: WELLS FARGO COMMERCIAL MORTGAGE  
SERVICING ACCOUNT  
#4535-133441  
401 S. Tryon Street, 8<sup>th</sup> Floor, Charlotte, North Carolina 28202  
ATTN:

REFERENCE: [WHR. LLC](#)  
[31-0961195 / DOUBLETREE GRAND](#)  
[NANILOA HOTEL](#)

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**Commercial Real Estate Notices**

**Appraisal Notices**

In connection with an application for credit that is to be secured by a first lien on a "dwelling" (as defined in 12 CFR Section 1002.14(b)(2)), which is defined as a residential structure that contains one to four family units whether or not that structure is attached to real property, including but not limited to an individual condominium, cooperative unit, mobile home or other manufactured home, you as an applicant have a right under 12 CFR Section 1002.14(a), to receive a copy of all written appraisals or other written valuations developed in connection with the application. The appraisal or valuation must be provided to you promptly upon completion, or the earlier of three business days prior to consummation of the transaction for closed-end credit, or at account opening for open-end credit. You may waive these timing requirements and agree to receive a copy of the appraisal or valuation at or before consummation of an extension of credit, except where prohibited by law, provided such waiver is obtained at least three business days prior to consummation of an extension of credit. If you provide such a waiver and consummation or an extension of credit does not occur, you must be provided a copy of the appraisal or valuation no later than 30 calendar days after it is determined that consummation will not occur or the extension of credit will not be made. For credit requests secured by a first lien on a "dwelling", Wells Fargo may charge you a reasonable fee to reimburse the bank's costs of appraisals or valuations, but must timely deliver copies to you whether or not the costs are paid. Wells Fargo may not charge for photocopy, postage, or other costs incurred in providing a copy of an appraisal or other written valuation to you, and the permitted reasonable fee for appraisal or valuation costs may not include such copy and/or delivery costs.

In connection with an application for credit that is to be secured by nonresidential real property in California, you have a right under California Business and Professions Code Section 11423(c) to receive a copy of the written appraisal used in connection with the application, upon satisfaction of the following conditions precedent: (i) your submittal of a written request for such copy to your Relationship Manager, at the address where the application was submitted, not more than 90 days after: (a) delivery to you of notice of the action taken on the application, including a notice of incompleteness; or (b) your withdrawal of the application; and (ii) your payment of all appraisal fees and other costs incurred in producing the appraisal and all actual copying costs.

**USA Patriot Act Customer Identification Program (CIP) Disclosure Notice:**

*To help the government fight the funding of terrorism and money laundering activities, U. S. Federal law requires financial institutions to obtain, verify, and record information that identifies all parties defined as a "customer" as well as, in certain cases, individuals or entities who have control over or are associated with an account. What this means for you: When you open an account or add any additional service for an institution, we will ask for the entity's name, address, tax identification number, affiliations and ownership. We may ask to see certified articles of incorporation or other identifying documents on the entity. Additionally, we may request identifying information on the individuals or entities that have control over or are associated with an account.*

**Equal Credit Opportunity Act – Notice (Regulation B)**

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the Applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency, which administers compliance with this law concerning Wells Fargo Bank, N.A. is the Consumer Financial Protection Bureau (CFPB), 1700 G Street NW., Washington, DC 20006. <http://www.consumerfinance.gov>.

If your application for business credit is denied, you have the right to a written statement of the specific reasons for the denial. To obtain the statement, please notify Wells Fargo in writing within 60 days from the date you are notified of our decision. We will send you a written statement of the reasons for the denial within 30 days of receiving your request for the statement.

**CALIFORNIA PROPERTIES ONLY: California Hazard Insurance Requirements (California Civil Code 2955.5)**

In accordance with California Civil Code §2955.5(b) which requires that a lender provide this disclosure to a borrower, you are hereby notified that Civil Code §2955.5(a) states that "no lender shall require a borrower, as a condition of receiving or maintaining a loan secured by real property, to provide hazard insurance coverage against risks to the improvements on that real property in an amount exceeding the replacement value of the improvements on the property". The amount of replacement or insurable value coverage required by Wells Fargo will be determined upon completion of an appraisal and costing or other evaluation documentation or information for the subject loan.

**California Consumer Privacy Act Notice**

For the categories of personal data that Wells Fargo may collect and how we use it, see the Wells Fargo California Consumer Privacy Act Notice at Collection at <https://www.wellsfargo.com/privacy-security/notice-of-data-collection/>. See additional Wells Fargo privacy notices at <https://www.wellsfargo.com/privacy-security/>.

The following Disclosure Notice will be provided to customers when applicable:

- [Loans in Areas Having Special Flood Hazards \(Flood Disaster Protection Act of 1973 et seq.; 12 CFR 22\)](#)

**Credits Secured by Real Property in Florida - Insurance**

The following Statement of Anti-Coercion (Florida Regulations 69B-124.013) is required under Rule 69B-124.002, F.A.C., of the rules and regulations promulgated by the Chief Financial Officer relative to anti-coercion:

The Insurance Laws of this state provide that the lender may not require the borrower to take insurance through any particular insurance agent or company to protect the mortgaged property.

The borrower, subject to the rules adopted by the Chief Financial Officer, has the right to have the insurance placed with an insurance agent or company of its choice, provided the company meets the requirements of the lender. The lender has the right to designate reasonable financial requirements as to the company and the adequacy of the coverage.

I have read the foregoing statement or the Rules of the Chief Financial Officer relative thereto, and understand my rights and privileges and those of the lender relative to the placing of such insurance.

**Real Estate Capital Markets - CMBS Origination  
Notice of Incomplete Application**

RE: Request for Extension of Credit from Real Estate Capital Markets

Dear Applicant,

This notice is provided in order to comply with the Equal Credit Opportunity Act. We thank you for your interest in pursuing financing with Wells Fargo. We are in receipt of your initial application for business credit. Please find below the information needed to make a credit decision on your application, as applicable. Additional items may be requested at a later date in order to render a final credit decision. We need to receive the information below within 120 calendar days from the date of the term sheet. If we do not receive the items listed on the following pages by this date, we will give no further consideration to your credit request.

Sincerely,

Relationship Manager

**Please Note: After Review of Information Received, Additional Information May Be Required. Not all items below may be applicable to subject transaction.**

71. Organizational Chart (please detail ownership percentage interests down to the underlying individuals as well as identify all managers/control parties of Borrower.)
  72. W-9 Form for Borrowing Entity (October 2018 form version) (Please fill out with EXACT borrowing entity name, including any punctuation, tax ID Number, and physical address, as we cannot accept a PO Box address on this form)
  73. Customer Information Form for Borrowing Entity (form to be provided)
  74. Executed Copy of Certification of Beneficial Owner Form (form to be provided)
  75. Operating Agreement for Borrowing Entity (or draft, if newly formed entity)
  76. Certificate of Formation, Certificate of Good Standing, Certificate of Incorporation, Articles of Organization or other equivalent evidencing filing for Borrowing Entity
  77. Certification & Credit Investigation Authorization (to be provided)
  78. Customer Activity Prescreening Form (to be provided)
  79. Application Form – Exhibit A (to be provided)
  
  80. Sources & Uses Statement for Loan Proceeds
  81. Detailed cost basis (refinance)
  82. Existing loan payments history (refinance)
  83. Property Management Company Resume (even if property is not managed by a third party)
  84. Property Management Agreement (fully executed)
  85. Ground Lease
  86. Alta Survey
  87. Site Plan
  88. Purchase & Sale Agreement (if deal is an Acquisition)
  89. Real Estate Tax Analysis
  90. Information on Real Estate Tax Abatements
  91. Historical Tax and Insurance Bills for the last 3 years
  92. Current Property Tax Bill Evidencing Payment (Online confirmations are acceptable)
  93. Current Property Insurance Premium Bill Evidencing Payment
  94. Full contact information for borrower's insurance broker (name, firm, email address, phone and fax numbers) and for any
  95. Executed Leases and All Amendments and/or Assignments for ALL Tenants
  96. Tenant that is insuring their leased space, evidence of property and liability coverage
  97. Tenant Estoppels (form to be provided)
  98. SNDAs for Tenants with Purchase Options/ROFR to Purchase
  
  99. Borrower tax returns (refinance only, should include income statement and balance sheet)
  100. Borrower financials including balance sheet - Signed and Dated by the Manager of the Borrowing Entity
  101. Borrower's bank statements (past 12 months for multifamily/MHC/self-storage)
  102. Guarantor Financial Statement – within 6 months (within 3 months for Small Loans) - certified, signed, and dated
  103. Guarantor's Current Real Estate Schedule
  104. Guarantor tax returns
  105. Guarantor Resume (including paragraph(s) summarizing Real Estate Owned)
  106. Verification of liquid assets for Guarantor
  
  107. Current Rent Roll
-

## RETAIN A COPY FOR YOUR RECORDS

108. Most Recent Operating Budget or Proforma
109. Current Capital Budget
110. Property Improvement Plan or description of the proposed construction/renovation, proposed construction/renovation costs, proposed construction/renovation
  
111. Historical Capital Expenditures for the past 5 years
112. Average Annual Occupancy for last 10 years (or 5 years if 10 years is not available)
113. Occupancy Statistics Report (self-storage only)
114. Current Aged Receivables Report
115. Breakout Other Income (if not detailed on operating statements)
116. Breakout Percentage/Overage Rent by Tenant (if Property type is Retail)
117. Expense Reimbursements Reconciliations/Tenant CAM reconciliation reports for last 3 years and current month billing
118. Trailing 12 Month Operating Statement (may also request 3 recent years)
119. Unit Mix summary (multifamily/MHC/self-storage) (if applicable)
120. Sample Lease (multi-family / mobile home park / self-storage)
121. Historical Tenant Improvements and Leasing Commissions (TI/LCs) (office, retail, and industrial) for last 3 years and current year to date.
122. Tenant Sales Information for Tenants Required to Report Sales for last 3 years and current year to date- (Retail only)
123. Tenant Financial Statements for last 3 years and current year to date (Only for tenants that submit financial statements and are greater than 20% of the NRA)
  
124. Please summarize how the subject property has been impacted by the COVID-19 pandemic (occupancy declines, collection issues, closures, rent re-structures; any other pertinent information)
125. Please provide full summary of tenant rent relief or abatements relating to Covid including (i) rent relief requests/inquiries; (ii) rent relief granted (temporary or permanent); and (iii) tenant delinquencies / any tenants not paying rent.
126. Has the Borrower (not the Sponsor) received a PPP loan?

### **Hotel Only**

127. Franchise Agreement
128. Last Two Guest Satisfaction/ Franchise Inspection/Quality Assurance Reports
129. Most Recent STR Report
130. Corporate Account Breakdown
131. Market segmentation reports
132. Forward Group Bookings (PACE) Report
133. Comfort Letter

### **Small Loans / Multifamily Express Only:**

134. Existing Environmental reports
  135. First page of trust documents
  136. Reliance Letters for all borrower ordered third party reports – Wells Fargo to provide form after internal review has been complete
  137. Existing Operations & Maintenance (O&M) program for asbestos-containing materials (ACM) if property was built prior to 1981 (if not available, borrower will need to engage a vendor to complete and O&M report or provide verification that they've done a full survey and all ACM has been properly removed)
  138. Existing Operations & Maintenance (O&M) program for lead-based paint (LBP) if property was built prior to 1979 (if not available, borrower will need to engage a vendor to complete an O&M report or provide verification that they've done a full survey and all LBP has been properly removed)
  139. Radon verification (if located in Zone 1, borrower must provide evidence of satisfactory radon testing or verification that a radon mitigation system has been installed)
  140. Auto Draft Authorization Form
-

**Exhibit B**  
**to Consent Request With Specific Agreed Upon Conditional Approval of Consent to  
Mortgage of General Lease S-5844 dated June 14, 2023**

Form of Consent to Mortgage



and duly noted on Transfer Certificates of Title No. 108,763 and 106,776.

Lessor hereby consents to that certain Mortgage, Assignment of Leases and Rents, Security Agreement, and Fixture Filing dated \_\_\_\_\_, 2018, in substantially the form attached hereto and made a part hereof as Exhibit "A", and recorded concurrently herewith in the Bureau of Conveyances and the Office of the Assistant Registrar of the Land Court of the State of Hawaii, and duly noted on Transfer Certificates of Title No. 108,763 and 106,776 (the "Leasehold Mortgage"), executed by Lessee for the benefit of WELLS FARGO BANK, NATIONAL ASSOCIATION ("Lender"), which secures that certain loan (the "Loan") from Lender to Lessee, which Leasehold Mortgage encumbers the "Property" (as defined in the Leasehold Mortgage and which includes the Resort Site (as defined in the Lease), the Golf Course and Allied Facilities Site (as defined in the Lease), the buildings and the Improvements (as defined in the Leasehold Mortgage) located thereon). The Leasehold Mortgage is an "Authorized Mortgage" under the Lease and Lender is an "Authorized Mortgagee" under the Lease.

This Consent shall serve as evidence that Lessor has received a copy of the Leasehold Mortgage and the notice address for purposes of the notices under the Lease shall be sent to Wells Fargo Bank, National Association, Attention: Wells Fargo Commercial Mortgage Servicing, 401 South Tryon Street, 8<sup>th</sup> Floor, Charlotte, North Carolina 28202 or such other address as Lender may designate to Lessor.

Lessor hereby confirms that:

(a) Lessor shall not agree to any mutual termination or cancellation or accept any surrender of the Lease, except upon the expiration of the term of the Lease or its termination pursuant to any express provision of the Lease, nor shall any material amendment, alteration or modification of the Lease (including, without limitation, any amendment or other modification to the economic terms of the Lease, any provisions addressed in this Consent, any provisions relating to Lender's rights under the Lease, the term of the Lease and/or any material increase in Lessee's obligations or material decrease in Lessee's rights under the Lease) be binding upon Lender or any purchaser in foreclosure from Lender, unless Lender has given its prior written consent to such amendment or modification, which consent shall not be unreasonably withheld and shall be deemed given if a written refusal to consent

together with a written explanation of the reasons for such refusal to consent is not received from Lender within ten (10) days after receipt by Lender of a written request for Lender's consent to a proposed amendment, alteration or modification;

(b) The Loan may be transferred or assigned without the consent of Lessor and any such transferee or assignee shall also be deemed an "Authorized Mortgagee" under the Lease;

(c) Until the Loan has been paid in full, Lessor will not exercise any lien rights it may have pursuant to Section 19 of the Lease on any buildings and improvements owned or placed on the Property by Lessee, any property kept or used on the Property, or any sublease rents of the improvements and buildings located on the Property; provided, however, that the foregoing shall in no way affect Lessor's reversionary interest in the Property as a result of, among other things, expiration of the lease term or earlier termination of the lease;

(d) With respect to Section 20.d. of the Lease, any new ground lease entered into between Lessor and any successor Lessee, Lessor shall assign to the successor Lessee all space leases and subleases under which the tenants have attorned to Lessor (if any), with the consent of Lender, within 10 days following execution of the new ground lease; and

(e) The renting of rooms in the ordinary course of Lessee's business does not constitute renting or subletting for purposes of Section 14 of the Lease.

Lessor hereby certifies that, to the best of its knowledge, the following statements are true and correct, recognizing that Lender and its successors and assigns will rely on such statements:

(1) As of the date of execution of this document, Lessee is the current lessee under the Lease;

(2) As of the Effective Date, the following events have occurred which with the passage of time or the giving of notice may constitute a default:

a. An application for Mechanic's Lien No. 16-1-003 filed October 7, 2016, by Lincoln Builders LLC, as claimant, in the amount of \$754,743.00 plus reasonable attorneys' fees and costs, and interest.



(3) Except as set forth in Paragraph (2) above, as far as Lessor is aware, the Lessee is not in default in any respect as of this date nor has any event occurred which with the passage of time or the giving of notice would constitute a default;

(4) Except as set forth in Paragraph (2) above, there are no claims for damages, rents due, or other liability which Lessor is aware of against Lessee arising out of the Lease or performance of the terms, covenants or conditions of the Lease;

(5) Lessor hereby agrees notwithstanding the potential defaults identified in Paragraph (2) above, that the same shall not be deemed a default under the Lease and Lessor will forbear from exercising any remedies under the Lease in connection therewith as long as the existing Performance and Payment Bond No. 800014335 naming Lessor as additional obligee in an amount no less than \$1,000,000 and the surety bond equal to two times the annual rental then payable pursuant to Section 18. of the Lease remain available to pay the referenced claims;

(6) The Lease is in full force and effect and has not been modified, supplemented, extended or amended as of this date;

(7) As of the date hereof, no Base Rent is due from Lessee under the Lease. The Base Rent currently payable by Lessee under the Lease is \$580,270.44 per annum. Base Rent due under the Lease has been paid through January 31, 2019; and

(8) The term of the Lease commenced on February 1, 2006, and expires on January 31, 2071, unless sooner terminated as provided in the Lease.

[Signature Page to Follow]




IN WITNESS WHEREOF, the STATE OF HAWAII, by the Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and these presents to be duly executed this 31st day of August, 2018.

STATE OF HAWAII

Approved by the Board of Land and Natural Resources at its meeting held on August 10, 2018.

By

  
\_\_\_\_\_  
SUZANNE D. CASE  
Chairperson  
Board of Land and  
Natural Resources

APPROVED AS TO FORM:

  
\_\_\_\_\_  
JULIE H. CHINA  
Deputy Attorney General

Dated: August 27, 2018

EXHIBIT "A"

FORM OF LEASEHOLD MORTGAGE

LAND COURT SYSTEM

REGULAR SYSTEM

AFTER RECORDATION, RETURN BY MAIL ( ) PICKUP ( )

Holland & Knight LLP  
101 S. Tryon Street, Suite 3600  
Charlotte, North Carolina 28280  
Attention: Chris Boothe, Esq.  
Loan No. 31-0946337

Pages \_\_\_\_\_

Tax Map Key: (3) 2-1-001: 012

Loan No. 31-0946337

(3) 2-1-005: 013, 016, 017, 032, 046 & 027

TCT Nos.: 106,776 & 108,763

**LEASEHOLD MORTGAGE, ASSIGNMENT OF LEASES AND  
RENTS, SECURITY AGREEMENT AND FIXTURE FILING**

**MORTGAGOR:** WHR LLC, a Hawaii limited liability company, with a mailing address at 1050 Bishop, Suite 530, Honolulu, Hawaii 96813

**MORTGAGEE:** WELLS FARGO BANK, NATIONAL ASSOCIATION, a national banking association, with a mailing address at c/o Wells Fargo Commercial Mortgage Servicing, 401 South Tryon Street, 8th Floor, Charlotte, North Carolina

**PROPERTY:** 93 Banyan Drive and 1713 Kamehameha Avenue, Hilo, Hawaii 96720 (TMK Nos. (3) 2-1-001: 012 and (3) 2-1-005: 013, 016, 017, 032, 046 & 027), more particularly described in the attached Exhibit "A"

THIS LEASEHOLD MORTGAGE, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING (this "Security Instrument") is made as of this \_\_\_\_ day of \_\_\_\_\_, 2018, by WHR LLC, a Hawaii limited liability company, with a mailing address at 1050 Bishop, Suite 530, Honolulu, Hawaii 96813, as mortgagor (together with its permitted successors and assigns, "Borrower") to WELLS FARGO BANK, NATIONAL ASSOCIATION, a national banking association, with a mailing address at c/o Wells Fargo Commercial Mortgage Servicing, 401 South Tryon Street, 8<sup>th</sup> Floor, Charlotte, North Carolina 28202, as mortgagee (together with its successors and assigns, "Lender"). All capitalized terms not defined herein shall have the respective meanings set forth in the Loan Agreement (defined below).

#### RECITALS:

This Security Instrument is given to Lender to secure a certain loan (the "Loan") advanced pursuant to a certain loan agreement between Borrower and Lender (as the same may have been or may be amended, restated, replaced, supplemented or otherwise modified from time to time, the "Loan Agreement"), which such Loan is evidenced by, among other things, a certain Promissory Note in the aggregate principal amount of \$50,000,000.00 executed in connection with the Loan Agreement (together with all extensions, renewals, replacements, restatements or other modifications thereof, whether one or more being hereinafter collectively referred to as the "Note");

Borrower desires to secure the payment of the outstanding principal amount set forth in, and evidenced by, the Loan Agreement and the Note together with all interest accrued and unpaid thereon and all other sums due to Lender in respect of the Loan under the Note, the Loan Agreement, this Security Instrument or any of the other Loan Documents (defined below) (collectively, the "Debt") and the performance of all of the obligations due under the Note, the Loan Agreement and all other documents, agreements and certificates executed and/or delivered in connection with the Loan (as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time, collectively, the "Loan Documents"); and

This Security Instrument is given pursuant to the Loan Agreement, and payment, fulfillment, and performance of the obligations due thereunder and under the other Loan Documents are secured hereby in accordance with the terms hereof.

#### Article 1 – GRANTS OF SECURITY

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

(a) Land. The real property described in Exhibit A attached hereto and made a part hereof, being the premises demised by the Ground Lease (collectively, the "Land");

(b) Additional Land. All additional lands, estates and development rights hereafter acquired by Borrower for use in connection with the Land and the development of the Land and

all additional lands and estates therein which may, from time to time, by supplemental mortgage or otherwise be expressly made subject to the lien of this Security Instrument;

(c) Ground Lease. That certain State of Hawaii Department of Land and Natural Resources General Lease No. S-5844, dated January 20, 2006, and recorded on February 1, 2006 in the Office of the Assistant Registrar of the Land Court of the State of Hawaii (the "**Land Court**") as Document No. 3385990 and noted on Transfer Certificate of Title Nos. 106,776 and 108,763, and in the Bureau of Conveyances of the State of Hawaii (the "**Bureau**") as Document No. 2006-021241, as assigned to Borrower pursuant to that certain Quitclaim Assignment and Assumption of Ground Lease dated December 17, 2013, recorded in the Land Court as Document No. T-8751081, noted on said certificates of title, and in the Bureau as Document No. A-50990611 (the "**Ground Lease**") and the leasehold estate created thereby (the "**Leasehold Estate**");

(d) Assignments/Modifications. All assignments, modifications, extensions and renewals of the Ground Lease and all credits, deposits, options, privileges and rights of Borrower as tenant under the Ground Lease, including, but not limited to, rights of first refusal, if any, and the right, if any, to renew or extend the Ground Lease for a succeeding term or terms, and also including all the right, title, claim or demand whatsoever of Borrower either in law or in equity, in possession or expectancy, of, in and to Borrower's right, as tenant under the Ground Lease, to elect under Section 365(h)(1) of the Bankruptcy Code to terminate or treat the Ground Lease as terminated in the event (i) of the bankruptcy, reorganization or insolvency of the landlord under the Ground Lease (the "**Ground Lessor**"), and (ii) the rejection of the Ground Lease by Ground Lessor, as debtor in possession, or by a trustee for Ground Lessor, pursuant to Section 365 of the Bankruptcy Code;

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

(f) Easements. All easements, rights-of-way or use, rights, strips and gores of land, streets, ways, alleys, passages, sewer rights, water, water courses, water rights and powers, air rights and development rights, and all estates, rights, titles, interests, privileges, liberties, servitudes, tenements, hereditaments and appurtenances of any nature whatsoever, in any way now or hereafter belonging, relating or pertaining to the Land and the Improvements, including, but not limited to, those arising under and by virtue of the Ground Lease, and the reversions and remainders, and all land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the Land, to the center line thereof and all the estates, rights, titles, interests, rights of dower, rights of curtesy, property, possession, claim and demand whatsoever, both at law and in equity, of Borrower of, in and to the Land and the Improvements, including, but not limited to, those arising under and by virtue of the Ground Lease, and every part and parcel thereof, with the appurtenances thereto;

(g) Fixtures and Personal Property. All machinery, equipment, fixtures (including, but not limited to, all heating, air conditioning, plumbing, lighting, communications and elevator fixtures), furniture, software used in or to operate any of the foregoing and other property of every kind and nature whatsoever owned by Borrower, or in which Borrower has or shall have

an interest, now or hereafter located upon the Land and the Improvements, or appurtenant thereto, and usable in connection with the present or future operation and occupancy of the Land and the Improvements and all building equipment, materials and supplies of any nature whatsoever owned by Borrower, or in which Borrower has or shall have an interest, now or hereafter located upon the Land and the Improvements, or appurtenant thereto, or usable in connection with the present or future operation and occupancy of the Land and the Improvements (collectively, the “**Personal Property**”), and the right, title and interest of Borrower in and to any of the Personal Property which may be subject to any security interests, as defined in the Uniform Commercial Code, as adopted and enacted by the state or states where any of the Property is located (the “**Uniform Commercial Code**”), and all proceeds and products of the above;

(h) Leases and Rents. All leases, subleases, subsubleases, lettings, licenses, concessions or other agreements (whether written or oral) pursuant to which any Person is granted a possessory interest in, or right to use or occupy all or any portion of the Land and the Improvements, and every modification, amendment or other agreement relating to such leases, subleases, subsubleases, or other agreements entered into in connection with such leases, subleases, subsubleases, or other agreements and every guarantee of the performance and observance of the covenants, conditions and agreements to be performed and observed by the other party thereto, heretofore or hereafter entered into, whether before or after the filing by or against Borrower of any petition for relief under any Creditors Rights Laws (collectively, the “**Leases**”) and all right, title and interest of Borrower, its successors and assigns therein and thereunder, including, without limitation, cash or securities deposited thereunder to secure the performance by the lessees of their obligations thereunder and all rents, additional rents, rent equivalents, moneys payable as damages or in lieu of rent or rent equivalents, royalties (including, without limitation, all oil and gas or other mineral royalties and bonuses), income, receivables, receipts, revenues, deposits (including, without limitation, security, utility and other deposits), accounts, cash, issues, profits, charges for services rendered, and other consideration of whatever form or nature received by or paid to or for the account of or benefit of Borrower or its agents or employees from any and all sources arising from or attributable to the Property, including, all receivables, customer obligations, installment payment obligations and other obligations now existing or hereafter arising or created out of the sale, lease, sublease, license, concession or other grant of the right of the use and occupancy of property or rendering of services by Borrower or Manager and proceeds, if any, from business interruption or other loss of income insurance whether paid or accruing before or after the filing by or against Borrower of any petition for relief under any Creditors Rights Laws (collectively, the “**Rents**”) and all proceeds from the sale or other disposition of the Leases and the right to receive and apply the Rents to the payment of the Debt;

(i) Insurance Proceeds. Subject to the obligations of Borrower and the rights of the lessor under the Ground Lease, all insurance proceeds in respect of the Property under any insurance policies covering the Property, including, without limitation, the right to receive and apply the proceeds of any insurance, judgments, or settlements made in lieu thereof, for damage to the Property (collectively, the “**Insurance Proceeds**”);

(j) Condemnation Awards. Subject to the obligations of Borrower and the rights of the lessor under the Ground Lease, all condemnation awards, including interest thereon, which



may heretofore and hereafter be made with respect to the Property by reason of any taking or condemnation, whether from the exercise of the right of eminent domain (including, but not limited to, any transfer made in lieu of or in anticipation of the exercise of the right), or for a change of grade, or for any other injury to or decrease in the value of the Property (collectively, the “Awards”);

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

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

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

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

(o) Accounts. All reserves, escrows and deposit accounts maintained by Borrower with respect to the Property, including without limitation, the Accounts and all cash, checks, drafts, certificates, securities, investment property, financial assets, instruments and other property held therein from time to time and all proceeds, products, distributions or dividends or substitutions thereon and thereof;

(p) Proceeds. All proceeds of any of the foregoing items set forth in subsections (a) through (o) including, without limitation, Insurance Proceeds and Awards (subject to the obligations of Borrower and the rights of the lessor under the Ground Lease), into cash or liquidation claims; and

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

**Section 1.2. ASSIGNMENT OF RENTS**. Borrower hereby absolutely and unconditionally assigns to Lender all of Borrower’s right, title and interest in and to all current and future Leases and Rents; it being intended by Borrower that this assignment constitutes a present, absolute assignment and not an assignment for additional security only. Nevertheless, subject to the terms of the Loan Agreement and Section 8.1(h) of this Security Instrument, Lender grants to Borrower a revocable license to (i) collect, receive, use and enjoy the Rents and Borrower shall hold the



Rents, or a portion thereof sufficient to discharge all current sums due on the Debt, for use in the payment of such sums, and (ii) enforce the terms of the Leases.

**Section 1.3. SECURITY AGREEMENT.** This Security Instrument is both a real property mortgage and a “security agreement” within the meaning of the Uniform Commercial Code. The Property includes both real and personal property and all other rights and interests, whether tangible or intangible in nature, of Borrower in the Property. By executing and delivering this Security Instrument, Borrower hereby grants to Lender, as security for the Obligations (hereinafter defined), a security interest in the Property to the full extent that the Property may be subject to the Uniform Commercial Code.

**Section 1.4. FIXTURE FILING.** Certain of the Property is or will become “fixtures” (as that term is defined in the Uniform Commercial Code) on the Land, and this Security Instrument, upon being filed for record in the real estate records of the city or county wherein such fixtures are situated, shall operate also as a financing statement filed as a fixture filing in accordance with the applicable provisions of said Uniform Commercial Code upon such of the Property that is or may become fixtures.

**Section 1.5. CONDITIONS TO GRANT.** TO HAVE AND TO HOLD the above granted and described Property unto and to the use and benefit of Lender and its successors and assigns; PROVIDED, HOWEVER, these presents are upon the express condition that, if Lender shall be well and truly paid the Debt at the time and in the manner provided in the Note, the Loan Agreement and this Security Instrument, if Borrower shall well and truly perform the Other Obligations as set forth in this Security Instrument and shall well and truly abide by and comply with each and every covenant and condition set forth herein and in the Note, the Loan Agreement and the other Loan Documents, these presents and the estate hereby granted shall cease, terminate and be void.

## **Article 2 – DEBT AND OBLIGATIONS SECURED**

**Section 2.1. DEBT.** This Security Instrument and the grants, assignments and transfers made in Article 1 are given for the purpose of securing the Debt.

**Section 2.2. OTHER OBLIGATIONS.** This Security Instrument and the grants, assignments and transfers made in Article 1 are also given for the purpose of securing the performance of the following (the “**Other Obligations**”): (a) all other obligations of Borrower contained herein; (b) each obligation of Borrower contained in the Loan Agreement and any other Loan Document; and (c) each obligation of Borrower contained in any renewal, extension, amendment, modification, consolidation, change of, or substitution or replacement for, all or any part of the Note, the Loan Agreement or any other Loan Document.

**Section 2.3. DEBT AND OTHER OBLIGATIONS.** Borrower’s obligations for the payment of the Debt and the performance of the Other Obligations shall be referred to collectively herein as the “**Obligations.**”

**Section 2.4. PAYMENT OF DEBT.** Borrower will pay the Debt at the time and in the manner provided in the Loan Agreement, the Note and this Security Instrument.



**Section 2.5.** INCORPORATION BY REFERENCE. All the covenants, conditions and agreements contained in (a) the Loan Agreement, (b) the Note and (c) all and any of the other Loan Documents, are hereby made a part of this Security Instrument to the same extent and with the same force as if fully set forth herein.

### **Article 3 – PROPERTY COVENANTS**

Borrower covenants and agrees that:

**Section 3.1.** INSURANCE. Borrower shall obtain and maintain, or cause to be obtained and maintained, in full force and effect at all times insurance with respect to Borrower and the Property as required pursuant to the Loan Agreement.

**Section 3.2.** TAXES AND OTHER CHARGES. Borrower shall pay all real estate and personal property taxes, assessments, water rates or sewer rents (collectively “**Taxes**”), ground rents, maintenance charges, impositions (other than Taxes), and any other charges, including, without limitation, vault charges and license fees for the use of vaults, chutes and similar areas adjoining the Property (collectively, “**Other Charges**”), now or hereafter levied or assessed or imposed against the Property or any part thereof in accordance with the Loan Agreement.

**Section 3.3.** LEASES. Borrower shall not (and shall not permit any other applicable Person to) enter in any Leases for all or any portion of the Property unless in accordance with the provisions of the Loan Agreement.

**Section 3.4.** WARRANTY OF TITLE. Borrower has good, indefeasible, marketable and insurable title to the Property and has the right to mortgage, grant, bargain, sell, pledge, assign, warrant, transfer and convey the same. Borrower possesses an unencumbered Leasehold Estate in the Land and the Improvements except for the Permitted Encumbrances, such other liens as are permitted pursuant to the Loan Documents, the liens created by the Loan Documents, and the encumbrances (the “**Title Encumbrances**”), if any, described in Exhibit A attached hereto and incorporated herein. This Security Instrument, when properly recorded in the appropriate records, together with any Uniform Commercial Code financing statements required to be filed in connection therewith, will create (a) a legal, valid, and perfected first priority lien on the Property, subject only to Permitted Encumbrances, the liens created by the Loan Documents, and the Title Encumbrances and (b) a legal, valid, and perfected first priority security interests in and to, and legal, valid, and perfected collateral assignments of, all personalty (including the Leases), all in accordance with the terms thereof, in each case subject only to any applicable Permitted Encumbrances, such other liens as are permitted pursuant to the Loan Documents, the liens created by the Loan Documents, and the Title Encumbrances. Borrower shall forever warrant, defend and preserve the title and the validity and priority of the lien of this Security Instrument and shall forever warrant and defend the same to Lender against the claims of all Persons whomsoever.

**Section 3.5.** PAYMENT FOR LABOR AND MATERIALS. Subject to Borrower’s right to contest any Work Charge (defined herein) pursuant to the terms of the Loan Agreement, Borrower will promptly pay (or cause to be paid) when due all bills and costs for labor, materials, and specifically fabricated materials incurred in connection with the Property (each, a

“Work Charge”) and never permit to exist beyond the due date thereof in respect of the Property or any part thereof any lien or security interest, even though inferior to the liens and the security interests hereof, and in any event never permit to be created or exist in respect of the Property or any part thereof any other or additional lien or security interest other than the liens or security interests hereof except for the Permitted Encumbrances and the Title Encumbrances. Borrower represents there are no claims for payment for work, labor or materials affecting the Property which are or may become a lien prior to, or of equal priority with, the liens created by the Loan Documents.

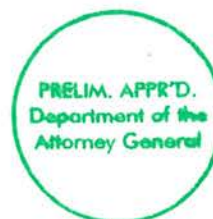
#### Article 4 – FURTHER ASSURANCES

**Section 4.1.** COMPLIANCE WITH LOAN AGREEMENT. Borrower shall comply with all covenants set forth in the Loan Agreement relating to acts or other further assurances to be made on the part of Borrower in order to protect and perfect the lien or security interest hereof upon, and in the interest of Lender in, the Property.

**Section 4.2.** AUTHORIZATION TO FILE FINANCING STATEMENTS; POWER OF ATTORNEY. Borrower hereby authorizes Lender at any time and from time to time to file any initial financing statements, amendments thereto and continuation statements as authorized by applicable law, as applicable to all or part of the Personal Property and as necessary or required in connection herewith. For purposes of such filings, Borrower agrees to furnish any information requested by Lender promptly upon request by Lender. Borrower also ratifies its authorization for Lender to have filed any like initial financing statements, amendments thereto or continuation statements, if filed prior to the date of this Security Instrument. Borrower hereby irrevocably constitutes and appoints Lender and any officer or agent of Lender, with full power of substitution, as its true and lawful attorneys-in-fact with full irrevocable power and authority in the place and stead of Borrower or in Borrower’s own name to execute in Borrower’s name any such documents and otherwise to carry out the purposes of this Section 4.2, to the extent that Borrower’s authorization above is not sufficient and Borrower fails or refuses to promptly execute such documents. To the extent permitted by law, Borrower hereby ratifies all acts said attorneys-in-fact have lawfully done in the past or shall lawfully do or cause to be done in the future by virtue hereof. This power of attorney is a power coupled with an interest and shall be irrevocable.

#### Article 5 – DUE ON SALE/ENCUMBRANCE

**Section 5.1.** NO SALE/ENCUMBRANCE. Except in accordance with the express terms and conditions contained in the Loan Agreement, Borrower shall not cause or permit a sale, conveyance, mortgage, grant, bargain, encumbrance, pledge, assignment, or grant of any options with respect to, or any other transfer or disposition (directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise, and whether or not for consideration or of record) of a legal or beneficial interest in the Property or any part thereof, Borrower, any constituent owner or other holder of a direct or indirect equity interest in Borrower, any indemnitor or other guarantor of the Loan, any constituent owner or other holder of a direct or indirect equity interest in such indemnitor or guarantor, any manager or operating lessee of the Property that is affiliated with Borrower or any constituent owner or other holder of a direct or indirect equity interest in such manager or such operating lessee.



## Article 6 – PREPAYMENT; RELEASE OF PROPERTY

**Section 6.1.** PREPAYMENT. The Debt may not be prepaid in whole or in part except in strict accordance with the express terms and conditions of the Note and the Loan Agreement.

**Section 6.2.** RELEASE OF PROPERTY. Borrower shall not be entitled to a release of any portion of the Property from the lien of this Security Instrument except in accordance with terms and conditions of the Loan Agreement.

## Article 7 – DEFAULT

**Section 7.1.** EVENT OF DEFAULT. The term “**Event of Default**” as used in this Security Instrument shall have the meaning assigned to such term in the Loan Agreement.

## Article 8 – RIGHTS AND REMEDIES UPON DEFAULT

**Section 8.1.** REMEDIES. Upon the occurrence and during the continuance of any Event of Default, Borrower agrees that Lender may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Borrower and in and to the Property, including, but not limited to, the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Lender may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Lender:

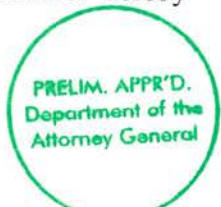
- (a) declare the entire unpaid Debt to be immediately due and payable;
- (b) institute proceedings, judicial or otherwise, for the complete foreclosure of this Security Instrument under any applicable provision of law, in which case the Property or any interest therein may be sold for cash or upon credit in one or more parcels or in several interests or portions and in any order or manner;
- (c) with or without entry, to the extent permitted and pursuant to the procedures provided by applicable law, institute proceedings for the partial foreclosure of this Security Instrument for the portion of the Debt then due and payable, subject to the continuing lien and security interest of this Security Instrument for the balance of the Debt not then due, unimpaired and without loss of priority;
- (d) sell for cash or upon credit the Property or any part thereof and all estate, claim, demand, right, title and interest of Borrower therein and rights of redemption thereof, pursuant to power of sale or otherwise, at one or more sales, as an entirety or in parcels, at such time and place, upon such terms and after such notice thereof as may be required or permitted by law;
- (e) institute an action, suit or proceeding in equity for the specific performance of any covenant, condition or agreement contained herein, in the Note, the Loan Agreement or in the other Loan Documents;
- (f) recover judgment on the Note either before, during or after any proceedings for the enforcement of this Security Instrument or the other Loan Documents;

(g) apply for the appointment of a receiver, trustee, liquidator or conservator of the Property, without notice to Borrower, which notice Borrower expressly waives, and without regard for the adequacy of the security for the Debt and without regard for the solvency of Borrower, any guarantor or indemnitor under the Loan or any other Person liable for the payment of the Debt and whose appointment Borrower expressly consents to take possession of and to operate the Property and to collect the Rents and to otherwise protect and preserve the Property;

(h) the license granted to Borrower under Section 1.2 hereof shall automatically be revoked and Lender may enter into or upon the Property, either personally or by its agents, nominees or attorneys and dispossess Borrower and its agents and servants therefrom, without liability for trespass, damages or otherwise and exclude Borrower and its agents or servants wholly therefrom, and take possession of all books, records and accounts relating thereto and Borrower agrees to surrender possession of the Property and of such books, records and accounts to Lender upon demand, and thereupon Lender may (i) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with all and every part of the Property and conduct the business thereat; (ii) subject to the terms of the Ground Lease, complete any construction on the Property in such manner and form as Lender deems advisable; (iii) subject to the terms of the Ground Lease, make alterations, additions, renewals, replacements and improvements to or on the Property; (iv) exercise all rights and powers of Borrower with respect to the Property, whether in the name of Borrower or otherwise, including, without limitation, the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents of the Property and every part thereof; (v) require Borrower to pay monthly in advance to Lender, or any receiver appointed to collect the Rents, the fair and reasonable rental value for the use and occupation of such part of the Property as may be occupied by Borrower; (vi) require Borrower to vacate and surrender possession of the Property to Lender or to such receiver and, in default thereof, Borrower may be evicted by summary proceedings or otherwise; and (vii) except as otherwise provided in the Loan Agreement, apply the receipts from the Property to the payment of the Debt, in such order, priority and proportions as Lender shall deem appropriate in its sole discretion after deducting therefrom all expenses (including reasonable attorneys' fees) incurred in connection with the aforesaid operations and all amounts necessary to pay the Taxes, Other Charges, insurance and other expenses in connection with the Property, as well as just and reasonable compensation for the services of Lender, its counsel, agents and employees;

(i) apply any sums then deposited or held in escrow or otherwise by or on behalf of Lender in accordance with the terms of the Loan Agreement, this Security Instrument or any other Loan Document to the payment of the following items in any order in its sole discretion: (i) Taxes and Other Charges; (ii) insurance premiums; (iii) interest on the unpaid principal balance of the Note; (iv) amortization of the unpaid principal balance of the Note; (v) all other sums payable pursuant to the Note, the Loan Agreement, this Security Instrument and the other Loan Documents, including without limitation advances made by Lender pursuant to the terms of this Security Instrument;

(j) subject to the terms of the Ground Lease, surrender the insurance policies maintained pursuant to the Loan Agreement, collect the unearned insurance premiums for such insurance policies and apply such sums as a credit on the Debt in such priority and proportion as Lender in its discretion shall deem proper, and in connection therewith, Borrower hereby



appoints Lender as agent and attorney-in-fact (which is coupled with an interest and is therefore irrevocable) for Borrower to collect such insurance premiums;

(k) apply the undisbursed balance of any deposit made by Borrower with Lender in connection with the restoration of the Property after a casualty thereto or condemnation thereof, together with interest thereon, to the payment of the Debt in such order, priority and proportions as Lender shall deem to be appropriate in its discretion; and/or

(l) pursue such other remedies as Lender may have under Applicable Law.

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

**Section 8.2. APPLICATION OF PROCEEDS.** The purchase money, proceeds and avails of any disposition of the Property, and or any part thereof, or any other sums collected by Lender pursuant to the Note, this Security Instrument or the other Loan Documents, may be applied by Lender to the payment of the Debt in such priority and proportions as Lender in its discretion shall deem proper to the extent consistent with Applicable Law.

**Section 8.3. RIGHT TO CURE DEFAULTS.** Upon the occurrence and during the continuance of any Event of Default, Lender may, but without any obligation to do so and without notice to or demand on Borrower and without releasing Borrower from any obligation hereunder, make any payment or do any act required of Borrower hereunder in such manner and to such extent as Lender may deem necessary to protect the security hereof. Lender is authorized to enter upon the Property for such purposes, or appear in, defend, or bring any action or proceeding to protect its interest in the Property or to foreclose this Security Instrument or collect the Debt, and the actual, out of pocket cost and expense thereof (including reasonable attorneys' fees to the extent permitted by law), with interest as provided in this Section 8.3, shall constitute a portion of the Debt and shall be due and payable to Lender upon demand. All such actual, out of pocket costs and expenses incurred by Lender in remedying such Event of Default or such failed payment or act or in appearing in, defending, or bringing any such action or proceeding shall bear interest at any default rate specified in the Loan Agreement, if any (the "**Default Rate**"), for the period after notice from Lender that such cost or expense was incurred to the date of payment to Lender. All such actual, out of pocket costs and expenses incurred by Lender together with interest thereon calculated at the Default Rate shall be deemed to constitute a portion of the Debt and be secured by this Security Instrument and the other Loan Documents and shall be immediately due and payable upon demand by Lender therefor.

**Section 8.4. ACTIONS AND PROCEEDINGS.** Lender has the right to appear in and defend any action or proceeding brought with respect to the Property and to bring any action or proceeding, in the name and on behalf of Borrower, which Lender, in its discretion, decides should be brought to protect its interest in the Property.

**Section 8.5.** RECOVERY OF SUMS REQUIRED TO BE PAID. Lender shall have the right from time to time to take action to recover any sum or sums which constitute a part of the Debt as the same become due, without regard to whether or not the balance of the Debt shall be due, and without prejudice to the right of Lender thereafter to bring an action of foreclosure, or any other action, for a default or defaults by Borrower existing at the time such earlier action was commenced.

**Section 8.6.** OTHER RIGHTS, ETC. (a) The failure of Lender to insist upon strict performance of any term hereof shall not be deemed to be a waiver of any term of this Security Instrument. Borrower shall not be relieved of Borrower's obligations hereunder by reason of (i) the failure of Lender to comply with any request of Borrower or any guarantor or indemnitor with respect to the Loan to take any action to foreclose this Security Instrument or otherwise enforce any of the provisions hereof or of the Note or the other Loan Documents, (ii) the release, regardless of consideration, of the whole or any part of the Property, or of any Person liable for the Debt or any portion thereof, or (iii) any agreement or stipulation by Lender extending the time of payment or otherwise modifying or supplementing the terms of the Note, this Security Instrument or the other Loan Documents.

(b) It is agreed that the risk of loss or damage to the Property is on Borrower, and Lender shall have no liability whatsoever for decline in the value of the Property, for failure to maintain the insurance policies required to be maintained pursuant to the Loan Agreement, or for failure to determine whether insurance in force is adequate as to the amount of risks insured. Possession by Lender shall not be deemed an election of judicial relief if any such possession is requested or obtained with respect to any Property or collateral not in Lender's possession.

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

**Section 8.7.** RIGHT TO RELEASE ANY PORTION OF THE PROPERTY. Lender may release any portion of the Property for such consideration as Lender may require without, as to the remainder of the Property, in any way impairing or affecting the lien or priority of this Security Instrument, or improving the position of any subordinate lienholder with respect thereto, except to the extent that the obligations hereunder shall have been reduced by the actual monetary consideration, if any, received by Lender for such release, and may accept by assignment, pledge or otherwise any other property in place thereof as Lender may require without being accountable for so doing to any other lienholder. This Security Instrument shall continue as a lien and security interest in the remaining portion of the Property.

**Section 8.8.** RIGHT OF ENTRY. Upon reasonable notice to Borrower, Lender and its agents shall have the right to enter and inspect the Property at all reasonable times.



**Section 8.9. BANKRUPTCY.** (a) Upon the occurrence and during the continuance of an Event of Default, Lender shall have the right to proceed in its own name or in the name of Borrower in respect of any claim, suit, action or proceeding relating to the rejection of any Lease, including, without limitation, the right to file and prosecute, to the exclusion of Borrower, any proofs of claim, complaints, motions, applications, notices and other documents, in any case in respect of the lessee under such Lease under the Bankruptcy Code.

(b) If there shall be filed by or against Borrower a petition under the Bankruptcy Code and Borrower, as lessor under any Lease, shall determine to reject such Lease pursuant to Section 365(a) of the Bankruptcy Code, then Borrower shall give Lender not less than ten (10) days' prior notice of the date on which Borrower shall apply to the bankruptcy court for authority to reject the Lease. Lender shall have the right, but not the obligation, to serve upon Borrower within such ten-day period a notice stating that (i) Lender demands that Borrower assume and assign the Lease to Lender pursuant to Section 365 of the Bankruptcy Code and (ii) Lender covenants to cure or provide adequate assurance of future performance under the Lease. If Lender serves upon Borrower the notice described in the preceding sentence, Borrower shall not seek to reject the Lease and shall comply with the demand provided for in clause (i) of the preceding sentence within thirty (30) days after the notice shall have been given, subject to the performance by Lender of the covenant provided for in clause (ii) of the preceding sentence.

**Section 8.10. SUBROGATION.** If any or all of the proceeds of the Note have been used to extinguish, extend or renew any indebtedness heretofore existing against the Property, then, to the extent of the funds so used, Lender shall be subrogated to all of the rights, claims, liens, titles, and interests existing against the Property heretofore held by, or in favor of, the holder of such indebtedness and such former rights, claims, liens, titles, and interests, if any, are not waived but rather are continued in full force and effect in favor of Lender and are merged with the lien and security interest created herein as cumulative security for the repayment of the Debt, the performance and discharge of the Other Obligations.

## Article 9 – ENVIRONMENTAL HAZARDS

**Section 9.1. ENVIRONMENTAL COVENANTS.** Borrower has provided representations, warranties and covenants regarding environmental matters set forth in the Environmental Indemnity and Borrower shall comply with the aforesaid covenants regarding environmental matters.

## Article 10 – WAIVERS

**Section 10.1. MARSHALLING AND OTHER MATTERS.** Borrower hereby waives, to the extent permitted by law, the benefit of all Applicable Law now or hereafter in force regarding appraisal, valuation, stay, extension, reinstatement and redemption and all rights of marshalling in the event of any sale hereunder of the Property or any part thereof or any interest therein. Further, Borrower hereby expressly waives any and all rights of redemption from sale under any order or decree of foreclosure of this Security Instrument on behalf of Borrower, and on behalf of each and every Person acquiring any interest in or title to the Property subsequent to the date of this Security Instrument and on behalf of all Persons to the extent permitted by Applicable Law.

**Section 10.2. WAIVER OF NOTICE.** Borrower shall not be entitled to any notices of any nature whatsoever from Lender except with respect to matters for which this Security Instrument or the Loan Agreement specifically and expressly provides for the giving of notice by Lender to Borrower and except with respect to matters for which Borrower is not permitted by Applicable Law to waive its right to receive notice, and Borrower hereby expressly waives the right to receive any notice from Lender with respect to any matter for which this Security Instrument does not specifically and expressly provide for the giving of notice by Lender to Borrower.

**Section 10.3. INTENTIONALLY OMITTED.**

**Section 10.4. SOLE DISCRETION OF LENDER.** Whenever pursuant to this Security Instrument, Lender exercises any right given to it to approve or disapprove, or any arrangement or term is to be satisfactory to Lender, the decision of Lender to approve or disapprove or to decide whether arrangements or terms are satisfactory or not satisfactory shall (except as is otherwise specifically herein provided) be in the sole discretion of Lender and shall be final and conclusive.

**Section 10.5. WAIVER OF TRIAL BY JURY. BORROWER AND LENDER EACH HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THE LOAN DOCUMENTS, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY BORROWER AND LENDER, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. EACH OF LENDER AND BORROWER IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY BORROWER AND LENDER.**

**Section 10.6. WAIVER OF FORECLOSURE DEFENSE.** Borrower hereby waives any defense Borrower might assert or have by reason of Lender's failure to make any tenant or lessee of the Property a party defendant in any foreclosure proceeding or action instituted by Lender.

**Article 11 – INTENTIONALLY OMITTED**

**Article 12 – NOTICES**

**Section 12.1. NOTICES.** All notices or other written communications hereunder shall be delivered in accordance with the applicable terms and conditions of the Loan Agreement.

**Article 13 – APPLICABLE LAW**

**Section 13.1. GOVERNING LAW. (A) THIS SECURITY INSTRUMENT WAS NEGOTIATED IN THE STATE OF NEW YORK, AND MADE BY BORROWER AND ACCEPTED BY LENDER IN THE STATE OF NEW YORK, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND**



TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS SECURITY INSTRUMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE (WITHOUT REGARD TO PRINCIPLES OF CONFLICT OF LAWS) AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES (I) THE PROVISIONS FOR THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED PURSUANT HERETO AND PURSUANT TO THE OTHER LOAN DOCUMENTS WITH RESPECT TO THE PROPERTY (OTHER THAN THAT DESCRIBED IN SUBPARAGRAPH II BELOW) SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE IN WHICH THE PROPERTY AND FIXTURES ARE LOCATED AND (II) WITH RESPECT TO THE PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED BY THIS SECURITY INSTRUMENT AND THE OTHER LOAN DOCUMENTS IN PROPERTY WHOSE PERFECTION AND PRIORITY IS COVERED BY ARTICLE 9 OF THE UCC (INCLUDING, WITHOUT LIMITATION, THE ACCOUNTS), THE LAW OF THE JURISDICTION APPLICABLE IN ACCORDANCE WITH SECTIONS 9-301 THROUGH 9-307 OF THE UCC AS IN EFFECT IN THE STATE OF NEW YORK SHALL GOVERN. TO THE FULLEST EXTENT PERMITTED BY LAW, BORROWER HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS SECURITY INSTRUMENT AND THE NOTE, AND THIS SECURITY INSTRUMENT AND THE NOTE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW EXCEPT AS SPECIFICALLY SET FORTH ABOVE. (B) ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST LENDER OR BORROWER ARISING OUT OF OR RELATING TO THIS SECURITY INSTRUMENT MAY AT LENDER'S OPTION BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW, AND BORROWER WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND BORROWER HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. BORROWER DOES HEREBY DESIGNATE AND APPOINT

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

AS ITS AUTHORIZED AGENT TO ACCEPT AND ACKNOWLEDGE ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW



YORK, NEW YORK, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE MAILED OR DELIVERED TO BORROWER IN THE MANNER PROVIDED HEREIN SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON BORROWER IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW YORK. BORROWER (I) SHALL GIVE PROMPT NOTICE TO LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (II) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW YORK, NEW YORK (WHICH SUBSTITUTE AGENT AND OFFICE SHALL BE DESIGNATED AS THE PERSON AND ADDRESS FOR SERVICE OF PROCESS), AND (III) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW YORK, NEW YORK OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR.

**Section 13.2. PROVISIONS SUBJECT TO APPLICABLE LAW.** All rights, powers and remedies provided in this Security Instrument may be exercised only to the extent that the exercise thereof does not violate any applicable provisions of law and are intended to be limited to the extent necessary so that they will not render this Security Instrument invalid, unenforceable or not entitled to be recorded, registered or filed under the provisions of any applicable law. If any term of this Security Instrument or any application thereof shall be invalid or unenforceable, the remainder of this Security Instrument and any other application of the term shall not be affected thereby.

#### Article 14 – DEFINITIONS

**Section 14.1. GENERAL DEFINITIONS.** Unless the context clearly indicates a contrary intent or unless otherwise specifically provided herein, words used in this Security Instrument may be used interchangeably in singular or plural form and the word “Borrower” shall mean “each Borrower and any subsequent owner or owners of the Property or any part thereof or any interest therein,” the word “Lender” shall mean “Lender and any of Lender’s successors and assigns,” the word “Note” shall mean “the Note and any other evidence of indebtedness secured by this Security Instrument,” the word “Property” shall include any portion of the Property and any interest therein, and the phrases “attorneys’ fees”, “legal fees” and “counsel fees” shall include any and all attorneys’, paralegal and law clerk fees and disbursements, including, but not limited to, fees and disbursements at the pre-trial, trial and appellate levels incurred or paid by Lender in protecting its interest in the Property, the Leases and the Rents and enforcing its rights hereunder.

#### Article 15 – MISCELLANEOUS PROVISIONS

**Section 15.1. NO ORAL CHANGE.** This Security Instrument, and any provisions hereof, may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of Borrower or Lender, but only by an agreement in writing signed by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.

**Section 15.2. SUCCESSORS AND ASSIGNS.** This Security Instrument shall be binding upon and inure to the benefit of Borrower, Lender and their respective successors and assigns forever.

**Section 15.3. INAPPLICABLE PROVISIONS.** If any term, covenant or condition of the Loan Agreement, the Note or this Security Instrument is held to be invalid, illegal or unenforceable in any respect, the Loan Agreement, the Note and this Security Instrument shall be construed without such provision.

**Section 15.4. HEADINGS, ETC.** The headings and captions of various Sections of this Security Instrument are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof.

**Section 15.5. NUMBER AND GENDER.** Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns and pronouns shall include the plural and vice versa.

**Section 15.6. ENTIRE AGREEMENT.** This Security Instrument and the other Loan Documents contain the entire agreement of the parties hereto and thereto in respect of the transactions contemplated hereby and thereby, and all prior agreements among or between such parties, whether oral or written, are superseded by the terms of this Security Instrument and the other Loan Documents.

**Section 15.7. LIMITATION ON LENDER'S RESPONSIBILITY.** No provision of this Security Instrument shall operate to place any obligation or liability for the control, care, management or repair of the Property upon Lender, nor shall it operate to make Lender responsible or liable for any waste committed on the Property by the tenants or any other Person, or for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee or stranger. Nothing herein contained shall be construed as constituting Lender a "mortgagee in possession." If more than one Person has executed this Security Instrument as "Borrower," the representations, covenants, warranties and obligations of all such Persons hereunder shall be joint and several.

**Section 15.8. SOLAR LEASE ALLOWANCE.** Notwithstanding anything herein to the contrary, Lender hereby acknowledges that it has consented to Borrower entering into the [Phase II Solar Lease Documents] (as defined in the Loan Agreement) in accordance with the terms of the Loan Agreement.

#### **Article 16 – INTENTIONALLY OMITTED**

#### **Article 17 - GROUND LEASE PROVISIONS**

**Section 17.1. NO MERGER OF FEE AND LEASEHOLD ESTATES; RELEASES.** So long as any portion of the Debt shall remain unpaid, unless Lender shall otherwise consent, the fee title to the Land and the Leasehold Estate shall not merge but shall always be kept separate and distinct.

notwithstanding the union of such estates in Borrower, Ground Lessor or in any other Person by purchase, operation of law or otherwise. Lender reserves the right, at any time, to release portions of the Property, including, but not limited to, the Leasehold Estate, with or without consideration, at Lender's election, without waiving or affecting any of its rights hereunder or under the Note or the other Loan Documents and any such release shall not affect Lender's rights in connection with the portion of the Property not so released.

**Section 17.2. BORROWER'S ACQUISITION OF FEE ESTATE.** In the event that Borrower, so long as any portion of the Debt remains unpaid, shall become the owner and holder of Ground Lessor's fee interest in the portion of the Property demised pursuant to the Ground Lease, the lien of this Security Instrument shall be spread to cover such interest and such interest shall be deemed to be included in the Property. Borrower agrees, at its sole cost and expense, including without limitation, Lender's reasonable attorney's fees, to (i) execute any and all documents or instruments necessary to subject the foregoing interest to the lien of this Security Instrument; and (ii) provide a title insurance policy which shall insure that the lien of this Security Instrument is a first lien on such interest. The foregoing shall not be construed to permit Borrower to acquire the aforesaid fee interest and Borrower rights to acquire additional property shall remain subject to the restrictions relating thereto contained in the Loan Agreement and the other Loan Documents.

**Section 17.3. REJECTION OF THE GROUND LEASE.**

(a) If the Ground Lease is terminated by Ground Lessor for any reason in the event of the rejection or disaffirmance of the Ground Lease by Ground Lessor pursuant to the Bankruptcy Code or any other law affecting creditor's rights, (i) Borrower, immediately after obtaining notice thereof, shall give notice thereof to Lender, (ii) Borrower, without the prior written consent of Lender, shall not elect to treat the Ground Lease as terminated pursuant to Section 365(h) of the Bankruptcy Code or any comparable federal or state statute or law, and any election by Borrower made without such consent shall be void and (iii) this Security Instrument and all the liens, terms, covenants and conditions of this Security Instrument shall extend to and cover Borrower's possessory rights under Section 365(h) of the Bankruptcy Code and to any claim for damages due to the rejection of the Ground Lease or other termination of the Ground Lease. In addition, Borrower hereby assigns irrevocably to Lender Borrower's rights to treat the Ground Lease as terminated pursuant to Section 365(h) of the Bankruptcy Code and to offset rents under the Ground Lease in the event any case, proceeding or other action is commenced by or against Ground Lessor under the Bankruptcy Code or any comparable federal or state statute or law, provided that Lender shall not exercise such rights and shall permit Borrower to exercise such rights with the prior written consent of Lender, not to be unreasonably withheld or delayed, unless an Event of Default shall have occurred and be continuing.

(b) Borrower hereby assigns to Lender Borrower's right to reject the Ground Lease under Section 365 of the Bankruptcy Code or any comparable federal or state statute or law with respect to any case, proceeding or other action commenced by or against Borrower under the Bankruptcy Code or comparable federal or state statute or law, provided Lender shall not exercise such right, and shall permit Borrower to exercise such right with the prior written consent of Lender, not to be unreasonably withheld or delayed, unless an Event of Default shall have occurred and be continuing. Further, if Borrower shall desire to so reject the Ground Lease, at Lender's request, to the extent not prohibited by the terms of the Ground Lease and applicable

law, Borrower shall assign its interest in the Ground Lease to Lender in lieu of rejecting the Ground Lease as described above, upon receipt by Borrower of written notice from Lender of such request together with Lender's agreement to cure any existing defaults of Borrower under the Ground Lease and to provide adequate assurance of future performance of Borrower's obligations thereunder.

(c) Borrower hereby assigns to Lender Borrower's right to seek an extension of the 60-day period within which Borrower must accept or reject the Ground Lease under Section 365 of the Bankruptcy Code or any comparable federal or state statute or law with respect to any case, proceeding or other action commenced by or against Borrower under the Bankruptcy Code or comparable federal or state statute or law, provided Lender shall not exercise such right, and shall permit Borrower to exercise such right with the prior written consent of Lender, not to be unreasonably withheld or delayed, unless an Event of Default shall have occurred and be continuing. Further, if Borrower shall desire to so reject the Ground Lease, at Lender's request, to the extent not prohibited by the terms of the Ground Lease and applicable law, Borrower shall assign its interest in the Ground Lease to Lender in lieu of rejecting such Ground Lease as described above, upon receipt by Borrower of written notice from Lender of such request together with Lender's agreement to cure any existing defaults of Borrower under the Ground Lease and to provide adequate assurance of future performance of the applicable Borrower's obligations thereunder.

(d) Borrower hereby agrees that if the Ground Lease is terminated for any reason in the event of the rejection or disaffirmance of the Ground Lease pursuant to the Bankruptcy Code or any other law affecting creditor's rights, any Personal Property of Borrower not removed from the Property by Borrower as permitted or required by the Ground Lease, shall at the option of Lender be deemed abandoned by Borrower, provided that Lender may remove any such Personal Property required to be removed by Borrower pursuant to the Ground Lease and all reasonable out-of-pocket costs and expenses associated with such removal shall be paid by Borrower within five (5) days of receipt by Borrower of an invoice for such removal costs and expenses.

## Article 18 – STATE-SPECIFIC PROVISIONS

**Section 18.1. PRINCIPLES OF CONSTRUCTION.** In the event of any inconsistencies between the terms and conditions of this Article 18 and the terms and conditions of this Security Instrument, the terms and conditions of this Article 18 shall control and be binding.

**Section 18.2. BUSINESS LOAN TRANSACTION.** The Loan evidenced by the Note is made for commercial purposes and the Loan is neither a consumer credit transaction nor a home business loan, as defined in Section 478-1, Hawaii Revised Statutes, as amended.

**Section 18.3. SECURED OBLIGATIONS.** With respect to the Property, the obligations secured by this Security Instrument shall include all amounts payable under this Security Instrument and the other Loan Documents including, without limitation, the repayment of all future advances or costs in an amount not to exceed \$100,000,000.00 (which future advances shall include, without limitation, advances to pay for such items as real property taxes, insurance premiums, ground lease rents, attorneys' fees, or any other sums) which Lender may, but is not

obligated to, make or incur in accordance with the terms of this Security Instrument or any of the other Loan Documents.

**Section 18.4. REMEDIES.** Without limiting any other remedies available under this Security Instrument, under any of the other Loan Documents or under applicable law, following an Event of Default hereunder, Lender shall be entitled to exercise any remedies available under Hawaii Revised Statutes Chapter 667, including, without limitation, a power of sale foreclosure pursuant to such Chapter 667.

**Section 18.5. NOTICE REGARDING INSURANCE COMPANIES.** This Security Instrument constitutes, and Borrower hereby acknowledges written notice from Lender that, LENDER MAY NOT MAKE THE GRANTING OF THE LOAN EVIDENCED BY THE NOTE CONTINGENT ON BORROWER PROCURING ANY REQUIRED INSURANCE WITH AN INSURANCE COMPANY DESIGNATED BY LENDER.

[NO FURTHER TEXT ON THIS PAGE]



**IN WITNESS WHEREOF**, this Security Instrument has been executed by the undersigned as of the day and year first above written.

**BORROWER:**

WHR LLC, a Hawaii limited liability company

By: Tower Development, Inc., a Hawaii corporation, its co-manager

By: \_\_\_\_\_  
Name: Stuart L. Miller  
Title: President



ACKNOWLEDGMENT

STATE OF HAWAII )  
 ) SS.  
CITY AND COUNTY OF HONOLULU )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared STUART L. MILLER, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

\_\_\_\_\_  
Notary Public, State of Hawaii

Printed Name: \_\_\_\_\_

My commission expires: \_\_\_\_\_

(Official Stamp or Seal)

<u>NOTARY CERTIFICATION STATEMENT</u>	
Document Identification or Description: <u>Leasehold Mortgage.</u>	
<u>Assignment of Leases and Rents, Security Agreement and Fixture Filing</u>	
<u>by WHR LLC in favor of Wells Fargo Bank, National Association</u>	
Doc. Date: _____ or <input type="checkbox"/> Undated at time of notarization.	
No. of Pages: _____	Jurisdiction: _____ Circuit (in which notarial act is performed)
_____ Signature of Notary	_____ Date of Notarization and Certification Statement
_____ Printed Name of Notary	(Official Stamp or Seal)





**EXHIBIT A**

**LEGAL DESCRIPTION**

**(attached hereto)**

*[Insert legal description with encumbrances]*



**Exhibit C**  
**to Consent Request With Specific Agreed Upon Conditional Approval of Consent to  
Mortgage of General Lease S-5844 dated June 14, 2023**

Form of Mortgage Instrument

LAND COURT SYSTEM

REGULAR SYSTEM

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AFTER RECORDATION, RETURN BY MAIL ( ) PICKUP ( )

Holland & Knight LLP  
101 S. Tryon Street, Suite 3600  
Charlotte, North Carolina 28280  
Attention: Chris Boothe, Esq.  
Loan No. 31-0946337

Pages \_\_\_\_\_

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Tax Map Key: (3) 2-1-001: 012

Loan No. 31-0946337

(3) 2-1-005: 013, 016, 017, 032, 046 & 027

TCT Nos.: 106,776 & 108,763

**LEASEHOLD MORTGAGE, ASSIGNMENT OF LEASES AND  
RENTS, SECURITY AGREEMENT AND FIXTURE FILING**

**MORTGAGOR:** WHR LLC, a Hawaii limited liability company, with a mailing address at 1050 Bishop, Suite 530, Honolulu, Hawaii 96813

**MORTGAGEE:** WELLS FARGO BANK, NATIONAL ASSOCIATION, a national banking association, with a mailing address at c/o Wells Fargo Commercial Mortgage Servicing, 401 South Tryon Street, 8th Floor, Charlotte, North Carolina

**PROPERTY:** 93 Banyan Drive and 1713 Kamehameha Avenue, Hilo, Hawaii 96720 (TMK Nos. (3) 2-1-001: 012 and (3) 2-1-005: 013, 016, 017, 032, 046 & 027), more particularly described in the attached Exhibit "A"

**THIS LEASEHOLD MORTGAGE, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING** (this “**Security Instrument**”) is made as of this [\_\_\_\_] day of [\_\_\_\_\_], 2018, by **WHR LLC**, a Hawaii limited liability company, with a mailing address at 1050 Bishop, Suite 530, Honolulu, Hawaii 96813, as mortgagor (together with its permitted successors and assigns, “**Borrower**”) to **WELLS FARGO BANK, NATIONAL ASSOCIATION**, a national banking association, with a mailing address at c/o Wells Fargo Commercial Mortgage Servicing, 401 South Tryon Street, 8<sup>th</sup> Floor, Charlotte, North Carolina 28202, as mortgagee (together with its successors and assigns, “**Lender**”). All capitalized terms not defined herein shall have the respective meanings set forth in the Loan Agreement (defined below).

#### **RECITALS:**

This Security Instrument is given to Lender to secure a certain loan (the “**Loan**”) advanced pursuant to a certain loan agreement between Borrower and Lender (as the same may have been or may be amended, restated, replaced, supplemented or otherwise modified from time to time, the “**Loan Agreement**”), which such Loan is evidenced by, among other things, a certain Promissory Note in the aggregate principal amount of \$[50,000,000.00] executed in connection with the Loan Agreement (together with all extensions, renewals, replacements, restatements or other modifications thereof, whether one or more being hereinafter collectively referred to as the “**Note**”);

Borrower desires to secure the payment of the outstanding principal amount set forth in, and evidenced by, the Loan Agreement and the Note together with all interest accrued and unpaid thereon and all other sums due to Lender in respect of the Loan under the Note, the Loan Agreement, this Security Instrument or any of the other Loan Documents (defined below) (collectively, the “**Debt**”) and the performance of all of the obligations due under the Note, the Loan Agreement and all other documents, agreements and certificates executed and/or delivered in connection with the Loan (as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time, collectively, the “**Loan Documents**”); and

This Security Instrument is given pursuant to the Loan Agreement, and payment, fulfillment, and performance of the obligations due thereunder and under the other Loan Documents are secured hereby in accordance with the terms hereof.

#### **Article 1 – GRANTS OF SECURITY**

**Section 1.1. PROPERTY MORTGAGED.** Borrower does hereby irrevocably mortgage, grant, bargain, sell, pledge, assign, warrant, transfer, convey and grant a security interest to Lender and its successors and assigns in and to the following property, rights, interests and estates, to the extent now owned, or hereafter acquired by Borrower (collectively, the “**Property**”):

(a) Land. The real property described in Exhibit A attached hereto and made a part hereof, being the premises demised by the Ground Lease (collectively, the “**Land**”);

(b) Additional Land. All additional lands, estates and development rights hereafter acquired by Borrower for use in connection with the Land and the development of the Land and

all additional lands and estates therein which may, from time to time, by supplemental mortgage or otherwise be expressly made subject to the lien of this Security Instrument;

(c) Ground Lease. That certain State of Hawaii Department of Land and Natural Resources General Lease No. S-5844, dated January 20, 2006, and recorded on February 1, 2006 in the Office of the Assistant Registrar of the Land Court of the State of Hawaii (the “**Land Court**”) as Document No. 3385990 and noted on Transfer Certificate of Title Nos. 106,776 and 108,763, and in the Bureau of Conveyances of the State of Hawaii (the “**Bureau**”) as Document No. 2006-021241, as assigned to Borrower pursuant to that certain Quitclaim Assignment and Assumption of Ground Lease dated December 17, 2013, recorded in the Land Court as Document No. T-8751081, noted on said certificates of title, and in the Bureau as Document No. A-50990611 (the “**Ground Lease**”) and the leasehold estate created thereby (the “**Leasehold Estate**”);

(d) Assignments/Modifications. All assignments, modifications, extensions and renewals of the Ground Lease and all credits, deposits, options, privileges and rights of Borrower as tenant under the Ground Lease, including, but not limited to, rights of first refusal, if any, and the right, if any, to renew or extend the Ground Lease for a succeeding term or terms, and also including all the right, title, claim or demand whatsoever of Borrower either in law or in equity, in possession or expectancy, of, in and to Borrower's right, as tenant under the Ground Lease, to elect under Section 365(h)(1) of the Bankruptcy Code to terminate or treat the Ground Lease as terminated in the event (i) of the bankruptcy, reorganization or insolvency of the landlord under the Ground Lease (the “**Ground Lessor**”), and (ii) the rejection of the Ground Lease by Ground Lessor, as debtor in possession, or by a trustee for Ground Lessor, pursuant to Section 365 of the Bankruptcy Code;

(e) Improvements. The buildings, structures, fixtures, additions, enlargements, extensions, modifications, repairs, replacements and improvements now or hereafter erected or located on the Land (collectively, the “**Improvements**”);

(f) Easements. All easements, rights-of-way or use, rights, strips and gores of land, streets, ways, alleys, passages, sewer rights, water, water courses, water rights and powers, air rights and development rights, and all estates, rights, titles, interests, privileges, liberties, servitudes, tenements, hereditaments and appurtenances of any nature whatsoever, in any way now or hereafter belonging, relating or pertaining to the Land and the Improvements, including, but not limited to, those arising under and by virtue of the Ground Lease, and the reversions and remainders, and all land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the Land, to the center line thereof and all the estates, rights, titles, interests, rights of dower, rights of curtesy, property, possession, claim and demand whatsoever, both at law and in equity, of Borrower of, in and to the Land and the Improvements, including, but not limited to, those arising under and by virtue of the Ground Lease, and every part and parcel thereof, with the appurtenances thereto;

(g) Fixtures and Personal Property. All machinery, equipment, fixtures (including, but not limited to, all heating, air conditioning, plumbing, lighting, communications and elevator fixtures), furniture, software used in or to operate any of the foregoing and other property of every kind and nature whatsoever owned by Borrower, or in which Borrower has or shall have

an interest, now or hereafter located upon the Land and the Improvements, or appurtenant thereto, and usable in connection with the present or future operation and occupancy of the Land and the Improvements and all building equipment, materials and supplies of any nature whatsoever owned by Borrower, or in which Borrower has or shall have an interest, now or hereafter located upon the Land and the Improvements, or appurtenant thereto, or usable in connection with the present or future operation and occupancy of the Land and the Improvements (collectively, the “**Personal Property**”), and the right, title and interest of Borrower in and to any of the Personal Property which may be subject to any security interests, as defined in the Uniform Commercial Code, as adopted and enacted by the state or states where any of the Property is located (the “**Uniform Commercial Code**”), and all proceeds and products of the above;

(h) Leases and Rents. All leases, subleases, subsubleases, lettings, licenses, concessions or other agreements (whether written or oral) pursuant to which any Person is granted a possessory interest in, or right to use or occupy all or any portion of the Land and the Improvements, and every modification, amendment or other agreement relating to such leases, subleases, subsubleases, or other agreements entered into in connection with such leases, subleases, subsubleases, or other agreements and every guarantee of the performance and observance of the covenants, conditions and agreements to be performed and observed by the other party thereto, heretofore or hereafter entered into, whether before or after the filing by or against Borrower of any petition for relief under any Creditors Rights Laws (collectively, the “**Leases**”) and all right, title and interest of Borrower, its successors and assigns therein and thereunder, including, without limitation, cash or securities deposited thereunder to secure the performance by the lessees of their obligations thereunder and all rents, additional rents, rent equivalents, moneys payable as damages or in lieu of rent or rent equivalents, royalties (including, without limitation, all oil and gas or other mineral royalties and bonuses), income, receivables, receipts, revenues, deposits (including, without limitation, security, utility and other deposits), accounts, cash, issues, profits, charges for services rendered, and other consideration of whatever form or nature received by or paid to or for the account of or benefit of Borrower or its agents or employees from any and all sources arising from or attributable to the Property, including, all receivables, customer obligations, installment payment obligations and other obligations now existing or hereafter arising or created out of the sale, lease, sublease, license, concession or other grant of the right of the use and occupancy of property or rendering of services by Borrower or Manager and proceeds, if any, from business interruption or other loss of income insurance whether paid or accruing before or after the filing by or against Borrower of any petition for relief under any Creditors Rights Laws (collectively, the “**Rents**”) and all proceeds from the sale or other disposition of the Leases and the right to receive and apply the Rents to the payment of the Debt;

(i) Insurance Proceeds. Subject to the obligations of Borrower and the rights of the lessor under the Ground Lease, all insurance proceeds in respect of the Property under any insurance policies covering the Property, including, without limitation, the right to receive and apply the proceeds of any insurance, judgments, or settlements made in lieu thereof, for damage to the Property (collectively, the “**Insurance Proceeds**”);

(j) Condemnation Awards. Subject to the obligations of Borrower and the rights of the lessor under the Ground Lease, all condemnation awards, including interest thereon, which

may heretofore and hereafter be made with respect to the Property by reason of any taking or condemnation, whether from the exercise of the right of eminent domain (including, but not limited to, any transfer made in lieu of or in anticipation of the exercise of the right), or for a change of grade, or for any other injury to or decrease in the value of the Property (collectively, the “**Awards**”);

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

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

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

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

(o) Accounts. All reserves, escrows and deposit accounts maintained by Borrower with respect to the Property, including without limitation, the Accounts and all cash, checks, drafts, certificates, securities, investment property, financial assets, instruments and other property held therein from time to time and all proceeds, products, distributions or dividends or substitutions thereon and thereof;

(p) Proceeds. All proceeds of any of the foregoing items set forth in subsections (a) through (o) including, without limitation, Insurance Proceeds and Awards (subject to the obligations of Borrower and the rights of the lessor under the Ground Lease), into cash or liquidation claims; and

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

**Section 1.2. ASSIGNMENT OF RENTS**. Borrower hereby absolutely and unconditionally assigns to Lender all of Borrower’s right, title and interest in and to all current and future Leases and Rents; it being intended by Borrower that this assignment constitutes a present, absolute assignment and not an assignment for additional security only. Nevertheless, subject to the terms of the Loan Agreement and Section 8.1(h) of this Security Instrument, Lender grants to Borrower a revocable license to (i) collect, receive, use and enjoy the Rents and Borrower shall hold the

Rents, or a portion thereof sufficient to discharge all current sums due on the Debt, for use in the payment of such sums, and (ii) enforce the terms of the Leases.

**Section 1.3. SECURITY AGREEMENT.** This Security Instrument is both a real property mortgage and a “security agreement” within the meaning of the Uniform Commercial Code. The Property includes both real and personal property and all other rights and interests, whether tangible or intangible in nature, of Borrower in the Property. By executing and delivering this Security Instrument, Borrower hereby grants to Lender, as security for the Obligations (hereinafter defined), a security interest in the Property to the full extent that the Property may be subject to the Uniform Commercial Code.

**Section 1.4. FIXTURE FILING.** Certain of the Property is or will become “fixtures” (as that term is defined in the Uniform Commercial Code) on the Land, and this Security Instrument, upon being filed for record in the real estate records of the city or county wherein such fixtures are situated, shall operate also as a financing statement filed as a fixture filing in accordance with the applicable provisions of said Uniform Commercial Code upon such of the Property that is or may become fixtures.

**Section 1.5. CONDITIONS TO GRANT.** TO HAVE AND TO HOLD the above granted and described Property unto and to the use and benefit of Lender and its successors and assigns; PROVIDED, HOWEVER, these presents are upon the express condition that, if Lender shall be well and truly paid the Debt at the time and in the manner provided in the Note, the Loan Agreement and this Security Instrument, if Borrower shall well and truly perform the Other Obligations as set forth in this Security Instrument and shall well and truly abide by and comply with each and every covenant and condition set forth herein and in the Note, the Loan Agreement and the other Loan Documents, these presents and the estate hereby granted shall cease, terminate and be void.

## **Article 2 – DEBT AND OBLIGATIONS SECURED**

**Section 2.1. DEBT.** This Security Instrument and the grants, assignments and transfers made in Article 1 are given for the purpose of securing the Debt.

**Section 2.2. OTHER OBLIGATIONS.** This Security Instrument and the grants, assignments and transfers made in Article 1 are also given for the purpose of securing the performance of the following (the “**Other Obligations**”): (a) all other obligations of Borrower contained herein; (b) each obligation of Borrower contained in the Loan Agreement and any other Loan Document; and (c) each obligation of Borrower contained in any renewal, extension, amendment, modification, consolidation, change of, or substitution or replacement for, all or any part of the Note, the Loan Agreement or any other Loan Document.

**Section 2.3. DEBT AND OTHER OBLIGATIONS.** Borrower’s obligations for the payment of the Debt and the performance of the Other Obligations shall be referred to collectively herein as the “**Obligations.**”

**Section 2.4. PAYMENT OF DEBT.** Borrower will pay the Debt at the time and in the manner provided in the Loan Agreement, the Note and this Security Instrument.



**Section 2.5. INCORPORATION BY REFERENCE.** All the covenants, conditions and agreements contained in (a) the Loan Agreement, (b) the Note and (c) all and any of the other Loan Documents, are hereby made a part of this Security Instrument to the same extent and with the same force as if fully set forth herein.

### **Article 3 – PROPERTY COVENANTS**

Borrower covenants and agrees that:

**Section 3.1. INSURANCE.** Borrower shall obtain and maintain, or cause to be obtained and maintained, in full force and effect at all times insurance with respect to Borrower and the Property as required pursuant to the Loan Agreement.

**Section 3.2. TAXES AND OTHER CHARGES.** Borrower shall pay all real estate and personal property taxes, assessments, water rates or sewer rents (collectively “**Taxes**”), ground rents, maintenance charges, impositions (other than Taxes), and any other charges, including, without limitation, vault charges and license fees for the use of vaults, chutes and similar areas adjoining the Property (collectively, “**Other Charges**”), now or hereafter levied or assessed or imposed against the Property or any part thereof in accordance with the Loan Agreement.

**Section 3.3. LEASES.** Borrower shall not (and shall not permit any other applicable Person to) enter in any Leases for all or any portion of the Property unless in accordance with the provisions of the Loan Agreement.

**Section 3.4. WARRANTY OF TITLE.** Borrower has good, indefeasible, marketable and insurable title to the Property and has the right to mortgage, grant, bargain, sell, pledge, assign, warrant, transfer and convey the same. Borrower possesses an unencumbered Leasehold Estate in the Land and the Improvements except for the Permitted Encumbrances, such other liens as are permitted pursuant to the Loan Documents, the liens created by the Loan Documents, and the encumbrances (the “**Title Encumbrances**”), if any, described in Exhibit A attached hereto and incorporated herein. This Security Instrument, when properly recorded in the appropriate records, together with any Uniform Commercial Code financing statements required to be filed in connection therewith, will create (a) a legal, valid, and perfected first priority lien on the Property, subject only to Permitted Encumbrances, the liens created by the Loan Documents, and the Title Encumbrances and (b) a legal, valid, and perfected first priority security interests in and to, and legal, valid, and perfected collateral assignments of, all personalty (including the Leases), all in accordance with the terms thereof, in each case subject only to any applicable Permitted Encumbrances, such other liens as are permitted pursuant to the Loan Documents, the liens created by the Loan Documents, and the Title Encumbrances. Borrower shall forever warrant, defend and preserve the title and the validity and priority of the lien of this Security Instrument and shall forever warrant and defend the same to Lender against the claims of all Persons whomsoever.

**Section 3.5. PAYMENT FOR LABOR AND MATERIALS.** Subject to Borrower’s right to contest any Work Charge (defined herein) pursuant to the terms of the Loan Agreement, Borrower will promptly pay (or cause to be paid) when due all bills and costs for labor, materials, and specifically fabricated materials incurred in connection with the Property (each, a

“**Work Charge**”) and never permit to exist beyond the due date thereof in respect of the Property or any part thereof any lien or security interest, even though inferior to the liens and the security interests hereof, and in any event never permit to be created or exist in respect of the Property or any part thereof any other or additional lien or security interest other than the liens or security interests hereof except for the Permitted Encumbrances and the Title Encumbrances. Borrower represents there are no claims for payment for work, labor or materials affecting the Property which are or may become a lien prior to, or of equal priority with, the liens created by the Loan Documents.

#### **Article 4 – FURTHER ASSURANCES**

**Section 4.1.** COMPLIANCE WITH LOAN AGREEMENT. Borrower shall comply with all covenants set forth in the Loan Agreement relating to acts or other further assurances to be made on the part of Borrower in order to protect and perfect the lien or security interest hereof upon, and in the interest of Lender in, the Property.

**Section 4.2.** AUTHORIZATION TO FILE FINANCING STATEMENTS; POWER OF ATTORNEY. Borrower hereby authorizes Lender at any time and from time to time to file any initial financing statements, amendments thereto and continuation statements as authorized by applicable law, as applicable to all or part of the Personal Property and as necessary or required in connection herewith. For purposes of such filings, Borrower agrees to furnish any information requested by Lender promptly upon request by Lender. Borrower also ratifies its authorization for Lender to have filed any like initial financing statements, amendments thereto or continuation statements, if filed prior to the date of this Security Instrument. Borrower hereby irrevocably constitutes and appoints Lender and any officer or agent of Lender, with full power of substitution, as its true and lawful attorneys-in-fact with full irrevocable power and authority in the place and stead of Borrower or in Borrower’s own name to execute in Borrower’s name any such documents and otherwise to carry out the purposes of this Section 4.2, to the extent that Borrower’s authorization above is not sufficient and Borrower fails or refuses to promptly execute such documents. To the extent permitted by law, Borrower hereby ratifies all acts said attorneys-in-fact have lawfully done in the past or shall lawfully do or cause to be done in the future by virtue hereof. This power of attorney is a power coupled with an interest and shall be irrevocable.

#### **Article 5 – DUE ON SALE/ENCUMBRANCE**

**Section 5.1.** NO SALE/ENCUMBRANCE. Except in accordance with the express terms and conditions contained in the Loan Agreement, Borrower shall not cause or permit a sale, conveyance, mortgage, grant, bargain, encumbrance, pledge, assignment, or grant of any options with respect to, or any other transfer or disposition (directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise, and whether or not for consideration or of record) of a legal or beneficial interest in the Property or any part thereof, Borrower, any constituent owner or other holder of a direct or indirect equity interest in Borrower, any indemnitor or other guarantor of the Loan, any constituent owner or other holder of a direct or indirect equity interest in such indemnitor or guarantor, any manager or operating lessee of the Property that is affiliated with Borrower or any constituent owner or other holder of a direct or indirect equity interest in such manager or such operating lessee.

## **Article 6 – PREPAYMENT; RELEASE OF PROPERTY**

**Section 6.1.** PREPAYMENT. The Debt may not be prepaid in whole or in part except in strict accordance with the express terms and conditions of the Note and the Loan Agreement.

**Section 6.2.** RELEASE OF PROPERTY. Borrower shall not be entitled to a release of any portion of the Property from the lien of this Security Instrument except in accordance with terms and conditions of the Loan Agreement.

## **Article 7 – DEFAULT**

**Section 7.1.** EVENT OF DEFAULT. The term “**Event of Default**” as used in this Security Instrument shall have the meaning assigned to such term in the Loan Agreement.

## **Article 8 – RIGHTS AND REMEDIES UPON DEFAULT**

**Section 8.1.** REMEDIES. Upon the occurrence and during the continuance of any Event of Default, Borrower agrees that Lender may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Borrower and in and to the Property, including, but not limited to, the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Lender may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Lender:

- (a) declare the entire unpaid Debt to be immediately due and payable;
- (b) institute proceedings, judicial or otherwise, for the complete foreclosure of this Security Instrument under any applicable provision of law, in which case the Property or any interest therein may be sold for cash or upon credit in one or more parcels or in several interests or portions and in any order or manner;
- (c) with or without entry, to the extent permitted and pursuant to the procedures provided by applicable law, institute proceedings for the partial foreclosure of this Security Instrument for the portion of the Debt then due and payable, subject to the continuing lien and security interest of this Security Instrument for the balance of the Debt not then due, unimpaired and without loss of priority;
- (d) sell for cash or upon credit the Property or any part thereof and all estate, claim, demand, right, title and interest of Borrower therein and rights of redemption thereof, pursuant to power of sale or otherwise, at one or more sales, as an entirety or in parcels, at such time and place, upon such terms and after such notice thereof as may be required or permitted by law;
- (e) institute an action, suit or proceeding in equity for the specific performance of any covenant, condition or agreement contained herein, in the Note, the Loan Agreement or in the other Loan Documents;
- (f) recover judgment on the Note either before, during or after any proceedings for the enforcement of this Security Instrument or the other Loan Documents;

(g) apply for the appointment of a receiver, trustee, liquidator or conservator of the Property, without notice to Borrower, which notice Borrower expressly waives, and without regard for the adequacy of the security for the Debt and without regard for the solvency of Borrower, any guarantor or indemnitor under the Loan or any other Person liable for the payment of the Debt and whose appointment Borrower expressly consents to take possession of and to operate the Property and to collect the Rents and to otherwise protect and preserve the Property;

(h) the license granted to Borrower under Section 1.2 hereof shall automatically be revoked and Lender may enter into or upon the Property, either personally or by its agents, nominees or attorneys and dispossess Borrower and its agents and servants therefrom, without liability for trespass, damages or otherwise and exclude Borrower and its agents or servants wholly therefrom, and take possession of all books, records and accounts relating thereto and Borrower agrees to surrender possession of the Property and of such books, records and accounts to Lender upon demand, and thereupon Lender may (i) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with all and every part of the Property and conduct the business thereat; (ii) subject to the terms of the Ground Lease, complete any construction on the Property in such manner and form as Lender deems advisable; (iii) subject to the terms of the Ground Lease, make alterations, additions, renewals, replacements and improvements to or on the Property; (iv) exercise all rights and powers of Borrower with respect to the Property, whether in the name of Borrower or otherwise, including, without limitation, the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents of the Property and every part thereof; (v) require Borrower to pay monthly in advance to Lender, or any receiver appointed to collect the Rents, the fair and reasonable rental value for the use and occupation of such part of the Property as may be occupied by Borrower; (vi) require Borrower to vacate and surrender possession of the Property to Lender or to such receiver and, in default thereof, Borrower may be evicted by summary proceedings or otherwise; and (vii) except as otherwise provided in the Loan Agreement, apply the receipts from the Property to the payment of the Debt, in such order, priority and proportions as Lender shall deem appropriate in its sole discretion after deducting therefrom all expenses (including reasonable attorneys' fees) incurred in connection with the aforesaid operations and all amounts necessary to pay the Taxes, Other Charges, insurance and other expenses in connection with the Property, as well as just and reasonable compensation for the services of Lender, its counsel, agents and employees;

(i) apply any sums then deposited or held in escrow or otherwise by or on behalf of Lender in accordance with the terms of the Loan Agreement, this Security Instrument or any other Loan Document to the payment of the following items in any order in its sole discretion: (i) Taxes and Other Charges; (ii) insurance premiums; (iii) interest on the unpaid principal balance of the Note; (iv) amortization of the unpaid principal balance of the Note; (v) all other sums payable pursuant to the Note, the Loan Agreement, this Security Instrument and the other Loan Documents, including without limitation advances made by Lender pursuant to the terms of this Security Instrument;

(j) subject to the terms of the Ground Lease, surrender the insurance policies maintained pursuant to the Loan Agreement, collect the unearned insurance premiums for such insurance policies and apply such sums as a credit on the Debt in such priority and proportion as Lender in its discretion shall deem proper, and in connection therewith, Borrower hereby

appoints Lender as agent and attorney-in-fact (which is coupled with an interest and is therefore irrevocable) for Borrower to collect such insurance premiums;

(k) apply the undisbursed balance of any deposit made by Borrower with Lender in connection with the restoration of the Property after a casualty thereto or condemnation thereof, together with interest thereon, to the payment of the Debt in such order, priority and proportions as Lender shall deem to be appropriate in its discretion; and/or

(l) pursue such other remedies as Lender may have under Applicable Law.

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

**Section 8.2.** APPLICATION OF PROCEEDS. The purchase money, proceeds and avails of any disposition of the Property, and or any part thereof, or any other sums collected by Lender pursuant to the Note, this Security Instrument or the other Loan Documents, may be applied by Lender to the payment of the Debt in such priority and proportions as Lender in its discretion shall deem proper to the extent consistent with Applicable Law.

**Section 8.3.** RIGHT TO CURE DEFAULTS. Upon the occurrence and during the continuance of any Event of Default, Lender may, but without any obligation to do so and without notice to or demand on Borrower and without releasing Borrower from any obligation hereunder, make any payment or do any act required of Borrower hereunder in such manner and to such extent as Lender may deem necessary to protect the security hereof. Lender is authorized to enter upon the Property for such purposes, or appear in, defend, or bring any action or proceeding to protect its interest in the Property or to foreclose this Security Instrument or collect the Debt, and the actual, out of pocket cost and expense thereof (including reasonable attorneys' fees to the extent permitted by law), with interest as provided in this Section 8.3, shall constitute a portion of the Debt and shall be due and payable to Lender upon demand. All such actual, out of pocket costs and expenses incurred by Lender in remedying such Event of Default or such failed payment or act or in appearing in, defending, or bringing any such action or proceeding shall bear interest at any default rate specified in the Loan Agreement, if any (the "**Default Rate**"), for the period after notice from Lender that such cost or expense was incurred to the date of payment to Lender. All such actual, out of pocket costs and expenses incurred by Lender together with interest thereon calculated at the Default Rate shall be deemed to constitute a portion of the Debt and be secured by this Security Instrument and the other Loan Documents and shall be immediately due and payable upon demand by Lender therefor.

**Section 8.4.** ACTIONS AND PROCEEDINGS. Lender has the right to appear in and defend any action or proceeding brought with respect to the Property and to bring any action or proceeding, in the name and on behalf of Borrower, which Lender, in its discretion, decides should be brought to protect its interest in the Property.

**Section 8.5. RECOVERY OF SUMS REQUIRED TO BE PAID.** Lender shall have the right from time to time to take action to recover any sum or sums which constitute a part of the Debt as the same become due, without regard to whether or not the balance of the Debt shall be due, and without prejudice to the right of Lender thereafter to bring an action of foreclosure, or any other action, for a default or defaults by Borrower existing at the time such earlier action was commenced.

**Section 8.6. OTHER RIGHTS, ETC.** (a) The failure of Lender to insist upon strict performance of any term hereof shall not be deemed to be a waiver of any term of this Security Instrument. Borrower shall not be relieved of Borrower's obligations hereunder by reason of (i) the failure of Lender to comply with any request of Borrower or any guarantor or indemnitor with respect to the Loan to take any action to foreclose this Security Instrument or otherwise enforce any of the provisions hereof or of the Note or the other Loan Documents, (ii) the release, regardless of consideration, of the whole or any part of the Property, or of any Person liable for the Debt or any portion thereof, or (iii) any agreement or stipulation by Lender extending the time of payment or otherwise modifying or supplementing the terms of the Note, this Security Instrument or the other Loan Documents.

(b) It is agreed that the risk of loss or damage to the Property is on Borrower, and Lender shall have no liability whatsoever for decline in the value of the Property, for failure to maintain the insurance policies required to be maintained pursuant to the Loan Agreement, or for failure to determine whether insurance in force is adequate as to the amount of risks insured. Possession by Lender shall not be deemed an election of judicial relief if any such possession is requested or obtained with respect to any Property or collateral not in Lender's possession.

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

**Section 8.7. RIGHT TO RELEASE ANY PORTION OF THE PROPERTY.** Lender may release any portion of the Property for such consideration as Lender may require without, as to the remainder of the Property, in any way impairing or affecting the lien or priority of this Security Instrument, or improving the position of any subordinate lienholder with respect thereto, except to the extent that the obligations hereunder shall have been reduced by the actual monetary consideration, if any, received by Lender for such release, and may accept by assignment, pledge or otherwise any other property in place thereof as Lender may require without being accountable for so doing to any other lienholder. This Security Instrument shall continue as a lien and security interest in the remaining portion of the Property.

**Section 8.8. RIGHT OF ENTRY.** Upon reasonable notice to Borrower, Lender and its agents shall have the right to enter and inspect the Property at all reasonable times.

**Section 8.9. BANKRUPTCY.** (a) Upon the occurrence and during the continuance of an Event of Default, Lender shall have the right to proceed in its own name or in the name of Borrower in respect of any claim, suit, action or proceeding relating to the rejection of any Lease, including, without limitation, the right to file and prosecute, to the exclusion of Borrower, any proofs of claim, complaints, motions, applications, notices and other documents, in any case in respect of the lessee under such Lease under the Bankruptcy Code.

(b) If there shall be filed by or against Borrower a petition under the Bankruptcy Code and Borrower, as lessor under any Lease, shall determine to reject such Lease pursuant to Section 365(a) of the Bankruptcy Code, then Borrower shall give Lender not less than ten (10) days' prior notice of the date on which Borrower shall apply to the bankruptcy court for authority to reject the Lease. Lender shall have the right, but not the obligation, to serve upon Borrower within such ten-day period a notice stating that (i) Lender demands that Borrower assume and assign the Lease to Lender pursuant to Section 365 of the Bankruptcy Code and (ii) Lender covenants to cure or provide adequate assurance of future performance under the Lease. If Lender serves upon Borrower the notice described in the preceding sentence, Borrower shall not seek to reject the Lease and shall comply with the demand provided for in clause (i) of the preceding sentence within thirty (30) days after the notice shall have been given, subject to the performance by Lender of the covenant provided for in clause (ii) of the preceding sentence.

**Section 8.10. SUBROGATION.** If any or all of the proceeds of the Note have been used to extinguish, extend or renew any indebtedness heretofore existing against the Property, then, to the extent of the funds so used, Lender shall be subrogated to all of the rights, claims, liens, titles, and interests existing against the Property heretofore held by, or in favor of, the holder of such indebtedness and such former rights, claims, liens, titles, and interests, if any, are not waived but rather are continued in full force and effect in favor of Lender and are merged with the lien and security interest created herein as cumulative security for the repayment of the Debt, the performance and discharge of the Other Obligations.

## **Article 9 – ENVIRONMENTAL HAZARDS**

**Section 9.1. ENVIRONMENTAL COVENANTS.** Borrower has provided representations, warranties and covenants regarding environmental matters set forth in the Environmental Indemnity and Borrower shall comply with the aforesaid covenants regarding environmental matters.

## **Article 10 – WAIVERS**

**Section 10.1. MARSHALLING AND OTHER MATTERS.** Borrower hereby waives, to the extent permitted by law, the benefit of all Applicable Law now or hereafter in force regarding appraisal, valuation, stay, extension, reinstatement and redemption and all rights of marshalling in the event of any sale hereunder of the Property or any part thereof or any interest therein. Further, Borrower hereby expressly waives any and all rights of redemption from sale under any order or decree of foreclosure of this Security Instrument on behalf of Borrower, and on behalf of each and every Person acquiring any interest in or title to the Property subsequent to the date of this Security Instrument and on behalf of all Persons to the extent permitted by Applicable Law.

**Section 10.2. WAIVER OF NOTICE.** Borrower shall not be entitled to any notices of any nature whatsoever from Lender except with respect to matters for which this Security Instrument or the Loan Agreement specifically and expressly provides for the giving of notice by Lender to Borrower and except with respect to matters for which Borrower is not permitted by Applicable Law to waive its right to receive notice, and Borrower hereby expressly waives the right to receive any notice from Lender with respect to any matter for which this Security Instrument does not specifically and expressly provide for the giving of notice by Lender to Borrower.

**Section 10.3. INTENTIONALLY OMITTED.**

**Section 10.4. SOLE DISCRETION OF LENDER.** Whenever pursuant to this Security Instrument, Lender exercises any right given to it to approve or disapprove, or any arrangement or term is to be satisfactory to Lender, the decision of Lender to approve or disapprove or to decide whether arrangements or terms are satisfactory or not satisfactory shall (except as is otherwise specifically herein provided) be in the sole discretion of Lender and shall be final and conclusive.

**Section 10.5. WAIVER OF TRIAL BY JURY. **BORROWER AND LENDER EACH HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THE LOAN DOCUMENTS, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY BORROWER AND LENDER, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. EACH OF LENDER AND BORROWER IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY BORROWER AND LENDER.****

**Section 10.6. WAIVER OF FORECLOSURE DEFENSE.** Borrower hereby waives any defense Borrower might assert or have by reason of Lender's failure to make any tenant or lessee of the Property a party defendant in any foreclosure proceeding or action instituted by Lender.

## **Article 11 – INTENTIONALLY OMITTED**

## **Article 12 – NOTICES**

**Section 12.1. NOTICES.** All notices or other written communications hereunder shall be delivered in accordance with the applicable terms and conditions of the Loan Agreement.

## **Article 13 – APPLICABLE LAW**

**Section 13.1. GOVERNING LAW. (A) THIS SECURITY INSTRUMENT WAS NEGOTIATED IN THE STATE OF NEW YORK, AND MADE BY BORROWER AND ACCEPTED BY LENDER IN THE STATE OF NEW YORK, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND**



**TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS SECURITY INSTRUMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE (WITHOUT REGARD TO PRINCIPLES OF CONFLICT OF LAWS) AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES (I) THE PROVISIONS FOR THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED PURSUANT HERETO AND PURSUANT TO THE OTHER LOAN DOCUMENTS WITH RESPECT TO THE PROPERTY (OTHER THAN THAT DESCRIBED IN SUBPARAGRAPH II BELOW) SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE IN WHICH THE PROPERTY AND FIXTURES ARE LOCATED AND (II) WITH RESPECT TO THE PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED BY THIS SECURITY INSTRUMENT AND THE OTHER LOAN DOCUMENTS IN PROPERTY WHOSE PERFECTION AND PRIORITY IS COVERED BY ARTICLE 9 OF THE UCC (INCLUDING, WITHOUT LIMITATION, THE ACCOUNTS), THE LAW OF THE JURISDICTION APPLICABLE IN ACCORDANCE WITH SECTIONS 9-301 THROUGH 9-307 OF THE UCC AS IN EFFECT IN THE STATE OF NEW YORK SHALL GOVERN. TO THE FULLEST EXTENT PERMITTED BY LAW, BORROWER HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS SECURITY INSTRUMENT AND THE NOTE, AND THIS SECURITY INSTRUMENT AND THE NOTE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW EXCEPT AS SPECIFICALLY SET FORTH ABOVE. (B) ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST LENDER OR BORROWER ARISING OUT OF OR RELATING TO THIS SECURITY INSTRUMENT MAY AT LENDER'S OPTION BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW, AND BORROWER WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND BORROWER HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. BORROWER DOES HEREBY DESIGNATE AND APPOINT**

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**AS ITS AUTHORIZED AGENT TO ACCEPT AND ACKNOWLEDGE ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW**

**YORK, NEW YORK, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE MAILED OR DELIVERED TO BORROWER IN THE MANNER PROVIDED HEREIN SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON BORROWER IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW YORK. BORROWER (I) SHALL GIVE PROMPT NOTICE TO LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (II) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW YORK, NEW YORK (WHICH SUBSTITUTE AGENT AND OFFICE SHALL BE DESIGNATED AS THE PERSON AND ADDRESS FOR SERVICE OF PROCESS), AND (III) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW YORK, NEW YORK OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR.**

**Section 13.2. PROVISIONS SUBJECT TO APPLICABLE LAW.** All rights, powers and remedies provided in this Security Instrument may be exercised only to the extent that the exercise thereof does not violate any applicable provisions of law and are intended to be limited to the extent necessary so that they will not render this Security Instrument invalid, unenforceable or not entitled to be recorded, registered or filed under the provisions of any applicable law. If any term of this Security Instrument or any application thereof shall be invalid or unenforceable, the remainder of this Security Instrument and any other application of the term shall not be affected thereby.

#### **Article 14 – DEFINITIONS**

**Section 14.1. GENERAL DEFINITIONS.** Unless the context clearly indicates a contrary intent or unless otherwise specifically provided herein, words used in this Security Instrument may be used interchangeably in singular or plural form and the word “Borrower” shall mean “each Borrower and any subsequent owner or owners of the Property or any part thereof or any interest therein,” the word “Lender” shall mean “Lender and any of Lender’s successors and assigns,” the word “Note” shall mean “the Note and any other evidence of indebtedness secured by this Security Instrument,” the word “Property” shall include any portion of the Property and any interest therein, and the phrases “attorneys’ fees”, “legal fees” and “counsel fees” shall include any and all attorneys’, paralegal and law clerk fees and disbursements, including, but not limited to, fees and disbursements at the pre-trial, trial and appellate levels incurred or paid by Lender in protecting its interest in the Property, the Leases and the Rents and enforcing its rights hereunder.

#### **Article 15 – MISCELLANEOUS PROVISIONS**

**Section 15.1. NO ORAL CHANGE.** This Security Instrument, and any provisions hereof, may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of Borrower or Lender, but only by an agreement in writing signed by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.

**Section 15.2. SUCCESSORS AND ASSIGNS.** This Security Instrument shall be binding upon and inure to the benefit of Borrower, Lender and their respective successors and assigns forever.

**Section 15.3. INAPPLICABLE PROVISIONS.** If any term, covenant or condition of the Loan Agreement, the Note or this Security Instrument is held to be invalid, illegal or unenforceable in any respect, the Loan Agreement, the Note and this Security Instrument shall be construed without such provision.

**Section 15.4. HEADINGS, ETC.** The headings and captions of various Sections of this Security Instrument are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof.

**Section 15.5. NUMBER AND GENDER.** Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns and pronouns shall include the plural and vice versa.

**Section 15.6. ENTIRE AGREEMENT.** This Security Instrument and the other Loan Documents contain the entire agreement of the parties hereto and thereto in respect of the transactions contemplated hereby and thereby, and all prior agreements among or between such parties, whether oral or written, are superseded by the terms of this Security Instrument and the other Loan Documents.

**Section 15.7. LIMITATION ON LENDER'S RESPONSIBILITY.** No provision of this Security Instrument shall operate to place any obligation or liability for the control, care, management or repair of the Property upon Lender, nor shall it operate to make Lender responsible or liable for any waste committed on the Property by the tenants or any other Person, or for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee or stranger. Nothing herein contained shall be construed as constituting Lender a "mortgagee in possession." If more than one Person has executed this Security Instrument as "Borrower," the representations, covenants, warranties and obligations of all such Persons hereunder shall be joint and several.

**Section 15.8. SOLAR LEASE ALLOWANCE.** Notwithstanding anything herein to the contrary, Lender hereby acknowledges that it has consented to Borrower entering into the [Phase II Solar Lease Documents] (as defined in the Loan Agreement) in accordance with the terms of the Loan Agreement.

## **Article 16 – INTENTIONALLY OMITTED**

## **Article 17 - GROUND LEASE PROVISIONS**

**Section 17.1. NO MERGER OF FEE AND LEASEHOLD ESTATES; RELEASES.** So long as any portion of the Debt shall remain unpaid, unless Lender shall otherwise consent, the fee title to the Land and the Leasehold Estate shall not merge but shall always be kept separate and distinct,

notwithstanding the union of such estates in Borrower, Ground Lessor or in any other Person by purchase, operation of law or otherwise. Lender reserves the right, at any time, to release portions of the Property, including, but not limited to, the Leasehold Estate, with or without consideration, at Lender's election, without waiving or affecting any of its rights hereunder or under the Note or the other Loan Documents and any such release shall not affect Lender's rights in connection with the portion of the Property not so released.

**Section 17.2. BORROWER'S ACQUISITION OF FEE ESTATE.** In the event that Borrower, so long as any portion of the Debt remains unpaid, shall become the owner and holder of Ground Lessor's fee interest in the portion of the Property demised pursuant to the Ground Lease, the lien of this Security Instrument shall be spread to cover such interest and such interest shall be deemed to be included in the Property. Borrower agrees, at its sole cost and expense, including without limitation, Lender's reasonable attorney's fees, to (i) execute any and all documents or instruments necessary to subject the foregoing interest to the lien of this Security Instrument; and (ii) provide a title insurance policy which shall insure that the lien of this Security Instrument is a first lien on such interest. The foregoing shall not be construed to permit Borrower to acquire the aforesaid fee interest and Borrower rights to acquire additional property shall remain subject to the restrictions relating thereto contained in the Loan Agreement and the other Loan Documents.

**Section 17.3. REJECTION OF THE GROUND LEASE.**

(a) If the Ground Lease is terminated by Ground Lessor for any reason in the event of the rejection or disaffirmance of the Ground Lease by Ground Lessor pursuant to the Bankruptcy Code or any other law affecting creditor's rights, (i) Borrower, immediately after obtaining notice thereof, shall give notice thereof to Lender, (ii) Borrower, without the prior written consent of Lender, shall not elect to treat the Ground Lease as terminated pursuant to Section 365(h) of the Bankruptcy Code or any comparable federal or state statute or law, and any election by Borrower made without such consent shall be void and (iii) this Security Instrument and all the liens, terms, covenants and conditions of this Security Instrument shall extend to and cover Borrower's possessory rights under Section 365(h) of the Bankruptcy Code and to any claim for damages due to the rejection of the Ground Lease or other termination of the Ground Lease. In addition, Borrower hereby assigns irrevocably to Lender Borrower's rights to treat the Ground Lease as terminated pursuant to Section 365(h) of the Bankruptcy Code and to offset rents under the Ground Lease in the event any case, proceeding or other action is commenced by or against Ground Lessor under the Bankruptcy Code or any comparable federal or state statute or law, provided that Lender shall not exercise such rights and shall permit Borrower to exercise such rights with the prior written consent of Lender, not to be unreasonably withheld or delayed, unless an Event of Default shall have occurred and be continuing.

(b) Borrower hereby assigns to Lender Borrower's right to reject the Ground Lease under Section 365 of the Bankruptcy Code or any comparable federal or state statute or law with respect to any case, proceeding or other action commenced by or against Borrower under the Bankruptcy Code or comparable federal or state statute or law, provided Lender shall not exercise such right, and shall permit Borrower to exercise such right with the prior written consent of Lender, not to be unreasonably withheld or delayed, unless an Event of Default shall have occurred and be continuing. Further, if Borrower shall desire to so reject the Ground Lease, at Lender's request, to the extent not prohibited by the terms of the Ground Lease and applicable

law, Borrower shall assign its interest in the Ground Lease to Lender in lieu of rejecting the Ground Lease as described above, upon receipt by Borrower of written notice from Lender of such request together with Lender's agreement to cure any existing defaults of Borrower under the Ground Lease and to provide adequate assurance of future performance of Borrower's obligations thereunder.

(c) Borrower hereby assigns to Lender Borrower's right to seek an extension of the 60-day period within which Borrower must accept or reject the Ground Lease under Section 365 of the Bankruptcy Code or any comparable federal or state statute or law with respect to any case, proceeding or other action commenced by or against Borrower under the Bankruptcy Code or comparable federal or state statute or law, provided Lender shall not exercise such right, and shall permit Borrower to exercise such right with the prior written consent of Lender, not to be unreasonably withheld or delayed, unless an Event of Default shall have occurred and be continuing. Further, if Borrower shall desire to so reject the Ground Lease, at Lender's request, to the extent not prohibited by the terms of the Ground Lease and applicable law, Borrower shall assign its interest in the Ground Lease to Lender in lieu of rejecting such Ground Lease as described above, upon receipt by Borrower of written notice from Lender of such request together with Lender's agreement to cure any existing defaults of Borrower under the Ground Lease and to provide adequate assurance of future performance of the applicable Borrower's obligations thereunder.

(d) Borrower hereby agrees that if the Ground Lease is terminated for any reason in the event of the rejection or disaffirmance of the Ground Lease pursuant to the Bankruptcy Code or any other law affecting creditor's rights, any Personal Property of Borrower not removed from the Property by Borrower as permitted or required by the Ground Lease, shall at the option of Lender be deemed abandoned by Borrower, provided that Lender may remove any such Personal Property required to be removed by Borrower pursuant to the Ground Lease and all reasonable out-of-pocket costs and expenses associated with such removal shall be paid by Borrower within five (5) days of receipt by Borrower of an invoice for such removal costs and expenses.

## **Article 18 – STATE-SPECIFIC PROVISIONS**

**Section 18.1. PRINCIPLES OF CONSTRUCTION.** In the event of any inconsistencies between the terms and conditions of this Article 18 and the terms and conditions of this Security Instrument, the terms and conditions of this Article 18 shall control and be binding.

**Section 18.2. BUSINESS LOAN TRANSACTION.** The Loan evidenced by the Note is made for commercial purposes and the Loan is neither a consumer credit transaction nor a home business loan, as defined in Section 478-1, Hawaii Revised Statutes, as amended.

**Section 18.3. SECURED OBLIGATIONS.** With respect to the Property, the obligations secured by this Security Instrument shall include all amounts payable under this Security Instrument and the other Loan Documents including, without limitation, the repayment of all future advances or costs in an amount not to exceed \$100,000,000.00 (which future advances shall include, without limitation, advances to pay for such items as real property taxes, insurance premiums, ground lease rents, attorneys' fees, or any other sums) which Lender may, but is not

obligated to, make or incur in accordance with the terms of this Security Instrument or any of the other Loan Documents.

**Section 18.4. REMEDIES.** Without limiting any other remedies available under this Security Instrument, under any of the other Loan Documents or under applicable law, following an Event of Default hereunder, Lender shall be entitled to exercise any remedies available under Hawaii Revised Statutes Chapter 667, including, without limitation, a power of sale foreclosure pursuant to such Chapter 667.

**Section 18.5. NOTICE REGARDING INSURANCE COMPANIES.** This Security Instrument constitutes, and Borrower hereby acknowledges written notice from Lender that, LENDER MAY NOT MAKE THE GRANTING OF THE LOAN EVIDENCED BY THE NOTE CONTINGENT ON BORROWER PROCURING ANY REQUIRED INSURANCE WITH AN INSURANCE COMPANY DESIGNATED BY LENDER.

**[NO FURTHER TEXT ON THIS PAGE]**

**IN WITNESS WHEREOF**, this Security Instrument has been executed by the undersigned as of the day and year first above written.

**BORROWER**

Signature and notary pages sent separately.

**EXHIBIT A**

**LEGAL DESCRIPTION**

**(attached hereto)**

***[CS Note to Draft: Exhibit A should describe the Ground Lease and the demised premises per Sched. C of the title proforma along with the relevant exceptions from Schedul B.]***



**Exhibit D**  
**to Consent Request With Specific Agreed Upon Conditional Approval of Consent to  
Mortgage of General Lease S-5844 dated June 14, 2023**

Form of Loan Agreement  
(Note: Section 11.6 to be removed)

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Loan No: 31-0946337

**LOAN AGREEMENT**

Dated as of August 31, 2018

Between

**WHR LLC,**  
as Borrower

and

**WELLS FARGO BANK, NATIONAL ASSOCIATION,**  
as Lender

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## TABLE OF CONTENTS

	<b>Page</b>
<b>ARTICLE 1. DEFINITIONS; PRINCIPLES OF CONSTRUCTION .....</b>	<b>7</b>
Section 1.1 Definitions.....	7
Section 1.2 Principles of Construction.....	25
<b>ARTICLE 2. GENERAL TERMS .....</b>	<b>25</b>
Section 2.1 The Loan .....	25
Section 2.2 Disbursement to Borrower .....	25
Section 2.3 The Note and the Other Loan Documents .....	25
Section 2.4 Use of Proceeds.....	25
Section 2.5 Interest Rate .....	26
Section 2.6 Loan Payments.....	26
Section 2.7 Prepayments.....	27
Section 2.8 Defeasance .....	29
<b>ARTICLE 3. REPRESENTATIONS AND WARRANTIES.....</b>	<b>31</b>
Section 3.1 Legal Status and Authority .....	31
Section 3.2 Validity of Documents .....	32
Section 3.3 Litigation.....	32
Section 3.4 Agreements .....	33
Section 3.5 Financial Condition.....	33
Section 3.6 Disclosure .....	33
Section 3.7 No Plan Assets .....	33
Section 3.8 Not a Foreign Person .....	34
Section 3.9 Business Purposes.....	34
Section 3.10 Borrower Information .....	34
Section 3.11 Status of Property.....	34
Section 3.12 Financial Information.....	36
Section 3.13 Condemnation.....	36
Section 3.14 Separate Lots.....	36
Section 3.15 Insurance .....	36
Section 3.16 Use of Property .....	36
Section 3.17 Leases and Rent Roll .....	37
Section 3.18 Filing and Recording Taxes .....	37
Section 3.19 Management Agreement.....	38
Section 3.20 Illegal Activity/Forfeiture .....	38

Section 3.21	Taxes .....	38
Section 3.22	Permitted Encumbrances .....	38
Section 3.23	Material Agreements.....	38
Section 3.24	Non-Consolidation Opinion Assumptions.....	39
Section 3.25	Federal Reserve Regulations.....	39
Section 3.26	Investment Company Act .....	39
Section 3.27	Fraudulent Conveyance .....	39
Section 3.28	Embargoed Person .....	40
Section 3.29	Patriot Act .....	40
Section 3.30	Organizational Chart.....	41
Section 3.31	Bank Holding Company .....	41
Section 3.32	Intentionally Omitted.....	41
Section 3.33	REA Representations .....	41
Section 3.34	No Change in Facts or Circumstances .....	41
Section 3.35	Perfection of Accounts.....	42
Section 3.36	Ground Lease .....	42
Section 3.37	Franchise Agreement.....	42
Section 3.38	Guarantor and Sponsor Representations.....	42
<b>ARTICLE 4. BORROWER COVENANTS .....</b>		<b>43</b>
Section 4.1	Existence .....	43
Section 4.2	Applicable Law .....	43
Section 4.3	Maintenance and Use of Property.....	44
Section 4.4	Waste.....	44
Section 4.5	Taxes and Other Charges .....	45
Section 4.6	Litigation.....	45
Section 4.7	Access to Property .....	46
Section 4.8	Notice of Default.....	46
Section 4.9	Cooperate in Legal Proceedings .....	46
Section 4.10	Performance by Borrower.....	46
Section 4.11	Awards .....	46
Section 4.12	Books and Records .....	46
Section 4.13	Estoppel Certificates .....	48
Section 4.14	Leases and Rents.....	49
Section 4.15	Management Agreement.....	51
Section 4.16	Payment for Labor and Materials .....	53
Section 4.17	Performance of Other Agreements .....	53
Section 4.18	Debt Cancellation.....	53

Section 4.19	ERISA.....	54
Section 4.20	No Joint Assessment.....	55
Section 4.21	Alterations.....	55
Section 4.22	REA Covenants.....	55
Section 4.23	Material Agreements.....	56
Section 4.24	Ground Lease.....	56
Section 4.25	Hotel Franchise.....	57
Section 4.26	Parking.....	60
<b>ARTICLE 5. ENTITY COVENANTS.....</b>		<b>60</b>
Section 5.1	Single Purpose Entity/Separateness.....	60
Section 5.2	Independent Director.....	66
Section 5.3	Change of Name, Identity or Structure.....	67
Section 5.4	Business and Operations.....	68
<b>ARTICLE 6. NO SALE OR ENCUMBRANCE.....</b>		<b>68</b>
Section 6.1	Transfer Definitions.....	68
Section 6.2	No Sale/Encumbrance.....	68
Section 6.3	Permitted Equity Transfers.....	69
Section 6.4	Permitted Property Transfers (Assumptions).....	70
Section 6.5	Lender's Rights.....	73
Section 6.6	Mezzanine Loan.....	73
Section 6.7	Release of Golf Course Parcel.....	74
Section 6.6	Release of an Individual Property.....	74
<b>ARTICLE 7. INSURANCE; CASUALTY; CONDEMNATION; RESTORATION.....</b>		<b>76</b>
Section 7.1	Insurance.....	76
Section 7.2	Casualty.....	82
Section 7.3	Condemnation.....	82
Section 7.4	Restoration.....	83
<b>ARTICLE 8. RESERVE FUNDS.....</b>		<b>87</b>
Section 8.1	Tax Reserve Funds.....	87
Section 8.2	Insurance Reserve Funds.....	88
Section 8.3	Immediate Repair Funds.....	88
Section 8.4	Springing PIP Reserve Funds.....	89
Section 8.5	FF&E Reserve Funds.....	91
Section 8.6	The Accounts Generally.....	92

Section 8.7	Ground Rent Reserve Funds .....	93
Section 8.8	Litigation Reserve Funds .....	94
<b>ARTICLE 9. CASH MANAGEMENT AGREEMENT .....</b>		<b>94</b>
Section 9.1	Cash Management Agreement .....	94
Section 9.2	Cash Flow Sweep.....	94
<b>ARTICLE 10. EVENTS OF DEFAULT; REMEDIES .....</b>		<b>95</b>
Section 10.1	Event of Default.....	95
Section 10.2	Remedies.....	98
<b>ARTICLE 11. SECONDARY MARKET .....</b>		<b>100</b>
Section 11.1	Securitization .....	100
Section 11.2	Securitization Indemnification.....	102
Section 11.3	REMIC Savings Clause .....	105
Section 11.4	Servicer .....	105
Section 11.5	Rating Agency Costs.....	105
Section 11.6	Mezzanine Option.....	106
Section 11.7	Conversion to Registered Form .....	106
<b>ARTICLE 12. INDEMNIFICATIONS.....</b>		<b>106</b>
Section 12.1	General Indemnification .....	106
Section 12.2	Mortgage and Intangible Tax and Transfer Tax Indemnification.....	107
Section 12.3	ERISA Indemnification .....	107
Section 12.4	Duty to Defend, Legal Fees and Other Fees and Expenses .....	107
Section 12.5	Survival.....	108
Section 12.6	Environmental Indemnity .....	108
<b>ARTICLE 13. EXCULPATION.....</b>		<b>108</b>
Section 13.1	Exculpation .....	108
Section 13.2	Survival.....	112
<b>ARTICLE 14. NOTICES .....</b>		<b>112</b>
Section 14.1	Notices .....	112
<b>ARTICLE 15. FURTHER ASSURANCES .....</b>		<b>113</b>
Section 15.1	Replacement Documents .....	113
Section 15.2	Recording of Security Instrument, etc .....	113

Section 15.3	Further Acts, etc.....	114
Section 15.4	Changes in Tax, Debt, Credit and Documentary Stamp Laws .....	114

**ARTICLE 16. WAIVERS ..... 115**

Section 16.1	Remedies Cumulative; Waivers.....	115
Section 16.2	Modification, Waiver in Writing .....	115
Section 16.3	Delay Not a Waiver .....	115
Section 16.4	Waiver of Trial by Jury.....	115
Section 16.5	Waiver of Notice.....	116
Section 16.6	Remedies of Borrower .....	116
Section 16.7	Marshalling and Other Matters .....	116
Section 16.8	Waiver of Statute of Limitations.....	116
Section 16.9	Waiver of Counterclaim.....	117
Section 16.10	Sole Discretion of Lender .....	117

**ARTICLE 17. MISCELLANEOUS ..... 117**

Section 17.1	Survival.....	117
Section 17.2	Governing Law .....	117
Section 17.3	Headings .....	119
Section 17.4	Severability .....	119
Section 17.5	Preferences.....	119
Section 17.6	Expenses .....	119
Section 17.7	Cost of Enforcement .....	121
Section 17.8	Exhibits and Schedules Incorporated.....	121
Section 17.9	Offsets, Counterclaims and Defenses .....	121
Section 17.10	No Joint Venture or Partnership; No Third Party Beneficiaries .....	121
Section 17.11	Publicity; Advertising .....	122
Section 17.12	Conflict; Construction of Documents; Reliance .....	123
Section 17.13	Entire Agreement .....	123
Section 17.14	Liability.....	123
Section 17.15	Duplicate Originals; Counterparts .....	123

**SCHEDULES AND EXHIBITS**

Exhibit A	Additional Definitions
Exhibit B	Intentionally Omitted
Exhibit C	Disbursement Request and Certification
Schedule I	Immediate Repairs
Schedule II	Organizational Chart
Schedule III	Description of REA’s

Schedule IV Phase II Solar Lease Documents  
Schedule V Permitted Equipment Leases



## LOAN AGREEMENT

**THIS LOAN AGREEMENT**, dated as of August 31, 2018 (as amended, restated, replaced, supplemented or otherwise modified from time to time, this “**Agreement**”), between **WELLS FARGO BANK, NATIONAL ASSOCIATION**, having an address at c/o Wells Fargo Commercial Mortgage Servicing, 401 South Tryon Street, 8<sup>th</sup> Floor, Charlotte, North Carolina 28202 (together with its successors and/or assigns, “**Lender**”) and **WHR LLC**, a Hawaii limited liability company, having an address at 93 Banyan Drive, Hilo, Hawaii 96720 (together with its permitted successors and/or assigns, “**Borrower**”).

### RECITALS:

Borrower desires to obtain the Loan (defined below) from Lender.

Lender is willing to make the Loan to Borrower, subject to and in accordance with the terms of this Agreement and the other Loan Documents (defined below).

In consideration of the making of the Loan by Lender and the covenants, agreements, representations and warranties set forth in this Agreement, the parties hereto hereby covenant, agree, represent and warrant as follows:

### ARTICLE 1.

#### DEFINITIONS; PRINCIPLES OF CONSTRUCTION

##### Section 1.1 Definitions.

For all purposes of this Agreement, except as otherwise expressly required or unless the context clearly indicates a contrary intent:

“**30/360 Basis**” shall mean on the basis of a 360-day year consisting of 12 months of 30 days each.

“**Acceptable Franchisor**” shall mean (i) the hotel franchisors commonly known as Marriott, Hilton and Hyatt, (ii) any hotel franchisor Affiliated with any of the foregoing, and (iii) any other hotel franchisor acceptable to Lender in its reasonable discretion.

“**Acceptable LLC**” shall mean a limited liability company formed under Delaware law which (i) has at least one springing member, which, upon the dissolution of all of the members or the withdrawal or the disassociation of all of the members from such limited liability company, shall immediately become the sole member of such limited liability company, and (ii) otherwise meets the Rating Agency criteria then applicable to such entities.

“**Accounts**” shall mean the Tax Reserve Account, the Insurance Reserve Account, the Immediate Repair Reserve Account, the PIP Reserve Account, the FF&E Reserve Account, the Ground Rent Reserve Account, the Litigation Reserve Account, and any other account established pursuant to this Agreement or the other Loan Documents.

“**Act**” shall have the meaning set forth in Section 5.1(d) hereof.

“**Actual/360 Basis**” shall mean on the basis of a 360-day year and charged on the basis of actual days elapsed for any whole or partial month in which interest is being calculated.

“**ADR**” shall mean the average daily rate actually charged at the Property over the trailing 12-month period.

“**Affiliate**” shall mean, as to any Person, any other Person that, directly or indirectly, owns more than twenty percent (20%) of, is in Control of, is Controlled by or is under common ownership or Control with such Person or is a director or officer of such Person or of an Affiliate of such Person.

“**Affiliated Manager**” shall mean any managing agent of the Property in which Borrower, Guarantor, Sponsor, any SPE Component Entity (if any) or any Affiliate of such entities has, directly or indirectly, any legal, beneficial or economic interest.

“**ALTA**” shall mean American Land Title Association, or any successor thereto.

“**Alteration Threshold**” shall mean an amount equal to 5% of the outstanding principal balance of the Loan.

“**Annual Budget**” shall have the meaning set forth in Section 4.12(a)(v) hereof.

“**Applicable Law**” shall mean all applicable federal, state, county, municipal and other governmental statutes, laws, rules, orders, regulations, ordinances, judgments, decrees and injunctions of Governmental Authorities affecting Borrower or the Property or any part thereof, or the construction, use, alteration or operation thereof, or any part thereof, whether now or hereafter enacted and in force, including, without limitation, the Americans with Disabilities Act of 1990, and all permits, licenses and authorizations and regulations relating thereto, and all covenants, agreements, restrictions and encumbrances contained in any instruments, either of record or known to Borrower, at any time in force affecting Borrower or the Property or any part thereof, including, without limitation, any which may (i) require repairs, modifications or alterations in or to the Property or any part thereof, or (ii) in any way limit the use and enjoyment thereof.

“**Approved ID Provider**” shall mean each of CT Corporation, Corporation Service Company, National Registered Agents, Inc., Wilmington Trust Company, Stewart Management Company and Lord Securities Corporation; provided, that, additional national providers of independent directors may be deemed added to the foregoing hereunder to the extent approved in writing by Lender and the Rating Agencies.

“**Aqua Hospitality Note**” shall mean that certain Promissory Note made by Borrower, Tower Development, Inc., and Guarantors, collectively, as maker, to Aqua Hospitality, LLC, as holder, securing certain obligations of Borrower that are the subject of the Manager Litigation.

“**Assignment of Management Agreement**” shall mean that certain Conditional Assignment of Management Agreement dated as of the date hereof among Lender, Borrower and

Manager, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“**Award**” shall mean any compensation paid by any Governmental Authority in connection with a Condemnation in respect of all or any part of the Property.

“**Bankruptcy Code**” shall mean Title 11 of the United States Code entitled “Bankruptcy”, as amended from time to time, and any successor statute or statutes and all rules and regulations from time to time promulgated thereunder, and any comparable foreign laws relating to bankruptcy, insolvency or creditors’ rights.

“**Borrower**” shall have the meaning set forth in the introductory paragraph hereof.

“**Borrower Litigation**” shall mean (a) litigation relating to that certain Application for Mechanic’s and Materialman’s Lien No. 16-1-003 filed October 12, 2016 in the Circuit Court of the Third Circuit of the State of Hawaii by Lincoln Builders LLC, as claimant, and (b) litigation relating to that certain Complaint Civil No. 18-1-0671-05 filed May 2, 2018 in the Circuit Court of the First Circuit of the State of Hawaii by Aqua Hospitality, LLC, as plaintiff, against Borrower, Tower Development, Inc., and Guarantors, as defendants.

“**Borrower Party**” shall mean any Person acting on behalf of or at the direction of Borrower, SPE Component Entity, Guarantor and/or Sponsor.

“**Business Day**” shall mean any day other than a Saturday, Sunday or any other day on which commercial banks in the State of North Carolina are not open for business.

“**Cash Management Account**” shall have the meaning set forth in the Cash Management Agreement.

“**Cash Management Agreement**” shall mean that certain Cash Management Agreement of even date herewith among Lender, Borrower, and Manager, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“**Cash Trap Event Period**” shall have the meaning set forth in the Cash Management Agreement.

“**Casualty**” shall have the meaning set forth in Section 7.2 hereof.

“**Casualty Consultant**” shall have the meaning set forth in Section 7.4 hereof.

“**Closing Date**” shall mean the date of the funding of the Loan.

“**Condemnation**” shall mean a temporary or permanent taking by any Governmental Authority as the result, in lieu or in anticipation, of the exercise of the right of condemnation or eminent domain, of all or any part of the Property, or any interest therein or right accruing thereto, including any right of access thereto or any change of grade affecting the Property or any part thereof.

“**Constituent Members**” shall have the meaning set forth in Section 5.2(b) hereof.

“**Control**” shall mean the power to direct the management and policies of an entity, directly or indirectly, whether through the ownership of voting securities or other beneficial interests, by contract or otherwise.

“**Creditors Rights Laws**” shall mean any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization, conservatorship, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to its debts or debtors.

“**Crowdfunded Person**” shall mean a Person capitalized primarily by monetary contributions (a) of less than \$35,000 each from more than 35 investors who are individuals and (b) which are funded primarily (i) in reliance upon Regulation Crowdfunding promulgated by the Securities and Exchange Commission pursuant to the Securities Act of 1933, as amended and/or (ii) through internet-mediated registries, platforms or similar portals, mail-order subscriptions, benefit events and/or other similar methods.

“**DBRS**” shall mean DBRS, Inc.

“**Debt**” shall mean the outstanding principal amount set forth in, and evidenced by, this Agreement and the Note together with all interest accrued and unpaid thereon and all other sums due to Lender in respect of the Loan under the Note, this Agreement or the other Loan Documents, including, without limitation, the payment of all sums advanced and costs and expenses incurred (including unpaid or unreimbursed servicing and special servicing fees) by Lender in connection with the enforcement and/or collection of the Debt or any part thereof.

“**Debt Service**” shall mean, with respect to any particular period of time, scheduled principal and/or interest payments under the Loan.

“**Debt Service Coverage Ratio**” shall have the meaning set forth on Exhibit A attached hereto and made a part hereof. All capitalized terms in such definition are also set forth on Exhibit A.

“**Debt Yield**” shall have the meaning set forth on Exhibit A attached hereto and made a part hereof. All capitalized terms in such definition are also set forth on Exhibit A.

“**Default Rate**” shall mean, with respect to the Loan, a rate per annum equal to the lesser of (i) the Maximum Legal Rate, or (ii) the sum of (a) the Interest Rate and (b) four percent (4%).

“**Defeasance Approval Item**” shall have the meaning set forth in Section 2.8 hereof.

“**Defeasance Collateral Account**” shall have the meaning set forth in Section 2.8 hereof.

“**Defeasance Lockout Release Date**” shall mean the earlier to occur of (i) the third anniversary of the Monthly Payment Date immediately following the Closing Date and (ii) the date that is two (2) years from the “startup day” (within the meaning of Section 860G(a)(9) of the

IRS Code) of the REMIC Trust established in connection with the last Securitization involving any portion of or interest in the Loan.

**“Defined Benefit Plan”** shall mean a plan, document, agreement, or arrangement currently or previously maintained or sponsored by the Borrower or by any ERISA Affiliate or to which either the Borrower or any ERISA Affiliate currently makes, or previously made, contributions and (i) that provides or is expected to provide retirement benefits to employees or other workers and (ii) under which the Borrower could reasonably be expected to have any liability (including liability attributable from an ERISA Affiliate). A Defined Benefit Plan shall include any plan that if it were terminated at any time, would result in Borrower or any ERISA Affiliate being deemed to be a “contributing sponsor” (as defined in Section 4001(a)(13) of ERISA) of the terminated plan pursuant to ERISA Section 4069. A Defined Benefit Plan does not include a Multiemployer Plan.

**“Disbursement Request Form”** shall mean a Disbursement Request and Certification in the form attached hereto as Exhibit C.

**“Disclosure Document”** shall have the meaning set forth in Section 11.2 hereof.

**“Eligible Account”** shall mean a separate and identifiable account from all other funds held by the holding institution that is either (a) an account or accounts maintained with a federal or state-chartered depository institution or trust company which complies with the definition of Eligible Institution or (b) a segregated trust account or accounts maintained with a federal or state chartered depository institution or trust company acting in its fiduciary capacity which, in the case of a state chartered depository institution or trust company, is subject to regulations substantially similar to 12 C.F.R. §9.10(b), having in either case a combined capital and surplus of at least \$50,000,000 and subject to supervision or examination by federal and state authority. An Eligible Account will not be evidenced by a certificate of deposit, passbook or other instrument.

**“Eligible Institution”** shall mean (a) a depository institution or trust company insured by the Federal Deposit Insurance Corporation, (i) the short term unsecured debt obligations or commercial paper of which are rated at least “A-1+” (or its equivalent) from each of the Rating Agencies in the case of accounts in which funds are held for thirty (30) days or less and (ii) the senior unsecured debt obligations of which are rated at least “A” (or its equivalent) from each of the Rating Agencies in the case of accounts in which funds are held for more than thirty (30) days or (b) such other depository institution otherwise approved by the Rating Agencies from time-to-time.

**“Embargoed Person”** shall have the meaning set forth in Section 3.28 hereof.

**“Environmental Indemnity”** shall mean that certain Environmental Indemnity Agreement, dated as of the date hereof, executed by Borrower and Guarantor in connection with the Loan for the benefit of Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**“Environmental Laws”** shall have the meaning set forth in the Environmental Indemnity.

**“Equity Collateral”** shall have the meaning set forth in Section 11.6 hereof.

“**ERISA**” shall mean the Employee Retirement Income Security Act of 1974, as the same may heretofore have been or may hereafter be amended, restated, replaced or otherwise modified.

“**ERISA Affiliate**” shall mean all members of a controlled group of corporations and all trades and business (whether or not incorporated) under common control and all other entities which, together with Borrower, are treated as a single employer under any or all of Sections 414(b), (c), (m) or (o) of the IRS Code.

“**Event of Default**” shall have the meaning set forth in Section 10.1 hereof.

“**Exchange Act**” shall have the meaning set forth in Section 11.2 hereof.

“**Exchange Act Filing**” shall mean any filing under or pursuant to the Exchange Act in connection with or relating to a Securitization.

“**Exculpated Parties**” shall have the meaning set forth in Section 13.1 hereof.

“**FF&E**” shall mean all movable furniture, furnishings, fixtures or equipment and other items of tangible personal property now or hereafter located in or on each Property or the Improvements or used in connection with the use, occupancy, operation and maintenance of all or any part of the hotel located on the Property that have no permanent structural connection to the building(s) at the Property, other than stocks of food and other supplies held for consumption in normal operation but including, without limitation, appliances, machinery, equipment, signs, artwork, office furnishings and equipment, guest room furnishings, and specialized equipment for kitchens, laundries, bars, restaurant, public rooms, health and recreational facilities, linens, dishware, all partitions, screens, awnings, shades, blinds, floor coverings, hall and lobby equipment, heating, lighting, plumbing, ventilating, refrigerating, incinerating, compacting, elevators, escalators, air conditioning and communication plants or systems with appurtenant fixtures, vacuum cleaning systems and services, call or beeper systems, security systems, sprinkler systems and other fire prevention and extinguishing apparatus and materials; reservation system computer and related equipment; all equipment, manual, mechanical or motorized, for the construction, maintenance, repair and cleaning of, parking areas, walks, underground ways, truck ways, driveways, common areas, roadways, highways and streets.

“**FF&E Reserve Account**” shall have the meaning set forth in Section 8.5 hereof.

“**FF&E Reserve Funds**” shall have the meaning set forth in Section 8.5 hereof.

“**FF&E Reserve Monthly Deposit**” shall mean, initially, \$87,099.00, subject to adjustment by Lender as set forth in Section 8.5 hereof.

“**FF&E Work**” shall have the meaning set forth in Section 8.5 hereof.

“**Fitch**” shall mean Fitch, Inc.

“**Flood Insurance Acts**” shall have the meaning set forth in Section 7.1 hereof.

**“Franchise Agreement”** shall mean that certain Franchise Agreement, dated March 12, 2015, between Borrower and Franchisor, together with any permitted amendment thereto or permitted replacement thereof.

**“Franchisor”** shall mean Hilton Franchise Holding LLC, a Delaware limited liability company, successor-by-merger to DoubleTree Franchise LLC, a Delaware limited liability company, together with any permitted replacement Acceptable Franchisor.

**“GAAP”** shall mean generally accepted accounting principles in the United States of America as of the date of the applicable financial report.

**“Golf Course Parcel”** shall mean the “Golf Course and Allied Facilities Site” as defined in the Ground Lease.

**“Governmental Authority”** shall mean any court, board, agency, commission, office or other authority of any nature whatsoever for any governmental unit (foreign, federal, state, county, district, municipal, city or otherwise) whether now or hereafter in existence.

**“Ground Lease”** shall mean that certain State of Hawaii Department of Land and Natural Resources General Lease No. S-5844 dated January 20, 2006, filed as Land Court Document No. 3385990 and as Regular System Document No. 2006-021241.

**“Ground Lease Estoppel”** shall mean that certain Consent to Mortgage of General Lease No. S-5844 and Estoppel Certificate made by the State of Hawaii by the Board of Land and Natural Resources, in favor of Lender, dated substantially concurrent with this Agreement.

**“Ground Lessor”** shall have the meaning set forth in Section 3.36(c) hereof.

**“Ground Rent”** shall mean any rent, additional rent or other charge payable by the lessee under the Ground Lease.

**“Ground Rent Reserve Account”** shall have the meaning set forth in Section 8.7 hereof.

**“Ground Rent Reserve Funds”** shall have the meaning set forth in Section 8.7 hereof.

**“Guarantor”** shall mean, jointly and severally, individually and/or collectively (as the context may require), Edward Bushor and Stuart L. Miller, each an individual.

**“Guaranty”** shall mean that certain Guaranty of Recourse Obligations executed by Guarantor and dated as of the date hereof, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**“Hazardous Substances”** shall have the meaning set forth in the Environmental Indemnity.

**“Immediate Repair Funds”** shall have the meaning set forth in Section 8.3 hereof.

**“Immediate Repair Reserve Account”** shall have the meaning set forth in Section 8.3 hereof.

**“Immediate Repairs”** shall have the meaning set forth in Section 8.3 hereof.

**“Improvements”** shall have the meaning set forth in the granting clause of the Security Instrument.

**“Indebtedness”** shall mean, for any Person, without duplication: (i) all indebtedness of such Person for borrowed money, for amounts drawn under a letter of credit, or for the deferred purchase price of property for which such Person or its assets is liable, (ii) all unfunded amounts under a loan agreement, letter of credit, or other credit facility for which such Person would be liable if such amounts were advanced thereunder, (iii) all amounts required to be paid by such Person as a guaranteed payment to partners or a preferred or special dividend, including any mandatory redemption of shares or interests, (iv) all indebtedness guaranteed by such Person, directly or indirectly, (v) all obligations under leases that constitute capital leases for which such Person is liable, (vi) all obligations of such Person under interest rate swaps, caps, floors, collars and other interest hedge agreements, in each case whether such Person is liable contingently or otherwise, as obligor, guarantor or otherwise, or in respect of which obligations such Person otherwise assures a creditor against loss, (vii) any property-assessed clean energy loans or similar indebtedness including, without limitation, if such loans or indebtedness are made or otherwise provided by any Governmental Authority and/or secured or repaid (directly or indirectly) by any taxes or similar assessments, and (viii) any other similar amounts.

**“Indemnified Parties”** shall mean (a) Lender, (b) any successor owner or holder of the Loan or participations in the Loan, (c) any Servicer or prior Servicer of the Loan, (d) any Investor or any prior Investor in any Securities, (e) any trustees, custodians or other fiduciaries who hold or who have held a full or partial interest in the Loan for the benefit of any Investor or other third party, (f) any receiver or other fiduciary appointed in a foreclosure or other Creditors Rights Laws proceeding, (g) any officers, directors, shareholders, partners, members, employees, agents, servants, representatives, contractors, subcontractors, affiliates or subsidiaries of any and all of the foregoing, and (h) the heirs, legal representatives, successors and assigns of any and all of the foregoing (including, without limitation, any successors by merger, consolidation or acquisition of all or a substantial portion of the Indemnified Parties’ assets and business) in all cases whether during the term of the Loan or as part of or following a foreclosure of the Loan.

**“Independent Director”** shall have the meaning set forth in Section 5.2(a) hereof.

**“Insurance Premiums”** shall have the meaning set forth in Section 7.1 hereof.

**“Insurance Reserve Account”** shall have the meaning set forth in Section 8.2 hereof.

**“Insurance Reserve Funds”** shall have the meaning set forth in Section 8.2 hereof.

**“Intercreditor Agreement”** shall have the meaning set forth in Section 6.6 hereof.



**“Interest Accrual Period”** shall mean the period beginning on the eleventh (11th) day of each calendar month during the term of the Loan and ending on (but including) the tenth (10th) day of the following calendar month.

**“Interest Rate”** shall mean a rate per annum equal to five and seventy-two hundredths percent (5.72%).

**“Interest Shortfall”** shall have the meaning set forth in Section 2.7 hereof.

**“Investor”** shall mean any investor or potential investor in the Loan (or any portion thereof or interest therein) in connection with a Securitization of the Loan (or any portion thereof or interest therein).

**“IRS Code”** shall mean the Internal Revenue Code of 1986, as amended from time to time or any successor statute.

**“Key Money Note”** shall mean that certain Key Money Advance Note made by Borrower in favor of Manager pursuant and subject to the Management Agreement, securing Borrower’s contingent obligation to repay the unamortized balance of the key money, which is in the amount of \$2,000,000.00, upon any termination of the Management Agreement prior to the end of the initial term thereof.

**“Kroll”** shall mean Kroll Bond Rating Agency, Inc.

**“Land”** shall have the meaning set forth in the Security Instrument.

**“Lease”** shall mean any and all leases, subleases, rental agreements and other agreements (but excluding (x) Permitted Equipment Leases and (y) agreements for the letting of hotel rooms permitting hotel guests to occupy the Property in the ordinary course of business) whether or not in writing affecting the use, enjoyment or occupancy of the Land and/or the Improvements heretofore or hereafter entered into and all extensions, amendments and modifications thereto, whether before or after the filing by or against Borrower of any petition for relief under Creditors Rights Laws.

**“Lender”** shall have the meaning set forth in the introductory paragraph hereof.

**“Liabilities”** shall have the meaning set forth in Section 11.2 hereof.

**“Licenses”** shall have the meaning set forth in Section 3.11(a) hereof.

**“Lien”** shall mean any mortgage, deed of trust, lien (statutory or otherwise), pledge, hypothecation, easement, restrictive covenant, preference, assignment, security interest, or any other encumbrance, charge or transfer of, or any agreement to enter into or create any of the foregoing, on or affecting all or any portion of the Property or any interest therein, or any direct or indirect interest in Borrower or any SPE Component Entity, including any conditional sale or other title retention agreement, any financing lease having substantially the same economic effect as any of the foregoing, the filing of any financing statement, and mechanic’s, materialmen’s and other similar liens and encumbrances.

**“Litigation Reserve Account”** shall have the meaning set forth in Section 8.8(a) hereof.

**“Litigation Reserve Funds”** shall have the meaning set forth in Section 8.8(a) hereof.

**“LLC Agreement”** shall have the meaning set forth in Section 5.1(d) hereof.

**“Loan”** shall mean the loan made by Lender to Borrower pursuant to this Agreement.

**“Loan Bifurcation”** shall have the meaning set forth in Section 11.1 hereof.

**“Loan Documents”** shall mean, collectively, this Agreement, the Note, the Security Instrument, the Environmental Indemnity, the Assignment of Management Agreement, the Cash Management Agreement, the Guaranty and all other documents executed and/or delivered in connection with the Loan.

**“Losses”** shall mean any and all claims, suits, liabilities (including, without limitation, strict liabilities and any impairment of Lender’s security for the Loan), actions, proceedings, obligations, debts, damages, losses, costs, expenses, fines, penalties, charges, fees, judgments, awards, amounts paid in settlement of whatever kind or nature (including but not limited to legal fees and other costs of defense).

**“Major Lease”** shall mean (i) any Lease which, individually or when aggregated with all other Leases with the same Tenant or its Affiliate, accounts for the greater of (x) \$5,000.00 in rental income per month or (y) 10% or more of the total rental income for the Property (excluding income from the letting of hotel rooms in the ordinary course of business), (ii) any Lease which contains any option, offer, right of first refusal or other similar entitlement to acquire all or any portion of the Property, (iii) any instrument guaranteeing or providing credit support for any Lease meeting the requirements of (i) and/or (ii) above, and (iv) the Restaurant Lease.

**“Management Agreement”** shall mean the management agreement entered into by and between Borrower and the current Manager or any replacement management agreement entered into by and between Borrower and any Manager in accordance with the terms hereof and of the other Loan Documents, pursuant to which Manager is to provide management and other services with respect to the Property.

**“Manager”** shall mean Evolution Hospitality, LLC, a California limited liability company, or such other entity selected as the manager of the Property in accordance with the terms of this Agreement or the other Loan Documents.

**“Manager Litigation”** shall have the meaning set forth in Section 8.8(a) hereof.

**“Material Adverse Effect”** shall mean a material adverse effect on (i) the Property, (ii) the business, profits, management, operations or condition (financial or otherwise) of Borrower, Guarantor, Sponsor or the Property, (iii) the enforceability, validity, perfection or priority of the lien of the Security Instrument or the other Loan Documents, (iv) the ability of Borrower to perform its obligations under the Security Instrument or the other Loan Documents, or (v) the ability of Guarantor to perform its obligations under the Guaranty and Environmental Indemnity.

**“Material Agreements”** shall mean each contract and agreement relating to the ownership, management, development, use, operation, leasing, maintenance, repair or improvement of the Property, other than the Management Agreement and the Leases, as to which either (i) there is an obligation of Borrower to pay more than \$100,000.00 per annum; or (ii) the term thereof extends beyond one year (unless cancelable on thirty (30) days or less notice without requiring the payment of termination fees or payments of any kind in excess of \$25,000.00).

**“Maturity Date”** shall mean September 11, 2023 or such other date on which the final payment of principal of the Note becomes due and payable as therein or herein provided, whether at such stated maturity date, by declaration of acceleration, or otherwise.

**“Maximum Legal Rate”** shall mean the maximum non-usurious interest rate, if any, that at any time or from time to time may be contracted for, taken, reserved, charged or received on the indebtedness evidenced by the Note and as provided for herein or the other Loan Documents, under the Applicable Law that is held by any court of competent jurisdiction to govern the interest rate provisions of the Loan.

**“Member”** shall have the meaning set forth in Section 5.1(d) hereof.

**“Mezzanine Borrower”** shall have the meaning set forth in Section 11.6 hereof.

**“Mezzanine Lender”** shall have the meaning set forth in Section 6.6 hereof.

**“Mezzanine Option”** shall have the meaning set forth in Section 11.6 hereof.

**“Minimum Disbursement Amount”** shall mean Twenty-Five Thousand and No/100 Dollars (\$25,000).

**“Monthly Debt Service Payment Amount”** shall mean a constant monthly payment of \$290,834.23.

**“Monthly Insurance Deposit”** shall have the meaning set forth in Section 8.2 hereof.

**“Monthly Payment Date”** shall mean the eleventh (11<sup>th</sup>) day of every calendar month occurring during the term of the Loan.

**“Monthly Tax Deposit”** shall have the meaning set forth in Section 8.1 hereof.

**“Moody’s”** shall mean Moody’s Investor Service, Inc.

**“Morningstar”** shall mean Morningstar Credit Ratings, LLC.

**“Multiemployer Plan”** shall mean a “multiemployer plan” as defined in Section 3(37) of ERISA or Section 4001(a)(3) of ERISA, and to which Borrower or any ERISA Affiliate is making, is obligated to make or has made or been obligated to make during the last six years, contributions on behalf of participants who are or were employed by any of them.

**“Net Proceeds”** shall mean: (i) the net amount of all insurance proceeds payable as a result of a Casualty to the Property, after deduction of reasonable costs and expenses (including, but not limited to, reasonable attorneys’ fees), if any, in collecting such insurance proceeds, or (ii) the net amount of the Award, after deduction of reasonable costs and expenses (including, but not limited to, reasonable attorneys’ fees), if any, in collecting such Award.

**“Net Proceeds Deficiency”** shall have the meaning set forth in Section 7.4 hereof.

**“New Manager”** shall have the meaning set forth in Section 4.15 hereof.

**“New Non-Consolidation Opinion”** shall mean a substantive non-consolidation opinion or an update thereof provided by outside counsel acceptable to Lender and the Rating Agencies and otherwise in form and substance acceptable to Lender and the Rating Agencies.

**“Non-Conforming Policy”** shall have the meaning set forth in Section 7.1 hereof.

**“Non-Consolidation Opinion”** shall mean that certain substantive non-consolidation opinion delivered to Lender by Young Conaway Stargatt & Taylor, LLP in connection with the closing of the Loan.

**“Note”** shall mean that certain Promissory Note of even date herewith in the principal amount of \$50,000,000.00, made by Borrower in favor of Lender, as the same may be amended, restated, replaced, extended, renewed, supplemented, severed, split, or otherwise modified from time to time.

**“OFAC”** shall have the meaning set forth in Section 3.28 hereof.

**“Officer’s Certificate”** shall mean a certificate delivered to Lender by Borrower which is signed by Responsible Officer of Borrower.

**“Open Period Start Date”** shall have the meaning set forth in Section 2.7(a) hereof.

**“Other Charges”** shall mean all maintenance charges, impositions other than Taxes, and any other charges, vault charges and license fees for the use of vaults, chutes and similar areas adjoining the Property, now or hereafter levied or assessed or imposed against the Property or any part thereof.

**“Patriot Act”** shall have the meaning set forth in Section 3.29 hereof.

**“Permitted Encumbrances”** shall mean collectively, (a) the lien and security interests created by this Agreement and the other Loan Documents, (b) all liens, encumbrances and other matters disclosed in the Title Insurance Policy, (c) liens, if any, for Taxes imposed by any Governmental Authority not yet due or delinquent (but excluding any lien securing any property-assessed clean energy loans or similar indebtedness with respect to Borrower and/or the Property, including, without limitation, if such loans or indebtedness are made or otherwise provided by any Governmental Authority and/or secured or repaid (directly or indirectly) by any taxes or similar assessments), (d) mechanic’s or materialmen’s liens being contested in accordance with the terms of this Agreement, (e) rights of Tenants (as tenants only with no options of purchase or rights of

first refusal to purchase the Property or any portion thereof) under Leases, (f) Permitted Equipment Leases and purchase money Liens on Personal Property permitted in accordance with the terms of this Agreement, and (g) such other title and survey exceptions as Lender has approved or may approve in writing in Lender's sole discretion.

**"Permitted Equipment Leases"** shall mean the existing equipment leases identified on Schedule V attached hereto and such other equipment leases or other similar instruments entered into with respect to the Personal Property; provided, that, in each case, such other equipment leases or other similar instruments (i) are entered into on commercially reasonable terms and conditions in the ordinary course of Borrower's business and (ii) relate to Personal Property which is (A) used in connection with the operation and maintenance of the Property in the ordinary course of Borrower's business and (B) readily replaceable without material interference or interruption to the operation of the Property.

**"Permitted Equity Transfer"** shall have the meaning set forth in Section 6.3 hereof.

**"Permitted Mezzanine Borrower"** shall have the meaning set forth in Section 6.6 hereof.

**"Permitted Mezzanine Debt"** shall have the meaning set forth in Section 6.6 hereof.

**"Person"** shall mean any individual, corporation, partnership, joint venture, limited liability company, estate, trust, unincorporated association, any federal, state, county or municipal government or any bureau, department or agency thereof and any fiduciary acting in such capacity on behalf of any of the foregoing.

**"Personal Property"** shall have the meaning set forth in the granting clause of the Security Instrument.

**"Phase I Solar Lease Documents"** shall mean the following documents pertaining to the leasing of space at the Property for the installation of solar panels: (i) Space Lease Agreement dated August 24, 2016, and Memorandum of Space Lease Agreement dated July 28, 2017, each between Borrower, as Host, and Neighborhood GP, LLC, a Hawaii limited liability company, as System Owner; and (ii) Solar Power Purchase Agreement dated August 24, 2016, between Borrower, as Purchaser, and Neighborhood GP, LLC, a Hawaii limited liability company, as Seller, as amended by First Amendment to Solar Power Purchase Agreement (Phase 1) dated December 18, 2017.

**"Phase II Solar Lease Documents"** shall mean the documents pertaining to the leasing of space at the Property for the installation of solar panels, attached hereto as Schedule IV.

**"PIP Reserve Account"** shall have the meaning set forth in Section 8.4 hereof.

**"PIP Reserve Deposit"** shall have the meaning set forth in Section 8.4 hereof.

**"PIP Reserve Funds"** shall have the meaning set forth in Section 8.4 hereof.

**"PIP Work"** shall mean those certain replacements and/or alterations to the Property as may be required by the Franchisor to be completed from time to time.

“**Policies**” shall have the meaning specified in Section 7.1 hereof.

“**Prior Lender**” shall mean, individually or collectively, as the context may require, the holders of all or any portion of any Prior Loan at the time that such Prior Loan was repaid.

“**Prior Loan**” shall mean the loan evidenced by that certain Construction Loan Agreement dated as of July 31, 2015, by and between Borrower, as borrower, and Hall Hilo, LLC, a Texas limited liability company, as lender.

“**Prohibited Transfer**” shall have the meaning set forth in Section 6.2 hereof.

“**Property**” shall have the meaning set forth in the Security Instrument.

“**Provided Information**” shall have the meaning set forth in Section 11.2 hereof.

“**Prudent Lender Standard**” shall, with respect to any matter, be deemed to have been met if the matter in question (i) prior to a Securitization, is reasonably acceptable to Lender and (ii) after a Securitization, would be acceptable to a prudent lender of securitized commercial mortgage loans.

“**Qualified Insurer**” shall have the meaning set forth in Section 7.1 hereof.

“**Qualified Manager**” shall have the meaning set forth in the Assignment of Management Agreement.

“**Rating Agencies**” shall mean each of S&P, Moody’s, Fitch, DBRS, Kroll and Morningstar, or any successor thereto, or any other nationally-recognized statistical rating agency which has been approved by Lender, but only to the extent that such Rating Agency has been designated by Lender, or is anticipated to be designated by Lender, in connection with any Secondary Market Transaction.

“**Rating Agency Confirmation**” shall mean a written affirmation from each of the Rating Agencies (obtained at Borrower’s sole cost and expense) that the credit rating of the Securities by such Rating Agency immediately prior to the occurrence of the event with respect to which such Rating Agency Confirmation is sought will not be qualified, downgraded or withdrawn as a result of the occurrence of such event, which affirmation may be granted or withheld in such Rating Agency’s sole and absolute discretion. For the purposes of this Agreement and the other Loan Documents, if any Rating Agency shall waive, decline or refuse to review or otherwise engage any request for a Rating Agency Confirmation hereunder or under the other Loan Documents (hereinafter, a “**RA Consent**”), such RA Consent shall be deemed to eliminate, for such request only, the condition that a Rating Agency Confirmation by such Rating Agency (only) be obtained for purposes of this Agreement or the other Loan Documents, as applicable; provided, however, if Lender does not have a separate and independent approval right with respect to such event set forth herein or in the other Loan Documents, as applicable, then the term “**Rating Agency Confirmation**” shall be deemed instead to require the approval of Lender based on its good faith determination. For purposes of clarity, any such waiver, declination or refusal to review or otherwise engage in any request for a Rating Agency Confirmation hereunder or under the other Loan Documents shall not be deemed a waiver, declination or refusal to review or otherwise

engage in any subsequent request for a Rating Agency Confirmation hereunder or under the other Loan Documents, and the condition for Rating Agency Confirmation pursuant to this Agreement and the other Loan Documents for any subsequent request shall apply regardless of any previous waiver, declination or refusal to review or otherwise engage in such prior request.

“**REA**” shall mean, individually and/or collectively (as the context may require), each reciprocal easement, covenant, condition and restriction agreement or similar agreement affecting the Property as more particularly described on Schedule III hereto and any future reciprocal easement or similar agreement affecting the Property entered into in accordance with the applicable terms and conditions hereof.

“**Registrar**” shall have the meaning set forth in Section 11.7 hereof.

“**Registration Statement**” shall have the meaning set forth in Section 11.2 hereof.

“**Regulation AB**” shall mean Regulation AB under the Securities Act and the Exchange Act, as such Regulation may be amended from time to time.

“**Related Loan**” shall mean a loan made to an Affiliate of Borrower, or secured by a Related Property, that is included with the Loan (or a portion of the Loan) in a Securitization.

“**Related Party**” shall have the meaning set forth in Section 5.1(b)(xi) hereof.

“**Related Property**” shall mean a parcel of real property, together with improvements thereon and personal property related thereto, that is “related”, within the meaning of the definition of Significant Obligor, to the Property.

“**Release**” shall have the meaning set forth in Section 6.7 hereof.

“**Release Property**” shall have the meaning set forth in Section 6.7 hereof.

“**Remaining Property**” shall have the meaning set forth in Section 6.7 hereof.

“**REMIC Requirements**” shall mean any applicable federal income tax requirements relating to the continued qualification of any REMIC Trust (including, without limitation, the continued treatment of the Loan as a “qualified mortgage” in the hands of the REMIC Trust) as such under the IRS Code, the non-imposition of any tax on such REMIC Trust under the IRS Code (including, without limitation, the taxes on “prohibited transactions” and “contributions”), and any other constraints, rules or other regulations or requirements relating to the servicing, modification or other similar matters with respect to the Loan (or any portion thereof or interest therein) that may exist in, or be promulgated administratively under, the IRS Code.

“**REMIC Trust**” shall mean a “real estate mortgage investment conduit” within the meaning of Section 860D of the IRS Code that holds any interest in all or any portion of the Loan (including, without limitation, the Note).

“**Rent Loss Proceeds**” shall have the meaning set forth in Section 7.1 hereof.

“**Rent Roll**” shall have the meaning set forth in Section 3.17 hereof.

“**Rents**” shall have the meaning set forth in the Security Instrument.

“**Required Financial Item**” shall have the meaning set forth in Section 4.12 hereof.

“**Reserve Funds**” shall mean the Tax Reserve Funds, the Insurance Reserve Funds, the Immediate Repair Funds, the PIP Reserve Funds, the FF&E Reserve Funds, the Ground Rent Reserve Funds, the Litigation Reserve Funds, and any other escrow funds established by this Agreement or the other Loan Documents.

“**Responsible Officer**” shall mean with respect to a Person, the chairman of the board, president, chief operating officer, chief financial officer, treasurer or vice president of such Person or such other similar officer of such Person reasonably acceptable to Lender and appropriately authorized by the applicable Person in a manner reasonably acceptable to Lender.

“**Restaurant Lease**” shall mean that certain Hotel Restaurant Lease dated as of April 13, 2018, between Borrower, as lessor, and HH Hilo LLC, a Hawaii limited liability company, as lessee.

“**Restoration**” shall have the meaning set forth in Section 7.2 hereof.

“**Restoration Retainage**” shall have the meaning set forth in Section 7.4 hereof.

“**Restoration Threshold**” shall mean an amount equal to 5% of the outstanding principal balance of the Loan.

“**Restricted Party**” shall have the meaning set forth in Section 6.1 hereof.

“**S&P**” shall mean Standard & Poor’s Ratings Services, a division of The McGraw-Hill Companies, Inc.

“**Sale or Pledge**” shall have the meaning set forth in Section 6.1 hereof.

“**Scheduled Defeasance Payments**” shall mean scheduled payments of interest and principal under the Note for all Monthly Payment Dates occurring after the Total Defeasance Date and up to and including the Open Period Start Date (including the outstanding principal balance on the Note as of the Open Period Start Date), and all payments required after the Total Defeasance Date, if any, under the Loan Documents for servicing fees, rating surveillance charges (to the extent applicable) and other similar charges.

“**Secondary Market Transaction**” shall have the meaning set forth in Section 11.1 hereof.

“**Securities**” shall have the meaning set forth in Section 11.1 hereof.

“**Securities Act**” shall have the meaning set forth in Section 11.2 hereof.

“**Securitization**” shall have the meaning set forth in Section 11.1 hereof.



“**Security Agreement**” shall mean a security agreement in form and substance that would be satisfactory to a prudent lender pursuant to which Borrower grants Lender a perfected, first priority security interest in the Defeasance Collateral Account and the Total Defeasance Collateral.

“**Security Instrument**” shall mean that certain first priority Leasehold Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing dated the date hereof, executed and delivered by Borrower as security for the Loan and encumbering the Property, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“**Servicer**” shall have the meaning set forth in Section 11.4 hereof.

“**Settlement Amount**” shall have the meaning set forth in Section 8.8(b) hereof.

“**Severed Loan Documents**” shall have the meaning set forth in Article 10.

“**SFHA**” shall have the meaning set forth in Section 7(a)(vii) hereof.

“**Significant Obligor**” shall have the meaning set forth in Item 1101(k) of Regulation AB under the Securities Act.

“**Single Purpose Entity**” shall mean an entity which satisfies all of the requirements of Section 5.1 hereof and whose structure and organizational and governing documents are otherwise in form and substance acceptable to Lender and the Rating Agencies.

“**Solar Lease Documents**” shall mean, individually and/or collectively, the Phase I Solar Lease Documents and the Phase II Solar Lease Documents.

“**SPE Component Entity**” shall have the meaning set forth in Section 5.1(c) hereof.

“**Special Member**” shall have the meaning set forth in Section 5.1(d) hereof.

“**Sponsor**” shall mean, individually and/or collectively, as the context may require, Edward Bushor and Stuart L. Miller, each an individual.

“**State**” shall mean the state in which the Property or any part thereof is located.

“**Successor Borrower**” shall have the meaning set forth in Section 2.8 hereof.

“**Tax Reserve Account**” shall have the meaning set forth in Section 8.1 hereof.

“**Tax Reserve Funds**” shall have the meaning set forth in Section 8.1 hereof.

“**Taxes**” shall mean all taxes, assessments, water rates, sewer rents, sales tax, room tax, business improvement district or other similar assessments and other governmental impositions, including, without limitation, vault charges and license fees for the use of vaults, chutes and similar areas adjoining the Land, now or hereafter levied or assessed or imposed against the Property or any part thereof.

“**Tenant**” shall mean any Person leasing, subleasing or otherwise occupying any portion of the Property under a Lease or other occupancy agreement with Borrower (but excluding hotel guests occupying the Property in the ordinary course of business).

“**Title Insurance Policy**” shall mean that certain ALTA mortgagee title insurance policy issued with respect to the Property and insuring the lien of the Security Instrument.

“**Total Defeasance Collateral**” shall mean U.S. Obligations, which provide payments (i) on or prior to, but as close as possible to, the Business Day immediately preceding all Monthly Payment Dates and other scheduled payment dates, if any, under the Note after the Total Defeasance Date and up to and including the Open Period Start Date (including the principal balance of the Loan on the Open Period Start Date), and (ii) in amounts equal to or greater than the Scheduled Defeasance Payments relating to such Monthly Payment Dates and other scheduled payment dates.

“**Total Defeasance Date**” shall have the meaning set forth in Section 2.8 hereof.

“**Total Defeasance Event**” shall have the meaning set forth in Section 2.8 hereof.

“**UCC**” or “**Uniform Commercial Code**” shall mean the Uniform Commercial Code as in effect in the State.

“**Underwriter Group**” shall have the meaning set forth in Section 11.2 hereof.

“**Updated Information**” shall have the meaning set forth in Section 11.1 hereof.

“**U.S. Obligations**” shall mean “government securities” as defined in Section 2(a)(16) of the Investment Company Act of 1940 and within the meaning of Treasury Regulation Section 1.860G-2(a)(8); provided, that, (i) such “government securities” are not subject to prepayment, call or early redemption, (ii) to the extent that any REMIC Requirements require a revised and/or alternate definition of “government securities” in connection with any defeasance hereunder, the foregoing shall be deemed amended in a manner commensurate therewith and (iii) the aforesaid laws and regulations shall be deemed to refer to the same as may be and/or may hereafter be amended, restated, replaced or otherwise modified.

“**Wells Fargo**” shall mean Wells Fargo Bank, National Association.

“**Wells Group**” shall have the meaning set forth in Section 11.2 hereof.

“**Work Charge**” shall have the meaning set forth in Section 4.16(a) hereof.

“**Yield Maintenance Premium**” shall mean an amount equal to the greater of the following two amounts: (a) an amount equal to 3% of the amount prepaid; or (b) an amount equal to (i) the amount, if any, by which the sum of the present values as of the prepayment date of all unpaid principal and interest payments required hereunder, calculated by discounting such payments from the respective dates each such payment was due hereunder (or, with respect to the payment required on the Open Period Start Date (assuming the outstanding principal balance of the Loan is due on the Open Period Start Date), from the Open Period Start Date) back to the

prepayment date at a discount rate equal to the Periodic Treasury Yield (defined below) exceeds the outstanding principal balance of the Loan as of the prepayment date, *multiplied* by (ii) a fraction whose numerator is the amount prepaid and whose denominator is the outstanding principal balance of the Loan as of the prepayment date. For purposes of the foregoing, “**Periodic Treasury Yield**” shall mean (y) the annual yield to maturity of the actively traded non-callable United States Treasury fixed interest rate security (other than any such security which can be surrendered at the option of the holder at face value in payment of federal estate tax or which was issued at a substantial discount) that has a maturity closest to (whether before, on or after) the Open Period Start Date (or if two or more such securities have maturity dates equally close to the Open Period Start Date, the average annual yield to maturity of all such securities), as reported in *The Wall Street Journal* or other authoritative publication or news retrieval service on the fifth Business Day preceding the prepayment date, *divided by* (z) 12. Lender’s calculation of the Yield Maintenance Premium, and all component calculations, shall be conclusive and binding on Borrower absent manifest error.

### **Section 1.2 Principles of Construction.**

All references to sections, exhibits and schedules are to sections, exhibits and schedules in or to this Agreement unless otherwise specified. All uses of the word “including” shall mean “including, without limitation” unless the context shall indicate otherwise. Unless otherwise specified, the words “hereof,” “herein” and “hereunder” and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement. Unless otherwise specified, all meanings attributed to defined terms herein shall be equally applicable to both the singular and plural forms of the terms so defined.

## **ARTICLE 2.**

### **GENERAL TERMS**

#### **Section 2.1 The Loan.**

Subject to and upon the terms and conditions set forth herein, Lender hereby agrees to make and Borrower hereby agrees to accept the Loan on the Closing Date.

#### **Section 2.2 Disbursement to Borrower.**

Borrower may request and receive only one borrowing hereunder in respect of the Loan and any amount borrowed and repaid hereunder in respect of the Loan may not be re-borrowed.

#### **Section 2.3 The Note and the Other Loan Documents.**

The Loan shall be evidenced by the Note and this Agreement and secured by this Agreement, the Security Instrument and the other Loan Documents.

#### **Section 2.4 Use of Proceeds.**

Borrower shall use the proceeds of the Loan to (i) pay and discharge any existing loans relating to the Property, (ii) pay all past-due Taxes, Insurance Premiums and Other Charges, if

any, in respect of the Property, (iii) make initial deposits of the Reserve Funds, (iv) pay costs and expenses incurred in connection with the closing of the Loan, and (v) to the extent any proceeds remain after satisfying clauses (i) through (iv) above, for such lawful purpose as Borrower shall designate.

## **Section 2.5 Interest Rate.**

(a) Generally. Interest on the outstanding principal balance of the Loan shall accrue from the Closing Date up to but excluding the Maturity Date at the Interest Rate.

(b) Default Rate. In the event that, and for so long as, any Event of Default shall have occurred and be continuing, the outstanding principal balance of the Loan and, to the extent permitted by Applicable Law, overdue interest in respect of the Loan, shall accrue interest at the Default Rate, calculated from the date such payment was due without regard to any grace or cure periods contained herein.

(c) Interest Calculation. Interest on the outstanding principal balance of the Loan shall accrue at the Interest Rate calculated on an Actual/360 Basis. Borrower acknowledges that interest calculated on an Actual/360 Basis exceeds interest calculated on a 30/360 Basis and, therefore: (i) a greater portion of each monthly installment of principal (if applicable) and interest will be applied to interest using the Actual/360 Basis than would be the case if interest accrued on a 30/360 Basis and (ii) the unpaid principal balance of the Loan on the Maturity Date will be greater using the Actual/360 Basis than would be the case if interest accrued on a 30/360 Basis.

(d) Usury Savings. This Agreement and the other Loan Documents are subject to the express condition that at no time shall Borrower be required to pay interest on the principal balance of the Loan at a rate which could subject Lender to either civil or criminal liability as a result of being in excess of the Maximum Legal Rate. If by the terms of this Agreement or the other Loan Documents, Borrower is at any time required or obligated to pay interest on the principal balance due hereunder at a rate in excess of the Maximum Legal Rate, the Interest Rate or the Default Rate, as the case may be, shall be deemed to be immediately reduced to the Maximum Legal Rate and all previous payments in excess of the Maximum Legal Rate shall be deemed to have been payments in reduction of principal and not on account of the interest due hereunder. All sums paid or agreed to be paid to Lender for the use or forbearance of the sums due under the Loan, shall, to the extent permitted by Applicable Law, be amortized, prorated, allocated, and spread throughout the full stated term of the Loan until payment in full so that the rate or amount of interest on account of the Loan does not exceed the Maximum Legal Rate from time to time in effect and applicable to the Loan for so long as the Loan is outstanding.

## **Section 2.6 Loan Payments.**

(a) Payment Before Maturity. Borrower shall make a payment to Lender of interest only on the Closing Date for the period from the Closing Date through (but excluding) the eleventh (11<sup>th</sup>) day of either (i) the month in which the Closing Date occurs (if such Closing Date is on or after the first (1<sup>st</sup>) day of such month, but prior to the eleventh (11<sup>th</sup>) day of such month) or (ii) if the Closing Date is after the eleventh (11<sup>th</sup>) day of the then current calendar month, the calendar month following the calendar month in which the Closing Date occurs (unless the Closing Date is

the eleventh (11<sup>th</sup>) day of a calendar month, in which case no such separate payment of interest shall be due). Borrower shall make a payment to Lender of principal (if applicable) and interest in the amount of the Monthly Debt Service Payment Amount on the Monthly Payment Date occurring in October, 2018 and on each Monthly Payment Date thereafter to and including the Maturity Date. Each payment shall be applied first to accrued and unpaid interest and the balance, if any, to principal. The Monthly Debt Service Payment Amount required hereunder (where such Monthly Debt Service Payment Amount includes both principal and interest) is based upon a thirty (30) year amortization schedule.

(b) Intentionally Omitted.

(c) Payment on Maturity. Borrower shall pay to Lender on the Maturity Date the outstanding principal balance of the Loan, all accrued and unpaid interest and all other amounts due hereunder and under the Note, the Security Instrument and the other Loan Documents.

(d) Late Payment Charge. If any principal, interest or any other sum due under the Loan Documents, other than the payment of principal due on the Maturity Date, is not paid by Borrower when due, Borrower shall pay to Lender upon demand an amount equal to the lesser of five percent (5%) of such unpaid sum or the maximum amount permitted by Applicable Law in order to defray the expense incurred by Lender in handling and processing such delinquent payment and to compensate Lender for the loss of the use of such delinquent payment. Any such amount shall be secured by the Security Instrument and the other Loan Documents.

(e) Method and Place of Payment.

(i) Except as otherwise specifically provided herein, all payments and prepayments under this Agreement and the Note shall be made to Lender not later than 1:00 P.M., New York City time, on the date when due and shall be made in lawful money of the United States of America in immediately available funds at Lender's office, and any funds received by Lender after such time shall, for all purposes hereof, be deemed to have been paid on the next succeeding Business Day.

(ii) Whenever any payment to be made hereunder or under any other Loan Document shall be stated to be due on a day which is not a Business Day, the due date thereof shall be deemed to be the immediately succeeding Business Day.

(iii) All payments required to be made by Borrower hereunder or under the Note or the other Loan Documents shall be made irrespective of, and without deduction for, any setoff, claim or counterclaim and shall be made irrespective of any defense thereto.

## **Section 2.7 Prepayments.**

(a) Voluntary Prepayments. Except as otherwise provided herein, Borrower shall not have the right to prepay the Loan in whole or in part. On and after the Monthly Payment Date occurring in March, 2023 (the "**Open Period Start Date**"), Borrower may, provided no Event of Default has occurred and is continuing, at its option and upon thirty (30) days prior notice to Lender (or such shorter period of time as may be permitted by Lender in its sole discretion), prepay the Debt in whole on any date without payment of the Yield Maintenance Premium. Any prepayment

received by Lender on a date other than a Monthly Payment Date shall include interest which would have accrued thereon to the next Monthly Payment Date (such amounts, the “**Interest Shortfall**”).

(b) Mandatory Prepayments. On each date on which Lender actually receives a distribution of Net Proceeds, and if such Net Proceeds are not made available to Borrower for Restoration, Borrower shall prepay the outstanding principal balance of the Note in an amount equal to one hundred percent (100%) of such Net Proceeds together with any applicable Interest Shortfall. No Yield Maintenance Premium shall be due in connection with any prepayment made pursuant to this Section 2.7(b).

(c) Prepayments After Default. After (A) the occurrence and during the continuance of an Event of Default and (B)(i) any acceleration of the Debt, including, without limitation, any acceleration pursuant to Section 10.2(a) hereof due to an Event of Default under Section 10.1(g) hereof or (ii) any prepayment of the Debt, the Yield Maintenance Premium shall, in all cases, be deemed a portion of the Debt due and owing hereunder and under the other Loan Documents. Without limitation of the foregoing, if, after the occurrence and during the continuance of an Event of Default, (x) payment of all or any part of the Debt is tendered by Borrower (voluntarily or involuntarily), a purchaser at foreclosure, or any other Person (which such payment shall be deemed an attempt to circumvent the prohibition against prepayment prior to the Defeasance Lockout Release Date as set forth herein), (y) Lender obtains a recovery of all or a portion of the Debt (through an exercise of remedies hereunder or under the other Loan Documents or otherwise), or (z) the Debt is deemed satisfied (in whole or in part) through an exercise of remedies hereunder or under the other Loan Documents or at law, the Yield Maintenance Premium, in addition to the outstanding principal balance, all accrued and unpaid interest, Interest Shortfall, and other amounts payable under the Loan Documents, shall be deemed due and payable hereunder. Borrower acknowledges that (i) a prepayment will cause damage to Lender; (ii) the Yield Maintenance Premium is intended to compensate Lender for the loss of its investment and the expense incurred and time and effort associated with making the Loan, which will not be fully repaid if the Loan is tendered, prepaid or repaid (in each case, in whole or in part and voluntarily or involuntarily) prior to the Maturity Date; (iii) it will be extremely difficult and impractical to ascertain the extent of Lender's damages caused by a prepayment after an acceleration or any other tender, prepayment or repayment of the Debt (in each case, in whole or in part and voluntarily or involuntarily) not permitted by the Loan Documents; and (iv) the Yield Maintenance Premium represents Lender's and Borrower's reasonable estimate of Lender's damages from the prepayment and is not a penalty. Notwithstanding anything to the contrary contained herein or in any other Loan Document, any tender, prepayment or repayment of the Debt made during the continuance of an Event of Default shall be applied to the Debt in such order and priority as may be determined by Lender in its sole discretion.

(d) Intentionally Omitted.

(e) Release of Lien. Except as expressly set forth in this Article 2, no repayment, prepayment or defeasance of all or any portion of the Note shall cause, give rise to a right to require, or otherwise result in, the release of the lien of the Security Instrument.

## **Section 2.8 Defeasance.**

(a) Provided no Event of Default shall have occurred and remain uncured, Borrower shall have the right at any time after the Defeasance Lockout Release Date and prior to the Open Period Start Date to voluntarily defease the entire Loan and obtain a release of the lien of the Security Instrument by providing Lender with the Total Defeasance Collateral (hereinafter, a “**Total Defeasance Event**”), subject to the satisfaction of the following conditions precedent:

(i) Borrower shall provide Lender not less than thirty (30) days’ notice (or such shorter period of time if permitted by Lender in its sole discretion) but not more than ninety (90) days’ notice specifying a date (the “**Total Defeasance Date**”) on which the Total Defeasance Event is to occur;

(ii) Borrower shall pay to Lender (A) all payments of principal and interest due and payable on the Loan to and including the Total Defeasance Date; (B) all other sums, if any, then due and payable under the Note, this Agreement, the Security Instrument and the other Loan Documents through and including the Total Defeasance Date (or, if the Total Defeasance Date is not a Monthly Payment Date, the next occurring Monthly Payment Date); (C) all escrow, closing, recording, legal, appraisal, Rating Agency and other out-of-pocket fees, costs and expenses reasonably paid or incurred by Lender or its agents in connection with the Total Defeasance Event, the release of the lien of Security Instrument on the Property, the review of the proposed Total Defeasance Collateral and the preparation of the Security Agreement and related documentation; and (D) any revenue, documentary stamp, intangible or other taxes, charges or fees due in connection with the transfer or assumption of the Note and/or the Total Defeasance Event;

(iii) Borrower shall deposit the Total Defeasance Collateral into the Defeasance Collateral Account and otherwise comply with the provisions of Section 2.8(d) hereof;

(iv) Borrower shall execute and deliver to Lender a Security Agreement in respect of the Defeasance Collateral Account and the Total Defeasance Collateral;

(v) Borrower shall deliver to Lender an opinion of counsel for Borrower that is standard in commercial lending transactions and subject only to customary qualifications, assumptions and exceptions opining, among other things, that (A) Lender has a legal and valid perfected first priority security interest in the Defeasance Collateral Account and the Total Defeasance Collateral; (B) if a Securitization has occurred (1) the REMIC Trust formed pursuant to such Securitization and/or any subsequent or prior Securitization of the Loan or any portion thereof or interest therein will each not fail to maintain their respective status as a “real estate mortgage investment conduit” within the meaning of Section 860D of the IRS Code as a result of a Total Defeasance Event pursuant to this Section 2.8 and (2) the Total Defeasance Event would neither (I) constitute a “significant modification” of the Loan within the meaning of Treasury Regulation Section 1.860G-2(b) nor (II) cause the Loan to fail to be a “qualified mortgage” within the meaning of Section 860G(a)(3)(A) of the IRS Code; and (C) a New Non-Consolidation Opinion with respect to the Successor Borrower;

(vi) Borrower shall deliver to Lender a Rating Agency Confirmation as to the Total Defeasance Event;

(vii) Borrower shall deliver an Officer's Certificate certifying that the requirements set forth in this Section 2.8 have been satisfied;

(viii) Borrower shall deliver a certificate of a "big four" or other nationally recognized public accounting firm acceptable to Lender certifying that the Total Defeasance Collateral will generate monthly amounts equal to or greater than the Scheduled Defeasance Payments;

(ix) Borrower shall deliver such other certificates, opinions, documents and instruments as Lender may reasonably request; and

(x) Borrower shall pay all reasonable costs and expenses of Lender incurred in connection with the Total Defeasance Event, including, without limitation, Lender's reasonable attorneys' fees and expenses and Rating Agency fees and expenses.

(b) If Borrower has elected to defease the entire Note and the requirements of this Section 2.8 have been satisfied, the Property shall be released from the lien of the Security Instrument and the Total Defeasance Collateral pledged pursuant to the Security Agreement shall be the sole source of collateral securing the Note. In connection with the release of the lien, Borrower shall submit to Lender, not less than thirty (30) days prior to the Total Defeasance Date (or such shorter time as is acceptable to Lender in its sole discretion), a release of lien (and related Loan Documents) for execution by Lender. Such release shall be in a form appropriate in the jurisdiction in which the Property is located and shall contain standard provisions protecting the rights of the releasing lender. In addition, Borrower shall provide all other documentation Lender reasonably requires to be delivered by Borrower in connection with such release, together with an Officer's Certificate certifying that such documentation (i) is in compliance with all Applicable Law, and (ii) will affect such release in accordance with the terms of this Agreement. Borrower shall pay all costs, taxes and expenses associated with the release of the lien of the Security Instrument, including Lender's reasonable attorneys' fees.

(c) Intentionally Omitted.

(d) On or before the date on which Borrower delivers the Total Defeasance Collateral, Borrower or Successor Borrower (as applicable) shall open at any Eligible Institution an Eligible Account (the "**Defeasance Collateral Account**"). The Defeasance Collateral Account shall contain only (i) Total Defeasance Collateral, and (ii) cash from interest and principal paid on the Total Defeasance Collateral. All cash from interest and principal payments paid on the Total Defeasance Collateral shall be paid over to Lender on each Monthly Payment Date and applied first to accrued and unpaid interest and then to principal. Any cash from interest and principal paid on the Total Defeasance Collateral not needed to pay the Scheduled Defeasance Payments shall be paid to Borrower or Successor Borrower (as applicable). Borrower or Successor Borrower (as applicable) shall cause the Eligible Institution at which the Total Defeasance Collateral is deposited to enter into an agreement with Borrower or Successor Borrower (as applicable) and Lender, satisfactory to Lender in its sole discretion, pursuant to which such Eligible Institution



shall agree to hold and distribute the Total Defeasance Collateral in accordance with this Agreement. Borrower or Successor Borrower (as applicable) shall be the owner of the Defeasance Collateral Account and shall report all income accrued on Total Defeasance Collateral for federal, state and local income tax purposes in its income tax return. Borrower shall prepay all cost and expenses associated with opening and maintaining the Defeasance Collateral Account. Lender shall not in any way be liable by reason of any insufficiency in the Defeasance Collateral Account.

(e) In connection with a Total Defeasance Event under this Section 2.8, Borrower shall transfer and assign all obligations, rights and duties under and to the Note and the Security Agreement, together with the Total Defeasance Collateral to a newly-created successor entity, which entity shall be a Single Purpose Entity and which entity shall be designated or established by Borrower, subject to approval by Lender in its reasonable discretion (the “**Successor Borrower**”). Such Successor Borrower shall assume the obligations under the Note and the Security Agreement and Borrower shall be relieved of its obligations under the Loan Documents (other than those obligations which by their terms survive a repayment, defeasance or other satisfaction of the Loan and/or a transfer of the Property in connection with Lender’s exercise of its remedies under the Loan Documents). Borrower shall pay a minimum of \$1,000 to any such Successor Borrower as consideration for assuming the obligations under the Note and the Security Agreement. Borrower shall pay all costs and expenses incurred by Lender, including the cost of establishing the Successor Borrower and Lender’s reasonable attorney’s fees and expenses, incurred in connection therewith.

(f) Notwithstanding anything to the contrary contained in this Section 2.8, the parties hereto hereby acknowledge and agree that after the Securitization of the Loan (or any portion thereof or interest therein), with respect to any Lender approval or similar discretionary rights over any matters contained in this Section (any such matter, a “**Defeasance Approval Item**”), such rights shall be construed such that Lender shall only be permitted to withhold its consent or approval with respect to any Defeasance Approval Item if the same fails to meet the Prudent Lender Standard.

### ARTICLE 3.

#### REPRESENTATIONS AND WARRANTIES

Borrower represents and warrants as of the Closing Date that:

##### **Section 3.1 Legal Status and Authority.**

Borrower (a) is duly organized, validly existing and in good standing under the laws of its state of formation; (b) is duly qualified to transact business and is in good standing in the State; and (c) has all necessary approvals, governmental and otherwise, and full power and authority to own, operate and lease the Property. Borrower has full power, authority and legal right to mortgage, grant, bargain, sell, pledge, assign, warrant, transfer and convey the Property pursuant to the terms hereof and to keep and observe all of the terms of this Agreement, the Note, the Security Instrument and the other Loan Documents on Borrower’s part to be performed.

### **Section 3.2 Validity of Documents.**

(a) The execution, delivery and performance of this Agreement, the Note, the Security Instrument and the other Loan Documents by Borrower and its applicable Affiliates and the borrowing evidenced by the Note and this Agreement (i) are within the power and authority of such parties; (ii) have been authorized by all requisite organizational action of such parties; (iii) have received all necessary approvals and consents, corporate, governmental or otherwise; (iv) to Borrower's knowledge, will not violate, conflict with, result in a breach of or constitute (with notice or lapse of time, or both) a material default under any provision of law, any order or judgment of any court or Governmental Authority, any license, certificate or other approval required to operate the Property, Borrower's organizational documents, or any indenture, agreement or other instrument to which Borrower is a party or by which it or any of its assets or the Property is or may be bound or affected, including, without limitation, the Management Agreement; (v) will not result in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of its assets, except the lien and security interest created hereby and by the other Loan Documents; and (vi) will not require any authorization or license from, or any filing with, any Governmental Authority (except for the recordation of the Security Instrument in appropriate land records in the State and except for Uniform Commercial Code filings relating to the security interest created hereby), (b) this Agreement, the Note, the Security Instrument and the other Loan Documents have been duly executed and delivered by Borrower through the undersigned authorized representative of Borrower and (c) this Agreement, the Note, the Security Instrument and the other Loan Documents constitute the legal, valid and binding obligations of Borrower and are enforceable against Borrower in accordance with their respective terms (except as such enforcement may be limited by bankruptcy, insolvency, fraudulent transfers, reorganization, moratorium or other similar Creditors Rights Laws, and by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law)). The Loan Documents are not subject to any right of rescission, set-off, counterclaim or defense by Borrower, including the defense of usury, nor would the operation of any of the terms of the Loan Documents, or the exercise of any right thereunder, render the Loan Documents unenforceable (except as such enforcement may be limited by bankruptcy, insolvency, fraudulent transfers, reorganization, moratorium or other similar Creditors Rights Laws, and by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law)), and Borrower has not asserted any right of rescission, set-off, counterclaim or defense with respect thereto.

### **Section 3.3 Litigation.**

There is no action, suit, investigation, arbitration or proceeding, judicial, governmental, administrative or otherwise (including any condemnation or similar proceeding), pending, filed or, to the best of Borrower's knowledge, threatened or contemplated against or affecting Borrower, Sponsor or Guarantor or against or affecting the Property that has not been disclosed to Lender by Borrower in writing in connection with the closing of the Loan, is not fully covered by insurance (other than deductibles) or, if determined adversely to Borrower, would have a material adverse effect on (a) Borrower's title to the Property, (b) the validity or enforceability of the Security Instrument, (c) Borrower's ability to perform under the Loan Documents, (d) Guarantor's ability to perform under the Loan Documents to which it is a party, (e) the use, operation or value of the Property, (f) the principal benefit of the security intended to be provided by the Loan Documents,

or (g) the ability of the Property to generate net cash flow sufficient to pay the Debt Service and other amounts due under the Loan.

### **Section 3.4 Agreements.**

Borrower is not a party to any agreement or instrument or subject to any restriction which would have a Material Adverse Effect. Borrower is not in default in any material respect in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any agreement or instrument to which it is a party or by which Borrower or the Property is bound. Borrower has no material financial obligation under any agreement or instrument to which Borrower is a party or by which Borrower or the Property is otherwise bound, other than (a) obligations incurred in the ordinary course of the operation of the Property, (b) obligations under this Agreement, the Security Instrument, the Note and the other Loan Documents, and (c) the Borrower Litigation and Permitted Equipment Leases. There is no agreement or instrument to which Borrower is a party or by which Borrower is bound that would require the subordination in right of payment of any of Borrower's obligations hereunder or under the Note to an obligation owed to another party.

### **Section 3.5 Financial Condition.**

(a) Borrower is solvent, and no proceeding under Creditors Rights Laws with respect to Borrower has been initiated and Borrower has received reasonably equivalent value for the granting of the Security Instrument.

(b) Neither the Property, nor any portion thereof, is the subject of any proceeding under Creditors Rights Laws.

(c) No petition in bankruptcy has been filed by or against Borrower, Sponsor, Guarantor or any related entity, or any principal, general partner or member thereof, in the last ten (10) years, and neither Borrower, Sponsor, Guarantor nor any related entity, or any principal, general partner or member thereof, in the last ten (10) years has ever made any assignment for the benefit of creditors or taken advantage of any Creditors Rights Laws.

(d) Borrower is not contemplating either the filing of a petition by it under any Creditors Rights Laws or the liquidation of its assets or property, and Borrower does not have any knowledge of any Person contemplating the filing of any such petition against it.

### **Section 3.6 Disclosure.**

Borrower has disclosed to Lender all material facts and has not failed to disclose any material fact that could cause any representation or warranty made herein to be materially misleading.

### **Section 3.7 No Plan Assets.**

As of the date hereof and throughout the term of the Loan (a) Borrower is not and will not be an "employee benefit plan," as defined in Section 3(3) of ERISA, subject to Title I of ERISA, (b) Borrower is not and will not be a "governmental plan" within the meaning of Section 3(32) of

ERISA, (c) transactions by or with Borrower are not and will not be subject to any state statute, regulation or ruling regulating investments of, or fiduciary obligations with respect to, governmental plans, and (d) none of the assets of Borrower constitutes or will constitute “plan assets” of one or more of such plans within the meaning of 29 C.F.R. Section 2510.3-101, as modified by Section 3(42) of ERISA. As of the date hereof, neither Borrower nor any ERISA Affiliate maintains, sponsors or contributes to a Defined Benefit Plan or a Multiemployer Plan. Neither the Borrower nor any ERISA Affiliate sponsors, contributes to or maintains, either currently or in the past, a plan, document, agreement, or arrangement subject to ERISA.

### **Section 3.8 Not a Foreign Person.**

Borrower is not a “foreign person” within the meaning of § 1445(f)(3) of the IRS Code.

### **Section 3.9 Business Purposes.**

The Loan is solely for the business purpose of Borrower, and is not for personal, family, household, or agricultural purposes.

### **Section 3.10 Borrower Information.**

Borrower’s principal place of business and its chief executive office as of the date hereof is 93 Banyan Drive, Hilo, Hawaii 96720. Borrower’s mailing address, as set forth in the opening paragraph hereof or as changed in accordance with the provisions hereof, is true and correct. Borrower is not subject to back-up withholding taxes.

### **Section 3.11 Status of Property.**

(a) Borrower has obtained all material certificates, licenses, permits, franchises, consents and other approvals, governmental and otherwise, necessary for the ownership and operation of the Property and the conduct of its business (collectively, “**Licenses**”) and all required zoning, building code, land use, environmental and other similar permits or approvals, all of which are in full force and effect as of the date hereof and not subject to revocation, suspension, forfeiture or modification based upon any facts known to Borrower.

(b) Except as disclosed in the zoning report delivered to Lender in connection with the closing of the Loan, the Property and the present and contemplated use and occupancy thereof are in compliance in all material respects with all applicable zoning ordinances, building codes, land use laws, Environmental Laws and other similar Applicable Law.

(c) The Property is served by all utilities necessary for the current or contemplated use thereof. All utility service is provided by public utilities and the Property has accepted or is equipped to accept such utility service. The Property is served by public water and sewer systems. All utilities and public water and sewer systems serving the Property are adequate for the current or contemplated use thereof.

(d) All public roads and streets necessary for service of and access to the Property for the current or contemplated use thereof have been completed and are physically and legally open for use by the public. The Property has either direct access to such public roads or streets or access

to such public roads or streets by virtue of a perpetual easement or similar agreement inuring in favor of Borrower and any subsequent owners of the Property.

(e) The Property is free from material damage caused by fire or other casualty. Except as disclosed in the physical conditions report delivered to Lender in connection with the closing of the Loan, the Property, including, without limitation, all buildings, improvements, parking facilities, sidewalks, storm drainage systems, roofs, plumbing systems, HVAC systems, fire protection systems, electrical systems, equipment, elevators, exterior sidings and doors, landscaping, irrigation systems and all structural components, are in good condition, order and repair in all material respects; there exists no structural or other material defects or damages in the Property, whether latent or otherwise, and Borrower has not received notice from any insurance company or bonding company of any defects or inadequacies in the Property, or any part thereof, which would adversely affect the insurability of the same or cause the imposition of extraordinary premiums or charges thereon or of any termination or threatened termination of any policy of insurance or bond.

(f) Other than costs in dispute in the Borrower Litigation, all costs and expenses of any and all labor, materials, supplies and equipment used in the construction of the Improvements have been paid in full. There are no mechanics' or similar liens or claims which have been filed for work, labor or material (and no rights are outstanding that under Applicable Law could give rise to any such liens) affecting the Property which are or may be prior to or equal to the lien of the Security Instrument.

(g) Except with respect to Borrower's ongoing obligations under the Permitted Equipment Leases (none of which are delinquent as of the Closing Date), Borrower has paid in full for, and is the owner of, all furnishings, fixtures and equipment (other than Tenants' property, including, without limitation, the tenant under the Solar Lease Documents) used in connection with the operation of the Property, free and clear of any and all security interests, liens or encumbrances, except Permitted Encumbrances.

(h) Except as disclosed in the physical conditions report delivered to Lender in connection with the closing of the Loan, all liquid and solid waste disposal, septic and sewer systems located on the Property are in a good and safe condition and repair and in material compliance with all Applicable Law.

(i) No portion of the Improvements is located in an area identified by the Federal Emergency Management Agency or any successor thereto as an area having special flood hazards pursuant to the Flood Insurance Acts or, if any portion of the Improvements is located within such area, Borrower has obtained and will maintain the insurance prescribed in Section 7.1(a) hereof. Except as shown on the survey of the Property delivered to Lender in connection with the closing of the Loan, no part of the Property consists of or is classified as wetlands, tidelands or swamp and overflow lands.

(j) Except for encroachments that are insured against pursuant to the Title Insurance Policy or otherwise do not cause a Material Adverse Effect, and except as otherwise shown on the survey of the Property delivered to Lender in connection with the closing of the Loan, all the

Improvements lie within the boundaries of the Land and any building restriction lines applicable to the Land and no improvements on adjoining properties encroach onto the Property.

(k) To Borrower's knowledge after due inquiry, there are no pending or proposed special or other assessments for public improvements or otherwise affecting the Property, nor are there any contemplated improvements to the Property that may result in such special or other assessments.

### **Section 3.12 Financial Information.**

All financial data, including, without limitation, the balance sheets, statements of cash flow, statements of income and operating expense and rent rolls, that have been delivered to Lender in respect of Borrower, Sponsor, Guarantor and/or the Property (a) are true, complete and correct in all material respects, (b) accurately represent the financial condition of Borrower, Sponsor, Guarantor or the Property, as applicable, as of the date of such reports in all material respects, and (c) to the extent prepared or audited by an independent certified public accounting firm, have been prepared in accordance with GAAP throughout the periods covered, except as disclosed therein. Borrower does not have any contingent liabilities, liabilities for taxes, unusual forward or long-term commitments or unrealized or anticipated losses from any unfavorable commitments that are known to Borrower and reasonably likely to have a Material Adverse Effect, except as referred to or reflected in said financial statements. Since the date of such financial statements, there has been no materially adverse change in the financial condition, operations or business of Borrower, Sponsor or Guarantor from that set forth in said financial statements.

### **Section 3.13 Condemnation.**

No Condemnation or other proceeding has been commenced, is pending or, to Borrower's best knowledge, is threatened with respect to all or any portion of the Property or for the relocation of the access to the Property.

### **Section 3.14 Separate Lots.**

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

### **Section 3.15 Insurance.**

Borrower has obtained and has delivered to Lender certified copies of all Policies reflecting the insurance coverages, amounts and other requirements set forth in this Agreement. There are no present claims of any material nature under any of the Policies, and to Borrower's knowledge, no Person, including Borrower, has done, by act or omission, anything which would impair the coverage of any of the Policies.

### **Section 3.16 Use of Property.**

The Property is used exclusively as a hotel and other appurtenant and related uses.

### **Section 3.17 Leases and Rent Roll.**

Except as disclosed in the rent roll for the Property delivered to and approved by Lender (the “**Rent Roll**”) and the aging report and Tenant estoppels delivered to and approved by Lender, (a) Borrower is the sole owner of the entire lessor’s interest in the Leases; (b) the Leases are valid and enforceable against Borrower and the Tenants set forth therein and are in full force and effect; (c) all of the Leases are arms-length agreements with bona fide, independent third parties; (d) no party under any Lease is in default; (e) all Rents due have been paid in full and no Tenant is in arrears in its payment of Rent; (f) none of the Rents reserved in the Leases have been assigned or otherwise pledged or hypothecated; (g) none of the Rents have been collected for more than one (1) month in advance (except a security deposit shall not be deemed rent collected in advance); (h) the premises demised under the Leases have been completed and the Tenants under the Leases have accepted the same and have taken possession of the same on a rent-paying basis with no rent concessions to any Tenants; (i) there exist no offsets or defenses to the payment of any portion of the Rents and Borrower has no monetary obligation to any Tenant under any Lease; (j) Borrower has received no notice from any Tenant challenging the validity or enforceability of any Lease; (k) there are no agreements with the Tenants under the Leases other than expressly set forth in each Lease; (l) no Lease contains an option to purchase, right of first refusal to purchase, right of first refusal to lease additional space at the Property, or any other similar provision; (m) except for hotel guests occupying the Property in the ordinary course of business, no person or entity has any possessory interest in, or right to occupy, the Property except under and pursuant to a Lease; (n) no Tenants have exercised any right to “go dark” that they may have under their Leases and, to Borrower’s knowledge, no event has occurred that, but for the giving of notice and/or passage of time, would give any Tenant any right to abate rent, “go dark” or terminate any Lease; (o) all security deposits relating to the Leases reflected on the Rent Roll have been collected by Borrower; (p) no brokerage commissions or finder’s fees are due and payable regarding any Lease; (q) each Tenant is in actual, physical occupancy of the premises demised under its Lease and is paying full rent under its Lease; (r) no Tenant has sublet any portion of the premises demised to such Tenant under its Lease; and (s) no Tenant occupying 20% or more (by square feet) of the net rentable area of the Property is, to Borrower’s knowledge, a debtor in any state or federal bankruptcy, insolvency or similar proceeding.

### **Section 3.18 Filing and Recording Taxes.**

All mortgage, mortgage recording, stamp, intangible or other similar tax required to be paid by any Person under Applicable Law currently in effect in connection with the execution, delivery, recordation, filing, registration, perfection or enforcement of any of this Agreement, the Security Instrument, the Note and the other Loan Documents, including, without limitation, the Security Instrument, have been paid or will be paid, and, under current Applicable Law, the Security Instrument is enforceable in accordance with its terms by Lender (or any subsequent holder thereof), except as such enforcement may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar Creditors Rights Laws, and by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

### **Section 3.19 Management Agreement.**

The Management Agreement is in full force and effect and there is no default thereunder by any party thereto and, to Borrower's knowledge, no event has occurred that, with the passage of time and/or the giving of notice would constitute a default thereunder. As of the date hereof, no management fees under the Management Agreement are due and payable.

### **Section 3.20 Illegal Activity/Forfeiture.**

(a) No portion of the Property has been or will be purchased, improved, equipped or furnished with proceeds of any illegal activity and to the best of Borrower's knowledge, there are no illegal activities or activities relating to controlled substances at the Property (including, without limitation, any growing, distributing and/or dispensing of medical marijuana).

(b) There has not been and shall never be committed by Borrower or any other person in occupancy of or involved with the operation or use of the Property any act or omission affording the federal government or any state or local government the right of forfeiture as against the Property or any part thereof or any monies paid in performance of Borrower's obligations under this Agreement, the Note, the Security Instrument or the other Loan Documents. Borrower hereby covenants and agrees not to commit, permit or suffer to exist any act or omission affording such right of forfeiture. Borrower also hereby covenants and agrees that it shall not commit, permit or knowingly suffer to exist any illegal activities or activities relating to controlled substances at the Property (including, without limitation, any growing, distributing and/or dispensing of medical marijuana).

### **Section 3.21 Taxes.**

Borrower has filed all federal, state, county, municipal, and city income, personal property and other tax returns or extensions relating thereto required to have been filed by it and has paid all taxes and related liabilities which have become due pursuant to such returns or pursuant to any assessments received by it. Borrower knows of no basis for any additional assessment in respect of any such taxes and related liabilities for prior years.

### **Section 3.22 Permitted Encumbrances.**

None of the Permitted Encumbrances, individually or in the aggregate, materially interferes with the benefits of the security intended to be provided by this Agreement, the Security Instrument, the Note and the other Loan Documents, materially and adversely affects the value or marketability of the Property, materially and adversely impairs the use or the operation of the Property or impairs Borrower's ability to pay its obligations in a timely manner.

### **Section 3.23 Material Agreements.**

With respect to each Material Agreement, (a) each Material Agreement is in full force and effect and has not been amended, restated, replaced or otherwise modified (except, in each case, as expressly set forth herein or disclosed to Lender in writing), (b) there are no defaults under any Material Agreement by any party thereto and, to Borrower's knowledge, no event has occurred which, but for the passage of time, the giving of notice, or both, would constitute a default under



any Material Agreement, (c) all payments and other sums due and payable under the Material Agreements have been paid in full, (d) no party to any Material Agreement has commenced any action or given or received any notice for the purpose of terminating any Material Agreement, and (e) the representations made in any estoppel or similar document delivered with respect to any Material Agreement in connection with the Loan are true, complete and correct and are hereby incorporated by reference as if fully set forth herein.

### **Section 3.24 Non-Consolidation Opinion Assumptions.**

To the best of Borrower's knowledge, all of the assumptions made in the Non-Consolidation Opinion, including, but not limited to, any exhibits attached thereto, are true, complete and correct in all material respects.

### **Section 3.25 Federal Reserve Regulations.**

No part of the proceeds of the Loan will be used for the purpose of purchasing or acquiring any "margin stock" within the meaning of Regulation U of the Board of Governors of the Federal Reserve System or for any other purpose which would be inconsistent with such Regulation U or any other Regulations of such Board of Governors, or for any purposes prohibited by Applicable Law or by the terms and conditions of this Agreement, the Security Instrument, the Note or the other Loan Documents.

### **Section 3.26 Investment Company Act.**

Borrower is not (a) an "investment company" or a company "controlled" by an "investment company," within the meaning of the Investment Company Act of 1940, as amended; or (b) subject to any other federal or state law or regulation which purports to restrict or regulate its ability to borrow money.

### **Section 3.27 Fraudulent Conveyance.**

Borrower (a) has not entered into the Loan or any Loan Document with the actual intent to hinder, delay, or defraud any creditor and (b) received reasonably equivalent value in exchange for its obligations under the Loan Documents. Giving effect to the Loan, the fair saleable value of Borrower's assets exceeds and will, immediately following the execution and delivery of the Loan Documents, exceed Borrower's total liabilities, including, without limitation, subordinated, unliquidated, disputed or contingent liabilities. The fair saleable value of Borrower's assets is and will, immediately following the execution and delivery of the Loan Documents, be greater than Borrower's probable liabilities, including the maximum amount of its contingent liabilities or its debts as such debts become absolute and matured. Borrower's assets do not and, immediately following the execution and delivery of the Loan Documents will not, constitute unreasonably small capital to carry out its business as conducted or as proposed to be conducted. Borrower does not intend to, and does not believe that it will, incur debts and liabilities (including, without limitation, contingent liabilities and other commitments) beyond its ability to pay such debts as they mature (taking into account the timing and amounts to be payable on or in respect of obligations of Borrower).

### **Section 3.28 Embargoed Person.**

As of the date hereof and at all times throughout the term of the Loan, including after giving effect to any transfers of interests permitted pursuant to the Loan Documents, (a) none of the funds or other assets of Borrower, Sponsor or Guarantor constitute property of, or are beneficially owned, directly or indirectly, by any person, entity or country which is a sanctioned person, entity or country under U.S. law, including but not limited to, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 et seq., The Trading with the Enemy Act, 50 U.S.C. App. 1 et seq., and any Executive Orders or regulations promulgated thereunder (including regulations administered by the Office of Foreign Assets Control (“**OFAC**”) of the U.S. Department of the Treasury and the Specially Designated Nationals List maintained by OFAC) with the result that the investment in Borrower, Sponsor and/or Guarantor, as applicable (whether directly or indirectly), is prohibited by Applicable Law or the Loan made by Lender is in violation of Applicable Law (“**Embargoed Person**”); (b) unless expressly waived in writing by Lender, no Embargoed Person has any interest of any nature whatsoever in Borrower, Sponsor or Guarantor, as applicable, with the result that the investment in Borrower, Sponsor and/or Guarantor, as applicable (whether directly or indirectly), is prohibited by Applicable Law or the Loan is in violation of Applicable Law; and (c) to the best knowledge of Borrower, none of the funds of Borrower, Sponsor or Guarantor, as applicable, have been derived from any unlawful activity with the result that the investment in Borrower, Sponsor and/or Guarantor, as applicable (whether directly or indirectly), is prohibited by Applicable Law or the Loan is in violation of Applicable Law. Borrower covenants and agrees that in the event Borrower receives any notice that Borrower, Sponsor or Guarantor (or any of their respective beneficial owners, affiliates or participants) or any Person that has an interest in the Property is designated as an Embargoed Person, Borrower shall immediately notify Lender in writing. At Lender’s option, it shall be an Event of Default hereunder if Borrower, Guarantor, Sponsor or any other party to the Loan is designated as an Embargoed Person.

### **Section 3.29 Patriot Act.**

All capitalized words and phrases and all defined terms used in the USA Patriot Act of 2001, 107 Public Law 56 (October 26, 2001) and in other statutes and all orders, rules and regulations of the United States government and its various executive departments, agencies and offices related to the subject matter of the Patriot Act (collectively referred to in this Section only as the “**Patriot Act**”) are incorporated into this Section. Borrower hereby represents and warrants that Borrower, Sponsor and Guarantor and each and every Person affiliated with Borrower, Sponsor and/or Guarantor or that to Borrower’s knowledge has an economic interest in Borrower, or, to Borrower’s knowledge, that has or will have an interest in the transaction contemplated by this Agreement or in the Property or will participate, in any manner whatsoever, in the Loan, is: (i) in full compliance with all applicable requirements of the Patriot Act and any regulations issued thereunder; (ii) operated under policies, procedures and practices, if applicable, that are in compliance with the Patriot Act and available to Lender for Lender’s review and inspection during normal business hours and upon reasonable prior notice; (iii) not in receipt of any notice from the Secretary of State or the Attorney General of the United States or any other department, agency or office of the United States claiming a violation or possible violation of the Patriot Act; (iv) not a Person who has been determined by competent authority to be subject to any of the prohibitions contained in the Patriot Act; and (v) not owned or controlled by or now acting and/or will in the

future act for or on behalf of any Person who has been determined to be subject to the prohibitions contained in the Patriot Act. Borrower covenants and agrees that in the event Borrower receives any notice that Borrower, Sponsor or Guarantor (or any of their respective beneficial owners, affiliates or participants) or any Person that has an interest in the Property is indicted, arraigned, custodially detained or convicted on charges involving money laundering or predicate crimes to money laundering, Borrower shall immediately notify Lender. At Lender's option, it shall be an Event of Default hereunder if Borrower, Guarantor, Sponsor or any other party to the Loan is indicted, arraigned, custodially detained or convicted on charges involving money laundering or predicate crimes to money laundering or is involved in any activity which could result in an indictment, arraignment, custodial detention or conviction on any such charges.

### **Section 3.30 Organizational Chart.**

The organizational chart attached as Schedule II hereto, relating to Borrower and certain Affiliates and other parties, is true, complete and correct on and as of the date hereof.

### **Section 3.31 Bank Holding Company.**

Borrower is not a "bank holding company" or a direct or indirect subsidiary of a "bank holding company" as defined in the Bank Holding Company Act of 1956, as amended, and Regulation Y thereunder of the Board of Governors of the Federal Reserve System.

### **Section 3.32 Intentionally Omitted.**

### **Section 3.33 REA Representations.**

With respect to each REA, (a) each REA is in full force and effect and has not been amended, restated, replaced or otherwise modified (except, in each case, as expressly set forth herein or disclosed to Lender in writing), (b) there are no defaults under any REA by any party thereto and, to Borrower's knowledge, no event has occurred which, but for the passage of time, the giving of notice, or both, would constitute a default under any REA, (c) all sums due and payable under each REA have been paid in full, (d) no party to any REA has commenced any action or given or received any notice for the purpose of terminating any REA, and (e) the representations made in any estoppel or similar document delivered with respect to any REA in connection with the Loan, if any, are true, complete and correct and are hereby incorporated by reference as if fully set forth herein.

### **Section 3.34 No Change in Facts or Circumstances.**

All information submitted by Borrower, Guarantor or Sponsor to Lender and in all financial statements, rent rolls, reports, certificates and other documents submitted in connection with the Loan or in satisfaction of the terms thereof and all statements of fact made by Borrower, Sponsor and/or Guarantor in this Agreement or in the other Loan Documents, are accurate, complete and correct in all material respects. There has been no material adverse change in any condition, fact, circumstance or event that would make any such information inaccurate, incomplete or otherwise misleading in any material respect or that would otherwise have a Material Adverse Effect.

### **Section 3.35 Perfection of Accounts.**

Borrower hereby represents and warrants to Lender that:

(a) This Agreement, together with the other Loan Documents, create a valid and continuing security interest (as defined in the Uniform Commercial Code) in the Accounts in favor of Lender, which security interest is prior to all other Liens, other than Permitted Encumbrances, and is enforceable as such against creditors of and purchasers from Borrower. Other than in connection with the Loan Documents and except for Permitted Encumbrances, Borrower has not sold or otherwise conveyed the Accounts; and

(b) The Accounts constitute “deposit accounts” or “securities accounts” within the meaning of the Uniform Commercial Code, as set forth in the Cash Management Agreement.

### **Section 3.36 Ground Lease**

Borrower hereby represents and warrants to Lender the following with respect to the Ground Lease, in each case as modified by the Ground Lease Estoppel:

(a) Recording; Modification; Termination. The Ground Lease or a memorandum of the Ground Lease has been duly recorded. The Ground Lease permits the interest of Borrower to be encumbered by the Security Instrument with the prior written consent of the chairperson of the Ground Lessor and does not restrict the use of the Property in a manner that would materially adversely affect the security provided by the Security Instrument. There have not been amendments or modifications to the terms of the Ground Lease since its recordation, with the exception of written instruments which have been recorded.

(b) No Liens. Except for the Permitted Encumbrances, Borrower’s interest in the Ground Lease is not subject to any Liens or encumbrances superior to, or of equal priority with, the Security Instrument other than the Ground Lessor’s related fee interest.

(c) Default. As of the date hereof, the Ground Lease is in full force and effect and no default has occurred under the Ground Lease and there is no existing condition which, but for the passage of time or the giving of notice, could result in a default under the terms of the Ground Lease.

### **Section 3.37 Franchise Agreement.**

The Franchise Agreement is in full force and effect, there is no default thereunder by any party thereto, and no event has occurred that, with the passage of time or the giving of notice, would constitute a default thereunder. As of the date hereof, no franchise fees under the Franchise Agreement are delinquent.

### **Section 3.38 Guarantor and Sponsor Representations.**

(a) Borrower hereby represents and warrants that, as of the date hereof, the representations and warranties set forth in Sections 3.1 through 3.8, 3.12, 3.18, 3.21, 3.27, 3.28, 3.29, and 3.34 above are true and correct with respect to Guarantor, as the same are applicable to

Guarantor. Wherever the term “Borrower” is used in each of the foregoing Sections it shall be deemed to be “Guarantor” with respect to Guarantor.

(b) Borrower hereby represents and warrants that, as of the date hereof, the representations and warranties set forth in Sections 3.3, 3.5, 3.12, and 3.27 through 3.29 above are true and correct with respect to Sponsor, as the same are applicable to Sponsor. Wherever the term “Borrower” is used in each of the foregoing Sections it shall be deemed to be “Sponsor” with respect to Sponsor.

Borrower agrees that, unless expressly provided otherwise, all of the representations and warranties of Borrower set forth in this Article 3 and elsewhere in this Agreement and the other Loan Documents shall survive for so long as any portion of the Debt remains owing to Lender. All representations, warranties, covenants and agreements made in this Agreement and in the other Loan Documents shall be deemed to have been relied upon by Lender notwithstanding any investigation heretofore or hereafter made by Lender or on its behalf.

#### **ARTICLE 4.**

#### **BORROWER COVENANTS**

From the date hereof and until payment and performance in full of all obligations of Borrower under this Agreement, the Security Instrument, the Note and the other Loan Documents or the earlier release of the lien of the Security Instrument (and all related obligations) in accordance with the terms of this Agreement, the Security Instrument, the Note and the other Loan Documents, Borrower hereby covenants and agrees with Lender that:

##### **Section 4.1 Existence.**

Borrower will continuously maintain (a) its existence and shall not dissolve or permit its dissolution, (b) its rights to do business in the applicable State and (c) its franchises and trade names, if any.

##### **Section 4.2 Applicable Law.**

(a) Borrower shall promptly comply and shall cause the Property to comply in all material respects with all Applicable Law affecting the Borrower and the Property, or the use thereof, including, without limitation, all Environmental Laws and Applicable Law relating to OFAC, Embargoed Persons, the Patriot Act, the U.S. Foreign Corrupt Practices Act of 1977, as amended, and any other anti-bribery or anti-corruption laws in any U.S. or foreign jurisdiction. Borrower shall do or cause to be done all things necessary to preserve, renew and keep in full force and effect its existence, rights, Licenses, permits, trade names, and franchises. Borrower shall give prompt notice to Lender of the receipt by Borrower of any notice related to a violation of any Applicable Law and of the commencement of any proceedings or investigations which relate to compliance with Applicable Law.

(b) After prior written notice to Lender, Borrower, at its own expense, may contest by appropriate legal proceeding, promptly initiated and conducted in good faith and with due diligence, the validity of any Applicable Law, the applicability of any Applicable Law to Borrower

or the Property or any alleged violation of any Applicable Law, provided that (i) no Event of Default has occurred and remains uncured; (ii) such proceeding shall be permitted under and be conducted in accordance with the provisions of any instrument to which Borrower is subject and shall not constitute a default thereunder and such proceeding shall be permitted by and conducted in accordance with all Applicable Law; (iii) neither the Property nor any part thereof or interest therein will be in danger of being sold, forfeited, terminated, cancelled or lost; (iv) Borrower shall promptly upon final determination thereof comply with any such Applicable Law determined to be valid or applicable or cure any violation of any Applicable Law; (v) such proceeding shall suspend the enforcement of the contested Applicable Law against Borrower or the Property; and (vi) Borrower shall furnish such security as may be required in the proceeding, or as may be reasonably requested by Lender, to insure compliance with such Applicable Law, together with all interest and penalties payable in connection therewith. Lender may apply any such security or part thereof, as necessary to cause compliance with such Applicable Law at any time when, in the judgment of Lender, the validity, applicability or violation of such Applicable Law is finally established or the Property (or any part thereof or interest therein) shall be in danger of being sold, forfeited, terminated, cancelled or lost.

#### **Section 4.3 Maintenance and Use of Property.**

Borrower shall cause the Property to be maintained in a good and safe condition and repair in all material respects. The Improvements and the Personal Property shall not be removed, demolished or materially altered (except for normal replacement of the Personal Property) without the consent of Lender or as otherwise permitted pursuant to Section 4.21 hereof. Borrower shall promptly repair, replace or rebuild any part of the Property which may be destroyed by any casualty, or become damaged, worn or dilapidated or which may be affected by any proceeding of the character referred to in Section 3.13 hereof and shall complete and pay for any structure at any time in the process of construction or repair on the Land. Except in connection with satisfying the requirements of Section 6.7 hereof, Borrower shall not initiate, join in, acquiesce in, or consent to any change in any private restrictive covenant, zoning law or other public or private restriction, limiting or defining the uses which may be made of the Property or any part thereof. If under applicable zoning provisions the use of all or any portion of the Property is or shall become a nonconforming use, Borrower will not cause or permit the nonconforming use to be discontinued or the nonconforming Improvement to be abandoned without the express written consent of Lender.

#### **Section 4.4 Waste.**

Borrower shall not commit or suffer any waste of the Property or make any change in the use of the Property which will in any way materially increase the risk of fire or other hazard arising out of the operation of the Property, or take any action that could reasonably be expected to invalidate or give cause for cancellation of any Policy, or do or permit to be done thereon anything that may in any way impair the value of the Property or the security for the Loan. Borrower will not, without the prior written consent of Lender, permit any drilling or exploration for or extraction, removal, or production of any minerals from the surface or the subsurface of the Property, regardless of the depth thereof or the method of mining or extraction thereof.

#### **Section 4.5 Taxes and Other Charges.**

(a) Borrower shall pay all Taxes and Other Charges now or hereafter levied or assessed or imposed against the Property or any part thereof as the same become due and payable; provided, however, Borrower's obligation to directly pay Taxes and Other Charges shall be suspended for so long as Borrower complies with the terms and provisions of Section 8.1 hereof. Borrower shall furnish to Lender receipts for the payment of the Taxes and the Other Charges (or other evidence reasonably acceptable to Lender evidencing the payment of such Taxes and Other Charges) prior to the date the same shall become delinquent (provided, however, that Borrower is not required to furnish such receipts (or other evidence) for payment of Taxes and Other Charges in the event that such Taxes and Other Charges have been paid by Lender pursuant to Section 8.1 hereof). Subject to the terms of Section 4.5(b) below, Borrower shall not suffer and shall promptly cause to be paid and discharged any lien or charge whatsoever which may be or become a lien or charge against the Property, and shall promptly pay for all utility services provided to the Property.

(b) After prior written notice to Lender, Borrower, at its own expense, may contest by appropriate legal proceeding, promptly initiated and conducted in good faith and with due diligence, the amount or validity or application in whole or in part of any Taxes or Other Charges, provided that (i) no Event of Default has occurred and remains uncured; (ii) such proceeding shall be permitted under and be conducted in accordance with the provisions of any other instrument to which Borrower is subject and shall not constitute a default thereunder and such proceeding shall be permitted by and conducted in accordance with all Applicable Law; (iii) neither the Property nor any part thereof or interest therein will be in danger of being sold, forfeited, terminated, canceled or lost; (iv) Borrower shall promptly upon final determination thereof pay the amount of any such Taxes or Other Charges, together with all costs, interest and penalties which may be payable in connection therewith; (v) such proceeding shall suspend the collection of such contested Taxes or Other Charges from the Property; and (vi) Borrower shall furnish such security as may be required in the proceeding, or deliver to Lender such reserve deposits as may be reasonably requested by Lender (but only to the extent Borrower does not pay the full amount of the contested Taxes or Other Charges in connection with such contest), to ensure the payment of any such Taxes or Other Charges, together with all interest and penalties thereon. Lender may pay over any such cash deposit or part thereof held by Lender to the claimant entitled thereto at any time when, in the judgment of Lender, the entitlement of such claimant is finally established or the Property (or part thereof or interest therein) shall be in danger of being sold, forfeited, terminated, canceled or lost or there shall be any danger of the lien of the Security Instrument being primed by any related lien.

#### **Section 4.6 Litigation.**

Borrower shall give prompt written notice to Lender of any litigation or governmental proceedings pending or threatened in writing against Borrower or any SPE Component Entity which might have a Material Adverse Effect.

**Section 4.7 Access to Property.**

Subject to the rights of Tenants as set forth in the Leases, Borrower shall permit agents, representatives and employees of Lender to inspect the Property or any part thereof at reasonable hours upon reasonable advance notice.

**Section 4.8 Notice of Default.**

Borrower shall promptly advise Lender of any material adverse change in Borrower's, Sponsor's and/or Guarantor's condition (financial or otherwise) or of the occurrence of any Event of Default of which Borrower has knowledge.

**Section 4.9 Cooperate in Legal Proceedings.**

Borrower shall cooperate fully with Lender with respect to any proceedings before any court, board or other Governmental Authority which may in any way affect the rights of Lender hereunder or any rights obtained by Lender under any of the Note, the Security Instrument or the other Loan Documents and, in connection therewith, permit Lender, at Lender's election, to participate in any such proceedings.

**Section 4.10 Performance by Borrower.**

Borrower shall in a timely manner observe, perform and fulfill each and every covenant, term and provision to be observed and performed by Borrower under this Agreement, the Security Instrument, the Note and the other Loan Documents and any amendments, modifications or changes thereto. Borrower shall in a timely manner observe, perform and fulfill in all material respects each and every covenant, term and provision to be observed and performed by Borrower under any other agreement or instrument affecting or pertaining to the Property and any amendments, modifications or changes thereto.

**Section 4.11 Awards.**

Borrower shall cooperate with Lender in obtaining for Lender the benefits of any Awards or insurance proceeds lawfully or equitably payable in connection with the Property, and Lender shall be reimbursed for any reasonable out-of-pocket expenses incurred in connection therewith (including reasonable, actual attorneys' fees and disbursements, and the payment by Lender of the expense of an appraisal on behalf of Borrower in case of a Casualty or Condemnation affecting the Property or any part thereto) out of such Awards or insurance proceeds.

**Section 4.12 Books and Records.**

(a) Borrower shall keep adequate books and records of account in accordance with GAAP, or in accordance with other methods acceptable to Lender in its reasonable discretion (consistently applied), and furnish to Lender:

(i) quarterly (and prior to a Securitization, monthly) certified rent rolls (in the form approved by Lender in connection with the closing of the Loan), each signed and



dated by a Responsible Officer of Borrower, within twenty-eight (28) days after the end of each calendar month or thirty (30) days after the end of each calendar quarter, as applicable;

(ii) quarterly (and prior to a Securitization, monthly) operating statements of the Property, prepared and certified by a Responsible Officer of Borrower in the form required by Lender, detailing the revenues received, the expenses incurred and major capital improvements for the period of calculation and containing appropriate year-to-date information, within twenty-eight (28) days after the end of each calendar month or thirty (30) days after the end of each calendar quarter, as applicable;

(iii) an annual balance sheet, profit and loss statement, statement of cash flow, and statement of change in financial position of Borrower audited by a “Big Four” accounting firm or other independent certified public accountant reasonably acceptable to Lender, within ninety (90) days after the close of each fiscal year of Borrower;

(iv) an annual operating statement of the Property audited by a “Big Four” accounting firm, CohnReznick LLP, or other independent certified public accountant reasonably acceptable to Lender, detailing the revenues received, the expenses incurred and major capital improvements for the period of calculation and containing appropriate year-to-date information, within ninety (90) days after the close of each fiscal year of Borrower; and

(v) by no later than December 15 of each calendar year, an annual operating budget for the next succeeding calendar year presented on a monthly basis consistent with the annual operating statement described above for the Property, including cash flow projections for the upcoming year and all proposed capital replacements and improvements (the “**Annual Budget**”). During the continuance of a Cash Trap Event Period, Lender shall have the right to approve each Annual Budget and no Annual Budget shall take effect unless and until the same has been approved by Lender, which approval shall not be unreasonably withheld, conditioned or delayed.

(b) Upon request from Lender, Borrower shall furnish in a timely manner to Lender: (A) Franchisor inspection reports, (B) operating leases or hotel management agreements, (C) a consent, estoppel and subordination agreement from the hotel operator/manager, (D) monthly ADR and occupancy reports for the trailing 12-month period, and (E) a STAR report for the Property.

(c) Within twenty (20) days of Lender’s request, Borrower shall furnish Lender (and shall cause Sponsor and/or Guarantor to furnish to Lender) with such other additional financial or management information (including State and Federal tax returns) as may, from time to time, be reasonably required by Lender in form and substance satisfactory to Lender. Borrower shall furnish to Lender and its agents convenient facilities for the examination and audit of any such books and records at any reasonable time from time to time during business hours upon reasonable advance notice, but not more often than one time during any calendar year except during the continuance of an Event of Default or if Lender has a reasonable basis to believe that financial statements provided to Lender have been materially inaccurate.

(d) Borrower agrees that all financial statements and other items required to be delivered to Lender pursuant to this Section 4.12 (each a “**Required Financial Item**” and, collectively, the “**Required Financial Items**”) shall: (i) be complete and correct in all material respects; (ii) present fairly the financial condition of the party; (iii) disclose all liabilities that are required to be reflected or reserved against; and (iv) be prepared (A) in hardcopy and electronic formats, the formats used in the financial statements delivered to Lender in connection with the closing of the Loan being deemed acceptable, and (B) in accordance with GAAP or in accordance with other methods acceptable to Lender in its reasonable discretion (consistently applied), the methods used in the financial statements delivered to Lender in connection with the closing of the Loan being deemed acceptable. Borrower shall be deemed to warrant and represent that, as of the date of delivery of any such financial statement, there has been no material adverse change in financial condition, nor have any assets or properties been sold, transferred, assigned, mortgaged, pledged or encumbered since the date of such financial statement except as disclosed by Borrower in a writing delivered to Lender. Borrower agrees that all Required Financial Items shall not contain any misrepresentation or omission of a material fact.

#### **Section 4.13 Estoppel Certificates.**

(a) After request by Lender, Borrower, within fifteen (15) days of such request, but following a Securitization, not more often than one time during any calendar year provided no Event of Default exists, shall furnish Lender or any proposed assignee with a statement, duly acknowledged and certified, setting forth (i) the original principal amount of the Note, (ii) the unpaid principal amount of the Note, (iii) the rate of interest of the Note, (iv) the terms of payment and maturity date of the Note, (v) the date installments of interest and/or principal were last paid, (vi) that, except as provided in such statement, no Event of Default exists, (vii) that this Agreement, the Note, the Security Instrument and the other Loan Documents are valid, legal and binding obligations and have not been modified or if modified, giving particulars of such modification, (viii) whether any offsets or defenses exist against the obligations secured hereby and, if any are alleged to exist, a detailed description thereof, (ix) that all Leases are in full force and effect and have not been modified in any material respect (or if so modified, setting forth all such modifications), (x) the date to which the Rents thereunder have been paid pursuant to the Leases, (xi) whether or not, to the best knowledge of Borrower, any of the Tenants are in monetary or material non-monetary default under the Leases, and, if any of the Tenants are in such default, setting forth the specific nature of all such defaults, (xii) the amount of security deposits held by Borrower under each Lease and that such amounts are consistent with the amounts required under each Lease, and (xiii) as to any other matters reasonably requested by Lender and reasonably related to the Leases, the obligations created and evidenced hereby and by the Security Instrument or the Property.

(b) Borrower shall use commercially reasonable efforts to deliver to Lender, promptly upon request, duly executed estoppel certificates from Tenants under Major Leases attesting to such facts regarding the Lease as required under such Lease or otherwise as Lender may reasonably require, including, but not limited to, attestations that each Lease covered thereby is in full force and effect with no known defaults thereunder on the part of any party, that none of the Rents have been paid more than one month in advance, except as security, and that the lessee claims no defense or offset against the full and timely performance of its obligations under the Lease. After Securitization of the Loan, unless an Event of Default is continuing, Borrower shall not be required

to use commercially reasonable efforts to deliver such estoppel certificates from any Tenant more frequently than once per calendar year.

(c) In connection with a Secondary Market Transaction in connection with the Loan (or any portion thereof or interest therein), at Lender's request, Borrower shall provide an estoppel certificate to any Investor or any prospective Investor containing the information listed in Section 4.13(a) above.

(d) Borrower shall use commercially reasonable efforts to deliver to Lender, upon request, estoppel certificates from each party under each REA and each Material Agreement in form and substance reasonably acceptable to Lender.

(e) Borrower shall use commercially reasonable efforts to deliver to Lender, upon request, an estoppel certificate from the Ground Lessor in form and substance reasonably acceptable to Lender.

#### **Section 4.14 Leases and Rents.**

(a) Upon request, Borrower shall furnish Lender with executed copies of all Leases then in effect. All renewals of Leases and all proposed leases shall provide for rental rates and terms comparable to existing local market rates, shall be arm's length transactions and, except for the Restaurant Lease, shall be with bona fide, independent third-party Tenants. Within ten (10) days after the execution of a Major Lease or any renewals, amendments or modifications of a Major Lease, Borrower shall deliver to Lender a copy thereof, together with Borrower's certification that such Major Lease (or such renewal, amendment or modification) was entered into in accordance with the terms of this Agreement.

(b) Any Lease and any renewals, amendments or modification of a Lease (provided such Lease or Lease renewal, amendment or modification is not a Major Lease (or a renewal, amendment or modification to a Major Lease)) that meets the following requirements may be entered into by Borrower without Lender's prior consent: such Lease (i) provides for rental rates comparable to existing local market rates for similar properties and is otherwise on commercially reasonable terms, (ii) unless a subordination, non-disturbance and attornment agreement is delivered pursuant to this Section 4.14, provides that such Lease is subordinate to the Security Instrument and that the lessee will attorn to Lender and any purchaser at a foreclosure sale, (iii) is written substantially in accordance with the standard form of Lease which shall have been approved by Lender (subject to any commercially-reasonable changes made in the course of negotiations with the applicable Tenant), (iv) is not with an Affiliate of Borrower or any Guarantor, and (v) does not contain any option to purchase, any right of first refusal to purchase, any right to terminate (except in the event of the destruction or condemnation of substantially all of the Property) or any other terms which would cause a Material Adverse Effect. All other Leases (including Major Leases) and all renewals, amendments and modifications thereof (including, without limitation, any subletting or assignment thereunder not contemplated by the express terms of such Lease (other than any subletting or assignment which does not require Borrower's consent under such Lease)) or waivers thereunder executed (or otherwise agreed to) after the date hereof shall be subject to Lender's prior approval, which approval shall not be unreasonably withheld or delayed.

(c) Lender shall execute and deliver a Subordination, Non-Disturbance and Attornment Agreement to Tenants under future Major Leases approved by Lender promptly upon request either (i) on the form as required in the applicable Major Lease with such changes as are reasonably requested or required by Lender, or (ii) if no form is required to be executed under the applicable Major Lease, then on Lender's then current standard form with such commercially reasonable changes as may be requested by Tenants, from time to time, as are reasonably acceptable to Lender. Lender's execution of a Subordination, Non-Disturbance and Attornment Agreement which is not in compliance with the foregoing sentence shall be at Lender's commercially reasonable discretion and subject to such additional conditions as Lender shall reasonably determine.

(d) Borrower (i) shall observe and perform the obligations imposed upon the lessor under the Leases in all material respects in a commercially reasonable manner; (ii) shall enforce in all material respects the terms, covenants and conditions contained in the Leases upon the part of the lessee thereunder to be observed or performed in a commercially reasonable manner, provided, however, Borrower shall not terminate or accept a surrender of a Major Lease without Lender's prior approval; (iii) shall not collect any of the Rents more than one (1) month in advance (other than security deposits); (iv) shall not execute any assignment of lessor's interest in the Leases or the Rents (except as contemplated by the Loan Documents); (v) shall not, without Lender's consent, alter, modify or change any Lease so as to decrease the amount of rent, change the expiration date, grant any option for additional space or term, materially reduce the obligations of the lessee or materially increase the obligations of lessor, except in each case to the extent the Lease, as so modified, would not require Lender's consent hereunder as a new Lease; and (vi) shall hold all security deposits under all Leases in accordance with Applicable Law.

(e) Notwithstanding anything contained herein to the contrary, Borrower shall not willfully withhold from Lender any information requested by Lender or required to be provided to Lender under the terms of this Agreement regarding renewal, extension, amendment, modification, waiver of provisions of, termination, rental reduction of, surrender of space of, or shortening of the term of, any Lease during the term of the Loan. Borrower's delivery of the certified rent roll required pursuant to Section 4.12 hereof shall not, in and of itself, satisfy the requirements of this clause (e).

(f) Borrower shall notify Lender in writing, within two (2) Business Days following receipt thereof, of Borrower's receipt of any termination fee or payment ("**Lease Event Payment**") paid by any Tenant under any Lease in consideration of any termination, modification or amendment or settlement of any Lease or any release or discharge of any Tenant under any Lease from any obligation thereunder (a "**Lease Event**"). Borrower further covenants and agrees that (i) Borrower shall hold any such Lease Event Payment in trust for the benefit of Lender and (ii) (A) in the event such Lease Event Payment is less than \$50,000 and such Lease Event does not have a Material Adverse Effect, and provided no Event of Default or Cash Trap Event Period has occurred and is continuing, such Lease Event Payment shall be payable to Borrower or (B) in the event such Lease Event Payment equals or exceeds \$50,000, such Lease Event has a Material Adverse Effect, or an Event of Default has occurred and is continuing, or a Cash Trap Event Period has occurred and is continuing, such Lease Event Payment shall be placed by Borrower in reserve with Lender, to be disbursed by Lender for tenant improvement and leasing commission costs with respect to the Property and/or for payment of the Debt or otherwise in connection with the Loan and/or the Property, as so determined by Lender, in its sole discretion.

(g) Notwithstanding anything to the contrary contained herein, to the extent Lender's prior approval is required for any leasing matters set forth in this Section 4.14, Lender shall have ten (10) Business Days from receipt of written request and all required information and documentation relating thereto in which to approve or disapprove such matter, provided that such request to Lender is marked in bold lettering with the following language: "LENDER'S RESPONSE IS REQUIRED WITHIN TEN (10) BUSINESS DAYS OF RECEIPT OF THIS NOTICE PURSUANT TO THE TERMS OF A LOAN AGREEMENT BETWEEN THE UNDERSIGNED AND LENDER" and the envelope containing the request must be marked "PRIORITY". In the event that Lender fails to respond to the leasing matter in question within such time, Lender's approval shall be deemed given for all purposes. Borrower shall provide Lender with such information and documentation as may be reasonably required by Lender, including, without limitation, lease comparables and other market information as reasonably required by Lender. For purposes of clarification, Lender requesting additional and/or clarified information within such time, in addition to approving or denying any request (in whole or in part), shall be deemed a response by Lender for purposes of the foregoing.

(h) The letting of guest rooms, meeting space, banquet space or lawn space in the ordinary course of business for a hotel shall not require Lender's consent.

(i) Notwithstanding the foregoing, Lender has reviewed and approved the Phase II Solar Lease Documents as of the Closing Date and Borrower shall be permitted to execute the same without Lender's consent, provided that Borrower shall provide Lender with copies of the executed Phase II Solar Lease Documents promptly following execution thereof.

#### **Section 4.15 Management Agreement.**

(a) Borrower shall (i) diligently perform, observe and enforce all of the terms, covenants and conditions of the Management Agreement on the part of Borrower to be performed, observed and enforced to the end that all things shall be done which are necessary to keep unimpaired the rights of Borrower under the Management Agreement and (ii) promptly notify Lender of the giving of any notice to Borrower of any default by Borrower in the performance or observance of any of the terms, covenants or conditions of the Management Agreement on the part of Borrower to be performed and observed and deliver to Lender a true copy of each such notice. Without Lender's prior written consent, not to be unreasonably withheld, conditioned or delayed, Borrower shall not surrender the Management Agreement, consent to the assignment by Manager of its interest under the Management Agreement, or terminate or cancel the Management Agreement or modify, change, supplement, alter or amend the Management Agreement, in any material respect, either orally or in writing, and Borrower hereby assigns to Lender as further security for the payment of the Debt and for the performance and observance of the terms, covenants and conditions of this Agreement, all the rights, privileges and prerogatives of Borrower to surrender the Management Agreement or to terminate, cancel, modify, change, supplement, alter or amend the Management Agreement in any respect (provided that such rights shall not be exercised by Lender except during the continuance of an Event of Default), and any such surrender of the Management Agreement or termination, cancellation, modification, change, supplement, alteration or amendment of the Management Agreement without the prior consent of Lender shall be void and of no force and effect.

(b) If Borrower shall default beyond any applicable notice and/or grace period in the performance or observance of any material term, covenant or condition of the Management Agreement on the part of Borrower to be performed or observed, then, without limiting the generality of the other provisions of this Agreement, and without waiving or releasing Borrower from any of its obligations hereunder, Lender shall have the right, but shall be under no obligation, to pay any sums and to perform any act or take any action as may be appropriate to cause all the terms, covenants and conditions of the Management Agreement on the part of Borrower to be performed or observed to be promptly performed or observed on behalf of Borrower, to the end that the rights of Borrower in, to and under the Management Agreement shall be kept unimpaired and free from default. Lender and any person designated by Lender shall have, and are hereby granted, the right to enter upon the Property at any time and from time to time for the purpose of taking any such action. If Manager shall deliver to Lender a copy of any notice sent to Borrower of default under the Management Agreement, such notice shall constitute full protection to Lender for any action taken or omitted to be taken by Lender in good faith, in reliance thereon.

(c) Borrower shall notify Lender if Manager sub-contracts to a third party or an affiliate any or all of its management responsibilities under the Management Agreement. Borrower shall, from time to time, use commercially reasonable efforts to obtain from Manager under the Management Agreement such certificates of estoppel with respect to compliance by Borrower with the terms of the Management Agreement as may be requested by Lender. Borrower shall exercise each individual option, if any, to extend or renew the term of the Management Agreement upon demand by Lender made at any time within one (1) year of the last day upon which any such option may be exercised, and Borrower hereby expressly authorizes and appoints Lender its attorney-in-fact to exercise any such option in the name of and upon behalf of Borrower, which power of attorney shall be irrevocable and shall be deemed to be coupled with an interest, provided that Lender shall not exercise such power of attorney unless Borrower has failed, for a period of thirty (30) days after notice from Lender, to either (i) exercise the option or (ii) enter into a new management agreement with a New Manager in accordance with the terms of Section 4.15(d) below. Any sums expended by Lender pursuant to this paragraph shall bear interest at the Default Rate from the date such cost is incurred to the date of payment to Lender, shall be deemed to constitute a portion of the Debt, shall be secured by the lien of the Security Instrument and the other Loan Documents and shall be immediately due and payable upon demand by Lender therefor.

(d) Without limitation of the foregoing, if the Management Agreement is terminated pursuant to the Assignment of Management Agreement or for any other reason, then Lender, at its option, may require Borrower to engage, in accordance with the terms and conditions set forth in the Assignment of Management Agreement, a new manager (the “**New Manager**”) to manage the Property, which such New Manager shall be a Qualified Manager. New Manager shall be engaged by Borrower pursuant to a written management agreement that complies with the terms hereof and of the Assignment of Management Agreement and is otherwise reasonably satisfactory to Lender in all respects. New Manager and Borrower shall execute an Assignment of Management Agreement in the form then used by Lender. Without limitation of the foregoing, if required by Lender, Borrower shall, as a condition precedent to Borrower’s engagement of such New Manager, obtain a Rating Agency Confirmation with respect to such New Manager and management agreement. To the extent that such New Manager is an Affiliated Manager, Borrower’s engagement of such New Manager shall be subject to Borrower’s delivery to Lender of a New Non-Consolidation Opinion with respect to such New Manager and new management agreement.

#### **Section 4.16 Payment for Labor and Materials.**

(a) Subject to Section 4.16(b), Borrower will promptly pay when due all bills and costs for labor, materials, and specifically fabricated materials incurred in connection with the Property (any such bills and costs, a “**Work Charge**”) and never permit to exist in respect of the Property or any part thereof any lien or security interest with respect to Work Charges, even though inferior to the liens and the security interests hereof, and in any event never permit to be created or exist in respect of the Property or any part thereof any other or additional lien or security interest other than the liens or security interests created hereby and by the Security Instrument, except for the Permitted Encumbrances.

(b) After prior written notice to Lender, Borrower, at its own expense, may contest by appropriate legal proceeding, promptly initiated and conducted in good faith and with due diligence, the validity of any Work Charge, the applicability of any Work Charge to Borrower or to the Property or any alleged non-payment of any Work Charge and defer paying the same, provided that (i) no Event of Default has occurred and is continuing; (ii) such proceeding shall be permitted under and be conducted in accordance with the provisions of any instrument to which Borrower is subject and shall not constitute a default thereunder and such proceeding shall be conducted in accordance with all Applicable Law; (iii) neither the Property nor any part thereof or interest therein will be in imminent danger of being sold, forfeited, terminated, cancelled or lost; (iv) Borrower shall promptly upon final determination thereof pay (or cause to be paid) any such contested Work Charge determined to be valid, applicable or unpaid; (v) such proceeding shall suspend the collection of such contested Work Charge from the Property or Borrower shall have paid the same (or shall have caused the same to be paid) under protest; and (vi) Borrower shall furnish (or cause to be furnished) such security as may be required in the proceeding, or as may be reasonably requested by Lender, to insure payment of such Work Charge, together with all interest and penalties payable in connection therewith. Lender may apply any such security or part thereof, as necessary to pay for such Work Charge at any time when, in the judgment of Lender, the validity, applicability or non-payment of such Work Charge is finally established or the Property (or any part thereof or interest therein) shall be in present danger of being sold, forfeited, terminated, cancelled or lost.

#### **Section 4.17 Performance of Other Agreements.**

Borrower shall observe and perform in all material respects each and every term to be observed or performed by Borrower pursuant to the terms of any agreement or recorded instrument affecting or pertaining to the Property, or given by Borrower to Lender for the purpose of further securing the Debt and any amendments, modifications or changes thereto.

#### **Section 4.18 Debt Cancellation.**

Borrower shall not cancel or otherwise forgive or release any claim or debt (other than termination of Leases in accordance herewith) owed to Borrower by any Person, except for adequate consideration and in the ordinary course of Borrower’s business.

#### **Section 4.19 ERISA.**

(a) Borrower shall not engage in any transaction which would cause any obligation, or action taken or to be taken, hereunder (or the exercise by Lender of any of its rights under the Note, this Agreement or the other Loan Documents) to be a non-exempt (under a statutory or administrative exemption) prohibited transaction under ERISA or constitute a violation of any state statute, regulation or ruling impacting a Defined Benefit Plan or a governmental plan.

(b) Borrower shall deliver to Lender such certifications or other evidence from time to time throughout the term of the Loan, as requested by Lender in its sole discretion, that (A) Borrower is not an “employee benefit plan” as defined in Section 3(3) of ERISA, which is subject to Title I of ERISA, or a “governmental plan” within the meaning of Section 3(32) of ERISA; (B) Borrower is not subject to any state statute, regulation or ruling regulating investments of, or fiduciary obligations with respect to, governmental plans; and (C) one or more of the following circumstances is true:

(i) Equity interests in Borrower are publicly offered securities, within the meaning of 29 C.F.R. §2510.3-101(b)(2);

(ii) Less than twenty-five percent (25%) of each outstanding class of equity interests in Borrower is held by “benefit plan investors” within the meaning of 29 C.F.R. §2510.3-101(f)(2), as modified by ERISA Section 3(42), disregarding the value of any equity interests in Borrower held by (I) a person (other than a benefit plan investor) who has discretionary authority or control with respect to the assets of Borrower, (II) any person who provides investment advice for a fee (direct or indirect) with respect to the assets of Borrower, or (III) any affiliate of a person described in the immediately preceding clause (I) or (II);

(iii) Borrower qualifies as an “operating company” or a “real estate operating company” within the meaning of 29 C.F.R. §2510.3-101(c) or (e);

(iv) The assets of Borrower are not otherwise “plan assets” of one or more “employee benefit plans” (as defined in Section 3(3) of ERISA) subject to Title I of ERISA, within the meaning of 29 C.F.R. §2510.3-101, as modified by ERISA Section 3(42); or

(v) If a state statute, regulation or ruling does apply to transactions by or with Borrower regulating investments of, or fiduciary obligations with respect to, governmental plans, no transactions contemplated by the Loan Documents will violate such statute, regulation or ruling.

(c) Borrower shall not maintain, sponsor, contribute to or become obligated to contribute to, or suffer or permit any ERISA Affiliate of Borrower to, maintain, sponsor, contribute to or become obligated to contribute to, any Defined Benefit Plan or a Multiemployer Plan or permit the assets of Borrower to (i) become “plan assets”, whether by operation of law or under regulations promulgated under ERISA or (ii) become subject to any state statute, regulation or ruling regulating investments of, or fiduciary obligations with respect to, governmental plans.



#### **Section 4.20 No Joint Assessment.**

Borrower shall not suffer, permit or initiate the joint assessment of the Property with (a) any other real property constituting a tax lot separate from the Property, or (b) any portion of the Property which may be deemed to constitute personal property, or any other procedure whereby the lien of any taxes which may be levied against such personal property shall be assessed or levied or charged to the Property.

#### **Section 4.21 Alterations.**

Lender's prior approval (which approval shall not be unreasonably withheld, conditioned or delayed) shall be required in connection with any alterations to any Improvements (a) that may have a Material Adverse Effect, (b) the cost of which (including any related alteration, improvement or replacement) is reasonably anticipated to exceed the Alteration Threshold, or (c) that are structural in nature, except for (x) any alterations performed as a part of a Restoration in accordance with Section 7.4 hereof, (y) any alterations or tenant improvements being made expressly pursuant to existing Leases in effect as of the Closing Date or Leases entered into after the Closing Date that have been reviewed and approved by Lender (including, without limitation, the Solar Lease Documents), and (z) any Immediate Repairs. If the total unpaid amounts incurred and to be incurred with respect to any alterations to the Improvements shall at any time exceed the Alteration Threshold, Borrower shall promptly deliver to Lender as security for the payment of such amounts and as additional security for Borrower's obligations under the Loan Documents any of the following: (i) cash, (ii) U.S. Obligations, (iii) other securities acceptable to Lender (provided that Lender shall have received a Rating Agency Confirmation as to the form and issuer of same), or (iv) a completion bond (provided that Lender shall have received a Rating Agency Confirmation as to the form and issuer of same). Such security shall be in an amount equal to the excess of the total unpaid amounts incurred and to be incurred with respect to such alterations to the Improvements over the Alteration Threshold. All alterations to any Improvements shall be made lien-free and in a good and workmanlike manner in accordance with all Applicable Laws.

#### **Section 4.22 REA Covenants.**

Borrower shall (a) promptly perform and/or observe, in all material respects, all of the covenants and agreements required to be performed and observed by it under any REA and do all things necessary to preserve and to keep unimpaired its material rights thereunder; (b) promptly notify Lender of any material default under any REA of which it is aware; (c) promptly deliver to Lender a copy of each financial statement, business plan, capital expenditures plan, notice, report and estimate received by it under any REA, to the extent material; (d) enforce, in all material respects, the performance and observance of all of the covenants and agreements required to be performed and/or observed under any REA in a commercially reasonable manner; (e) cause the Property to be operated, in all material respects, in accordance with any REA; and (f) not, without the prior written consent of Lender, (i) enter into any new REA or execute material modifications to any existing REA, (ii) surrender, terminate or cancel any REA, (iii) reduce or consent to the reduction of the term of any REA, (iv) increase or consent to the increase of the amount of any charges under any REA, (v) otherwise modify, change, supplement, alter or amend, or waive or release any of its rights and remedies under, any REA in any material respect, or (vi) following

the occurrence and during the continuance of an Event of Default, exercise any rights, make any decisions, grant any approvals or otherwise take any action under any REA.

#### **Section 4.23 Material Agreements.**

Borrower shall (a) promptly perform and/or observe, in all material respects, all of the covenants and agreements required to be performed and observed by it under the Material Agreements and do all things necessary to preserve and to keep unimpaired its material rights thereunder; (b) promptly notify Lender of any material default under the Material Agreements of which it is aware; (c) promptly deliver to Lender a copy of each financial statement, business plan, capital expenditures plan, notice, report and estimate received by it under the Material Agreements, to the extent material; (d) enforce, in all material respects, the performance and observance of all of the covenants and agreements required to be performed and/or observed under the Material Agreements in a commercially reasonable manner; (e) cause the Property to be operated, in all material respects, in accordance with the Material Agreements; and (f) not, without the prior written consent of Lender, (i) enter into any new Material Agreement or execute material modifications to any existing Material Agreements, (ii) surrender, terminate or cancel the Material Agreements, (iii) reduce or consent to the reduction of the term of the Material Agreements, (iv) increase or consent to the increase of the amount of any charges under the Material Agreements, (v) otherwise modify, change, supplement, alter or amend, or waive or release any of its rights and remedies under, the Material Agreements in any material respect, or (vi) following the occurrence and during the continuance of an Event of Default, exercise any rights, make any decisions, grant any approvals or otherwise take any action under the Material Agreements.

#### **Section 4.24 Ground Lease.**

(a) Borrower shall (i) pay all rents, additional rents and other sums required to be paid by Borrower, as tenant under and pursuant to the provisions of the Ground Lease, (ii) diligently perform and observe all of the terms, covenants and conditions of the Ground Lease on the part of Borrower, as tenant thereunder, to be performed and observed, (iii) promptly notify Lender of the giving of any written notice by the Ground Lessor to Borrower of any default by Borrower in the performance or observance of any of the terms, covenants or conditions of the Ground Lease on the part of Borrower, as tenant thereunder, to be performed or observed, and deliver to Lender a true copy of each such notice within five (5) Business Days of receipt, and (iv) promptly notify Lender of any bankruptcy, reorganization or insolvency of the Ground Lessor or of any notice thereof, and deliver to Lender a true copy of such notice within five (5) Business Days of Borrower's receipt.

(b) Borrower shall not, without the prior consent of Lender, surrender the leasehold estate created by the Ground Lease or terminate or cancel the Ground Lease or modify, change, supplement, alter or amend the Ground Lease, either orally or in writing. Borrower hereby assigns to Lender, as further security for the payment and performance of the obligations and for the performance and observance of the terms, covenants and conditions of the Security Instrument, this Agreement and the other Loan Documents, all of the rights, privileges and prerogatives of Borrower, as tenant under the Ground Lease, to surrender the leasehold estate created by the Ground Lease or to terminate, cancel, modify, change, supplement, alter or amend the Ground Lease in any material respect, and any such surrender of the leasehold estate created by the Ground

Lease or termination, cancellation, modification, change, supplement, alteration or amendment of the Ground Lease in any material respect without the prior consent of Lender shall be void and of no force and effect.

(c) If Borrower shall default in the performance or observance of any term, covenant or condition of the Ground Lease on the part of Borrower, as tenant thereunder, and shall fail to cure the same prior to the expiration of any applicable cure period provided thereunder, then, without limiting the generality of the other provisions of the Security Instrument, this Agreement and the other Loan Documents, and without waiving or releasing Borrower from any of its obligations hereunder, Lender shall have the right, but shall be under no obligation, to pay any sums and to perform any act or take any action as may be appropriate to cause all of the terms, covenants and conditions of the Ground Lease on the part of Borrower to be performed or observed on behalf of Borrower, to the end that the rights of Borrower in, to and under the Ground Lease shall be kept unimpaired and free from default. If the Ground Lessor shall deliver to Lender a copy of any notice of default under the Ground Lease, such notice shall constitute full protection to Lender for any action taken or omitted to be taken by Lender, in good faith, in reliance thereon. Borrower shall exercise each individual option, if any, to extend or renew the term of the Ground Lease upon demand by Lender made at any time within one (1) year prior to the last day upon which any such option may be exercised, and Borrower hereby expressly authorizes and appoints Lender its attorney-in-fact to exercise any such option in the name of and upon behalf of Borrower, which power of attorney shall be irrevocable and shall be deemed to be coupled with an interest. Borrower will not subordinate or consent to the subordination of the Ground Lease to any mortgage, security deed, lease or other interest on or in the Ground Lessor's interest in all or any part of the Property, unless, in each such case, the written consent of Lender shall have been first had and obtained.

(d) Notwithstanding anything contained in the Ground Lease to the contrary, Borrower shall not further sublet any portion of the Property (other than as permitted pursuant to Section 4.14 hereof) without prior written consent of Lender. Each such sublease hereafter made shall provide that (i) in the event of the termination of the Ground Lease, the sublease shall not terminate or be terminable by the lessee thereunder; (ii) in the event of any action for the foreclosure of the Security Instrument, the sublease shall not terminate or be terminable by the lessee thereunder by reason of the termination of the Ground Lease unless such lessee is specifically named and joined in any such action and unless a judgment is obtained therein against such lessee; and (iii) in the event that the Ground Lease is terminated as aforesaid, the lessee under the sublease shall attorn to the lessor under the Ground Lease or to the purchaser at the sale of the Property on such foreclosure, as the case may be. In the event that any portion of the Property shall be sublet pursuant to the terms of this subsection, such sublease shall be deemed to be included in the Property.

#### **Section 4.25 Hotel Franchise.**

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

(b) In the event that the Franchise Agreement is terminated during the term of the Loan, Lender shall have the right to declare the entire Loan immediately due and payable; provided,

however, Lender shall not have the right to declare the Loan immediately due and payable if, within thirty (30) days after such termination, Borrower enters into an agreement in form and substance satisfactory to Lender with an Acceptable Franchisor.

(c) Borrower agrees to notify Lender in writing of any default by Franchisor under the Franchise Agreement or any default by Borrower under the Franchise Agreement of which Borrower receives written notice from the Franchisor, which notification must be delivered to Lender within five (5) Business Days after Borrower having knowledge of such default.

(d) Upon Lender's request, Borrower shall obtain a "comfort letter" from each Franchisor, including any replacement Acceptable Franchisor, in form and substance reasonably satisfactory to Lender, including provisions that require the Franchisor to notify Lender of any default under the Franchise Agreement and grant Lender the right to cure any default by Borrower under the Franchise Agreement.

(e) Without limitation of the foregoing, Borrower covenants and agrees that it shall:

(i) promptly perform and/or observe in all material respects all of the covenants and agreements required to be performed and observed by it under the Franchise Agreement and do all things necessary to preserve and keep unimpaired Borrower's rights thereunder;

(ii) promptly deliver to Lender a copy of any financial statement, business plan and capital expenditures plan delivered by Franchisor to Borrower, and any material report or estimate delivered in connection therewith, and notices of default received by Borrower under the Franchise Agreement; and

(iii) promptly enforce the performance and observance of all of the covenants and agreements required to be performed and/or observed by the Franchisor under the Franchise Agreement.

(f) Borrower consents and agrees that it shall not, without Lender's prior written consent:

(i) surrender, terminate, or cancel the Franchise Agreement;

(ii) reduce or consent to the reduction of the term of the Franchise Agreement;

(iii) increase or consent to the increase of the amount of any charges under the Franchise Agreement; the foregoing restriction shall not apply to an increase that is expressly permitted or mandatory under the Franchise Agreement; or

(iv) otherwise modify, change, supplement, alter or amend, or waive or release any of Borrower's rights and remedies under the Franchise Agreement.

(g) Except for any Management Agreement with an Affiliated Manager and the Restaurant Lease (with an Affiliated Tenant), each of which shall be on terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arm's-length

basis with unaffiliated third parties, Borrower shall not, without Lender's prior consent (which consent shall not be unreasonably withheld, conditioned or delayed), enter into transactions with any Affiliate, including without limitation, any arrangement providing for the franchise/licensing of the hotel on the Property, the rendering or receipt of services or the purchase or sale of inventory, except any such transaction in the ordinary course of business of Borrower and only so long as the monetary or business consideration arising therefrom would be substantially as advantageous to Borrower as the monetary or business consideration that would obtain in a comparable transaction with a person or entity not an affiliate of Borrower.

(h) Each future franchise/license agreement (directly or by separate agreement in form and content reasonably satisfactory to Lender) will provide, among other things, unless otherwise agreed to by Lender, that:

(i) the Franchise Agreement is subject and subordinate to the lien of the Security Instrument and to Lender's rights under the Loan Documents;

(ii) until the Franchise Agreement is terminated by Lender after foreclosure or transfer by deed-in-lieu of foreclosure or for the then remainder of the term of the Franchise Agreement if it is not terminated after foreclosure or transfer by deed-in-lieu of foreclosure, the hotel on the Property will continue to be operated in accordance with the provisions of the Franchise Agreement;

(iii) the franchisor's/licensor's right to receive any fees under the Franchise Agreement will be non-cumulative and will be subject and subordinate to Lender's rights to receive debt service payments or any other payments to be made to Lender pursuant to the Loan Documents;

(iv) the franchisor/licensor will accept cure of any default from Lender and will not terminate the Franchise Agreement without giving Lender an additional notice and thirty (30) day period to cure and if the default cannot be cured without Lender's taking possession of the Property, Lender's thirty (30) day cure period will be extended for as long as is necessary for Lender to complete a foreclosure or deed-in-lieu of foreclosure of the Security Instrument and for a reasonable period thereafter and if the default is of a type that cannot be cured by Lender, then completion of the foreclosure or deed-in-lieu of foreclosure will be deemed a cure of such defaults; and

(v) after foreclosure or transfer by deed in lieu of foreclosure, Lender or the transferee of the Property will not be liable for any defaults of Borrower or any other previous owner under the Franchise Agreement, will not be liable for repayment of any loans made by franchisor/licensor to Borrower or to any other entity and will have no liability under the Franchise Agreement from and after the date Lender or the transferee of the Property transfers the Property.

(i) Borrower shall indemnify, defend and hold Lender harmless against any liability, loss, cost, damage or expense which Lender may incur under the Franchise Agreement under or by reason of this Agreement prior to the exercise by Lender of any of its remedies under this Agreement and the other Loan Documents.

(j) Borrower shall use commercially reasonable efforts to cause the Property to pass the next quality assurance inspection performed pursuant to the Franchise Agreement following the Closing Date, and shall provide Lender with reasonably acceptable evidence of the same.

**Section 4.26 Parking.**

Within sixty (60) days after the Closing Date, Borrower shall stripe at least sixty-one (61) spaces on the Golf Course Parcel.

**ARTICLE 5.**

**ENTITY COVENANTS**

**Section 5.1 Single Purpose Entity/Separateness.**

(a) Borrower has not and will not:

(i) engage in any business or activity other than the ownership, operation and maintenance of the Property, and activities incidental thereto;

(ii) acquire or own any assets other than (A) the Property, and (B) such incidental Personal Property as may be necessary for the ownership, leasing, maintenance and operation of the Property;

(iii) merge into or consolidate with any Person, or dissolve, terminate, liquidate in whole or in part, transfer or otherwise dispose of all or substantially all of its assets (except as otherwise expressly permitted hereunder) or change its legal structure;

(iv) fail to observe all organizational formalities, or fail to preserve its existence as an entity duly organized, validly existing and in good standing (if applicable) under the Applicable Law of the jurisdiction of its organization or formation, or amend or modify any of the provisions of its organizational documents related to its status as a special purpose entity, or terminate or fail to comply in all material respects with the provisions of its organizational documents;

(v) own any subsidiary, or make any investment in, any Person;

(vi) commingle its assets with the assets of any other Person;

(vii) incur any Indebtedness, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than (A) the Debt and the Prior Loan, (B) trade and operational indebtedness incurred in the ordinary course of business with trade creditors, provided such indebtedness is (1) unsecured, (2) not evidenced by a note, (3) on commercially reasonable terms and conditions, and (4) due not more than sixty (60) days past the date incurred and paid on or prior to such date (unless payment is being contested in accordance with the terms hereof), (C) Permitted Equipment Leases (including, without limitation, any Borrower obligation to purchase electric energy or solar

panels under the Solar Lease Documents), (D) the Aqua Hospitality Note, until such time as the Litigation Reserve Funds have been disbursed to Borrower pursuant to Section 8.8(b) hereof, and/or (E) the Key Money Note; provided however, the aggregate amount of the indebtedness described in (B) and (C) shall not exceed at any time four percent (4%) of the outstanding principal amount of the Debt. No Indebtedness other than the Debt may be secured (subordinate or pari passu) by the Property;

(viii) fail to maintain all of its books, records, financial statements and bank accounts separate from those of its affiliates and any constituent party. Borrower's assets have not and will not be listed as assets on the financial statement of any other Person; provided, however, that Borrower's assets may be included in a consolidated financial statement of its affiliates, provided that (i) appropriate notation shall be made on such consolidated financial statements to indicate the separateness of Borrower and such affiliates and to indicate that Borrower's assets and credit are not available to satisfy the debts and other obligations of such affiliates or any other Person and (ii) such assets shall be listed on Borrower's own separate balance sheet. Borrower has maintained and will maintain its books, records, resolutions and agreements as official records;

(ix) enter into any contract or agreement with any general partner, member, shareholder, principal or affiliate, except upon terms and conditions that are commercially reasonable and substantially similar to those that would be available on an arm's-length basis with unaffiliated third parties (other than capital contributions and distributions or dividends permitted under its organizational documents);

(x) maintain its assets in such a manner that it will be costly or difficult to segregate, ascertain or identify its individual assets from those of any other Person;

(xi) except as expressly permitted in the Loan Documents, assume or guaranty the debts of any other Person, hold itself out to be responsible for the debts of any other Person, or otherwise pledge its assets for the benefit of any other Person or hold out its credit as being available to satisfy the obligations of any other Person;

(xii) make any loans or advances to any Person; provided, that the foregoing and no other provision hereof shall prohibit Borrower from making distributions to its members of available cash unless an Event of Default or Cash Trap Event Period is continuing;

(xiii) fail to file its own tax returns unless prohibited by Applicable Law from doing so (except that Borrower may file or may include its filing as part of a consolidated federal tax return, to the extent required and/or permitted by Applicable Law, provided that there shall be an appropriate notation indicating the separate existence of Borrower and its assets and liabilities);

(xiv) fail either to hold itself out to the public as a legal entity separate and distinct from any other Person and not as a division or part of any other Person or to conduct its business solely in its own name or fail to correct any known misunderstanding regarding its separate identity;

(xv) fail to maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations (to the extent there exists sufficient cash flow from the Property to do so after the payment of all operating expenses and Debt Service and shall not require any equity owner to make additional capital contributions to Borrower);

(xvi) without the unanimous written consent of all of its partners or members, as applicable, and the consent of each Independent Director (regardless of whether such Independent Director is engaged at the Borrower or SPE Component Entity level), (a) file or consent to the filing of any petition, either voluntary or involuntary, to take advantage of any Creditors Rights Laws, (b) seek or consent to the appointment of a receiver, liquidator or any similar official, (c) take any action that might cause such entity to become insolvent, or (d) make an assignment for the benefit of creditors;

(xvii) fail to allocate shared expenses (including, without limitation, shared office space) or fail to use separate stationery, invoices and checks;

(xviii) fail to remain solvent, to pay its own liabilities (including, without limitation, salaries of its own employees) from its own funds or fail to maintain a sufficient number of employees in light of its contemplated business operations (in each case, to the extent there exists sufficient cash flow from the Property to do so);

(xix) acquire obligations or securities of its partners, members, shareholders or other affiliates, as applicable, or identify its partners, members or shareholders or other Affiliates, as applicable, as a division or part of it; or

(xx) violate or cause to be violated the assumptions made with respect to Borrower and its principals in the Non-Consolidation Opinion or in any New Non-Consolidation Opinion.

(b) Borrower hereby represents that, (x) from the date of its formation to the date of this Agreement, Borrower and (y) from the date of its formation to the date of this Agreement, SPE Component Entity:

(i) is and always has been duly formed, validly existing, and in good standing in the state of its incorporation and in all other jurisdictions where it is qualified to do business;

(ii) has no judgments or liens of any nature against it except for tax liens not yet due;

(iii) is in compliance in all material respects with all laws, regulations, and orders applicable to it and, except as otherwise disclosed in this Agreement, has received all permits necessary for it to operate its contemplated business;

(iv) is not involved in any dispute with any taxing authority, other than contests of Taxes and Other Charges made in accordance with the terms of this Agreement;



- (v) has paid all taxes which it owes;
- (vi) has never owned any real property other than the Property and personal property necessary or incidental to its ownership or operation of the Property and has never engaged in any business other than the ownership and operation of the Property (or, in the case of SPE Component Entity, its ownership interest in Borrower);
- (vii) except for the Borrower Litigation, is not now, nor has ever been, party to any lawsuit, arbitration, summons, or legal proceeding that is still pending or that resulted in a judgment against it that has not been paid in full;
- (viii) has provided Lender with complete financial statements that reflect a fair and accurate view of the entity's financial condition;
- (ix) has passed a Phase One environmental audit for the Property;
- (x) has no material contingent or actual obligations not related to the Property;
- (xi) has not entered into any contract or agreement with any of its Affiliates, constituents, or owners, or any guarantors of any of its obligations or any Affiliate of any of the foregoing (each, a “**Related Party**”), except upon terms and conditions that are commercially reasonable and substantially similar to those available in an arm’s-length transaction with an unrelated party;
- (xii) has paid all of its debts and liabilities from its assets;
- (xiii) has done or caused to be done all things necessary to observe all organizational formalities applicable to it and to preserve its existence;
- (xiv) has maintained all of its books, records, financial statements and bank accounts separate from those of any other Person;
- (xv) has not had its assets listed as assets on the financial statement of any other Person;
- (xvi) has filed its own tax returns (except to the extent that it has been a tax-disregarded entity not required to file tax returns under applicable law) and, if it is a corporation, has not filed a consolidated federal income tax return with any other Person;
- (xvii) has been, and at all times has held itself out to the public as, a legal entity separate and distinct from any other Person (including any Affiliate or other Related Party);
- (xviii) has corrected any known misunderstanding regarding its status as a separate entity;
- (xix) has conducted all of its business and held all of its assets in its own name;

(xx) has not identified itself or any of its affiliates as a division or part of the other;

(xxi) has maintained and utilized separate stationery, invoices and checks bearing its own name;

(xxii) has not commingled its assets with those of any other Person and has held all of its assets in its own name;

(xxiii) has not guaranteed or become obligated for the debts of any other Person;

(xxiv) has not held itself out as being responsible for the debts or obligations of any other Person;

(xxv) has allocated fairly and reasonably any overhead expenses that have been shared with an Affiliate, including paying for office space and services performed by any employee of an Affiliate or Related Party;

(xxvi) has not pledged its assets to secure the obligations of any other Person and no such pledge remains outstanding except in connection with the Loan;

(xxvii) has maintained adequate capital in light of its contemplated business operations;

(xxviii) has maintained a sufficient number of employees in light of its contemplated business operations and has paid the salaries of its own employees from its own funds;

(xxix) except for SPE Component Entity's equity interest in Borrower, has not owned any subsidiary or any equity interest in any other entity;

(xxx) has not incurred any indebtedness that is still outstanding other than indebtedness that is permitted under the Loan Documents;

(xxxi) the Prior Loan has been satisfied in full, Prior Lender has released all collateral and security for the Prior Loan, and none of Borrower, Guarantor or any SPE Component Entity has any remaining liabilities or obligations, other than environmental and other limited and customary indemnity obligations, in connection with the Prior Loan;

(xxxii) has not had any of its obligations guaranteed by an affiliate, except for guarantees that have been either released or discharged (or that will be discharged as a result of the closing of the Loan) or guarantees that are expressly contemplated by the Loan Documents; and

(xxxiii) except for the Restaurant Lease, has not leased any portion of the Property to a Tenant that is affiliated with the Borrower.

(c) If Borrower is a limited partnership or a limited liability company (other than an Acceptable LLC), each general partner or managing member (each, an "**SPE Component Entity**")

shall be a corporation or an Acceptable LLC (I) whose sole asset is its interest in Borrower, (II) which has not been and shall not be permitted to engage in any business or activity other than owning an interest in Borrower; (III) which has not been and shall not be permitted to incur any debt, secured or unsecured, direct or contingent (including guaranteeing any obligation); and (IV) which has and will at all times own at least a 0.5% direct equity ownership interest in Borrower. Each such SPE Component Entity will at all times comply, and will cause Borrower to comply, with each of the representations, warranties, and covenants contained in this Article 5 (to the extent applicable) as if such representation, warranty or covenant was made directly by such SPE Component Entity. Upon the withdrawal or the disassociation of an SPE Component Entity from Borrower, Borrower shall immediately appoint a new SPE Component Entity whose articles of incorporation or organization are substantially similar to those of such SPE Component Entity and deliver a New Non-Consolidation Opinion to Lender with respect to the new SPE Component Entity and its equity owners.

(d) In the event Borrower or the SPE Component Entity is an Acceptable LLC, the limited liability company agreement of Borrower or the SPE Component Entity (as applicable) (the “**LLC Agreement**”) shall provide that (i) upon the occurrence of any event that causes the last remaining member of Borrower or the SPE Component Entity (as applicable) (“**Member**”) to cease to be the member of Borrower or the SPE Component Entity (as applicable) (other than (A) upon an assignment by Member of all of its limited liability company interest in Borrower or the SPE Component Entity (as applicable) and the admission of the transferee in accordance with the Loan Documents and the LLC Agreement, or (B) the resignation of Member and the admission of an additional member of Borrower or the SPE Component Entity (as applicable) in accordance with the terms of the Loan Documents and the LLC Agreement), any person acting as Independent Director of Borrower or the SPE Component Entity (as applicable) shall, without any action of any other Person and simultaneously with the Member ceasing to be the member of Borrower or the SPE Component Entity (as applicable) automatically be admitted to Borrower or the SPE Component Entity (as applicable) as a member with a 0% economic interest (“**Special Member**”) and shall continue Borrower or the SPE Component Entity (as applicable) without dissolution and (ii) Special Member may not resign from Borrower or the SPE Component Entity (as applicable) or transfer its rights as Special Member unless (A) a successor Special Member has been admitted to Borrower or the SPE Component Entity (as applicable) as a Special Member in accordance with requirements of Delaware law and (B) after giving effect to such resignation or transfer, there remains at least one (1) Independent Director of the SPE Component Entity or Borrower (as applicable) in accordance with Section 5.2 below. The LLC Agreement shall further provide that (i) Special Member shall automatically cease to be a member of Borrower or the SPE Component Entity (as applicable) upon the admission to Borrower or the SPE Component Entity (as applicable) of the first substitute member, (ii) Special Member shall be a member of Borrower or the SPE Component Entity (as applicable) that has no interest in the profits, losses and capital of Borrower or the SPE Component Entity (as applicable) and has no right to receive any distributions of the assets of Borrower or the SPE Component Entity (as applicable), (iii) pursuant to the applicable provisions of the limited liability company act of the State of Delaware (the “**Act**”), Special Member shall not be required to make any capital contributions to Borrower or the SPE Component Entity (as applicable) and shall not receive a limited liability company interest in Borrower or the SPE Component Entity (as applicable), (iv) Special Member, in its capacity as Special Member, may not bind Borrower or the SPE Component Entity (as applicable) and (v) except as required by any mandatory provision of the Act, Special Member, in its capacity as

Special Member, shall have no right to vote on, approve or otherwise consent to any action by, or matter relating to, Borrower or the SPE Component Entity (as applicable) including, without limitation, the merger, consolidation or conversion of Borrower or the SPE Component Entity (as applicable); provided, however, such prohibition shall not limit the obligations of Special Member, in its capacity as Independent Director, to vote on such matters required by the Loan Documents or the LLC Agreement. In order to implement the admission to Borrower or the SPE Component Entity (as applicable) of Special Member, Special Member shall execute a counterpart to the LLC Agreement. Prior to its admission to Borrower or the SPE Component Entity (as applicable) as Special Member, Special Member shall not be a member of Borrower or the SPE Component Entity (as applicable), but Special Member may serve as an Independent Director of Borrower or the SPE Component Entity (as applicable).

(e) The LLC Agreement shall further provide that, (i) upon the occurrence of any event that causes the Member to cease to be a member of Borrower or the SPE Component Entity (as applicable) to the fullest extent permitted by law, the personal representative of Member shall, within ninety (90) days after the occurrence of the event that terminated the continued membership of Member in Borrower or the SPE Component Entity (as applicable) agree in writing (A) to continue Borrower or the SPE Component Entity (as applicable) and (B) to the admission of the personal representative or its nominee or designee, as the case may be, as a substitute member of Borrower or the SPE Component Entity (as applicable) effective as of the occurrence of the event that terminated the continued membership of Member in Borrower or the SPE Component Entity (as applicable), (ii) any action initiated by or brought against Member or Special Member under any Creditors Rights Laws shall not cause Member or Special Member to cease to be a member of Borrower or the SPE Component Entity (as applicable) and upon the occurrence of such an event, the business of Borrower or the SPE Component Entity (as applicable) shall continue without dissolution, and (iii) each of Member and Special Member waives any right it might have to agree in writing to dissolve Borrower or the SPE Component Entity (as applicable) upon the occurrence of any action initiated by or brought against Member or Special Member under any Creditors Rights Laws, or the occurrence of an event that causes Member or Special Member to cease to be a member of Borrower or the SPE Component Entity (as applicable).

## **Section 5.2 Independent Director.**

(a) The organizational documents of Borrower (to the extent Borrower is a corporation or an Acceptable LLC) or the SPE Component Entity, as applicable, shall provide that at all times there shall be at least one (1) duly appointed member of its board of directors or managers, as applicable (each, an “**Independent Director**”) reasonably satisfactory to Lender who each shall not have been at the time of each such individual’s initial appointment, and (I) shall not have been at any time during the preceding five (5) years, and shall not be at any time while serving as Independent Director, either (i) a shareholder (or other equity owner) of, or an officer, director (other than in its capacity as Independent Director), partner, member or employee of, Borrower or any of its respective shareholders, partners, members, subsidiaries or affiliates, (ii) a customer of, or supplier to, or other Person who derives any of its purchases or revenues from its activities with, Borrower or any of its respective shareholders, partners, members, subsidiaries or affiliates, (iii) a Person who Controls or is under common Control with any such shareholder, officer, director, partner, member, employee supplier, customer or other Person, or (iv) a member of the immediate family of any such shareholder, officer, director, partner, member, employee, supplier, customer

or other Person, and (II) shall be employed by, in good standing with and engaged by Borrower in connection with, in each case, an Approved ID Provider. Each Independent Director at the time of its initial engagement shall have had at least three (3) years prior experience as an independent director to a company or a corporation in the business of owning and operating commercial properties similar in type and quality to the Property.

(b) The organizational documents of Borrower or the SPE Component Entity (as applicable) shall further provide that (I) the board of directors or managers of Borrower or the SPE Component Entity, as applicable, and the constituent members of such entities (the “**Constituent Members**”) shall not take any action which, under the terms of any organizational documents of Borrower or the SPE Component Entity, as applicable, requires the unanimous vote of (1) the board of directors or managers of Borrower or the SPE Component Entity, as applicable, or (2) the Constituent Members, unless at the time of such action there shall be at least one (1) Independent Director engaged as provided by the terms hereof; (II) any resignation, removal or replacement of any Independent Director (other than as a result of death or incapacity) shall not be effective without two (2) Business Days prior written notice to Lender accompanied by evidence that the replacement Independent Director satisfies the applicable terms and conditions hereof and of the applicable organizational documents; (III) to the fullest extent permitted by applicable law, including Section 18-1101(c) of the Act and notwithstanding any duty otherwise existing at law or in equity, the Independent Director shall consider only the interests of the Constituent Members and Borrower and any SPE Component Entity (including Borrower’s and any SPE Component Entity’s respective creditors) in acting or otherwise voting on the matters provided for herein and in Borrower’s and SPE Component Entity’s organizational documents (which such fiduciary duties to the Constituent Members and Borrower and any SPE Component Entity (including Borrower’s and any SPE Component Entity’s respective creditors), in each case, shall be deemed to apply solely to the extent of their respective economic interests in Borrower or SPE Component Entity (as applicable) exclusive of (x) all other interests (including, without limitation, all other interests of the Constituent Members), (y) the interests of other affiliates of the Constituent Members, Borrower and SPE Component Entity and (z) the interests of any group of affiliates of which the Constituent Members, Borrower or SPE Component Entity is a part)); (IV) other than as provided in subsection (III) above, the Independent Director shall not have any fiduciary duties to any Constituent Members, any directors of Borrower or SPE Component Entity or any other Person; (V) the foregoing shall not eliminate the implied contractual covenant of good faith and fair dealing under applicable law; (VI) to the fullest extent permitted by applicable law, including Section 18-1101(e) of the Act, an Independent Director shall not be liable to Borrower, SPE Component Entity, any Constituent Member or any other Person for breach of contract or breach of duties (including fiduciary duties), unless the Independent Director acted in bad faith or engaged in willful misconduct; and (VII) except as provided in the foregoing subsections (III) through (VI), the Independent Director shall, in exercising their rights and performing their duties under the applicable organizational documents, have a fiduciary duty of loyalty and care similar to that of a director of a business corporation organized under the General Corporation Law of the State of Delaware.

### **Section 5.3 Change of Name, Identity or Structure.**

Borrower shall not change (or permit to be changed) Borrower’s or the SPE Component Entity’s (a) name, (b) identity (including its trade name or names), (c) principal place of business

set forth on the first page of this Agreement or, (d) if not an individual, Borrower's or the SPE Component Entity's corporate, partnership or other structure, without notifying Lender of such change in writing at least thirty (30) days prior to the effective date of such change and, in the case of a change in Borrower's or the SPE Component Entity's structure, without first obtaining the prior written consent of Lender. Borrower shall execute and deliver to Lender, prior to or contemporaneously with the effective date of any such change, any financing statement or financing statement change required by Lender to establish or maintain the validity, perfection and priority of the security interest granted herein. At the request of Lender, Borrower shall execute a certificate in form satisfactory to Lender listing the trade names under which Borrower or the SPE Component Entity intends to operate the Property, and representing and warranting that Borrower or the SPE Component Entity does business under no other trade name with respect to the Property.

#### **Section 5.4 Business and Operations.**

Borrower will continue to engage in the businesses now conducted by it as and to the extent the same are necessary for the ownership, maintenance, management and operation of the Property. Borrower will qualify to do business and will remain in good standing under the laws of the jurisdiction as and to the extent the same are required for the ownership, maintenance, management and operation of the Property.

### **ARTICLE 6.**

#### **NO SALE OR ENCUMBRANCE**

##### **Section 6.1 Transfer Definitions.**

For purposes of this Article 6, "**Restricted Party**" shall mean Borrower, Sponsor, Guarantor, any SPE Component Entity, any Affiliated Manager, or any shareholder, partner, member or non-member manager, or any direct or indirect legal or beneficial owner of Borrower, Sponsor, Guarantor, any SPE Component Entity, any Affiliated Manager or any shareholder, partner, member or non-member manager; and a "**Sale or Pledge**" shall mean a voluntary or involuntary sale, conveyance, mortgage, grant, bargain, lien, encumbrance, pledge, assignment, grant of any options with respect to, or any other transfer or disposition of (directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise, and whether or not for consideration or of record) a legal or beneficial interest.

##### **Section 6.2 No Sale/Encumbrance.**

(a) Without the prior written consent of Lender, Borrower shall not cause or permit (i) a Sale or Pledge of the Property or any part thereof or any legal or beneficial interest therein, (ii) a Sale or Pledge of an interest in any Restricted Party or (iii) any change in Control of Borrower, Sponsor, Guarantor, any Affiliated Manager, or any change in control of the day-to-day operations of the Property (collectively, a "**Prohibited Transfer**"), other than pursuant to (a) Leases of space in the Improvements to Tenants in accordance with the provisions of Section 4.14, including, without limitation, the Solar Lease Documents, (b) any Permitted Encumbrances, (c) any Permitted Equipment Leases, (d) Permitted Equity Transfers, (e) a Release,

and (f) normal replacement or other disposition of obsolete FF&E and Personal Property in the ordinary course of business and in accordance with the terms hereof.

(b) A Prohibited Transfer shall include, but not be limited to, (i) an installment sales agreement wherein Borrower agrees to sell the Property or any part thereof for a price to be paid in installments; (ii) an agreement by Borrower leasing all or a substantial part of the Property for other than actual occupancy by a Tenant thereunder or a sale, assignment or other transfer of, or the grant of a security interest in, Borrower's right, title and interest in and to (A) any Leases or any Rents or (B) any REA, any Material Agreements or the Franchise Agreement; (iii) any action for partition of the Property (or any portion thereof or interest therein) or any similar action instituted or prosecuted by Borrower or by any other person or entity, pursuant to any contractual agreement or other instrument or under Applicable Law (including, without limitation, common law); (iv) any other action instituted by (or at the behest of) Borrower or its affiliates or consented to or acquiesced in by Borrower or its affiliates which results in a termination of an REA, any Material Agreements or the Franchise Agreement; (v) if a Restricted Party is a corporation, any merger, consolidation or Sale or Pledge of such corporation's stock or the creation or issuance of new stock in one or a series of transactions; (vi) if a Restricted Party is a limited or general partnership or joint venture, any merger or consolidation or the change, removal, resignation or addition of a general partner or the Sale or Pledge of the partnership interest of any general or limited partner or any profits or proceeds relating to such partnership interests or the creation or issuance of new limited partnership interests; (vii) if a Restricted Party is a limited liability company, any merger or consolidation or the change, removal, resignation or addition of a managing member or non-member manager (or if no managing member, any member) or the Sale or Pledge of the membership interest of any member or any profits or proceeds relating to such membership interest; (viii) if a Restricted Party is a trust or nominee trust, any merger, consolidation or the Sale or Pledge of the legal or beneficial interest in a Restricted Party or the creation or issuance of new legal or beneficial interests; (ix) the incurrence of any property-assessed clean energy loans or similar indebtedness with respect to Borrower and/or the Property, including, without limitation, if such loans or indebtedness are made or otherwise provided by any Governmental Authority and/or secured or repaid (directly or indirectly) by any taxes or similar assessments; or (x) the removal or the resignation of Manager (including, without limitation, an Affiliated Manager) other than in accordance with Section 4.15.

### **Section 6.3 Permitted Equity Transfers.**

Notwithstanding the restrictions contained in this Article 6, the following equity transfers shall be permitted without Lender's consent and without the payment of any fee to Lender (each, a "**Permitted Equity Transfer**"): (a) a transfer (but not a pledge) by devise or descent or by operation of law upon the death of a Restricted Party or any member, partner or shareholder of a Restricted Party, (b) the transfer (but not the pledge), in one or a series of transactions, of the stock, partnership interests or membership interests (as the case may be) in a Restricted Party (including, without limitation, transfers for estate planning purposes), and (c) the sale, transfer or issuance of shares of common stock in any Restricted Party that is a publicly traded entity, provided such shares of common stock are listed on the New York Stock Exchange or another nationally recognized stock exchange (provided, that the foregoing provision of clause (c) shall not be deemed to waive, qualify or otherwise limit Borrower's obligation to comply (or to cause the compliance) with the other covenants set forth herein and in the other Loan Documents (including,

without limitation, the covenants contained herein relating to ERISA matters)); provided, further, that, with respect only to the transfers listed in clauses (a) and/or (b) above, (A) with respect to any transfer (or series of transfers) that results in any Person owning 25% (or, if such Person is not formed, organized or incorporated in, or is not a citizen of, the United States of America, 10%) of the direct or indirect interests in Borrower or any SPE Component Entity that did not own such interest prior to such transfer(s), (x) Lender shall receive written notice of any transfers pursuant to clause (a) above within ten (10) days of such transfer and (y) Lender shall receive not less than thirty (30) days prior written notice of such transfers in connection with any transfer pursuant to clause (b) above, (B) no such transfers shall result in a change in Control of Sponsor, Guarantor or Affiliated Manager, (C) after giving effect to such transfers, (I) Sponsor shall, collectively, own at least a 25% direct or indirect equity ownership interest in each of Borrower and any SPE Component Entity; (II) each Sponsor shall Control Borrower and any SPE Component Entity; and (III) each Sponsor shall control the day-to-day operation of the Property, (D) after giving effect to such transfers, the Property shall continue to be managed by Affiliated Manager or a New Manager approved in accordance with the applicable terms and conditions hereof, (E) in the case of the transfer of any direct equity ownership interests in Borrower or in any SPE Component Entity, such transfers shall be conditioned upon continued compliance with the relevant provisions of Article 5 hereof, (F) in the case of (1) the transfer of the management of the Property to a new Affiliated Manager in accordance with the applicable terms and conditions hereof, or (2) the transfer of any direct or indirect equity ownership interests in any Restricted Party that results in any Person and its Affiliates owning in excess of forty-nine percent (49%) of the direct or indirect equity ownership interests in Borrower or in any SPE Component Entity that did not own the same on the date hereof or at the time of the delivery of any New Non-Consolidation Opinion prior to such transfer, such transfers shall be conditioned upon delivery to Lender of a New Non-Consolidation Opinion addressing such transfer, (G) such transfers shall be conditioned upon Borrower's ability to, after giving effect to the equity transfer in question, (I) remake the representations contained herein relating to ERISA, OFAC and Patriot Act matters (and, upon Lender's request, Borrower shall deliver to Lender (x) an Officer's Certificate containing such updated representations effective as of the date of the consummation of the applicable equity transfer and (y) searches, acceptable to Lender, for any Person owning, directly or indirectly, 25% (or, if such Person is not formed, organized or incorporated in, or is not a citizen of, the United States of America, 10%) or more of the interests in the Borrower as a result of such transfer) and (II) continue to comply with the covenants contained herein relating to ERISA, OFAC and Patriot Act matters, (H) such transfers are permitted under the Ground Lease, and (I) such transfers are permitted under the Franchise Agreement. Upon request from Lender, Borrower shall promptly provide Lender a revised version of the organizational chart delivered to Lender in connection with the Loan reflecting any equity transfer consummated in accordance with this Section 6.3. Furthermore, in the event of the death or incompetency of any Guarantor, it shall not be an Event of Default hereunder, provided that, a Satisfactory Replacement Guarantor (as defined in the Guaranty) is provided pursuant to the terms of Section 23 of the Guaranty.

#### **Section 6.4 Permitted Property Transfers (Assumptions).**

Notwithstanding the foregoing provisions of this Article 6, following the date which is twelve (12) months from the Closing Date, Lender shall not unreasonably withhold consent to the transfer of the Property, on two (2) occasions, in its entirety to, and the related assumptions of the



Loan by, any Person (a “**Transferee**”) provided that, with respect to each such transfer, each of the following terms and conditions are satisfied:

(a) no Event of Default has occurred and is continuing;

(b) Borrower shall have (i) delivered written notice to Lender of the terms of such prospective transfer not less than sixty (60) days before the date on which such transfer is scheduled to close and, concurrently therewith, all such information concerning the proposed Transferee as Lender shall reasonably require and (ii) paid to Lender a non-refundable processing fee in the amount of \$25,000. Lender shall have the right to approve or disapprove the proposed transfer based on its then current underwriting and credit requirements for similar loans secured by similar properties which loans are sold in the secondary market, such approval not to be unreasonably withheld. In determining whether to give or withhold its approval of the proposed transfer, Lender shall consider the experience and track record of Transferee and its principals in owning and operating facilities similar to the Property, the financial strength of Transferee and its principals, the general business standing of Transferee and its principals and Transferee’s and its principals’ relationships and experience with contractors, vendors, tenants, lenders and other business entities; provided, however, that, notwithstanding Lender’s agreement to consider the foregoing factors in determining whether to give or withhold such approval, such approval shall be given or withheld based on what Lender determines to be commercially reasonable and, if given, may be given subject to such conditions as Lender may deem reasonably appropriate;

(c) Borrower shall have paid or caused to be paid to Lender, concurrently with the closing of such prospective transfer, (i) a non-refundable assumption fee in an amount equal to the greater of (y) one percent (1%) of the then outstanding principal balance of the Loan or (z) \$15,000, (ii) all out-of-pocket costs and expenses, including reasonable attorneys’ fees, incurred by Lender in connection therewith and (iii) all reasonable fees, costs and expenses of all third parties and the Rating Agencies incurred in connection therewith;

(d) Transferee assumes and agrees to pay the Debt as and when due subject to the provisions of Article 13 hereof and, prior to or concurrently with the closing of such transfer, Transferee and its constituent partners, members, shareholders, affiliates or sponsors as Lender may require, shall execute, without any cost or expense to Lender, such documents and agreements as Lender shall reasonably require to evidence and effectuate said assumption and an Affiliate of Transferee reasonably acceptable to Lender shall execute a recourse guaranty and an environmental indemnity in form and substance identical to the Guaranty and Environmental Indemnity, respectively, with such changes to each of the foregoing as may be reasonably required by Lender;

(e) Borrower and Transferee, without any cost to Lender, shall furnish any information requested by Lender for the preparation of, and shall authorize Lender to file, new financing statements and financing statement amendments and other documents to the fullest extent permitted by Applicable Law, and shall execute any additional documents reasonably requested by Lender;

(f) Borrower shall have delivered to Lender, without any cost or expense to Lender, such endorsements to Lender’s Title Insurance Policy insuring that fee simple or leasehold title to

the Property, as applicable, is vested in Transferee (subject to Permitted Encumbrances), hazard insurance endorsements or certificates and other similar materials as Lender may deem necessary at the time of the transfer, all in form and substance satisfactory to Lender;

(g) Transferee shall have furnished to Lender all appropriate papers evidencing Transferee's organization and good standing, and the qualification of the signers to execute the assumption of the Debt, which papers shall include certified copies of all documents relating to the organization and formation of Transferee and of the entities, if any, which are partners or members of Transferee. Transferee and such constituent partners, members or shareholders of Transferee (as the case may be), as Lender shall require, shall comply with the covenants set forth in Article 5 hereof (provided, however, such Transferee shall not be a Delaware Statutory Trust, a tenancy-in-common, a Crowdfunded Person, or any Person who is (i) Controlled (directly or indirectly) by one or more of the foregoing and/or (ii) more than 49% owned (directly or indirectly) by one or more of the foregoing);

(h) Transferee shall assume the obligations of Borrower under any Management Agreement or provide a new management agreement with a new manager which meets with the requirements of the Assignment of Management Agreement and Section 4.15 hereof and assign to Lender as additional security such new management agreement;

(i) Transferee shall furnish to Lender a New Non-Consolidation Opinion and an opinion of counsel satisfactory to Lender and its counsel (A) that Transferee's formation documents provide for the matters described in subparagraph (g) above, (B) that the assumption of the Debt has been duly authorized, executed and delivered, and that the assumption agreement and the other Loan Documents are valid, binding and enforceable against Transferee in accordance with their terms, (C) that Transferee and any entity which is a controlling stockholder, member or general partner of Transferee, have been duly organized, and are in existence and good standing, (D) that the transfer will not constitute a "significant modification" of the Loan under Section 1001 of the IRS Code or otherwise cause a tax to be imposed on a "prohibited transaction" by any REMIC Trust and (E) with respect to such other matters as Lender may reasonably request;

(j) if required by Lender and the Loan has been Securitized, Lender shall have received a Rating Agency Confirmation with respect to such transfer;

(k) the proposed transfer is expressly permitted pursuant to the terms of the Ground Lease or Lender has received evidence, reasonably acceptable to Lender, that such proposed transfer has been consented to by the Ground Lessor;

(l) Transferee shall deposit with Lender such new or increased Reserve Funds as Lender may require, including, without limitation, new or increased Reserve Funds for taxes, insurance, tenant improvements and leasing commissions, capital expenditures and immediate repairs, and the amendment of the Loan Documents to require the Transferee to make monthly deposits of such new or increased Reserve Funds for such purposes thereafter; and

(m) Borrower's obligations under the contract of sale pursuant to which the transfer is proposed to occur shall expressly be subject to the satisfaction of the applicable terms and conditions of this Section 6.4.

Notwithstanding the foregoing or anything herein to the contrary, Borrower may not exercise its rights pursuant to this Section 6.4 during the period that commences on the date that is sixty (60) days prior to the date of any intended Securitization of the Loan and ending on the date that is sixty (60) days after the date of such Securitization of the Loan.

### **Section 6.5 Lender's Rights.**

Lender reserves the right to condition the consent to a Prohibited Transfer requested hereunder upon (a) a modification of the terms hereof and on assumption of this Agreement and the other Loan Documents as so modified by the proposed Prohibited Transfer, (b) payment of a transfer fee of 1% of outstanding principal balance of the Loan and all of Lender's reasonable out-of-pocket expenses incurred in connection with such Prohibited Transfer, (c) to the extent required by Lender, receipt of a Rating Agency Confirmation with respect to the Prohibited Transfer, (d) the proposed transferee's continued compliance with the covenants set forth in this Agreement, including, without limitation, the covenants in Article 5, (e) receipt of a New Non-Consolidation Opinion with respect to the Prohibited Transfer, and/or (f) such other conditions and/or legal opinions as Lender shall determine in its sole discretion to be in the interest of Lender. All reasonable expenses incurred by Lender shall be payable by Borrower whether or not Lender consents to the Prohibited Transfer. Lender shall not be required to demonstrate any actual impairment of its security or any increased risk of default hereunder in order to declare the Debt immediately due and payable upon a Prohibited Transfer without Lender's consent. This provision shall apply to every Prohibited Transfer, whether or not Lender has consented to any previous Prohibited Transfer.

### **Section 6.6 Mezzanine Loan.**

Notwithstanding anything to the contrary contained in this Agreement, direct or indirect constituent owners of Borrower (other than any general partner or managing member of Borrower) (collectively, the "**Permitted Mezzanine Borrower**") may incur indebtedness (the "**Permitted Mezzanine Debt**") secured by 100% of its ownership interest in Borrower, provided all of the following conditions have been satisfied: (a) Lender receives not less than thirty (30) days' prior written notice of the Permitted Mezzanine Borrower's intention to incur the Permitted Mezzanine Debt; (b) the security granted in connection with such Permitted Mezzanine Debt shall consist only of a pledge of the membership interests in Borrower; (c) the Debt and the Permitted Mezzanine Debt have a combined Debt Service Coverage Ratio on the date the Permitted Mezzanine Debt is incurred of not less than 1.71 to 1.00; (d) the aggregate sum of the Debt and the Permitted Mezzanine Debt does not exceed a loan-to-value ratio on the date the Permitted Mezzanine Debt is incurred of 50% (as determined by Lender based on a then-current appraisal obtained by Borrower from a nationally recognized MAI appraiser); (e) the Debt Yield on the date the Permitted Mezzanine Debt is incurred is not less than 11.8% (as determined by Lender in its sole and absolute discretion); (f) the lender of the Permitted Mezzanine Debt is a third party acceptable to Lender (the "**Mezzanine Lender**"); (g) the Mezzanine Lender executes and delivers an intercreditor and standstill agreement (the "**Intercreditor Agreement**") with Lender in form and substance reasonably acceptable to Lender and any applicable Rating Agency; (h) the Permitted Mezzanine Debt is subordinate in all respects to the Debt pursuant to the Intercreditor Agreement; (i) the Permitted Mezzanine Debt is not cross-defaulted or cross-collateralized with any other properties or loans; (j) the terms, conditions and structure of, and documentation for, the

Permitted Mezzanine Debt are approved by Lender (which approval shall not be unreasonably withheld or conditioned) and any applicable Rating Agency; (k) Lender has received written confirmation from each applicable Rating Agency that incurrence of the Permitted Mezzanine Debt will not result in a qualification, downgrade, or withdrawal of the then-current ratings assigned by any Rating Agency to the Securities issued in connection with a Secondary Market Transaction; (l) Borrower shall execute and/or deliver any documents, instruments, agreements or opinions or any amendments to the Loan Documents as reasonably requested by Lender in connection with the Permitted Mezzanine Debt; (m) hard cash management shall have commenced under the Loan; (n) the stated maturity of the Debt and the Permitted Mezzanine Debt must be co-terminus; and (o) Borrower pays all of Lender's costs and expenses reasonably incurred in connection with the exercise of the rights contained in this Section 6.6 (including, without limitation, reasonable attorneys' fees and any Rating Agency costs). The incurrence of the Permitted Mezzanine Debt in accordance with the requirements of this Section shall not, in and of itself, result in payment of any transfer fee to Lender under the Loan Documents.

### **Section 6.7 Release of Golf Course Parcel.**

Notwithstanding anything to the contrary contained in this Agreement, and provided that no Event of Default then exists, Lender shall release the Golf Course Parcel (the "**Release Property**") from the lien of the Security Instrument or, as applicable, shall consent to a modification of the Ground Lease excluding the Golf Course Parcel therefrom (the "**Release**") after the date that is sixty (60) days after the date of any intended Securitization of the Loan upon Borrower's satisfaction of the following terms and conditions:

(a) Borrower shall deliver to Lender a written request for the Release accompanied by a processing fee of \$5,000 at least thirty (30) but not more than ninety (90) days prior to the desired date of the Release;

(b) Borrower shall procure from the title company that issued the Title Insurance Policy to Lender an endorsement to the Title Insurance Policy, such endorsement to be reasonably acceptable to Lender and to provide, *inter alia*, that the lien and priority of the Security Instrument as to the Property remaining after giving effect to the Release (the "**Remaining Property**") shall be unaffected as a result of the Release and that the Security Instrument shall continue to constitute a valid first lien. Borrower shall further cause such title company to issue such additional endorsements as Lender shall reasonably require;

(c) Borrower shall simultaneously with the Release transfer title to the Release Property to a Person other than Borrower;

(d) if requested by Lender and if the Loan is part of a Securitization, Lender shall have received Rating Agency Confirmations from the applicable Rating Agencies;

(e) if requested by Lender, Borrower shall deliver to Lender an opinion of counsel that is standard in commercial lending transactions and subject only to customary qualifications, assumptions and exceptions opining, among other things, that if a Securitization has occurred (i) the REMIC Trust formed pursuant to such Securitization and/or any subsequent or prior Securitization of the Loan or any portion thereof or interest therein will each not fail to maintain

their respective status as a “real estate mortgage investment conduit” within the meaning of Section 860D of the IRS Code as a result of the Individual Property Release pursuant to this Section 6.7 and (ii) the Individual Property Release would not (x) constitute a “significant modification” of the Loan within the meaning of Treasury Regulation Section 1.860G-2(b) or (y) cause the Loan to fail to be a “qualified mortgage” within the meaning of Section 860G(a)(3)(A) of the IRS Code;

(f) Borrower shall provide to Lender such other opinions as Lender shall reasonably request;

(g) Borrower shall provide evidence reasonably satisfactory to Lender that expenses for the operation and maintenance of the Release Property and the Remaining Property are segregated;

(h) Manager and other parties to the Management Agreement shall provide Lender with evidence reasonably satisfactory to Lender that the Release Property will no longer be subject to the Management Agreement once such release has been completed and that Manager will no longer earn fees under the Management Agreement with respect to the Release Property; provided, however, that Manager shall be permitted to enter into a separate management, leasing and/or development agreement with the owner of such Release Property;

(i) the Remaining Property shall have available to it all necessary utility and other services for its development, use, occupancy and operation, and adequate, free, unimpeded and unencumbered access for pedestrian and vehicular ingress and egress onto all adjacent public roads at such locations as are reasonably necessary for the development, use, occupancy and its present operation, and, upon request, Lender may approve or require, in its sole and absolute discretion, the granting of necessary easements over the Remaining Property that benefit the Release Property (or vice versa);

(j) if requested by Lender, Borrower shall provide Lender with an updated survey of the Remaining Property and the Release Property reasonably satisfactory to Lender, prepared by a registered land surveyor and certified to Lender, its successors and assigns, and the title insurer in form reasonably acceptable to Lender, containing only such encroachments, exceptions and state of facts as reasonably satisfactory to Lender;

(k) Borrower shall provide Lender with evidence reasonably satisfactory to Lender that the Remaining Property, including, without limitation, all improvements thereon, shall be in compliance with all applicable zoning laws (including parking ordinances and requirements), land use and other governmental rules and regulations, Borrower being hereby permitted to initiate, join in, acquiesce in, or consent to any change in any private restrictive covenant, zoning law or other public or private restriction, in connection with effectuating the exclusion of the Golf Course Parcel from the Ground Lease, subject to Lender’s prior approval thereof (not to be unreasonably withheld, conditioned or delayed);

(l) Borrower shall have delivered to Lender an amendment to the Ground Lease effectuating the exclusion of the Golf Course Parcel, which amendment shall be in form and substance reasonably satisfactory to Lender; and

(m) Borrower shall provide evidence reasonably satisfactory to Lender that (a) any Tenants required to approve the Release have given such approval and (b) Borrower has complied with any requirements applicable to the Release in any of the Leases, reciprocal easement agreements or similar agreements and the Release does not violate any of the provisions of such documents.

Notwithstanding the foregoing provisions of this Section 6.7 or anything herein to the contrary, this Section 6.7 is subject to the terms of Section 11.3 hereof, and if a prepayment of the Debt is required thereunder, Borrower shall pay to Lender a Yield Maintenance Premium with respect to such prepayment.

Regardless of whether or not the requested Release occurs, Borrower shall pay or reimburse Lender for all reasonable third party costs and expenses actually incurred by Lender (including, without limitation, reasonable attorneys' fees and disbursements) in connection with the Release, and Borrower shall have paid all recording charges, filing fees, taxes (including, without limitation, any applicable mortgage and intangibles taxes and documentary stamp taxes), or other expenses payable in connection with the Release. Borrower shall also pay all costs and expenses of the Rating Agencies incurred in connection with any Release.

## **ARTICLE 7.**

### **INSURANCE; CASUALTY; CONDEMNATION; RESTORATION**

#### **Section 7.1 Insurance.**

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

(i) insurance with respect to the Improvements and, if applicable, the Personal Property insuring against any peril now or hereafter included within the "Special" or "All Risks" Causes of Loss form (which shall not exclude fire, lightning, windstorm (including named storms), hail, explosion, riot, civil commotion, aircraft, vehicles and smoke), in each case (A) in an amount equal to 100% of the "Full Replacement Cost," which for purposes of this Agreement shall mean actual replacement value exclusive of costs of excavations, foundations, underground utilities and footings waiving of depreciation; (B) to be written on a no coinsurance form or containing an agreed amount endorsement with respect to the Improvements and, if applicable, Personal Property waiving all co-insurance provisions; (C) providing for no deductible in excess of \$25,000, excluding windstorm and earthquake insurance which may have a deductible of 5% of the total insurable value; (D) at all times insuring against at least those hazards that are commonly insured against under a "Special" or "All Risks" Causes of Loss form of policy, as the same shall exist on the date hereof, and together with any increase in the scope of coverage provided under such form after the date hereof; (E) if any of the Improvements constitute legal non-conforming structures or uses, providing Law & Ordinance coverage, including Coverage for Loss to the Undamaged Portion of the Building, Demolition Costs and Increased Cost of Construction in amounts acceptable to Lender; and (F) providing coverage for furniture, fixtures and equipment in an amount not less than \$9,500,000.00. The Full Replacement Cost shall be

re-determined from time to time (but not more frequently than once in any twelve (12) calendar months) at the request of Lender by an appraiser or contractor designated and paid by Borrower and approved by Lender, or by an engineer or appraiser in the regular employ of the insurer. After the first appraisal, additional appraisals may be based on construction cost indices customarily employed in the trade. No omission on the part of Lender to request any such ascertainment shall relieve Borrower of any of its obligations under this Subsection;

(ii) commercial general liability insurance against all claims for personal injury, bodily injury, death or property damage occurring upon, in or about the Property, including “Dram Shop” or other liquor liability coverage if the Borrower sells or distributes alcoholic beverages from the Property, such insurance (A) to be on the so-called “occurrence” form with a general aggregate limit of not less than \$2,000,000 and a per occurrence limit of not less than \$1,000,000; (B) to continue at not less than the aforesaid limit until required to be changed by Lender in writing by reason of changed economic conditions making such protection inadequate; and (C) to cover at least the following hazards: (1) premises and operations; (2) products and completed operations on an “if any” basis; (3) independent contractors; (4) contractual liability for all insured contracts; and (5) contractual liability covering the indemnities contained in Articles 12 and 13 hereof to the extent the same is available;

(iii) loss of rents and/or business interruption insurance (A) with loss payable to Lender; (B) covering all risks required to be covered by the insurance provided for in Subsections 7.1(a)(i), (iv) and (vi) through (viii); (C) in an amount equal to 100% of the projected gross income from the Property on an actual loss sustained basis for a period beginning on the date of Casualty and continuing until the Restoration of the Property is completed, or the expiration of eighteen (18) months, whichever first occurs, and notwithstanding that the policy may expire prior to the end of such period; the amount of such business interruption/loss of rents insurance shall be determined prior to the Closing Date and at least once each year thereafter based on the greatest of: (x) Borrower’s reasonable estimate of the gross income from the Property and (y) the highest gross income received during the term of the Loan for any full calendar year prior to the date the amount of such insurance is being determined, in each case for the succeeding eighteen (18) month period and (D) containing an extended period of indemnity endorsement which provides that after the physical loss to the Improvements has been repaired, the continued loss of income will be insured until such income either returns to the same level it was at prior to the loss, or the expiration of six (6) months from the date that the Property is repaired or replaced and operations are resumed, whichever first occurs, and notwithstanding that the policy may expire prior to the end of such period. All Net Proceeds payable to Lender pursuant to this Subsection (the “**Rent Loss Proceeds**”) shall be held by Lender (x) if no Cash Trap Event Period has occurred, in an Eligible Account (which account shall be deemed to be included within the definition of “Accounts”) and (y) upon the occurrence of a Cash Trap Event Period, in accordance with the terms of the Cash Management Agreement and shall be applied to the obligations secured hereunder from time to time due and payable hereunder and under the Note; provided, however, that (I) nothing herein contained shall be deemed to relieve Borrower of its obligations to pay the obligations secured hereunder on the respective dates of payment provided for in the Note except to

the extent such amounts are actually paid out of the Rent Loss Proceeds and (II) in the event the Rent Loss Proceeds are paid in a lump sum in advance and Borrower is entitled to disbursement of such Rent Loss Proceeds in accordance with the terms hereof, Lender or Servicer shall hold such Rent Loss Proceeds in a segregated interest-bearing Eligible Account (which account shall be deemed to be included within the definition of “Accounts”) and Lender or Servicer shall estimate the number of months required for Borrower to restore the damage caused by the applicable Casualty, shall divide the applicable aggregate Rent Loss Proceeds by such number of months and shall disburse such monthly installment of Rent Loss Proceeds from such Eligible Account (x) if no Cash Trap Event Period has occurred, to Borrower after Lender’s deduction therefrom of the amount of Debt Service and deposits into the Reserve Funds then due and payable hereunder and (y) upon the occurrence of a Cash Trap Event Period, into the Cash Management Account each month during the performance of such Restoration;

(iv) at all times during which structural construction, repairs or alterations are being made with respect to the Improvements and only if the current property and liability coverage forms do not otherwise apply (A) commercial general liability and umbrella liability insurance covering claims related to the construction, repairs or alterations being made at the Property which are not covered by or under the terms or provisions of the commercial general liability and umbrella liability insurance policies required herein; and (B) the insurance provided for in Subsection 7.1(a)(i) written in a so-called builder’s risk completed value form (1) on a non-reporting basis, (2) against all risks insured against pursuant to Subsections 7.1(a)(i), (iv) and (vi) through (viii), as applicable, (3) including permission to occupy the Property, and (4) written on a no coinsurance form or containing an agreed amount endorsement waiving co-insurance provisions;

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

(vi) equipment breakdown/boiler and machinery insurance covering all mechanical and electrical equipment in such amounts as shall be reasonably be required by Lender, on terms and in amounts consistent with the commercial property insurance policy required under Subsection 7.1(a)(i) above or in such other amount as shall be reasonably required by Lender (if applicable to the Property);

(vii) if any portion of the Improvements or Personal Property is at any time located in an area identified in the Federal Register by the Federal Emergency Management Agency or any successor thereto as an area having special flood hazards (“**SFHA**”) pursuant to the National Flood Insurance Act of 1968, the Flood Disaster Protection Act of 1973 or the National Flood Insurance Reform Act of 1994, as each may be amended, or any successor law (the “**Flood Insurance Acts**”), flood hazard insurance for all such improvements and/or Personal Property located in the SFHA in an amount equal to (1) the maximum limit of building and/or contents coverage available under the Flood Insurance Acts plus (2) additional limits in an amount equal to the “Full Replacement Cost” or such



other amount agreed to by Lender; provided that, the insurance provided pursuant to this clause (vii) shall be on terms consistent with the “All Risk” insurance policy required in Section 7.1(a)(i) above;

(viii) earthquake insurance in amounts equal to one and one-half times (1.5x) the probable maximum loss or scenario expected loss of the Property plus loss of rents and/or business interruption as determined by Lender in its sole discretion and in form and substance satisfactory to Lender, provided that the insurance pursuant to this Subsection (viii) shall be on terms consistent with the all risk insurance policy required under Section 7.1(a)(i);

(ix) umbrella liability insurance in an amount not less than \$25,000,000.00 per occurrence on terms consistent with the commercial general liability insurance policy required under subsection (ii) above;

(x) insurance against employee dishonesty in amounts acceptable to Lender (if applicable to the Property and Borrower);

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

(xii) such insurance as may be required pursuant to the terms of the Ground Lease;

(xiii) such insurance as may be required pursuant to the terms of the Franchise Agreement; and

(xiv) such other insurance and in such amounts as Lender from time to time may reasonably request against such other insurable hazards which at the time are commonly insured against for property similar to the Property located in or around the region in which the Property is located.

(b) All insurance provided for in Subsection 7.1(a) hereof shall be obtained under valid and enforceable policies (the “**Policies**” or in the singular, the “**Policy**”), in such forms and, from time to time after the date hereof, in such amounts as may be satisfactory to Lender, issued by financially sound and responsible insurance companies authorized to do business in the state in which the Property is located and approved by Lender. The insurance companies must have a financial strength rating of “A” or better and a financial size category of “VIII” or better by A.M. Best Company, Inc., and a rating of (i) “A-” or better by S&P, and (ii) if Moody’s rates the insurance company and is designated by Lender in connection with the Securitization, “A3” or better by Moody’s (each such insurer shall be referred to below as a “**Qualified Insurer**”). Not less than fifteen (15) days prior to the expiration dates of the Policies theretofore furnished to Lender pursuant to Subsection 7.1(a), Borrower shall deliver carrier-issued binders and certificates of the renewal Policies, and thereafter, complete copies of the Policies when issued. Upon renewal of the Policies, Borrower shall deliver evidence satisfactory to Lender of payment of the premiums due thereunder (the “**Insurance Premiums**”).

(c) Except to the extent required pursuant to Section 7.1(a) hereof, Borrower shall not obtain (or permit to be obtained) (i) any umbrella or blanket liability or casualty Policy unless, in each case, such Policy is approved in advance in writing by Lender and Lender's interest is included therein as provided in this Agreement and such Policy is issued by a Qualified Insurer, or (ii) separate insurance concurrent in form or contributing in the event of loss with that required in Subsection 7.1(a) to be furnished by, or which may be reasonably required to be furnished by, Borrower. In the event Borrower obtains (or causes to be obtained) separate insurance or an umbrella or a blanket Policy, Borrower shall notify Lender of the same and shall cause complete copies of each Policy to be delivered as required in Subsection 7.1(a). Any umbrella or blanket Policy remains subject to review and approval by Lender based on the schedule of locations and values. Notwithstanding Lender's approval of any umbrella or blanket liability or casualty Policy hereunder, Lender reserves the right, in its sole discretion, to require Borrower to obtain a separate Policy in compliance with this Section 7.1.

(d) All Policies of insurance provided for or contemplated by Subsection 7.1(a) shall name Borrower as the named insured and, in the case of liability policies, except for the Policies referenced in Subsection 7.1(a)(v) and (xi), shall name Lender as additional insured, as their respective interests may appear, and in the case of property coverages, including but not limited to the all-risk/special form coverage, rent loss, business interruption, terrorism, boiler and machinery, earthquake and flood insurance, shall name Lender as mortgagee/lender's loss payable by a standard noncontributing mortgagee clause in favor of Lender providing that the loss thereunder shall be payable to Lender.

(e) All Policies of insurance provided for in Subsection 7.1(a) shall provide that:

(i) with respect to the Policies (other than those Policies limited to liability protection), (1) no (A) act, failure to act, violation of warranties, declarations or conditions, or negligence by Borrower, or anyone acting for Borrower, or by any Tenant under any Lease or other occupant, (B) occupancy or use of the Property for purposes more hazardous than those permitted, (C) foreclosure or similar action by Lender, or (D) failure to comply with the provisions of any Policy which might otherwise result in a forfeiture of the insurance or any part thereof, shall in any way affect the validity or enforceability of the insurance insofar as Lender is concerned and (2) the Policies shall not be cancelled without at least thirty (30) days' written notice to Lender, except ten (10) days' notice for non-payment of premium;

(ii) with respect to the Policies limited to liability protection, if available to Borrower using commercially reasonable efforts, such Policies shall not be cancelled without at least thirty (30) days' written notice to Lender, except ten (10) days' notice for non-payment of premium; provided, however, if the issuer will not or cannot provide such endorsements or the notices required in this clause (ii), Borrower shall be obligated to provide such notices;

(iii) with respect to all Policies, if available to Borrower using commercially reasonable efforts, such Policies shall not be materially changed without thirty (30) days' written notice to Lender; provided, however, if the issuer will not or cannot provide such

endorsements or the notices required in this clause (iii), Borrower shall be obligated to provide such notice;

(iv) each Policy shall provide that (A) the issuers thereof shall give written notice to Lender if the Policy has not been renewed ten (10) days prior to its expiration and (B) Lender is permitted to make payments to effect the continuation of such Policy upon notice of cancellation due to non-payment of Insurance Premiums; and

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

Additionally, Borrower further covenants and agrees to promptly send to Lender any notices of non-renewal or cancellation it receives from the insurer with respect to the Policies required pursuant to this Section 7.1.

(f) Borrower shall furnish to Lender, on or before thirty (30) days after the close of each of Borrower's fiscal years, a statement certified by Borrower or a Responsible Officer of Borrower of the amounts of insurance maintained in compliance herewith, of the risks covered by such insurance and of the insurance company or companies which carry such insurance and, if requested by Lender, verification of the adequacy of such insurance by an independent insurance broker or appraiser acceptable to Lender.

(g) If at any time Lender is not in receipt of written evidence that all insurance required hereunder is in full force and effect, Lender shall have the right, without notice to Borrower to take such action as Lender deems necessary to protect its interest in the Property, including, without limitation, the obtaining of such insurance coverage as Lender in its sole discretion deems appropriate, and all expenses incurred by Lender in connection with such action or in obtaining such insurance and keeping it in effect shall be paid by Borrower to Lender upon demand and until paid shall be secured by the Security Instrument and shall bear interest at the Default Rate.

(h) In the event of a foreclosure of the Security Instrument or other transfer of title to the Property in extinguishment in whole or in part of the Debt, all right, title and interest of Borrower in and to the Policies then in force concerning the Property and all proceeds payable thereunder shall thereupon vest exclusively in Lender or the purchaser at such foreclosure or other transferee in the event of such other transfer of title.

(i) As an alternative to the Policies required to be maintained pursuant to the preceding provisions of this Section 7.1, Borrower will not be in default under this Section 7.1 if Borrower maintains (or causes to be maintained) Policies which (i) have coverages, deductibles and/or other related provisions other than those specified above and/or (ii) are provided by insurance companies not meeting the credit ratings requirements set forth above (any such Policy, a "**Non-Conforming Policy**"), provided, that, prior to obtaining such Non-Conforming Policies (or permitting such Non-Conforming Policies to be obtained), Borrower shall have (1) received Lender's prior written consent thereto and (2) confirmed that Lender has received a Rating Agency Confirmation with respect to any such Non-Conforming Policy.

(j) The property, loss of rents/business interruption, general liability and umbrella liability insurance policies required in this Section 7.1 shall not exclude Terrorism Coverage

(defined below) (such insurance policies, the “**Applicable Policies**”). Such Terrorism Coverage shall comply with each of the applicable requirements for Policies set forth above (including, without limitation, those relating to deductibles); provided that, Lender, at Lender’s option, may reasonably require Borrower to obtain or cause to be obtained the Terrorism Coverage with higher deductibles than set forth above. As used above, “**Terrorism Coverage**” shall mean insurance for acts of terror or similar acts of sabotage; provided, that, for so long as the Terrorism Risk Insurance Act of 2002, as extended and modified by the Terrorism Risk Insurance Program Authorization Act of 2015 (as the same may be further modified, amended, or extended, “**TRIPRA**”) (i) remains in full force and effect and (ii) continues to cover both foreign and domestic acts of terror, the provisions of TRIPRA shall determine what is deemed to be included within this definition of “**Terrorism Coverage.**” Notwithstanding the foregoing, whether or not TRIPRA or subsequent statute, extension, or reauthorization is in effect, Borrower shall be required to carry terrorism insurance throughout the term of the Loan as required by the preceding sentence; provided, however, if TRIPRA (or such subsequent statute, extension or reauthorization) is not in effect Borrower shall not be required to pay annual premiums in excess of the TC Cap (defined below) in order to obtain the Terrorism Coverage (but Borrower shall be obligated to purchase the maximum amount of Terrorism Coverage available with funds equal to the TC Cap). As used above, “**TC Cap**” shall mean an amount equal to two (2) times the premium for a separate “Special Form” or “All Risks” policy or equivalent policy insuring only the Property on a stand-alone basis (including, without limitation, the insurance required pursuant to Sections 7.1(a)(i) and (iii) hereof) at the time that any Terrorism Coverage is excluded from any Applicable Policy.

### **Section 7.2 Casualty.**

If the Property shall be damaged or destroyed, in whole or in part, by fire or other casualty (a “**Casualty**”), Borrower shall give prompt notice of such damage to Lender and shall promptly commence and diligently prosecute the completion of the repair and restoration of the Property as nearly as possible to the condition the Property was in immediately prior to such Casualty, with such alterations as may be reasonably approved by Lender (a “**Restoration**”) and otherwise in accordance with Section 7.4. Borrower shall pay all costs of such Restoration whether or not such costs are covered by insurance. Lender may, but shall not be obligated to make proof of loss if not made promptly by Borrower.

### **Section 7.3 Condemnation.**

Borrower shall promptly give Lender notice of the actual or threatened commencement of any proceeding for the Condemnation of the Property of which Borrower has knowledge and shall deliver to Lender copies of any and all papers served in connection with such proceedings. Lender may participate in any such proceedings, and Borrower shall from time to time deliver to Lender all instruments requested by it to permit such participation. Borrower shall, at its expense, diligently prosecute any such proceedings, and shall consult with Lender, its attorneys and experts, and cooperate with them in the carrying on or defense of any such proceedings. Notwithstanding any taking by any public or quasi-public authority through Condemnation or otherwise (including but not limited to any transfer made in lieu of or in anticipation of the exercise of such taking), Borrower shall continue to pay the Debt at the time and in the manner provided for its payment in the Note and in this Agreement and the Debt shall not be reduced until any Award shall have been actually received and applied by Lender, after the deduction of expenses of collection, to the

reduction or discharge of the Debt. Lender shall not be limited to the interest paid on the Award by the condemning authority but shall be entitled to receive out of the Award interest at the rate or rates provided herein or in the Note. If the Property or any portion thereof is taken by a condemning authority, Borrower shall promptly commence and diligently prosecute the Restoration of the Property and otherwise comply with the provisions of Section 7.4. If the Property is sold, through foreclosure or otherwise, prior to the receipt by Lender of the Award, Lender shall have the right, whether or not a deficiency judgment on the Note shall have been sought, recovered or denied, to receive the Award, or a portion thereof sufficient to pay the Debt.

#### **Section 7.4 Restoration.**

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

(a) If the Net Proceeds shall be less than the Restoration Threshold and the costs of completing the Restoration shall be less than the Restoration Threshold, the Net Proceeds will be disbursed by Lender to Borrower upon receipt, provided that all of the conditions set forth in Section 7.4(b)(i) are met and Borrower delivers to Lender a written undertaking to expeditiously commence and to satisfactorily complete with due diligence the Restoration in accordance with the terms of this Agreement.

(b) If the Net Proceeds are equal to or greater than the Restoration Threshold or the costs of completing the Restoration are equal to or greater than the Restoration Threshold, Lender shall make the Net Proceeds available for the Restoration in accordance with the provisions of this Section 7.4.

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

- (A) no Event of Default shall have occurred and be continuing;
- (B) (1) in the event the Net Proceeds are insurance proceeds, less than thirty percent (30%) of each of (i) the fair market value of the Property as reasonably determined by Lender, and (ii) the rentable area of the Property has been damaged, destroyed or rendered unusable as a result of a Casualty or (2) in the event the Net Proceeds are condemnation proceeds, less than ten percent (10%) of each of (i) the fair market value of the Property as reasonably determined by Lender and (ii) the rentable area of the Property is taken, such land is located along the perimeter or periphery of the Property, no portion of the Improvements is located on such land, and such taking does not materially impair the existing access to the Property;
- (C) intentionally omitted;
- (D) Borrower shall commence the Restoration as soon as reasonably practicable (but in no event later than forty-five (45) days after the issuance of a building permit with respect thereto) and shall diligently pursue the same to satisfactory completion in compliance with all Applicable Laws, in all

material respects, including, without limitation, all applicable Environmental Laws;

- (E) Lender shall be satisfied that any operating deficits which will be incurred with respect to the Property as a result of the occurrence of any such fire or other casualty or taking will be covered out of (1) the Net Proceeds, (2) the insurance coverage referred to in Section 7.1(a)(iii) above, or (3) by other funds of Borrower;
- (F) Lender shall be satisfied that, upon the completion of the Restoration, the fair market value and cash flow of the Property will not be less than the fair market value and cash flow of the Property as the same existed immediately prior to the applicable Casualty or Condemnation (assuming the affected portion of the Property is relet within a reasonable period after the date of such Casualty or Condemnation);
- (G) Lender shall be satisfied that the Restoration will be completed on or before the earliest to occur of (1) three (3) months prior to the Maturity Date, (2) the expiration of the insurance coverage referred to in Section 7.1(a)(iii) above, (3) such time as may be required under applicable zoning law, ordinance, rule or regulation in order to repair and restore the Property to the condition it was in immediately prior to such fire or other casualty or taking, or (4) the earliest date required for such completion under the terms of any Material Agreements or REA;
- (H) the Property and the use thereof after the Restoration will be in compliance with and permitted under the Ground Lease, the Franchise Agreement, any REA, any Material Agreements and all Applicable Law;
- (I) the Restoration shall be done and completed in an expeditious and diligent fashion and in compliance with the Ground Lease, the Franchise Agreement, any REA, any Material Agreements and all Applicable Law; and
- (J) Lender shall be satisfied that making the Net Proceeds available for Restoration shall be permitted pursuant to REMIC Requirements.

(ii) The Net Proceeds shall be held by Lender and, until disbursed in accordance with the provisions of this Section 7.4(b), shall constitute additional security for the Debt and other obligations under this Agreement, the Security Instrument, the Note and the other Loan Documents. The Net Proceeds (other than the Rent Loss Proceeds) shall be disbursed by Lender to, or as directed by, Borrower from time to time during the course of the Restoration, upon receipt of evidence satisfactory to Lender that (A) all materials installed and work and labor performed (except to the extent that they are to be paid for out of the requested disbursement) in connection with the related Restoration item have been paid for in full, and (B) there exist no notices of pendency, stop orders, mechanic's or materialman's liens or notices of intention to file same, or any other liens or encumbrances

of any nature whatsoever on the Property (other than Permitted Encumbrances) which have not either been fully bonded to the satisfaction of Lender and discharged of record or in the alternative fully insured to the satisfaction of Lender by the title company issuing the Title Insurance Policy.

(iii) All plans and specifications required in connection with the Restoration shall be subject to prior review and acceptance in all reasonable respects by Lender and by an independent consulting engineer selected by Lender (the “**Casualty Consultant**”). All such plans and specifications and all permits, licenses and approvals required or obtained in connection with the Restoration shall be assigned to Lender as additional collateral for the Loan and Lender shall have the use of the same. The identity of the contractors, subcontractors and materialmen engaged in the Restoration shall be subject to prior review and acceptance by Lender and the Casualty Consultant. All reasonable out-of-pocket costs and expenses incurred by Lender in connection with making the Net Proceeds available for the Restoration including, without limitation, reasonable counsel fees and disbursements and the Casualty Consultant’s fees, shall be paid by Borrower. Borrower shall have the right to settle all claims under the Policies jointly with Lender, provided that (a) no Event of Default exists, (b) Borrower promptly and with commercially reasonable diligence negotiates a settlement of any such claims and (c) the insurer with respect to the Policy under which such claim is brought has not raised any act of the insured as a defense to the payment of such claim. If an Event of Default exists, Lender shall, at its election, have the exclusive right to settle or adjust any claims made under the Policies in the event of a Casualty.

(iv) In no event shall Lender be obligated to make disbursements of the Net Proceeds in excess of an amount equal to the costs actually incurred from time to time for work in place as part of the Restoration, as certified by the Casualty Consultant, minus the Restoration Retainage. The term “**Restoration Retainage**” as used in this Section 7.4(b) shall mean an amount equal to 5% of the costs actually incurred for work in place as part of the Restoration, as certified by the Casualty Consultant, until such time as the Casualty Consultant certifies to Lender that Net Proceeds representing 50% of the required Restoration have been disbursed. There shall be no Restoration Retainage with respect to costs actually incurred by Borrower for work in place in completing the last 50% of the required Restoration. The Restoration Retainage shall in no event, and notwithstanding anything to the contrary set forth above in this Section 7.4(b), be less than the amount actually held back by Borrower from contractors, subcontractors and materialmen engaged in the Restoration. The Restoration Retainage shall not be released until the Casualty Consultant certifies to Lender that the Restoration has been completed in accordance with the provisions of this Section 7.4(b) and that all approvals necessary for the re-occupancy and use of the Property have been obtained from all appropriate governmental and quasi-governmental authorities, and Lender receives evidence satisfactory to Lender that the costs of the Restoration have been paid in full or will be paid in full out of the Restoration Retainage, provided, however, that Lender will release the portion of the Restoration Retainage being held with respect to any contractor, subcontractor or materialman engaged in the Restoration as of the date upon which the Casualty Consultant certifies to Lender that the contractor, subcontractor or materialman has satisfactorily completed all work and has supplied all materials in accordance with the provisions of the contractor’s,

subcontractor's or materialman's contract, and the contractor, subcontractor or materialman delivers the lien waivers and evidence of payment in full of all sums due to the contractor, subcontractor or materialman as may be reasonably requested by Lender or by the title company insuring the lien of the Security Instrument. If required by Lender, the release of any such portion of the Restoration Retainage shall be approved by the surety company, if any, which has issued a payment or performance bond with respect to the contractor, subcontractor or materialman.

(v) Lender shall not be obligated to make disbursements of the Net Proceeds more frequently than once every calendar month.

(vi) If at any time the Net Proceeds or the undisbursed balance thereof shall not, in the reasonable opinion of Lender in consultation with the Casualty Consultant, be sufficient to pay in full the balance of the costs which are estimated by the Casualty Consultant to be incurred in connection with the completion of the Restoration, Borrower shall deposit the deficiency (the "**Net Proceeds Deficiency**") with Lender before any further disbursement of the Net Proceeds shall be made; provided, however, if Borrower obtains a bonded construction contract, the dollar value of such contract shall be used to calculate the Net Proceeds Deficiency. The Net Proceeds Deficiency deposited with Lender shall be held by Lender and shall be disbursed for costs actually incurred in connection with the Restoration on the same conditions applicable to the disbursement of the Net Proceeds, and until so disbursed pursuant to this Section 7.4(b) shall constitute additional security for the Debt and other obligations under this Agreement, the Security Instrument, the Note and the other Loan Documents.

(vii) The excess, if any, of the Net Proceeds and the remaining balance, if any, of the Net Proceeds Deficiency deposited with Lender after the Casualty Consultant certifies to Lender that the Restoration has been completed in accordance with the provisions of this Section 7.4(b), and the receipt by Lender of evidence satisfactory to Lender that all costs incurred in connection with the Restoration have been paid in full, shall be remitted by Lender to Borrower, provided no Event of Default shall have occurred and shall be continuing under this Agreement, the Security Instrument, the Note or any of the other Loan Documents.

(c) All Net Proceeds not required (i) to be made available for the Restoration or (ii) to be returned to Borrower as excess Net Proceeds pursuant to Section 7.4(b)(vii) shall be retained and applied by Lender toward the payment of the Debt whether or not then due and payable in such order, priority and proportions as Lender in its discretion shall deem proper. If Lender shall receive and retain Net Proceeds, (x) the lien of the Security Instrument shall be reduced only by the amount thereof received and retained by Lender and actually applied by Lender in reduction of the Debt, and (y) if the Net Proceeds are actually applied by Lender in reduction of the Debt, the Monthly Debt Service Payment Amount shall be adjusted accordingly by Lender to reflect such application of Net Proceeds in reduction of the Debt and, if applicable, the re-amortization of the remaining principal balance of the Loan over the remaining amortization period.



(d) Notwithstanding the foregoing provisions of this Section 7.4 or anything herein to the contrary, this Section 7.4 is subject to the terms of Section 11.3 hereof to the extent applicable with respect to any Casualty or Condemnation.

(e) Notwithstanding the foregoing provisions of Article 7 or anything in this Agreement to the contrary (but in all cases subject to the terms of Section 11.3 hereof), to the extent the terms of this Article 7 with respect to the application and distribution of Net Proceeds conflict with the terms of the Ground Lease, such application and distribution shall be made in accordance with the terms of the Ground Lease (and to the extent the terms of this Article 7 with respect to the application and distribution of Net Proceeds do not conflict with the terms of the Ground Lease, such application and distribution shall be made in accordance with the terms of this Article 7).

## **ARTICLE 8.**

### **RESERVE FUNDS**

#### **Section 8.1 Tax Reserve Funds.**

(a) On the Closing Date, Borrower shall deposit with Lender the amount of \$31,027.00 and Borrower shall deposit on each Monthly Payment Date an amount equal to one-twelfth (1/12<sup>th</sup>) of the Taxes that Lender estimates will be payable during the next ensuing twelve (12) months in order to accumulate sufficient funds to pay all such Taxes at least ten (10) days prior to their respective due dates (the “**Monthly Tax Deposit**”). Amounts deposited pursuant to this Section 8.1 are referred to herein as the “**Tax Reserve Funds**”. The initial estimated Monthly Tax Deposit shall be \$31,027.00. If at any time Lender reasonably determines that the Tax Reserve Funds will not be sufficient to pay the Taxes, Lender shall notify Borrower of such determination and the monthly deposits for Taxes shall be increased by the amount that Lender estimates is sufficient to make up the deficiency at least ten (10) days prior to the respective due dates for the Taxes; provided that if Borrower receives notice of any deficiency after the date that is ten (10) days prior to the date that Taxes are due, Borrower will deposit such amount within five (5) Business Days after its receipt of such notice. All Tax Reserve Funds shall be held by Lender or Servicer in an Eligible Account (the “**Tax Reserve Account**”).

(b) To the extent of available Tax Reserve Funds in the Tax Reserve Account, Lender shall apply the Tax Reserve Funds to payments of Taxes. In making any payment relating to Taxes, Lender may do so according to any bill, statement or estimate procured from the appropriate public office (with respect to Taxes) without inquiry into the accuracy of such bill, statement or estimate or into the validity of any tax, assessment, sale, forfeiture, tax lien or title or claim thereof. If the amount of the Tax Reserve Funds shall exceed the amounts due for Taxes, Lender shall, in its sole discretion, return any excess to Borrower or credit such excess against future payments to be made to the Tax Reserve Funds. Any Tax Reserve Funds remaining after the Debt has been paid in full shall be returned to Borrower.

## **Section 8.2 Insurance Reserve Funds.**

(a) (i) Borrower shall deposit on each Monthly Payment Date an amount equal to one-twelfth (1/12<sup>th</sup>) of the Insurance Premiums that Lender estimates will be payable for the renewal of the coverage afforded by the Policies upon the expiration thereof in order to accumulate sufficient funds to pay all such Insurance Premiums at least thirty (30) days prior to the expiration of the Policies (the “**Monthly Insurance Deposit**”). Amounts deposited pursuant to this Section 8.2 are referred to herein as the “**Insurance Reserve Funds**”. If at any time Lender reasonably determines that the Insurance Reserve Funds will not be sufficient to pay the Insurance Premiums, Lender shall notify Borrower of such determination and the monthly deposits for Insurance Premiums shall be increased by the amount that Lender estimates is sufficient to make up the deficiency at least thirty (30) days prior to expiration of the Policies. All Insurance Reserve Funds shall be held by Lender or Servicer in an Eligible Account (the “**Insurance Reserve Account**”).

(ii) Notwithstanding the foregoing, Borrower shall not be required to make the Monthly Insurance Deposit as set forth above, provided that (w) no Event of Default shall have occurred and be continuing, (x) the Policies maintained by Borrower covering the Property are part of a blanket or umbrella policy approved by Lender in its reasonable discretion pursuant to Section 7.1 hereof, including, without limitation, approval of the schedule of locations and values, (y) Borrower provides Lender evidence of renewal of such Policies pursuant to Section 7.1 hereof, and (z) Borrower provides Lender paid receipts for the payment of the Insurance Premiums by no later than ten (10) Business Days prior to the expiration dates of the Policies. Borrower shall immediately commence making all Monthly Insurance Deposits, as required pursuant to this Section 8.2, within five (5) days of receipt of notice from Lender of Borrower’s failure to comply with items (w), (x), (y) or (z) above, which such notice shall instruct Borrower to immediately commence making all Monthly Insurance Deposits.

(b) To the extent of available Insurance Reserve Funds in the Insurance Reserve Account, Lender shall apply the Insurance Reserve Funds to payment of Insurance Premiums. In making any payment relating to Insurance Premiums, Lender may do so according to any bill, statement or estimate procured from the insurer or its agent, without inquiry into the accuracy of such bill, statement or estimate. If the amount of the Insurance Reserve Funds shall exceed the amounts due for Insurance Premiums, Lender shall, in its sole discretion, return any excess to Borrower or credit such excess against future payments to be made to the Insurance Reserve Funds. Any Insurance Reserve Funds remaining after the Debt has been paid in full shall be returned to Borrower.

## **Section 8.3 Immediate Repair Funds.**

(a) Borrower shall perform the repairs at the Property as set forth on Schedule I hereto (such repairs hereinafter referred to as “**Immediate Repairs**”) and shall complete each of the Immediate Repairs on or before the respective deadline for each repair as set forth on Schedule I hereto; provided that, Lender may, in its sole discretion, extend the respective deadlines for performance of such Immediate Repairs by written notice to Borrower. On the Closing Date, Borrower shall deposit with Lender the amount set forth on such Schedule I hereto to perform the

Immediate Repairs. Amounts deposited pursuant to this Section 8.3 are referred to herein as the “**Immediate Repair Funds**”. All Immediate Repair Funds shall be held by Lender or Servicer in an Eligible Account (the “**Immediate Repair Reserve Account**”).

(b) Provided no Event of Default has occurred and is continuing, Lender shall disburse Immediate Repair Funds to Borrower within fifteen (15) Business Days after the delivery by Borrower to Lender of a Disbursement Request Form together with Lender’s then standard reserve disbursement schedule (but not more often than once per month), in increments of at least the Minimum Disbursement Amount (or a lesser amount if the total amount of Immediate Repair Funds is less than the Minimum Disbursement Amount, in which case only one disbursement of the amount remaining shall be made). Additionally, with respect to any disbursement that is \$700,000 or more, in connection with any invoice relating to such disbursement that is greater than \$150,000, Borrower shall also provide the following items (which items shall be in form and substance satisfactory to Lender): (i) an Officer’s Certificate (A) stating that the Immediate Repairs (or relevant portion thereof) to be funded by the requested disbursement have been completed in a good and workmanlike manner and in accordance with all Applicable Law and the Ground Lease, (B) identifying each Person that supplied materials or labor in connection with the Immediate Repairs to be funded by the requested disbursement, (C) stating that each such Person has been paid in full or will be paid in full upon such disbursement, or if such payment is a progress payment, that such payment represents full payment to such Person, less any applicable retention amount, for work completed through the date of the relevant invoice from such Person, (D) stating that the Immediate Repairs (or relevant portion thereof) to be funded have not been the subject of a previous disbursement, and (E) stating that all previous disbursements for Immediate Repairs have been used to pay the previously identified Immediate Repairs, (ii) as to any completed Immediate Repair, a copy of any license, permit or other approval by any Governmental Authority required, if any, in connection with the Immediate Repairs and not previously delivered to Lender, (iii) copies of appropriate lien waivers (or conditional lien waivers) or other evidence of payment satisfactory to Lender, (iv) at Lender’s option, if the requested disbursement is greater than \$150,000, a title search for the Property indicating that the Property is free from all Liens, claims and other encumbrances other than Permitted Encumbrances, (v) at Lender’s option, if the cost of the Immediate Repairs exceeds \$150,000, Lender shall have received a report satisfactory to Lender in its reasonable discretion from an architect or engineer approved by Lender in respect of such architect or engineer’s inspection of such Immediate Repairs, and (vi) such other evidence as Lender shall reasonably request to demonstrate that the Immediate Repairs to be funded by the requested disbursement have been completed (or completed to the extent of the requested payment) and are paid for or will be paid upon such disbursement to Borrower. Upon Borrower’s completion of all Immediate Repairs in accordance with this Section 8.3 and provided no Event of Default has occurred and is continuing, Lender shall release any remaining Immediate Repair Funds, if any, to Borrower.

#### **Section 8.4 Springing PIP Reserve Funds.**

(a) In the event that any PIP Work is required by the Franchisor under the Franchise Agreement, within thirty (30) days after receipt of notice from Franchisor with respect to such PIP Work, Borrower shall deposit with Lender an amount equal to 125% of the estimated costs to complete such additional PIP Work, as reasonably determined by Lender (collectively, the “**PIP Reserve Deposit**”). Amounts deposited pursuant to this Section 8.4 are referred to herein as the

**“PIP Reserve Funds”**. All PIP Reserve Funds shall be held by Lender or Servicer in an Eligible Account (the **“PIP Reserve Account”**). Failure to timely make any PIP Reserve Deposit shall be an Event of Default. Borrower shall provide Lender with any information Lender may request from time to time relating to any PIP Work. Lender may reassess its estimate of the future cost of PIP Work from time to time, and may require Borrower to (and Borrower shall) deposit additional PIP Reserve Funds upon thirty (30) days’ notice to Borrower in order to cause the amount of PIP Reserve Funds on deposit to equal 125% of Lender’s reasonably estimated future cost of new and remaining PIP Work.

(b) Lender shall disburse PIP Reserve Funds only for PIP Work. Provided no Event of Default has occurred and is continuing, Lender shall disburse PIP Reserve Funds to Borrower within fifteen (15) Business Days after the delivery by Borrower to Lender of a Disbursement Request Form together with Lender’s then standard reserve disbursement schedule (but not more often than once per month), in increments of at least the Minimum Disbursement Amount (or a lesser amount if the total amount of the PIP Reserve Funds is less than the Minimum Disbursement Amount, in which case only one disbursement of the amount remaining shall be made). Additionally, with respect to any disbursement that is \$700,000 or more, in connection with any invoice relating to such disbursement that is greater than \$150,000, Borrower shall also provide the following items (which items shall be in form and substance satisfactory to Lender): (i) an Officer’s Certificate (A) stating that the items to be funded by the requested disbursement are PIP Work, (B) stating that all PIP Work at the Property to be funded by the requested disbursement has been completed in a good and workmanlike manner and in accordance with all Applicable Law, the Ground Lease and the Franchise Agreement, (C) identifying each Person that supplied materials or labor in connection with the PIP Work to be funded by the requested disbursement, (D) stating that each such Person has been paid in full or will be paid in full upon such disbursement or, if such payment is a progress payment, that such payment represents full payment to such Person, less any applicable retention amount, for work completed through the date of the relevant invoice from such Person, (E) stating that the PIP Work (or relevant portion thereof) to be funded has not been the subject of a previous disbursement, and (F) stating that all previous disbursements for PIP Work have been used to pay the previously identified PIP Work, (ii) as to any completed PIP Work, a copy of any license, permit or other approval by any Governmental Authority required, if any, in connection with the PIP Work and not previously delivered to Lender, (iii) copies of appropriate lien waivers (or conditional lien waivers) or other evidence of payment satisfactory to Lender, (iv) at Lender’s option, if the requested disbursement is greater than \$150,000, a title search for the Property indicating that the Property is free from all Liens, claims and other encumbrances other than Permitted Encumbrances or other encumbrances previously approved by Lender in writing, (v) at Lender’s option, if the cost of any individual PIP Work exceeds \$150,000, Lender shall have received a report satisfactory to Lender in its reasonable discretion from an architect or engineer approved by Lender in respect of such architect or engineer’s inspection of the applicable PIP Work, and (vi) such other evidence as Lender shall reasonably request to demonstrate that the PIP Work to be funded by the requested disbursement has been completed (or completed to the extent of the requested payment) and has been paid for or will be paid upon such disbursement to Borrower.

(c) Nothing in this Section 8.4 shall (i) make Lender responsible for making or completing the PIP Work; (ii) require Lender to expend funds in addition to the PIP Reserve Funds

to complete any PIP Work; (iii) obligate Lender to proceed with the PIP Work; or (iv) obligate Lender to demand from Borrower additional sums to complete any PIP Work.

(d) Borrower shall permit Lender and Lender's agents and representatives (including, without limitation, Lender's engineer, architect, or inspector) or third parties to enter onto the Property during normal business hours (subject to the rights of Tenants under their Leases) to inspect the progress of any PIP Work and all materials being used in connection therewith and to examine all plans and shop drawings relating to such PIP Work. Borrower shall cause all contractors and subcontractors to cooperate with Lender or Lender's representatives or such other Persons described above in connection with inspections described in this Section.

(e) In addition to any insurance required under the Loan Documents, Borrower shall provide or cause to be provided workmen's compensation insurance, builder's risk, and public liability insurance and other insurance to the extent required under Applicable Law in connection with the PIP Work. All such policies shall be in form and amount reasonably satisfactory to Lender.

#### **Section 8.5 FF&E Reserve Funds.**

(a) Borrower shall deposit with Lender on each Monthly Payment Date an amount equal to the FF&E Reserve Monthly Deposit for the costs and expenses of replacement and maintenance of furniture, furnishings, fixtures and equipment that may be incurred following the date hereof to fully equip the hotel on the Property as set forth in the Lender-approved Annual Budget (collectively, the "**FF&E Work**"). Amounts deposited pursuant to this Section 8.5 are referred to herein as the "**FF&E Reserve Funds**". All FF&E Reserve Funds shall be held by Lender or Servicer in an Eligible Account (the "**FF&E Reserve Account**"). Based on the annual operating statements for the Property, Lender may adjust the FF&E Reserve Monthly Deposit to the greater of (x) the then-existing FF&E Reserve Monthly Deposit or (y) one-twelfth of four percent (4.0%) of the Underwritten Revenue (as defined on Exhibit A) for the prior fiscal year.

(b) Lender shall disburse FF&E Reserve Funds only for FF&E Work. Provided no Event of Default has occurred and is continuing, Lender shall disburse FF&E Reserve Funds to Borrower within fifteen (15) Business Days after the delivery by Borrower to Lender of a Disbursement Request Form together with Lender's then standard reserve disbursement schedule (but not more often than once per month), in increments of at least the Minimum Disbursement Amount (or a lesser amount if the total amount of the FF&E Reserve Funds is less than the Minimum Disbursement Amount, in which case only one disbursement of the amount remaining shall be made). Additionally, with respect to any disbursement that is \$700,000 or more in the aggregate for an item of FF&E Work, in connection with any single invoice to a particular vendor relating to such disbursement that is greater than \$150,000, Borrower shall also provide the following items (which items shall be in form and substance satisfactory to Lender): (i) an Officer's Certificate (A) stating that the items to be funded by the requested disbursement are FF&E Work, (B) stating that all FF&E Work at the Property to be funded by the requested disbursement has been completed in a good and workmanlike manner and in accordance with all Applicable Law, the Ground Lease and the Franchise Agreement, (C) identifying each Person that supplied materials or labor in connection with the FF&E Work to be funded by the requested disbursement, (D) stating that each such Person has been paid in full or will be paid in full upon

such disbursement or, if such payment is a progress payment, that such payment represents full payment to such Person, less any applicable retention amount, for work completed through the date of the relevant invoice from such Person, (E) stating that the FF&E Work (or relevant portion thereof) to be funded has not been the subject of a previous disbursement, and (F) stating that all previous disbursements for FF&E Work have been used to pay the previously identified FF&E Work, (ii) as to any completed FF&E Work, a copy of any license, permit or other approval by any Governmental Authority required, if any, in connection with the FF&E Work and not previously delivered to Lender, (iii) copies of appropriate lien waivers (or conditional lien waivers) or other evidence of payment satisfactory to Lender, (iv) at Lender's option, if the requested disbursement is greater than \$150,000, a title search for the Property indicating that the Property is free from all Liens, claims and other encumbrances other than Permitted Encumbrances or other encumbrances previously approved by Lender in writing, (v) at Lender's option, if the cost of any individual FF&E Work exceeds \$150,000, Lender shall have received a report satisfactory to Lender in its reasonable discretion from an architect or engineer approved by Lender in respect of such architect or engineer's inspection of the applicable FF&E Work, and (vi) such other evidence as Lender shall reasonably request to demonstrate that the FF&E Work to be funded by the requested disbursement has been completed (or completed to the extent of the requested payment) and has been paid for or will be paid upon such disbursement to Borrower.

#### **Section 8.6 The Accounts Generally.**

(a) All Reserve Funds shall be held in Eligible Accounts. Borrower grants to Lender a first-priority perfected security interest in each of the Reserve Funds, the Accounts and all sums now or hereafter deposited in the Reserve Funds and the Accounts as additional security for payment of the Debt. Until expended or applied in accordance herewith, the Reserve Funds and the Accounts shall constitute additional security for the Debt. The provisions of this Section 8.6 are intended to give Lender and/or Servicer "control" of the Reserve Funds and the Accounts within the meaning of the UCC. Borrower acknowledges and agrees that the Reserve Funds and the Accounts are subject to the sole dominion, control and discretion of Lender, its authorized agents or designees, subject to the terms hereof, and Borrower shall have no right of withdrawal with respect to any Reserve Funds except with the prior written consent of Lender or as otherwise provided herein. The Reserve Funds shall not constitute trust funds and may be commingled with other monies held by Lender.

(b) Borrower shall not, without obtaining the prior written consent of Lender, further pledge, assign or grant any security interest in the Reserve Funds or the Accounts or permit any lien to attach thereto, or any levy to be made thereon, or any UCC-1 Financing Statements, except those naming Lender as the secured party, to be filed with respect thereto. Lender shall have the right to file a financing statement or statements under the UCC in connection with any of the Reserve Funds and/or the Accounts with respect thereto in the form required to properly perfect Lender's security interest therein. Borrower agrees that at any time and from time to time, at the expense of Borrower, Borrower will promptly execute and deliver all further instruments and documents, and take all further action, that may be reasonably necessary or desirable, or that Lender may reasonably request, in order to perfect and protect any security interest granted or purported to be granted hereby or to enable Lender to exercise and enforce its rights and remedies hereunder with respect to any Reserve Funds and/or the Accounts.

(c) Notwithstanding anything to the contrary contained herein or in any other Loan Document, upon the occurrence and during the continuance of an Event of Default, without notice from Lender or Servicer (i) Borrower shall have no rights in respect of the Reserve Funds and (ii) Lender shall have all rights and remedies with respect to the Accounts and the amounts on deposit therein and the Reserve Funds as described in this Agreement, the Cash Management Agreement and in the Security Instrument, in addition to all of the rights and remedies available to a secured party under the UCC, and, notwithstanding anything to the contrary contained in this Agreement, the Cash Management Agreement or in the Security Instrument, may apply the Reserve Funds as Lender determines in its sole discretion including, but not limited to, payment of the Debt.

(d) The insufficiency of Reserve Funds on deposit with Lender shall not absolve Borrower of the obligation to make any payments, as and when due pursuant to this Agreement and the other Loan Documents, and such obligations shall be separate and independent, and not conditioned on any event or circumstance whatsoever.

(e) Borrower shall indemnify Lender and hold Lender harmless from and against any and all actions, suits, claims, demands, liabilities, losses, damages, obligations and costs and expenses (including litigation costs and reasonable attorneys' fees and expenses) arising from or in any way connected with the Reserve Funds, the Accounts, the sums deposited therein or the performance of the obligations for which the Reserve Funds were established, except to the extent arising from the gross negligence or willful misconduct of Lender, its agents or employees. Borrower shall assign to Lender all rights and claims Borrower may have against all Persons supplying labor, materials or other services which are to be paid from or secured by the Reserve Funds and the Accounts; provided, however, that Lender may not pursue any such right or claim unless an Event of Default has occurred and remains uncured.

(f) Interest accrued, if any, on the Reserve Funds shall not be required to be remitted to any Account and may instead be retained by Lender.

(g) Borrower acknowledges and agrees that it solely shall be, and shall at all times remain, liable to Lender or Servicer for all fees, charges, costs and expenses in connection with the Reserve Funds, the Accounts, this Agreement and the enforcement hereof, including, without limitation, any monthly or annual fees or charges as may be assessed by Lender or Servicer in connection with the administration of the Accounts and the Reserve Funds and the reasonable fees and expenses of legal counsel to Lender and Servicer as needed to enforce, protect or preserve the rights and remedies of Lender and/or Servicer under this Agreement.

#### **Section 8.7 Ground Rent Reserve Funds.**

(a) During the continuance of a Cash Trap Event Period, Borrower shall deposit with Lender on each Monthly Payment Date an amount (the "**Monthly Ground Rent Deposit**") equal to one-sixth (1/6<sup>th</sup>) of the next semi-annual payment of the Ground Rent that will be payable under the Ground Lease for the month in which such Monthly Payment Date occurs (such amounts so deposited shall hereinafter be referred to as the "**Ground Rent Reserve Funds**"). Such deposit shall be increased based on any increases in the Ground Rent. All Ground Rent Reserve Funds

shall be held by Lender or Servicer in an Eligible Account (the “**Ground Rent Reserve Account**”).

(b) Lender shall apply the Ground Rent Reserve Funds to payments of Ground Rent. In making any payment relating to Ground Rent, Lender may do so according to any bill or statement given by the Ground Lessor without inquiry into the accuracy of such bill or statement or into the validity of any rent, additional rent or other charge thereof. If the amount of the Ground Rent Reserve Funds shall exceed the amounts due for Ground Rent, Lender shall, in its sole discretion, either (a) return any excess to Borrower or (b) credit such excess against future payments to be made to the Ground Rent Reserve Funds. Any Ground Rent Reserve Funds remaining after the Debt has been paid in full shall be returned to Borrower.

### **Section 8.8 Litigation Reserve Funds.**

(a) Borrower shall deposit with Lender on the date hereof \$3,845,515.00 (the “**Litigation Reserve Funds**”), representing the amount of potential liability in connection with the litigation relating to that certain Complaint Civil No. 18-1-0671-05 filed May 2, 2018 in the Circuit Court of the First Circuit of the State of Hawaii by Aqua Hospitality, LLC, as plaintiff, against Borrower, Tower Development, Inc., and Guarantors, as defendants (the “**Manager Litigation**”). All Litigation Reserve Funds shall be held by Lender or Servicer in an Eligible Account (the “**Litigation Reserve Account**”).

(b) Provided that (i) no Event of Default has occurred and is continuing, (ii) Borrower provides Lender with a fully-executed copy of a settlement agreement with respect to the Manager Litigation, which settlement agreement shall set forth a certain amount to be paid by Borrower to finally resolve the Manager Litigation and obtain a dismissal thereof with prejudice (the “**Settlement Amount**”), and (iii) other than payment of the Settlement Amount, Borrower shall have satisfied any and all conditions set forth in the settlement agreement, Lender shall disburse the Litigation Reserve Funds in the amount of the Settlement Amount directly to satisfy the payment obligation under the settlement agreement, and shall disburse any remaining Litigation Reserve Funds to Borrower

## **ARTICLE 9.**

### **CASH MANAGEMENT AGREEMENT**

#### **Section 9.1 Cash Management Agreement.**

Borrower shall enter into the Cash Management Agreement on the date hereof which shall govern the collection, holding and disbursement of Rents and any other income from the Property during the term of the Loan.

#### **Section 9.2 Cash Flow Sweep.**

In the event of a Cash Trap Event Period, all Excess Cash Flow (as defined in the Cash Management Agreement) shall be deposited into the Excess Cash Flow Subaccount (as defined in the Cash Management Agreement), as more particularly set forth in the Cash Management Agreement.



## ARTICLE 10.

### EVENTS OF DEFAULT; REMEDIES

#### Section 10.1 Event of Default.

The occurrence of any one or more of the following events shall constitute an “**Event of Default**”:

(a) if Borrower shall fail to (i) pay when due (A) any sums which by the express terms of this Agreement and the other Loan Documents require immediate or prompt payment without any grace period, (B) any monthly Debt Service and any amount required to be paid into the Reserve Funds or (C) any sums which are payable on the Maturity Date, or (ii) pay within five (5) days when due any other sums payable under this Agreement or any of the other Loan Documents;

(b) if any of the Taxes or Other Charges are not paid prior to delinquency, except to the extent (i) sums sufficient to pay such Taxes and Other Charges have been deposited with Lender in accordance with the terms of this Agreement and Lender’s access to such sums is not restricted or constrained in any manner, or (ii) Borrower is contesting unpaid Taxes or Other Charges (or part thereof) in accordance with Section 4.5(b) hereof;

(c) if the Policies are not kept in full force and effect or if evidence of the same is not delivered to Lender as provided in Section 7.1 hereof (provided demand is made therefor);

(d) if any of the representations or covenants contained in Article 5 hereof are breached or violated; provided, however, that if (i) the breach or violation is immaterial and susceptible of cure and (ii) Borrower delivers to Lender a New Non-Consolidation Opinion providing that such breach or violation, as cured by Borrower, does not negate or impair the opinion previously delivered to Lender, then such breach or violation shall not be deemed an Event of Default hereunder if it is cured within thirty (30) days after Borrower first becomes aware of the same;

(e) if any of the representations or covenants contained in Article 6 hereof are breached or violated;

(f) if any representation or warranty of, or with respect to, Borrower, Sponsor, Guarantor or any member, general partner, principal or beneficial owner of any of the foregoing, made herein, in the Guaranty or in the Environmental Indemnity or in any other guaranty, or in any certificate, report, financial statement or other instrument or document furnished to Lender shall have been false or misleading in any material adverse respect when made;

(g) if (i) Borrower, any SPE Component Entity, Sponsor or Guarantor shall commence any case, proceeding or other action (A) under any Creditors Rights Laws seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, or (B) seeking appointment of a receiver, trustee, custodian, conservator or other similar official for it or for all or any substantial part of its assets, or Borrower or any managing member or general partner of Borrower, any SPE Component Entity, Sponsor or Guarantor shall make a general assignment for the benefit of its creditors; (ii) there shall be commenced against Borrower or any managing member or general partner of Borrower, any SPE Component Entity,

Sponsor or Guarantor any case, proceeding or other action of a nature referred to in clause (i) above which (A) results in the entry of an order for relief or any such adjudication or appointment or (B) remains undismissed, undischarged or unbonded for a period of ninety (90) days; (iii) there shall be commenced against Borrower, any SPE Component Entity, Sponsor or Guarantor any case, proceeding or other action seeking issuance of a warrant of attachment, execution, distraint or similar process against all or any substantial part of its assets which results in the entry of any order for any such relief which shall not have been vacated, discharged, or stayed or bonded pending appeal within ninety (90) days from the entry thereof; (iv) Borrower, any SPE Component Entity, Sponsor or Guarantor shall take any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts set forth in clause (i), (ii), or (iii) above; or (v) Borrower, any SPE Component Entity, Sponsor or Guarantor shall generally not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due;

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

(i) subject to Borrower's right to contest pursuant to Sections 4.5(b) and 4.16(b) hereof, if the Property becomes subject to any mechanic's, materialman's or other lien other than a lien for any Taxes not then due and payable and the lien shall remain undischarged of record (by payment, bonding or otherwise) for a period of thirty (30) days;

(j) if any federal tax lien is filed against Borrower, any SPE Component Entity, Sponsor, Guarantor or the Property and same is not discharged of record (by payment, bonding or otherwise) within thirty (30) days after same is filed;

(k) if Borrower shall fail to comply with the covenants in Article 15 or otherwise fails to deliver to Lender, within twenty (20) days after request by Lender, the estoppel certificates required by Section 4.13(a) or (c) hereof;

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

(m) if any of the assumptions contained in the Non-Consolidation Opinion, or in any New Non-Consolidation Opinion are untrue or shall become untrue in any material respect;

(n) if Borrower shall fail to deliver to Lender within thirty (30) days after request by Lender any Required Financial Item and such failure continues for an additional thirty (30) days after a second request by Lender;

(o) if Borrower defaults under the Management Agreement beyond the expiration of applicable notice and grace periods, if any, thereunder such that the Management Agreement may be terminated or if the Management Agreement is canceled, terminated or surrendered or expires pursuant to its terms, unless in such case Borrower shall enter into a new management agreement with a Qualified Manager in accordance with the applicable terms and provisions hereof;

(p) if any representation and/or covenant herein relating to ERISA matters is breached;

(q) if (i) Borrower shall fail (beyond any applicable notice or grace period) to pay any charges payable under any REA or Material Agreements as and when payable thereunder, (ii) Borrower defaults under any REA or Material Agreements beyond the expiration of applicable notice and grace periods, if any, thereunder, (iii) any REA or Material Agreements are amended, supplemented, replaced, restated or otherwise modified in any material respect without Lender's prior written consent or if Borrower consents to a transfer of any party's interest thereunder without Lender's prior written consent, or (iv) any REA or Material Agreements and/or the estate created thereunder is canceled, rejected, terminated, surrendered or expires pursuant to its terms, unless in such case Borrower enters into a replacement thereof in accordance with the applicable terms and provisions hereof;

(r) if (i) Borrower shall fail in the payment of any rent, additional rent or other charge mentioned in or made payable by the Ground Lease as and when such rent or other charge is payable (unless waived by the Ground Lessor), (ii) there shall occur any default beyond any applicable cure period by Borrower, as tenant under the Ground Lease, in the observance or performance of any term, covenant or condition of the Ground Lease on the part of Borrower, to be observed or performed (unless waived by the Ground Lessor), (iii) if any one or more of the events referred to in the Ground Lease shall occur which would cause the Ground Lease to terminate without notice or action by the Ground Lessor or which would entitle the Ground Lessor to terminate the Ground Lease and the term thereof by giving notice to Borrower, as tenant thereunder (unless waived by the Ground Lessor), (iv) if the leasehold estate created by the Ground Lease shall be surrendered or the Ground Lease shall be terminated or canceled for any reason or under any circumstances whatsoever or (v) if any of the terms, covenants or conditions of the Ground Lease shall in any manner be modified, changed, supplemented, altered, or amended without the consent of Lender except as otherwise permitted by this Agreement;

(s) if Borrower shall continue to be in default under any term, covenant or condition of this Agreement not specified in subsections (a) through (r) above or not otherwise specifically specified as an Event of Default herein, (i) for more than ten (10) days after notice from Lender, in the case of any default which can be cured by the payment of a sum of money or (ii) for thirty (30) days after notice from Lender, in the case of any other default, provided that if such default cannot reasonably be cured within such thirty (30) day period and Borrower shall have commenced to cure such default within such thirty (30) day period and thereafter diligently and expeditiously proceeds to cure the same, such thirty (30) day period shall be extended for so long as it shall require Borrower in the exercise of due diligence to cure such default, it being agreed that no such extension shall be for a period in excess of ninety (90) days (subject to further extension by Lender, in Lender's sole discretion);

(t) if there shall be default under any of the other Loan Documents beyond any applicable notice and cure periods contained in such Loan Documents, whether as to Borrower or the Property, or if any other such event shall occur or condition shall exist, if the effect of such event or condition is to accelerate the maturity of any portion of the Debt or to permit Lender to accelerate the maturity of all or any portion of the Debt;

(u) a default or event of default occurs under the Franchise Agreement, after the expiration of any applicable notice and cure period;

(v) the Franchise Agreement is amended or otherwise modified without Lender's consent; and

(w) Borrower fails to comply in any material respect with any applicable requirements or deadlines regarding PIP Work.

## **Section 10.2 Remedies.**

(a) Upon the occurrence and during the continuance of an Event of Default (other than an Event of Default described in Section 10.1(g) above with respect to Borrower and SPE Component Entity only) and at any time thereafter Lender may, in addition to any other rights or remedies available to it pursuant to this Agreement, the Security Instrument, the Note and the other Loan Documents or at law or in equity, take such action, without notice or demand, that Lender deems advisable to protect and enforce its rights against Borrower and in the Property, including, without limitation, declaring the Debt to be immediately due and payable, and Lender may enforce or avail itself of any or all rights or remedies provided in this Agreement, the Security Instrument, the Note and the other Loan Documents against Borrower and the Property, including, without limitation, all rights or remedies available at law or in equity. Upon any Event of Default described in Section 10.1(g) above (with respect to Borrower and SPE Component Entity only), the Debt and all other obligations of Borrower under this Agreement, the Security Instrument, the Note and the other Loan Documents shall immediately and automatically become due and payable, without notice or demand, and Borrower hereby expressly waives any such notice or demand, anything contained herein or in the Security Instrument, the Note and the other Loan Documents to the contrary notwithstanding.

(b) Upon the occurrence and during the continuance of an Event of Default, all or any one or more of the rights, powers, privileges and other remedies available to Lender against Borrower under this Agreement, the Security Instrument, the Note or the other Loan Documents executed and delivered by, or applicable to, Borrower or at law or in equity may be exercised by Lender at any time and from time to time, whether or not all or any of the Debt shall be declared due and payable, and whether or not Lender shall have commenced any foreclosure proceeding or other action for the enforcement of its rights and remedies under this Agreement, the Security Instrument, the Note or the other Loan Documents with respect to the Property. Any such actions taken by Lender shall be cumulative and concurrent and may be pursued independently, singularly, successively, together or otherwise, at such time and in such order as Lender may determine in its sole discretion, to the fullest extent permitted by Applicable Law, without impairing or otherwise affecting the other rights and remedies of Lender permitted by Applicable Law, equity or contract or as set forth herein or in the Security Instrument, the Note or the other Loan Documents. No delay or omission to exercise any remedy, right or power accruing upon an Event of Default shall impair any such remedy, right or power or shall be construed as a waiver thereof, but any such remedy, right or power may be exercised from time to time and as often as may be deemed expedient. A waiver of one Event of Default with respect to Borrower shall not be construed to be a waiver of any subsequent Event of Default by Borrower or to impair any remedy, right or power consequent thereon.

(c) Upon the occurrence and during the continuance of an Event of Default, Lender shall have the right from time to time to partially foreclose the Security Instrument in any manner

and for any amounts secured by the Security Instrument then due and payable as determined by Lender in its sole discretion including, without limitation, the following circumstances: (i) in the event Borrower defaults beyond any applicable grace period in the payment of one or more scheduled payments of principal and interest, Lender may foreclose the Security Instrument to recover such delinquent payments, or (ii) in the event Lender elects to accelerate less than the entire outstanding principal balance of the Loan, Lender may foreclose the Security Instrument to recover so much of the principal balance of the Loan as Lender may accelerate and such other sums secured by the Security Instrument as Lender may elect. Notwithstanding one or more partial foreclosures, the Property shall remain subject to the Security Instrument to secure payment of sums secured by the Security Instrument and not previously recovered.

(d) Upon the occurrence and during the continuance of an Event of Default, Lender shall have the right from time to time to sever the Note and the other Loan Documents into one or more separate notes, security instruments and other security documents (the “**Severed Loan Documents**”) in such denominations as Lender shall determine in its sole discretion for purposes of evidencing and enforcing its rights and remedies provided hereunder. Borrower shall execute and deliver to Lender from time to time, promptly after the request of Lender, a severance agreement and such other documents as Lender shall request in order to effect the severance described in the preceding sentence, all in form and substance reasonably satisfactory to Lender. Borrower hereby absolutely and irrevocably appoints Lender as its true and lawful attorney, coupled with an interest, in its name and stead to make and execute all documents necessary or desirable to effect the aforesaid severance, Borrower ratifying all that its said attorney shall do by virtue thereof; provided, however, Lender shall not make or execute any such documents under such power until three (3) days after notice has been given to Borrower by Lender of Lender’s intent to exercise its rights under such power. Borrower shall not be obligated to pay any costs or expenses incurred in connection with the preparation, execution, recording or filing of the Severed Loan Documents and the Severed Loan Documents shall not contain any representations, warranties or covenants not contained in the Loan Documents and any such representations and warranties contained in the Severed Loan Documents will be given by Borrower only as of the Closing Date.

(e) Any amounts recovered from the Property or any other collateral for the Loan after an Event of Default may be applied by Lender toward the payment of any interest and/or principal of the Loan and/or any other amounts due under the Loan Documents in such order, priority and proportions as Lender in its sole discretion shall determine.

(f) Upon the occurrence and during the continuance of an Event of Default, Lender may, but without any obligation to do so and without notice to or demand on Borrower and without releasing Borrower from any obligation hereunder or being deemed to have cured any Event of Default hereunder, make, do or perform any obligation of Borrower hereunder in such manner and to such extent as Lender may deem necessary. Lender is authorized to enter upon the Property for such purposes, or appear in, defend, or bring any action or proceeding to protect its interest in the Property for such purposes, and the cost and expense thereof (including reasonable attorneys’ fees to the extent permitted by Applicable Law), with interest as provided in this Section, shall constitute a portion of the Debt and shall be due and payable to Lender upon demand. All such costs and expenses incurred by Lender in remedying such Event of Default or such failed payment or act or in appearing in, defending, or bringing any action or proceeding shall bear interest at the

Default Rate, for the period after such cost or expense was incurred through and including the date of payment to Lender. All such costs and expenses incurred by Lender together with interest thereon calculated at the Default Rate shall be deemed to constitute a portion of the Debt and be secured by the liens, claims and security interests provided to Lender under the Loan Documents and shall be immediately due and payable upon demand by Lender therefor.

## ARTICLE 11.

### SECONDARY MARKET

#### Section 11.1 Securitization.

(a) Lender shall have the right (i) to sell or otherwise transfer the Loan or any portion thereof as a whole loan, (ii) to sell participation interests in the Loan or (iii) to securitize the Loan or any portion thereof in a single asset securitization or a pooled loan securitization. The transaction referred to in clauses (i), (ii) and (iii) above shall hereinafter be referred to collectively as “**Secondary Market Transactions**” and the transactions referred to in clause (iii) shall hereinafter be referred to as a “**Securitization**”. Any certificates, notes or other securities issued in connection with a Securitization are hereinafter referred to as “**Securities**”.

(b) If requested by Lender, Borrower shall assist Lender in satisfying the market standards to which Lender customarily adheres or which may be reasonably required in the marketplace or by the Rating Agencies in connection with any Secondary Market Transactions, at Borrower’s cost and expense (not to exceed \$15,000), including, without limitation, to:

(i) (A) provide updated financial and other information with respect to the Property, the business operated at the Property, Borrower, Guarantor, Sponsor and Manager, (B) provide updated budgets relating to the Property and (C) provide updated appraisals, market studies, environmental reviews (Phase I’s and, if appropriate, Phase II’s), property condition reports and other due diligence investigations of the Property (the “**Updated Information**”), together, if customary, with appropriate verification of the Updated Information through letters of auditors or opinions of counsel acceptable to Lender and the Rating Agencies;

(ii) provide opinions of counsel, which may be relied upon by Lender, the Rating Agencies and their respective counsel, agents and representatives, as to non-consolidation, matters of Delaware and federal bankruptcy law relating to limited liability companies or any other opinion customary in Secondary Market Transactions or required by the Rating Agencies with respect to the Property and Borrower and Borrower’s Affiliates, which counsel and opinions shall be satisfactory in form and substance to Lender and the Rating Agencies;

(iii) provide updated, as of the closing date of the Secondary Market Transaction, representations and warranties made in the Loan Documents and such additional representations and warranties as the Rating Agencies may require;

(iv) at any time prior to a Secondary Market Transaction, execute such amendments to the Loan Documents as requested by Lender, in its discretion, to change

the dates on which the Monthly Payment Date and Maturity Date occur; provided that such change in Maturity Date shall only be with respect to the day of the month, and not the year or month, of such Maturity Date; and

(v) execute such amendments to the Loan Documents and Borrower or any SPE Component Entity's organizational documents as may be reasonably requested by Lender or requested by the Rating Agencies or otherwise to effect the Securitization including, without limitation, bifurcation of the Loan into two or more components and/or separate notes and/or creating a senior/subordinate note structure (any of the foregoing, a "**Loan Bifurcation**"); provided, however, that Borrower shall not be required to modify or amend any Loan Document if such modification or amendment would change the interest rate, the stated maturity or the amortization of principal set forth in the Note, except in connection with a Loan Bifurcation which may result in varying fixed interest rates and amortization schedules, but which shall have the same initial weighted average coupon of the original Note, or would materially increase Borrower's obligations or materially decrease Borrower's rights under the Loan Documents, including, without limitation, any amendments or modifications that would result in any operational changes that are materially adverse to Borrower or the Property.

(c) If, at the time one or more Disclosure Documents are being prepared for a Securitization, Lender expects that Borrower alone or Borrower and one or more Affiliates of Borrower collectively, or the Property alone or the Property and Related Properties collectively, will be a Significant Obligor for purposes of such Securitization, Borrower shall furnish (or cause to be furnished) to Lender upon request (i) the selected financial data or, if applicable, net operating income, described in Item 1112(b)(1) of Regulation AB, if Lender expects that the principal amount of the Loan together with any Related Loans as of the cut-off date for such Securitization may, or if the principal amount of the Loan together with any Related Loans as of the cut-off date for such Securitization and at any time during which the Loan (or portion of the Loan included in such Securitization) and any Related Loans are included in a Securitization does, equal or exceed ten percent (10%) (but less than twenty percent (20%)) of the aggregate principal amount of all mortgage loans included or expected to be included, as applicable, in such Securitization or (ii) the financial statements described in Item 1112(b)(2) of Regulation AB, if Lender expects that the principal amount of the Loan (or portion of the Loan included in such Securitization) together with any Related Loans as of the cut-off date for such Securitization may, or if the principal amount of the Loan together with any Related Loans as of the cut-off date for such Securitization and at any time during which the Loan (or apportion of the Loan included in such Securitization) and any Related Loans are included in a Securitization does, equal or exceed twenty percent (20%) of the aggregate principal amount of all mortgage loans included or expected to be included, as applicable, in the Securitization. Notwithstanding anything herein to the contrary, such financial data or financial statements shall be furnished to Lender (A) within ten (10) Business Days after notice from Lender in connection with the preparation of Disclosure Documents for the Securitization, (B) not later than thirty (30) days after the end of each fiscal quarter of Borrower and (C) not later than seventy-five (75) days after the end of each fiscal year of Borrower; provided, however, that Borrower shall not be obligated to furnish financial data or financial statements pursuant to clauses (B) or (C) of this sentence with respect to any period for which an Exchange Act Filing is not required. If requested by Lender, and to the extent not prohibited by any applicable lease, other agreement or order, Borrower shall furnish to Lender financial data

and/or financial statements for any tenant of any of the Properties if, in connection with a Securitization, Lender expects there to be, with respect to such tenant or group of affiliated tenants, a concentration within all of the mortgage loans included or expected to be included, as applicable, in the Securitization such that such tenant or group of affiliated tenants would constitute a Significant Obligor.

(d) All financial data and financial statements provided by Borrower hereunder pursuant to Section 11.1(c) and (d) hereof shall be prepared in accordance with GAAP, and shall meet the requirements of Regulation AB and other applicable legal requirements. All financial statements referred to in Section 11.1(c) above shall be audited by independent accountants of Borrower (which accountants shall be reasonably acceptable to Lender) in accordance with Regulation AB and all other applicable legal requirements, shall be accompanied by the manually executed report of the independent accountants thereon, which report shall meet the requirements of Regulation AB and all applicable legal requirements, and shall be further accompanied by a manually executed written consent of the independent accountants, in form and substance acceptable to Lender, to the inclusion of such financial statements in any Disclosure Document and any Exchange Act Filing and to the use of the name of such independent accountants and the reference to such independent accountants as “experts” in any Disclosure Document and Exchange Act Filing, all of which shall be provided at the same time as the related financial statements are required to be provided. All financial data and financial statements (audited or unaudited) provided by Borrower under Section 11.1(c) shall be accompanied by an Officer’s Certificate stating that such financial statements meet the requirements set forth in the first sentence of this Section 11.1(d).

(e) If requested by Lender, Borrower shall provide Lender, promptly upon request, with any other or additional financial statements, or financial, statistical or operating information, as Lender shall determine to be required pursuant to Regulation AB or any amendment, modification or replacement thereto or other legal requirements in connection with any Disclosure Document or any Exchange Act Filing or as shall otherwise be reasonably requested by Lender.

(f) In the event Lender determines, in connection with a Securitization, that the financial data and financial statements and (if applicable) related accountants’ reports and consents required in order to comply with Regulation AB or any amendment, modification or replacement of Regulation AB or with other legal requirements are other than as provided herein, then notwithstanding the provisions of Section 11.1(c) and (d), Lender may request, and Borrower shall promptly provide, such other financial statements and (if applicable) related accountants’ reports and consents as Lender reasonably determines to be necessary or appropriate for such compliance.

## **Section 11.2 Securitization Indemnification.**

(a) Borrower understands that information provided to Lender by Borrower and its agents, counsel and representatives may be included in disclosure documents in connection with the Securitization, including, without limitation, an offering circular, a prospectus, prospectus supplement, private placement memorandum or other offering document (each, a “**Disclosure Document**”) and may also be included in filings with the Securities and Exchange Commission pursuant to the Securities Act of 1933, as amended (the “**Securities Act**”), or the Securities and Exchange Act of 1934, as amended (the “**Exchange Act**”), and may be made available to investors



or prospective investors in the Securities, the Rating Agencies, and service providers relating to the Securitization.

(b) Borrower shall provide in connection with each of (i) a preliminary and a final private placement memorandum or (ii) a preliminary and final prospectus or prospectus supplement, as applicable, an agreement (A) certifying that Borrower has examined such Disclosure Documents specified by Lender and that each such Disclosure Document, as it relates to Borrower, Borrower Affiliates, the Property, Manager, Sponsor, Guarantor and all other aspects of the Loan, does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, (B) indemnifying Lender (and for purposes of this Section 11.2, Lender hereunder shall include its officers and directors), the Affiliate of Wells Fargo that has filed the registration statement relating to the Securitization (the “**Registration Statement**”), each of its directors, each of its officers who have signed the Registration Statement and each Person that controls the Affiliate within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act (collectively, the “**Wells Group**”), and Wells Fargo, and any other placement agent or underwriter with respect to the Securitization, each of their respective directors and each Person who controls Wells Fargo or any other placement agent or underwriter within the meaning of Section 15 of the Securities Act and Section 20 of the Exchange Act (collectively, the “**Underwriter Group**”) for any losses, claims, damages or liabilities (collectively, the “**Liabilities**”) to which Lender, the Wells Group or the Underwriter Group may become subject insofar as the Liabilities arise out of or are based upon any untrue statement of any material fact contained in such sections or arise out of or are based upon the omission to state therein a material fact required to be stated in such sections or necessary in order to make the statements in such sections, in light of the circumstances under which they were made, not misleading and (C) agreeing to reimburse Lender, the Wells Group and/or the Underwriter Group for any legal or other expenses reasonably incurred by Lender, the Wells Group and the Underwriter Group in connection with investigating or defending the Liabilities; provided, however, that Borrower will be liable in any such case under clauses (B) or (C) above only to the extent that any such loss claim, damage or liability arises out of or is based upon any such untrue statement or omission made therein in reliance upon and in conformity with information furnished to Lender by or on behalf of Borrower in connection with the preparation of the Disclosure Document or in connection with the underwriting or closing of the Loan, including, without limitation, financial statements of Borrower, operating statements and rent rolls with respect to the Property (collectively, the “**Provided Information**”). The indemnification provided for in clauses (B) and (C) above shall be effective whether or not the indemnification agreement described above is provided; provided, however, such indemnity shall be limited to the Provided Information and shall only be effective to the extent that Lender accurately states the Provided Information in the applicable Disclosure Document. The aforesaid indemnity will be in addition to any liability which Borrower may otherwise have.

(c) In connection with Exchange Act Filings, Borrower shall (i) indemnify Lender, the Wells Group and the Underwriter Group for Liabilities to which Lender, the Wells Group or the Underwriter Group may become subject insofar as the Liabilities arise out of or are based upon any untrue statement of any material fact in the Disclosure Document or the omission to state in the Disclosure Document a material fact required to be stated in the Disclosure Document in order to make the statements in the Disclosure Document, in light of the circumstances under which they

were made, not misleading and (ii) reimburse Lender, the Wells Group or the Underwriter Group for any legal or other expenses reasonably incurred by Lender, the Wells Group or the Underwriter Group in connection with defending or investigating the Liabilities; provided, however, such indemnity shall be limited to the Provided Information and shall only be effective to the extent that Lender accurately states the Provided Information in the applicable Disclosure Document.

(d) Promptly after receipt by an indemnified party under this Section 11.2 of notice of the commencement of any action, such indemnified party will, if a claim in respect thereof is to be made against the indemnifying party under this Section 11.2, notify the indemnifying party in writing of the commencement thereof, but the omission to so notify the indemnifying party will not relieve the indemnifying party from any liability which the indemnifying party may have to any indemnified party hereunder except to the extent that failure to notify causes prejudice to the indemnifying party. In the event that any action is brought against any indemnified party, and it notifies the indemnifying party of the commencement thereof, the indemnifying party will be entitled, jointly with any other indemnifying party, to participate therein and, to the extent that it (or they) may elect by written notice delivered to the indemnified party promptly after receiving the aforesaid notice from such indemnified party, to assume the defense thereof with counsel satisfactory to such indemnified party. After notice from the indemnifying party to such indemnified party under this Section 11.2, such indemnified party shall pay for any legal or other expenses subsequently incurred by such indemnified party in connection with the defense thereof other than reasonable costs of investigation; provided, however, if the defendants in any such action include both the indemnified party and the indemnifying party and the indemnified party shall have reasonably concluded that there are any legal defenses available to it and/or other indemnified parties that are different from or additional to those available to the indemnifying party, the indemnified party or parties shall have the right to select separate counsel to assert such legal defenses and to otherwise participate in the defense of such action on behalf of such indemnified party at the cost of the indemnifying party. The indemnifying party shall not be liable for the expenses of more than one separate counsel unless an indemnified party shall have reasonably concluded that there may be legal defenses available to it that are different from or additional to those available to another indemnified party.

(e) In order to provide for just and equitable contribution in circumstances in which the indemnity agreement provided for in Section 11.2(b) or (c) hereof is for any reason held to be unenforceable as to an indemnified party in respect of any losses, claims, damages or liabilities (or action in respect thereof) referred to therein which would otherwise be indemnifiable under Section 11.2(b) or (c) hereof, the indemnifying party shall contribute to the amount paid or payable by the indemnified party as a result of such losses, claims, damages or liabilities (or action in respect thereof); provided, however, that no Person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any Person who was not guilty of such fraudulent misrepresentation. In determining the amount of contribution to which the respective parties are entitled, the following factors shall be considered: (i) Wells Fargo's and Borrower's relative knowledge and access to information concerning the matter with respect to which the claim was asserted; (ii) the opportunity to correct and prevent any statement or omission; and (iii) any other equitable considerations appropriate in the circumstances. Lender and Borrower hereby agree that it would not be equitable if the amount of such contribution were determined by pro rata or per capita allocation.

(f) Borrower shall jointly and severally indemnify Lender and its officers, directors, partners, employees, representatives, agents and Affiliates against any Losses to which Lender or its officers, directors, partners, employees, representatives, agents and Affiliates, may become subject in connection with any indemnification to the Rating Agencies in connection with issuing, monitoring or maintaining the Securities insofar as the Losses arise out of or are based upon any untrue statement of any material fact in any information provided by or on behalf of Borrower to the Rating Agencies (the “**Covered Rating Agency Information**”) or arise out of or are based upon the omission to state a material fact in the Covered Rating Agency Information required to be stated therein or necessary in order to make the statements in Covered Rating Agency Information, in light of the circumstances under which they were made, not misleading; provided, however, such indemnity shall be limited to the Covered Rating Agency Information.

(g) The liabilities and obligations of both Borrower and Lender under this Section 11.2 shall survive the termination of this Agreement and the satisfaction and discharge of the Debt.

### **Section 11.3 REMIC Savings Clause.**

Notwithstanding anything herein to the contrary, if the Loan is included in a REMIC Trust and, immediately following a release of any portion of the real property relating to the Property, the ratio of the unpaid principal balance of the Loan to the value of the remaining real property relating to the Property is greater than 125% (such value to be determined, in Lender’s sole discretion, by any commercially reasonable method permitted to a REMIC Trust and it being agreed and acknowledged that such loan-to-value determination shall be based on the value of only real property and shall exclude any personal property or going-concern value, if any), the principal balance of the Loan must be paid down by Borrower by an amount sufficient to satisfy REMIC Requirements, unless the Lender receives an opinion of counsel that the Loan will not fail to maintain its status as a “qualified mortgage” within the meaning of Section 860G(a)(3)(A) of the IRS Code as a result of the related release of lien.

### **Section 11.4 Servicer.**

At the option of Lender, the Loan may be serviced by a servicer/trustee selected by Lender (the “**Servicer**”) and Lender may delegate all or any portion of its responsibilities under this Agreement and the other Loan Documents to such servicer/trustee pursuant to a servicing agreement between Lender and such Servicer; provided, however, Borrower shall not be obligated to pay any monthly servicing fees to such Servicer.

### **Section 11.5 Rating Agency Costs.**

In connection with any Rating Agency Confirmation or other Rating Agency consent, approval or review required hereunder as a result of Borrower’s or Guarantor’s actions, inactions or requests for the same (other than the initial review of the Loan by the Rating Agencies in connection with a Securitization), Borrower shall pay all of the costs and expenses of Lender, Servicer and each Rating Agency in connection therewith, and, if applicable, shall pay any fees imposed by any Rating Agency in connection therewith.

### **Section 11.6 Mezzanine Option.**

Lender shall have the option (the “**Mezzanine Option**”) at any time to divide the Loan into two parts, a mortgage loan and a mezzanine loan, provided, that (i) the total loan amounts for such mortgage loan and such mezzanine loan shall equal the then outstanding amount of the Loan immediately prior to Lender’s exercise of the Mezzanine Option, and (ii) the weighted average interest rate of such mortgage loan and mezzanine loan shall equal the Interest Rate (other than in connection with prepayments, default interest, late charges and other, similar charges already referenced in the Loan Documents). Borrower shall, at Borrower’s sole cost and expense (not to exceed \$15,000), cooperate with Lender in Lender’s exercise of the Mezzanine Option in good faith and in a timely manner, which such cooperation shall include, but not be limited to, (i) executing such amendments to the Loan Documents and Borrower or any SPE Component Entity’s organizational documents as may be reasonably requested by Lender or requested by the Rating Agencies, (ii) creating one or more Single Purpose Entities (the “**Mezzanine Borrower**”), which such Mezzanine Borrower shall (A) own, directly or indirectly, 100% of the equity ownership interests in Borrower (the “**Equity Collateral**”), and (B) together with such constituent equity owners of such Mezzanine Borrower as may be designated by Lender, execute such agreements, instruments and other documents as may be required by Lender in connection with the mezzanine loan (including, without limitation, a promissory note evidencing the mezzanine loan and a pledge and security agreement pledging the Equity Collateral to Lender as security for the mezzanine loan); and (iii) delivering such opinions, title endorsements, UCC title insurance policies and other materials as may be required by Lender or the Rating Agencies.

### **Section 11.7 Conversion to Registered Form.**

At the request of Lender, Borrower shall appoint, as its agent, a registrar and transfer agent (the “**Registrar**”) reasonably acceptable to Lender which shall maintain, subject to such reasonable regulations as it shall provide, such books and records as are necessary for the registration and transfer of the Note in a manner that shall cause the Note to be considered to be in registered form for purposes of Section 163(f) of the IRS Code. The option to convert the Note into registered form once exercised may not be revoked. Any agreement setting out the rights and obligation of the Registrar shall be subject to the reasonable approval of Lender. Borrower may revoke the appointment of any particular person as Registrar, effective upon the effectiveness of the appointment of a replacement Registrar. The Registrar shall not be entitled to any fee from Borrower or Lender or any other lender in respect of transfers of the Note and other Loan Documents.

## **ARTICLE 12.**

### **INDEMNIFICATIONS**

#### **Section 12.1 General Indemnification.**

Borrower shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless the Indemnified Parties from and against any and all actual Losses imposed upon or incurred by or asserted against any Indemnified Parties and directly or indirectly arising out of or in any way relating to any one or more of the following: (a) any accident, injury to or death of

persons or loss of or damage to property occurring in, on or about the Property or any part thereof or on the adjoining sidewalks, curbs, adjacent property or adjacent parking areas, streets or ways; (b) any use, nonuse or condition in, on or about the Property or any part thereof or on the adjoining sidewalks, curbs, adjacent property or adjacent parking areas, streets or ways; (c) performance of any labor or services or the furnishing of any materials or other property in respect of the Property or any part thereof; (d) any failure of the Property to be in compliance with any Applicable Law; (e) any and all claims and demands whatsoever which may be asserted against Lender by reason of any alleged obligations or undertakings on its part to perform or discharge any of the terms, covenants, or agreements contained in any Lease; (f) the payment of any commission, charge or brokerage fee to anyone (other than a broker or other agent retained by Lender) which may be payable in connection with the funding of the Loan evidenced by the Note and secured by the Security Instrument; and/or (g) the holding or investing of the funds on deposit in the Accounts or the performance of any work or the disbursement of funds in each case in connection with the Reserve Funds. Any amounts payable to Indemnified Parties by reason of the application of this Section 12.1 shall become immediately due and payable and shall bear interest at the Default Rate from the date loss or damage is sustained by Indemnified Parties until paid. Notwithstanding the foregoing, nothing herein shall be deemed to exculpate Lender or any Indemnified Party for its own gross negligence or willful misconduct or to require that Lender or any Indemnified Party be indemnified for its own gross negligence or willful misconduct.

#### **Section 12.2 Mortgage and Intangible Tax and Transfer Tax Indemnification.**

Borrower shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless the Indemnified Parties from and against any and all Losses imposed upon or incurred by or asserted against any Indemnified Parties and directly or indirectly arising out of or in any way relating to (a) any tax on the making and/or recording of the Security Instrument, the Note or any of the other Loan Documents (whether due upon the making of same or upon the exercise of its remedies under the Loan Documents), and (b) any transfer tax incurred by Indemnified Parties in connection with the exercise of remedies hereunder or under any other Loan Documents, including, without limitation, a foreclosure of the Security Instrument by Lender or its designee and any subsequent transfer of the Property by the Lender or its designee.

#### **Section 12.3 ERISA Indemnification.**

Borrower shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless the Indemnified Parties from and against any and all Losses (including, without limitation, reasonable attorneys' fees and costs incurred in the investigation, defense, and settlement of Losses incurred in correcting any prohibited transaction or in the sale of a prohibited loan, and in obtaining any individual prohibited transaction exemption under ERISA that may be required, in Lender's sole discretion) that Indemnified Parties may incur, directly or indirectly, as a result of a default under Sections 3.7 or 4.19 of this Agreement.

#### **Section 12.4 Duty to Defend, Legal Fees and Other Fees and Expenses.**

Upon written request by any Indemnified Party, Borrower shall defend such Indemnified Party (if requested by any Indemnified Party, in the name of the Indemnified Party) by attorneys and other professionals approved by the Indemnified Parties. Notwithstanding the foregoing, any

Indemnified Parties may, in their sole discretion, engage their own attorneys and other professionals to defend or assist them, and, at the option of Indemnified Parties, their attorneys shall control the resolution of any claim or proceeding. Upon demand, Borrower shall pay or, in the sole discretion of the Indemnified Parties, reimburse, the Indemnified Parties for the payment of reasonable fees and disbursements of attorneys, engineers, environmental consultants, laboratories and other professionals in connection therewith.

#### **Section 12.5 Survival.**

The obligations and liabilities of Borrower under this Article 12 shall fully survive indefinitely notwithstanding any termination, satisfaction, assignment, entry of a judgment of foreclosure, exercise of any power of sale, or delivery of a deed in lieu of foreclosure of the Security Instrument.

#### **Section 12.6 Environmental Indemnity.**

Simultaneously herewith, Borrower and Guarantor have executed and delivered the Environmental Indemnity to Lender, which Environmental Indemnity is not secured by the Security Instrument.

### **ARTICLE 13.**

#### **EXCULPATION**

##### **Section 13.1 Exculpation.**

(a) Subject to the qualifications below, Lender shall not enforce the liability and obligation of Borrower to perform and observe the obligations contained in the Note, this Agreement, the Security Instrument or the other Loan Documents by any action or proceeding wherein a money judgment or any deficiency judgment or other judgment establishing personal liability shall be sought against Borrower or any principal, director, officer, employee, beneficiary, shareholder, partner, member, trustee, agent, or Affiliate of Borrower (but specifically excluding Guarantor to the extent of its obligations under the Guaranty and Environmental Indemnity) or any legal representatives, successors or assigns of any of the foregoing (collectively, the “**Exculpated Parties**”), except that Lender may bring a foreclosure action, an action for specific performance or any other appropriate action or proceeding to enable Lender to enforce and realize upon its interest under the Note, this Agreement, the Security Instrument and the other Loan Documents, or in the Property, the Rents, or any other collateral given to Lender pursuant to the Loan Documents; provided, however, that, except as specifically provided herein, any judgment in any such action or proceeding shall be enforceable against Borrower only to the extent of Borrower’s interest in the Property, in the Rents and in any other collateral given to Lender, and Lender, by accepting the Note, this Agreement, the Security Instrument and the other Loan Documents, shall not sue for, seek or demand any deficiency judgment against Borrower or any of the Exculpated Parties in any such action or proceeding under or by reason of or under or in connection with the Note, this Agreement, the Security Instrument or the other Loan Documents. The provisions of this Section shall not, however, (1) constitute a waiver, release or impairment of any obligation evidenced or secured by any of the Loan Documents; (2) impair the right of Lender to name

Borrower as a party defendant in any action or suit for foreclosure and sale under the Security Instrument; (3) affect the validity or enforceability of any indemnity, guaranty or similar instrument (including, without limitation, the indemnities set forth in Article 12 hereof, Section 11.2 hereof, in the Guaranty and in the Environmental Indemnity) made in connection with the Loan or any of the rights and remedies of Lender thereunder (including, without limitation, Lender's right to enforce said rights and remedies against Borrower and/or Guarantor (as applicable) personally and without the effect of the exculpatory provisions of this Article 13); (4) impair the right of Lender to obtain the appointment of a receiver; (5) impair the enforcement of the assignment of leases and rents contained in the Security Instrument; (6) intentionally omitted; (7) constitute a prohibition against Lender to seek a deficiency judgment against Borrower in order to fully realize the security granted by the Security Instrument or to commence any other appropriate action or proceeding in order for Lender to exercise its remedies against the Property; or (8) constitute a waiver of the right of Lender to enforce the liability and obligation of Borrower, by money judgment or otherwise, to the extent of any Losses incurred by Lender (including attorneys' fees and costs reasonably incurred) arising out of or in connection with any of the following:

(i) fraud or intentional misrepresentation or any failure to disclose a material fact by Borrower, any SPE Component Entity, Guarantor, Sponsor, or any Borrower Party in connection with the Loan;

(ii) the gross negligence or willful misconduct of Borrower, any SPE Component Entity, Guarantor, Sponsor, or any Borrower Party or the commission of a criminal act by Borrower, any SPE Component Entity, Guarantor, Sponsor or any Borrower Party which results in any seizure or forfeiture of the Property, or any portion thereof, or Borrower's interest therein;

(iii) material physical waste to the Property caused by the intentional acts or intentional omissions of Borrower, any SPE Component Entity, Guarantor, Sponsor, or any Borrower Party (including, without limitation, any arson or abandonment of the Property) and/or the removal or disposal of any portion of the Property after an Event of Default by Borrower, any SPE Component Entity, Guarantor, Sponsor or any Borrower Party;

(iv) the misapplication, misappropriation or conversion by Borrower of (A) any insurance proceeds paid by reason of any loss, damage or destruction to the Property, (B) any Awards or other amounts received in connection with the Condemnation of all or a portion of the Property, (C) any Rents or (D) any Tenant security deposits or Rents collected in advance; provided, however, that any funds applied as specifically required by the Loan Documents shall not be considered misapplied, misappropriated or converted hereunder;

(v) failure to pay any Taxes or Other Charges, charges for labor or materials or any other charges that can create liens on any portion of the Property to the extent that the revenue from the Property is sufficient to pay such amounts (other than (x) amounts deposited with Lender as Tax Reserve Funds for Taxes or Other Charges where Lender elects not to apply such funds toward payment of such Taxes or Other Charges owed or (y)

Taxes or Other Charges owed that are contested strictly in accordance with the terms of the Loan Documents);

(vi) failure to maintain insurance as required by this Agreement to the extent that the revenue from the Property is sufficient to pay the Insurance Premiums relating thereto (other than the failure to pay amounts deposited with Lender as Insurance Reserve Funds for Insurance Premiums to be paid to maintain such insurance where Lender elects not to apply such funds toward payment of such Insurance Premiums);

(vii) the breach of any representation, warranty, covenant or indemnification provision in the Environmental Indemnity, this Agreement or in the Security Instrument concerning Environmental Laws and Hazardous Substances;

(viii) any fees or commissions paid by Borrower after the occurrence of any Event of Default to Guarantor, Sponsor and/or any Affiliate of Borrower, Guarantor and/or Sponsor in violation of the terms of the Note, this Agreement, the Security Instrument or the other Loan Documents;

(ix) Borrower's breach of, or failure to comply with, the representations, warranties and covenants contained in Article 15 of this Agreement and/or the provisions of Sections 11.2, 12.2 and 12.3 hereof;

(x) Borrower fails to appoint a new property manager upon the request of Lender, each as required by, and in accordance with the terms and provisions of, this Agreement, the Assignment of Management Agreement and the other Loan Documents or Borrower appoints a new property manager or replaces the property manager other than in accordance with the terms of this Agreement, the Assignment of Management Agreement and the other Loan Documents;

(xi) any litigation or other legal proceeding related to the Debt filed by Borrower, any SPE Component Entity, Guarantor, Sponsor or any Borrower Party in bad faith that delays, opposes, impedes, obstructs, hinders, enjoins or otherwise interferes with or frustrates the efforts of Lender to exercise any rights and remedies available to Lender as provided herein and in the other Loan Documents;

(xii) failure to pay rent, additional rent or any other amounts due and payable under the Ground Lease to the extent that the revenue from the Property is sufficient to pay such amounts (other than amounts deposited with Lender as Ground Rent Reserve Funds where Lender fails to apply such funds toward payment of such Ground Rent);

(xiii) uninsured damage to the Property resulting from terrorism;

(xiv) any violation or breach of any representation, warranty or covenant contained in Article 5 hereof, to the extent that same does not result in substantive consolidation of the assets of Borrower or any SPE Component Entity with the assets of any other Person;



(xv) any exercise of Ground Lessor's lien on the Improvements, Personal Property and Rents pursuant to the terms of the Ground Lease in connection with a default thereunder;

(xvi) any increase in Ground Rent resulting from Leases or from the letting of hotel rooms at the Property;

(xvii) Borrower's failure to perform any Restoration as a result of Net Proceeds not being available to Borrower following a Condemnation;

(xviii) Borrower's failure to comply with or complete any PIP Work; and/or

(xix) the Borrower Litigation, to the extent Borrower's liability in connection therewith exceeds \$3,845,515.00.

(b) Notwithstanding anything to the contrary in this Agreement, the Note or any of the Loan Documents, (A) Lender shall not be deemed to have waived any right which Lender may have under Section 506(a), 506(b), 1111(b) or any other provisions of the Bankruptcy Code to file a claim for the full amount of the Debt or to require that all collateral shall continue to secure all of the Debt owing to Lender in accordance with the Loan Documents, and (B) the Debt shall be fully recourse to Borrower in the event that: (i) any representation, warranty or covenant contained in Article 5 hereof is violated or breached, and such violation or breach results or is cited as a factor in the substantive consolidation of the assets of Borrower or any SPE Component Entity with the assets of any other Person; (ii) any Prohibited Transfer occurs in violation of Article 6 hereof; (iii) Borrower or any SPE Component Entity files a voluntary petition under the Bankruptcy Code or any other Creditors Rights Laws; (iv) an Affiliate, officer, director, or representative which Controls, directly or indirectly, Borrower or any SPE Component Entity files, or joins in the filing of, an involuntary petition against Borrower or any SPE Component Entity under the Bankruptcy Code or any other Creditors Rights Laws, or solicits or causes to be solicited petitioning creditors for any involuntary petition against Borrower or any SPE Component Entity from any Person; (v) Borrower or any SPE Component Entity files an answer consenting to or otherwise acquiescing in or joining in any involuntary petition filed against it by any other Person (other than an involuntary petition filed by Lender) under the Bankruptcy Code or any other Creditors Rights Laws, or solicits or causes to be solicited petitioning creditors for any involuntary petition from any Person; (vi) any Affiliate, officer, director, or representative which Controls Borrower or any SPE Component Entity consents to or acquiesces in or joins in an application for the appointment of a custodian, receiver, trustee, or examiner for Borrower, any SPE Component Entity or any portion of the Property (other than an application for such appointment filed by Lender); (vii) Borrower or any SPE Component Entity makes an assignment for the benefit of creditors or admits in any legal proceeding its insolvency or inability to pay its debts as they become due (other than an admission in a legal proceeding commenced by Lender in which either Borrower or SPE Component Entity is making a truthful statement upon the advice of counsel which is required to be made in such legal proceeding); (viii) there is substantive consolidation of Borrower or any SPE Component Entity (or any Restricted Party) with any other Person in connection with any federal or state bankruptcy proceeding involving the Guarantor or any of its Affiliates; (ix) Borrower or any SPE Component Entity (or any Restricted Party) contests or opposes any motion made by Lender to obtain relief from the automatic stay or seeks to reinstate

the automatic stay in the event of any federal or state bankruptcy or insolvency proceeding involving the Guarantor or its Affiliates; (x) Borrower fails to comply with the Cash Management Agreement relating to the establishment of a Deposit Account (as defined in the Cash Management Agreement) or Cash Management Account, or the institution of cash management generally; (xi) the Ground Lease is terminated, cancelled or otherwise ceases to exist; or (xii) there occurs any cancellation, termination, or expiration of the Franchise Agreement, until such time as Borrower has entered into a replacement franchise agreement reasonably satisfactory to Lender with an Acceptable Franchisor.

### **Section 13.2 Survival.**

The obligations and liabilities of Borrower under this Article 13 shall fully survive indefinitely notwithstanding any termination, satisfaction, assignment, entry of a judgment of foreclosure, exercise of any power of sale, or delivery of a deed in lieu of foreclosure of the Security Instrument.

## **ARTICLE 14.**

### **NOTICES**

#### **Section 14.1 Notices.**

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

If to Borrower:                   WHR LLC  
  c/o Tower Development  
  1050 Bishop Street, Suite 530  
  Honolulu, Hawaii 96813  
  Attention: General Counsel

With a copy to:                   Cades Schutte LLP  
  Cades Schutte Building  
  1000 Bishop Street  
  Suite 1200  
  Honolulu, Hawaii 96813  
  Facsimile No.: 808-540-501  
  Attention: David Banks, Esq.

If to Lender: Wells Fargo Commercial Mortgage Servicing  
401 South Tryon Street  
8<sup>th</sup> Floor  
Charlotte, North Carolina 28202  
Facsimile No.: 844-879-5855

With a copy to: Holland & Knight LLP  
101 S. Tryon Street  
Suite 3600  
Charlotte, North Carolina 28280  
Attention: Chris Boothe, Esq.

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

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

## **ARTICLE 15.**

### **FURTHER ASSURANCES**

#### **Section 15.1 Replacement Documents.**

Upon receipt of an affidavit of an officer of Lender as to the loss, theft, destruction or mutilation of the Note, this Agreement or any of the other Loan Documents which is not of public record, and, in the case of any such mutilation, upon surrender and cancellation of the Note, this Agreement or such other Loan Document, Borrower will issue, in lieu thereof, a replacement thereof, dated the date of the Note, this Agreement or such other Loan Document, as applicable, in the same principal amount thereof and otherwise of like tenor.

#### **Section 15.2 Recording of Security Instrument, etc.**

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

### **Section 15.3 Further Acts, etc.**

Borrower will, at the cost of Borrower, and without expense to Lender, do, execute, acknowledge and deliver all and every further acts, deeds, conveyances, deeds of trust, mortgages, assignments, notices of assignments, transfers and assurances as Lender shall, from time to time, reasonably require, for the better assuring, conveying, assigning, transferring, and confirming unto Lender the property and rights hereby mortgaged, deeded, granted, bargained, sold, conveyed, confirmed, pledged, assigned, warranted and transferred or intended now or hereafter so to be, or which Borrower may be or may hereafter become bound to convey or assign to Lender, or for carrying out the intention or facilitating the performance of the terms of this Agreement or for filing, registering or recording the Security Instrument, or for complying with all Applicable Law. Borrower, on demand, will execute and deliver, and in the event it shall fail to so execute and deliver, hereby authorizes Lender to execute in the name of Borrower or without the signature of Borrower to the extent Lender may lawfully do so, one or more financing statements to evidence more effectively the security interest of Lender in the Property. Borrower grants to Lender an irrevocable power of attorney coupled with an interest for the purpose of exercising and perfecting any and all rights and remedies available to Lender at law and in equity, including without limitation, such rights and remedies available to Lender pursuant to this Section 15.3.

### **Section 15.4 Changes in Tax, Debt, Credit and Documentary Stamp Laws.**

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

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

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

## **ARTICLE 16.**

### **WAIVERS**

#### **Section 16.1 Remedies Cumulative; Waivers.**

The rights, powers and remedies of Lender under this Agreement shall be cumulative and not exclusive of any other right, power or remedy which Lender may have against Borrower pursuant to this Agreement, the Security Instrument, the Note or the other Loan Documents, or existing at law or in equity or otherwise. Lender's rights, powers and remedies may be pursued singularly, concurrently or otherwise, at such time and in such order as Lender may determine in Lender's sole discretion. No delay or omission to exercise any remedy, right or power accruing upon an Event of Default shall impair any such remedy, right or power or shall be construed as a waiver thereof, but any such remedy, right or power may be exercised from time to time and as often as may be deemed expedient. A waiver of one Event of Default with respect to Borrower shall not be construed to be a waiver of any subsequent Event of Default by Borrower or to impair any remedy, right or power consequent thereon.

#### **Section 16.2 Modification, Waiver in Writing.**

No modification, amendment, extension, discharge, termination or waiver of any provision of this Agreement, the Security Instrument, the Note and the other Loan Documents, nor consent to any departure by Borrower therefrom, shall in any event be effective unless the same shall be in a writing signed by the party against whom enforcement is sought, and then such waiver or consent shall be effective only in the specific instance, and for the purpose, for which given. Except as otherwise expressly provided herein, no notice to, or demand on Borrower, shall entitle Borrower to any other or future notice or demand in the same, similar or other circumstances.

#### **Section 16.3 Delay Not a Waiver.**

Neither any failure nor any delay on the part of Lender in insisting upon strict performance of any term, condition, covenant or agreement, or exercising any right, power, remedy or privilege under this Agreement, the Security Instrument, the Note or the other Loan Documents, or any other instrument given as security therefor, shall operate as or constitute a waiver thereof, nor shall a single or partial exercise thereof preclude any other future exercise, or the exercise of any other right, power, remedy or privilege. In particular, and not by way of limitation, by accepting payment after the due date of any amount payable under this Agreement, the Security Instrument, the Note or the other Loan Documents, Lender shall not be deemed to have waived any right either to require prompt payment when due of all other amounts due under this Agreement, the Security Instrument, the Note and the other Loan Documents, or to declare a default for failure to effect prompt payment of any such other amount.

#### **Section 16.4 Waiver of Trial by Jury.**

TO THE EXTENT PERMITTED BY APPLICABLE LAW, BORROWER AND LENDER, BY ACCEPTANCE OF THIS AGREEMENT, HEREBY WAIVE, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, THE RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER IN CONTRACT,

TORT OR OTHERWISE, RELATING DIRECTLY OR INDIRECTLY TO THE LOAN, THE APPLICATION FOR THE LOAN, THIS AGREEMENT, THE NOTE, THE SECURITY INSTRUMENT OR THE OTHER LOAN DOCUMENTS OR ANY ACTS OR OMISSIONS OF LENDER OR BORROWER.

**Section 16.5 Waiver of Notice.**

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

**Section 16.6 Remedies of Borrower.**

In the event that a claim or adjudication is made that Lender or its agents have acted unreasonably or unreasonably delayed acting in any case where by Applicable Law or under this Agreement, the Security Instrument, the Note and the other Loan Documents, Lender or such agent, as the case may be, has an obligation to act reasonably or promptly, Borrower agrees that neither Lender nor its agents shall be liable for any monetary damages, and Borrower's sole remedies shall be limited to commencing an action seeking injunctive relief or declaratory judgment. The parties hereto agree that any action or proceeding to determine whether Lender has acted reasonably shall be determined by an action seeking declaratory judgment. Lender agrees that, in such event, it shall cooperate in expediting any action seeking injunctive relief or declaratory judgment.

**Section 16.7 Marshalling and Other Matters.**

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

**Section 16.8 Waiver of Statute of Limitations.**

To the extent permitted by Applicable Law, Borrower hereby expressly waives and releases to the fullest extent permitted by Applicable Law, the pleading of any statute of limitations as a defense to payment of the Debt or performance of its obligations hereunder, under the Note, Security Instrument or other Loan Documents.

### **Section 16.9 Waiver of Counterclaim.**

Borrower hereby waives the right to assert a counterclaim, other than a compulsory counterclaim, in any action or proceeding brought against it by Lender or its agents.

### **Section 16.10 Sole Discretion of Lender.**

Wherever pursuant to this Agreement (a) Lender exercises any right given to it to approve or disapprove, (b) any arrangement or term is to be satisfactory to Lender, or (c) any other decision or determination is to be made by Lender, the decision to approve or disapprove all decisions that arrangements or terms are satisfactory or not satisfactory, and all other decisions and determinations made by Lender, shall be in the sole discretion of Lender, except as may be otherwise expressly and specifically provided herein. Prior to a Securitization, whenever pursuant to this Agreement or any other Loan Document the Rating Agencies are given any right to approve or disapprove any matter, or any arrangement or term is to be satisfactory to the Rating Agencies, to the extent not already required, the decision of Lender to approve or disapprove such matter or to decide whether arrangements or terms are satisfactory or not satisfactory, shall be substituted therefor.

## **ARTICLE 17.**

### **MISCELLANEOUS**

#### **Section 17.1 Survival.**

This Agreement and all covenants, agreements, representations and warranties made herein and in the certificates delivered pursuant hereto shall survive the making by Lender of the Loan and the execution and delivery to Lender of the Note, and shall continue in full force and effect so long as all or any of the Debt is outstanding and unpaid unless a longer period is expressly set forth in this Agreement, the Security Instrument, the Note or the other Loan Documents. Whenever in this Agreement any of the parties hereto is referred to, such reference shall be deemed to include the legal representatives, successors and assigns of such party. All covenants, promises and agreements in this Agreement, by or on behalf of Borrower, shall inure to the benefit of the legal representatives, successors and assigns of Lender.

#### **Section 17.2 Governing Law.**

**(A) THIS AGREEMENT WAS NEGOTIATED IN THE STATE OF NEW YORK AND THE LOAN WAS MADE BY LENDER AND ACCEPTED BY BORROWER IN THE STATE OF NEW YORK, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE. THIS AGREEMENT, THE NOTE AND THE OTHER LOAN DOCUMENTS AND THE OBLIGATIONS ARISING HEREUNDER AND THEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE (WITHOUT REGARD**

**TO PRINCIPLES OF CONFLICT OF LAWS) AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES THE PROVISIONS FOR THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIEN AND SECURITY INTEREST CREATED PURSUANT HERETO AND PURSUANT TO THE OTHER LOAN DOCUMENTS (OTHER THAN WITH RESPECT TO LIENS AND SECURITY INTERESTS IN PROPERTY WHOSE PERFECTION AND PRIORITY IS COVERED BY ARTICLE 9 OF THE UCC (INCLUDING, WITHOUT LIMITATION, THE ACCOUNTS) WHICH SHALL BE GOVERNED BY THE LAW OF THE JURISDICTION APPLICABLE THERETO IN ACCORDANCE WITH SECTIONS 9-301 THROUGH 9-307 OF THE UCC AS IN EFFECT IN THE STATE OF NEW YORK) SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE IN WHICH THE PROPERTY IS LOCATED, IT BEING UNDERSTOOD THAT, TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH STATE, THE LAW OF THE STATE OF NEW YORK SHALL GOVERN THE CONSTRUCTION, VALIDITY AND ENFORCEABILITY OF ALL LOAN DOCUMENTS AND ALL OF THE OBLIGATIONS ARISING HEREUNDER OR THEREUNDER. TO THE FULLEST EXTENT PERMITTED BY LAW, BORROWER HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS AGREEMENT, THE NOTE AND THE OTHER LOAN DOCUMENTS, AND THIS AGREEMENT, THE NOTE AND THE OTHER LOAN DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW EXCEPT AS SPECIFICALLY SET FORTH ABOVE.**

**(B) ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST LENDER OR BORROWER ARISING OUT OF OR RELATING TO THIS AGREEMENT MAY AT LENDER'S OPTION BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW AND BORROWER WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND BORROWER HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. BORROWER DOES HEREBY DESIGNATE AND APPOINT:**

Corporation Service Company (CSC)  
1180 Avenue of the Americas, Suite 210  
New York, NY 10036-8401

**AS ITS AUTHORIZED AGENT TO ACCEPT AND ACKNOWLEDGE ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW YORK, NEW YORK, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE MAILED OR DELIVERED TO BORROWER IN THE MANNER PROVIDED HEREIN SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON**



**BORROWER, IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW YORK. BORROWER (I) SHALL GIVE PROMPT NOTICE TO LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (II) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW YORK, NEW YORK (WHICH SUBSTITUTE AGENT AND OFFICE SHALL BE DESIGNATED AS THE PERSON AND ADDRESS FOR SERVICE OF PROCESS), AND (III) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW YORK, NEW YORK OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR.**

**Section 17.3 Headings.**

The Article and/or Section headings in this Agreement are included herein for convenience of reference only and shall not constitute a part of this Agreement for any other purpose.

**Section 17.4 Severability.**

Wherever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under Applicable Law, but if any provision of this Agreement shall be prohibited by or invalid under Applicable Law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

**Section 17.5 Preferences.**

Lender shall have the continuing and exclusive right to apply or reverse and reapply any and all payments by Borrower to any portion of the obligations of Borrower hereunder. To the extent Borrower makes a payment or payments to Lender, which payment or proceeds or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside or required to be repaid to a trustee, receiver or any other party under any Creditors Rights Laws, state or federal law, common law or equitable cause, then, to the extent of such payment or proceeds received, the obligations hereunder or part thereof intended to be satisfied shall be revived and continue in full force and effect, as if such payment or proceeds had not been received by Lender.

**Section 17.6 Expenses.**

Subject to any limitations on payments of costs and expenses by Borrower expressly set forth in the Loan Documents, Borrower shall, within ten (10) Business Days of demand, pay Lender all reasonable, out-of-pocket costs and expenses incurred by Lender in connection with: (a) the preparation, negotiation, execution and delivery of this Agreement and all of the other Loan Documents; (b) the administration of this Agreement and the other Loan Documents for the term of the Loan and any modifications and amendments, if any, of this Agreement or any of the other Loan Documents; (c) the processing of any Borrower requests made hereunder and under any of the other Loan Documents; (d) the enforcement of any remedies hereunder or under the other Loan Documents or the satisfaction by Lender of any of Borrower's or Guarantor's obligations under this Agreement and the other Loan Documents; (e) enforcing or preserving any rights, in response to third party claims or the prosecuting or defending of any action or proceeding or other litigation, in each case against, under or affecting Borrower, this Agreement, the Security Instrument, the

Note, the other Loan Documents, the Property, or any other security given for the Loan; and (f) otherwise protecting Lender's interests under this Agreement and any other Loan Document, including, without limitation, in connection with any "work-out" of the Loan or any bankruptcy, insolvency, receivership, reorganization, rehabilitation, liquidation or other similar proceeding in respect of Borrower, SPE Component Entity or Guarantor or an assignment by Borrower, SPE Component Entity or Guarantor for the benefit of its creditors. For all purposes of this Agreement and the other Loan Documents, Lender's costs and expenses as described above shall also include, without limitation, all actual appraisal fees, engineering and architect costs and inspection fees, reasonable legal fees and expenses, accounting fees, any amounts payable in respect of advances (including, without limitation, protective advances, monthly payment advances, special servicer fee advances and advances of delinquent debt service payments, together with interest thereon, made pursuant to the servicing agreement), in each case, as a result of Borrower's default hereunder beyond any applicable grace period (or, with respect to special servicer fee advances, as a result of the Loan becoming a specially serviced loan pursuant to the servicing agreement), environmental and other consultant fees, auditor fees, and the cost to Lender of any title insurance premiums and title company charges (including for down dates, abstracts, tax certificates, title insurance endorsements required by Lender, and UCC financing statements, tax lien and litigation searches), surveys, recording, reconveyance and notary fees, any transfer and mortgage taxes, any Rating Agency fees and expenses, and any loan servicing and special servicing fees and expenses (including, without limitation, any "work-out" and/or liquidation fees, but excluding any monthly servicing fees and any fees in connection with any approval or consent with respect to a Lease, subordination, non-disturbance and attornment agreement, property management agreement, hotel franchise agreement, the release of any letter of credit, escrow analysis fees, fees for copies of loan histories, "pay by phone" payments, reserve disbursements, tax service or the continuation of UCC financing statements (for the avoidance of doubt, Borrower will pay any actual costs and expenses of Lender in connection with the foregoing, but not any fees)). Borrower shall not be liable for the payment of any such costs and expenses to the extent the same arise by reason of the gross negligence, illegal acts, fraud or willful misconduct of Lender. Borrower recognizes and agrees that formal written appraisals of the Property by a licensed independent appraiser may be required by Lender's internal procedures and/or federal regulatory reporting requirements on an annual and/or specialized basis and that Lender may, at its option, require inspection of the Property by an independent supervising architect and/or cost engineering specialist at least semiannually. Notwithstanding the foregoing, except to the extent an appraisal is required as a result of any action taken or request made by Borrower, Borrower shall not be required to pay for more than one appraisal in any twenty-four (24) month period unless an Event of Default occurs and is continuing or as otherwise required by law. Additionally, if Borrower is undertaking a Restoration or is performing work that requires the obtaining of a building permit, then Borrower shall pay the reasonable out-of-pocket costs of architects, engineers and other consultants retained by Lender to review the performance of such Restoration or work. Any amounts payable to Lender pursuant to this Section 17.6 shall become immediately due and payable upon written demand and, if the same is not paid within ten (10) Business Days from such written demand, shall bear interest at the Default Rate from the date which is ten (10) Business Days from such written demand until the date such amounts have been paid.

### **Section 17.7 Cost of Enforcement.**

In the event (a) that the Security Instrument is foreclosed in whole or in part, (b) of the bankruptcy, insolvency, rehabilitation or other similar proceeding in respect of Borrower or any of its constituent Persons or an assignment by Borrower or any of its constituent Persons for the benefit of its creditors, or (c) Lender exercises any of its other remedies under this Agreement, the Security Instrument, the Note and the other Loan Documents, Borrower shall be chargeable with and agrees to pay all costs of collection and defense, including attorneys' fees and costs, incurred by Lender or Borrower in connection therewith and in connection with any appellate proceeding or post judgment action involved therein, together with all required service or use taxes. Any amounts payable to Lender pursuant to this Section 17.7 shall become immediately due and payable upon written demand and, if the same is not paid within ten (10) Business Days from such written demand, shall bear interest at the Default Rate from the date which is ten (10) Business Days from such written demand until the date such amounts have been paid.

### **Section 17.8 Exhibits and Schedules Incorporated.**

The Exhibits and Schedules annexed hereto are hereby incorporated herein as a part of this Agreement with the same effect as if set forth in the body hereof.

### **Section 17.9 Offsets, Counterclaims and Defenses.**

Any assignee of Lender's interest in and to this Agreement, the Security Instrument, the Note and the other Loan Documents shall take the same free and clear of all offsets, counterclaims or defenses which are unrelated to such documents which Borrower may otherwise have against any assignor of such documents, and no such unrelated counterclaim or defense shall be interposed or asserted by Borrower in any action or proceeding brought by any such assignee upon such documents and any such right to interpose or assert any such unrelated offset, counterclaim or defense in any such action or proceeding is hereby expressly waived by Borrower.

### **Section 17.10 No Joint Venture or Partnership; No Third Party Beneficiaries.**

(a) Borrower and Lender intend that the relationships created under this Agreement, the Security Instrument, the Note and the other Loan Documents be solely that of borrower and lender. Nothing herein or therein is intended to create a joint venture, partnership, tenancy-in-common, or joint tenancy relationship between Borrower and Lender or to grant Lender any interest in the Property other than that of mortgagee, beneficiary or lender.

(b) This Agreement, the Security Instrument, the Note and the other Loan Documents are solely for the benefit of Lender and Borrower and nothing contained in this Agreement, the Security Instrument, the Note or the other Loan Documents shall be deemed to confer upon anyone other than Lender and Borrower any right to insist upon or to enforce the performance or observance of any of the obligations contained herein or therein. All conditions to the obligations of Lender to make the Loan hereunder are imposed solely and exclusively for the benefit of Lender and no other Person shall have standing to require satisfaction of such conditions in accordance with their terms or be entitled to assume that Lender will refuse to make the Loan in the absence of strict compliance with any or all thereof and no other Person shall under any circumstances be deemed to be a beneficiary of such conditions, any or all of which may be freely waived in whole

or in part by Lender if, in Lender's sole discretion, Lender deems it advisable or desirable to do so.

(c) The general partners, members, principals and (if Borrower is a trust) beneficial owners of Borrower are experienced in the ownership and operation of properties similar to the Property, and Borrower and Lender are relying solely upon such expertise and business plan in connection with the ownership and operation of the Property. Borrower is not relying on Lender's expertise, business acumen or advice in connection with the Property.

(d) Notwithstanding anything to the contrary contained herein, Lender is not undertaking the performance of (i) any obligations under the Leases; or (ii) any obligations with respect to such agreements, contracts, certificates, instruments, franchises, permits, trademarks, licenses and other documents.

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

(f) Borrower recognizes and acknowledges that in accepting this Agreement, the Note, the Security Instrument and the other Loan Documents, Lender is expressly and primarily relying on the truth and accuracy of the representations and warranties set forth in Article 3 of this Agreement without any obligation to investigate the Property and notwithstanding any investigation of the Property by Lender; that such reliance existed on the part of Lender prior to the date hereof, that the warranties and representations are a material inducement to Lender in making the Loan; and that Lender would not be willing to make the Loan and accept the this Agreement, the Note, the Security Instrument and the other Loan Documents in the absence of the warranties and representations as set forth in Article 3 of this Agreement.

#### **Section 17.11 Publicity; Advertising.**

(a) All news releases, publicity or advertising by Borrower or its Affiliates through any media intended to reach the general public which refers to this Agreement, the Note, the Security Instrument or the other Loan Documents or the financing evidenced by this Agreement, the Note, the Security Instrument or the other Loan Documents, to Lender or any of its Affiliates shall be subject to the prior written approval of Lender, not to be unreasonably withheld, except to the extent such disclosure is ordered by a court of competent jurisdiction or is otherwise required under Applicable Law.

(b) Borrower hereby agrees that Lender and its affiliated entities, including, without limitation, Wells Fargo & Company and its subsidiaries, may publicly identify details of the Loan in their respective advertising and public communications of all kinds, including, but not limited to, press releases, direct mail, newspapers, magazines, journals, e-mail or internet advertising or

communications. Such details may include the name of the Property, the address of the Property, the amount of the Loan, the Closing Date, and a description of the size and location of the Property.

#### **Section 17.12 Conflict; Construction of Documents; Reliance.**

In the event of any conflict between the provisions of this Agreement and the Security Instrument, the Note or any of the other Loan Documents, the provisions of this Agreement shall control. Wherever the phrase “during the continuance of an Event of Default” or the like appears herein or in any other Loan Document, such phrase shall not mean or imply that Lender has any obligation to accept a cure of such Event of Default. The parties hereto acknowledge that they were represented by competent counsel in connection with the negotiation, drafting and execution of this Agreement, the Note, the Security Instrument and the other Loan Documents and this Agreement, the Note, the Security Instrument and the other Loan Documents shall not be subject to the principle of construing their meaning against the party which drafted same. Borrower acknowledges that, with respect to the Loan, Borrower shall rely solely on its own judgment and advisors in entering into the Loan without relying in any manner on any statements, representations or recommendations of Lender or any parent, subsidiary or Affiliate of Lender. Lender shall not be subject to any limitation whatsoever in the exercise of any rights or remedies available to it under this Agreement, the Note, the Security Instrument and the other Loan Documents or any other agreements or instruments which govern the Loan by virtue of the ownership by it or any parent, subsidiary or Affiliate of Lender of any equity interest any of them may acquire in Borrower, and Borrower hereby irrevocably waives the right to raise any defense or take any action on the basis of the foregoing with respect to Lender’s exercise of any such rights or remedies. Borrower acknowledges that Lender engages in the business of real estate financings and other real estate transactions and investments which may be viewed as adverse-to or competitive with the business of Borrower or its Affiliates.

#### **Section 17.13 Entire Agreement.**

This Agreement, the Note, the Security Instrument and the other Loan Documents contain the entire agreement of the parties hereto and thereto in respect of the transactions contemplated hereby and thereby, and all prior agreements among or between such parties, whether oral or written between Borrower and Lender are superseded by the terms of this Agreement, the Note, the Security Instrument and the other Loan Documents.

#### **Section 17.14 Liability.**

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

#### **Section 17.15 Duplicate Originals; Counterparts.**

This Agreement may be executed in any number of duplicate originals and each duplicate original shall be deemed to be an original. The failure of any party hereto to execute this Agreement, or any counterpart hereof, shall not relieve the other signatories from their obligations hereunder.

**[NO FURTHER TEXT ON THIS PAGE]**

IN WITNESS WHEREOF, the parties hereto have caused this Loan Agreement to be duly executed by their duly authorized representatives, all as of the day and year first above written

BORROWER:

WHR LLC, a Hawaii limited liability company

By: Tower Development, Inc., a Hawaii corporation, its co-manager

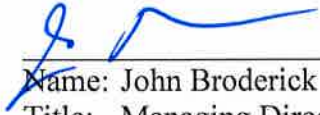
By:



Name: Stuart L. Miller  
Title: President

LENDER:

WELLS FARGO BANK, NATIONAL  
ASSOCIATION

By:   
Name: John Broderick  
Title: Managing Director



## EXHIBIT A

### **ADDITIONAL DEFINITIONS**

**“Debt Service Coverage Ratio”** means as of the last day of the calendar month immediately preceding the applicable date of calculation, the quotient obtained by dividing (1) the Adjusted Net Cash Flow by (2) the aggregate principal and interest projected to be due and payable over the twelve (12) month period subsequent to the date of calculation and a thirty (30) year amortization period. Borrower shall deliver to Lender such information as is reasonably required for Lender to make all applicable calculations. Lender’s calculation of the Debt Service Coverage Ratio, and all component calculations, shall be conclusive and binding on Borrower absent manifest error.

**“Adjusted Net Cash Flow”** means NOI minus normalized expenditures for costs and expenses related to movable furniture, fixtures or equipment that have no permanent structural connection to the applicable building at the Property (**“FF&E”**) equal to the greater of (a) 4% of Underwritten Revenue and (b) projected forward 12-month FF&E expenditures based on Borrower’s budget.

**“Debt Yield”** shall mean, as of the last day of the calendar month immediately preceding the applicable date of determination, the quotient (expressed as a percentage) obtained by dividing (a) Adjusted Net Cash Flow as of such date by (b) the outstanding principal amount of the Loan as of such date. Lender’s calculation of the Debt Yield, and all component calculations, shall be conclusive and binding on Borrower absent manifest error.

**“NOI”** means Underwritten Revenue minus Underwritten Operating Expenses.

### **INCOME**

**“Underwritten Revenue”** means Room Revenue plus F&B Revenue plus Telephone Revenue plus Parking Revenue plus Other Revenue.

**“Room Revenue”** means the product of (a) ADR and (b) Total Occupied Rooms.

**“ADR”** means the average daily rate actually charged at the Property over the trailing 12-month period.

**“Total Occupied Rooms”** means the product of (a) 365 (or 366 if the applicable period includes February 29), (b) the total number of rooms at the Property (which at the time of closing is 388), and (c) the actual occupancy percentage at the Property over the trailing 12-month period.

**“F&B Revenue”** means the actual food and beverage revenue as determined from the most recent operating statement for the Property at the time of determination, to the extent such revenue is deemed recurring and sustainable, determined on a trailing 12-month basis, however, a trailing 6-month basis will be utilized for the 1<sup>st</sup> year of the Loan.

**“Telephone Revenue”** means the actual telephone revenue as determined from the most recent operating statement for the Property at the time of determination, to the extent such revenue is deemed recurring and sustainable, determined on a trailing 12-month basis.

**“Parking Revenue”** means the actual parking revenue as determined from the most recent operating statement for the Property at the time of determination, to the extent such revenue is deemed recurring and sustainable, determined on a trailing 12-month basis, however, a trailing 6-month basis will be utilized for the 1<sup>st</sup> year of the Loan.

**“Other Revenue”** means all other applicable income as determined from the most recent operating statement for the Property at the time of determination, to the extent such income is deemed recurring and sustainable, determined on a trailing 12-month basis, computed in accordance with accounting principles reasonably acceptable to Lender. Notwithstanding the foregoing, Other Income will not include (i) insurance proceeds (other than proceeds of rent loss, business interruption or other similar insurance allocable to the applicable period); (ii) Condemnation Proceeds (other than Condemnation Proceeds arising from a temporary taking or the use and occupancy of all or part of the applicable Property allocable to the applicable period); (iii) proceeds of any financing; (iv) proceeds of any sale, exchange or transfer of the Property or any part thereof or interest therein (including proceeds of any sales of furniture, fixtures and equipment); (v) capital contributions or loans to Borrower or an Affiliate of Borrower; (vi) where applicable, any item of income otherwise includable in Other Income but paid directly by any tenant to a Person other than Borrower; (vii) any other extraordinary, non-recurring revenues; (viii) where applicable, payments paid by or on behalf of any tenant under a Lease which is the subject of any proceeding or action relating to its bankruptcy, reorganization or other arrangement pursuant to the Bankruptcy Code or any similar federal or state law or which has been adjudicated a bankrupt or insolvent unless such Lease has been affirmed by the trustee in such proceeding or action pursuant to a final, non-appealable order of a court of competent jurisdiction; (ix) where applicable, payments paid by or on behalf of any tenant in default under its lease beyond any applicable notice and cure periods; (x) where applicable, payments paid by or on behalf of any tenant that has expressed its intention (directly, constructively or otherwise) to not renew or to terminate, cancel and/or reject its applicable lease; (xi) where applicable, payments by or on behalf of any tenant under a lease which has failed to extend or renew such lease in accordance with an option in its lease for which the notice period has expired; (xii) where applicable, payments by or on behalf of any tenant under a lease which has less than one hundred eighty (180) days remaining under its lease term and has not extended or renewed its lease by written notice to Borrower; (xiii) where applicable, payments paid by or on behalf of any tenant under a Lease the demised premises of which are not occupied either by such tenant or an affiliate or sublessee thereof; (xiv) where applicable, payments paid by or on behalf of any tenant under a Lease in whole or partial consideration for the termination of any Lease; (xv) sales tax rebates from any Governmental Authority; (xvi) sales, use and occupancy taxes on receipts required to be accounted for by Borrower to any Governmental Authority; (xvii) refunds and uncollectible accounts; (xviii) interest income from any source; (xix) where applicable, unforfeited security deposits, utility and other similar deposits; (xx) where applicable, income from tenants not paying rent; or (xxi) any disbursements to Borrower from the Reserve Funds.

### **EXPENSES**

**“Underwritten Operating Expenses”** means projected annualized Operating Expenses based on a trailing 12-month period adjusted upwards or downwards in Lender’s reasonable discretion by anticipated changes in Operating Expenses.

**“Operating Expenses”** means the sum of (a) Departmental Expenses, (b) Undistributed Expenses and (c) Fixed Expenses.

**“Departmental Expenses”** means Room Expenses plus F&B Expenses plus Telephone Expenses plus Other Departmental Expenses.

**“Room Expenses”** means the product of (a) actual expenses related to the generation of room revenue as determined from the most recent operating statement for the Property at the time of determination, expressed as a dollar amount per occupied room (based on actual occupancy over the applicable period) and (b) Total Occupied Rooms.

**“F&B Expenses”** means the product of (a) actual expenses related to the generation of food and beverage revenue as determined from the most recent operating statement for the Property at the time of determination, expressed as a dollar amount per occupied room (based on actual occupancy over the applicable period) and (b) Total Occupied Rooms.

**“Telephone Expenses”** means the product of (a) actual expenses related to the generation of telephone revenue as determined from the most recent operating statement for the Property at the time of determination, expressed as a dollar amount per occupied room (based on actual occupancy over the applicable period) and (b) Total Occupied Rooms.

**“Other Departmental Expenses”** means the product of (a) actual expenses related to the generation of Other Revenue as determined from the most recent operating statement for the Property at the time of determination expressed as a dollar amount per occupied room (based on actual occupancy over the applicable period) and (b) Total Occupied Rooms.

**“Undistributed Expenses”** means all other expenses not otherwise included in another category of expenses within the definition of Operating Expenses, computed in accordance with accounting principles reasonably acceptable to Lender, of whatever kind and from whatever source, relating to the ownership, operation, repair, maintenance and management of the Property that are incurred on a regular monthly or other periodic basis, including, without limitation (and without duplication): (a) management fees (whether or not actually paid) equal to, if managed by a third-party manager, the actual management fees or, if managed by an Affiliated Manager, 3.0% of Underwritten Revenue; franchise fees (whether or not actually paid) equal to the greater of the actual franchise fees or 2.4% of Underwritten Revenue; actual advertising and marketing expenses; and actual general and administrative costs and expenses; and (b) costs attributable to the ordinary operation, repair and maintenance of the Improvements (including any common area maintenance costs); professional fees; license fees; utilities; payroll, benefits and related taxes and expenses; computer processing charges; where applicable, operating equipment or other lease payments as approved by Lender; bond assessments; and other similar costs and expenses; in each instance, unless otherwise noted, only to the extent actually paid for by Borrower. Notwithstanding the foregoing, Undistributed Expenses shall not include debt service (including principal, interest, impounds and other reserves), capital expenditures, FF&E expenses, costs and expenses related to any property improvement plan (or similar obligations), tenant improvement costs, leasing commissions or other expenses which are paid from escrows required by the Loan Documents (other than escrows with respect to Taxes and/or Insurance Premiums); any payment or expense for which Borrower was or is to be reimbursed from proceeds of the loan or insurance or by any

third party; federal, state or local income taxes; any non-cash charges such as depreciation and amortization; and, where applicable, any item of expense otherwise includable in Undistributed Expenses which is paid directly by any tenant except real estate taxes paid directly to any taxing authority by any tenant.

**“Fixed Expenses”** means the sum of (a) Taxes (based on the most current bill annualized, subject to adjustment by Lender to take into account any change in assessment that has not yet been reflected in the most current tax bill), (b) Insurance Premiums (based on the most current premium annualized), (c) forward 12-month ground lease payments, and (d) operating lease payments.

In making the calculations described herein, applicable line items may be adjusted by Lender in its reasonable discretion (a) to accurately reflect the amounts of any extraordinary non-recurring items in the relevant period and to reflect on a pro rata basis those items on an annual or semi-annual basis, and (b) where applicable, to reflect leases (and projected changes to the applicable line items above) which are either (i) anticipated to terminate within ninety (90) days of the date of calculation or (ii) executed with creditworthy tenants with rent commencement dates scheduled to occur within ninety (90) days of the date of calculation.

**[NO FURTHER TEXT ON THIS PAGE]**

**Exhibit E**  
**to Consent Request With Specific Agreed Upon Conditional Approval of Consent to  
Mortgage of General Lease S-5844 dated June 14, 2023**

Form of Promissory Note

## PROMISSORY NOTE

\$50,000,000.00

New York, New York  
August 31, 2018

FOR VALUE RECEIVED **WHR LLC**, a Hawaii limited liability company, having its principal place of business at 93 Banyan Drive, Hilo, Hawaii 96720, as maker (“**Borrower**”), hereby unconditionally promises to pay to the order of **WELLS FARGO BANK, NATIONAL ASSOCIATION**, having an address at c/o Wells Fargo Commercial Mortgage Servicing, 401 South Tryon Street, 8<sup>th</sup> Floor, Charlotte, North Carolina 28202 (together with its successors and/or assigns, “**Lender**”), or at such other place as the holder hereof may from time to time designate in writing, the principal sum of FIFTY MILLION AND NO/100 DOLLARS (\$50,000,000.00), or so much thereof as is advanced, in lawful money of the United States of America, with interest thereon to be computed from the date of this Promissory Note (“**Note**”) at the Interest Rate, and to be paid in accordance with the terms of this Note and that certain Loan Agreement dated the date hereof between Borrower and Lender (as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time, the “**Loan Agreement**”). All capitalized terms not defined herein shall have the respective meanings set forth in the Loan Agreement.

### ARTICLE 1: PAYMENT TERMS

Borrower agrees to pay the principal sum of this Note and interest on the unpaid principal sum of this Note from time to time outstanding at the rates and at the times specified in Article 2 of the Loan Agreement and the outstanding balance of the principal sum of this Note and all accrued and unpaid interest thereon shall be due and payable on the Maturity Date.

### ARTICLE 2: DEFAULT AND ACCELERATION

The Debt shall without notice become immediately due and payable at the option of Lender if any payment required in this Note is not paid on or prior to the date when due or if not paid on the Maturity Date or on the happening of any other Event of Default.

### ARTICLE 3: LOAN DOCUMENTS

This Note is secured by the Security Instrument and the other Loan Documents. All of the terms, covenants and conditions contained in the Loan Agreement, the Security Instrument and the other Loan Documents are hereby made part of this Note to the same extent and with the same force as if they were fully set forth herein. In the event of a conflict or inconsistency between the terms of this Note and the Loan Agreement, the terms and provisions of the Loan Agreement shall govern.

#### **ARTICLE 4: SAVINGS CLAUSE**

Notwithstanding anything to the contrary, (a) all agreements and communications between Borrower and Lender are hereby and shall automatically be limited so that, after taking into account all amounts deemed interest, the interest contracted for, charged or received by Lender shall never exceed the Maximum Legal Rate, (b) in calculating whether any interest exceeds the Maximum Legal Rate, all such interest shall be amortized, prorated, allocated and spread over the full amount and term of all principal indebtedness of Borrower to Lender, and (c) if through any contingency or event, Lender receives or is deemed to receive interest in excess of the Maximum Legal Rate, any such excess shall be deemed to have been applied toward payment of the principal of any and all then outstanding indebtedness of Borrower to Lender, or if there is no such indebtedness, shall immediately be returned to Borrower.

#### **ARTICLE 5: NO ORAL CHANGE**

This Note may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of Borrower or Lender, but only by an agreement in writing signed by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.

#### **ARTICLE 6: WAIVERS**

Borrower and all others who may become liable for the payment of all or any part of the Debt do hereby severally waive presentment and demand for payment, notice of dishonor, notice of intention to accelerate, notice of acceleration, protest and notice of protest and non-payment and all other notices of any kind, except for any notices expressly required pursuant to the Loan Documents. No release of any security for the Debt or extension of time for payment of this Note or any installment hereof, and no alteration, amendment or waiver of any provision of this Note, the Loan Agreement or the other Loan Documents made by agreement between Lender or any other Person shall release, modify, amend, waive, extend, change, discharge, terminate or affect the liability of Borrower or any other Person who may become liable for the payment of all or any part of the Debt under this Note, the Loan Agreement or the other Loan Documents. No notice to or demand on Borrower shall be deemed to be a waiver of the obligation of Borrower or of the right of Lender to take further action without further notice or demand as provided for in this Note, the Loan Agreement or the other Loan Documents. If Borrower is a partnership or limited liability company, the agreements herein contained shall remain in force and be applicable, notwithstanding any changes in the individuals comprising the partnership or limited liability company, and the term "Borrower," as used herein, shall include any alternate or successor partnership or limited liability company, but any predecessor partnership or limited liability company and their partners or members shall not thereby be released from any liability. If Borrower is a corporation, the agreements contained herein shall remain in full force and be applicable notwithstanding any changes in the shareholders comprising, or the officers and directors relating to, the corporation, and the term "Borrower," as used herein, shall include any alternative or successor corporation, but any predecessor corporation shall not be relieved of liability hereunder. Nothing in the foregoing sentence shall be construed as a consent to, or a waiver of, any prohibition or restriction on transfers of interests

in such partnership, limited liability company or corporation, which may be set forth in the Loan Agreement, the Security Instrument or any other Loan Document.

#### **ARTICLE 7: TRANSFER**

Upon the transfer of this Note, Borrower hereby waiving notice of any such transfer, Lender may deliver all the collateral mortgaged, granted, pledged or assigned pursuant to the Loan Documents, or any part thereof, to the transferee who shall thereupon become vested with all the rights herein or under applicable law given to Lender with respect thereto, and Lender shall thereafter forever be relieved and fully discharged from any liability or responsibility in the matter; but Lender shall retain all rights hereby given to it with respect to any liabilities and the collateral not so transferred.

#### **ARTICLE 8: EXCULPATION**

The provisions of Article 13 of the Loan Agreement are hereby incorporated by reference into this Note to the same extent and with the same force as if fully set forth herein.

#### **ARTICLE 9: GOVERNING LAW**

**(A) THIS NOTE WAS NEGOTIATED IN THE STATE OF NEW YORK AND MADE BY BORROWER AND ACCEPTED BY LENDER IN THE STATE OF NEW YORK, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS NOTE AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE (WITHOUT REGARD TO PRINCIPLES OF CONFLICT LAWS) AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA. TO THE FULLEST EXTENT PERMITTED BY LAW, BORROWER HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS NOTE AND THIS NOTE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW.**

**(B) ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST LENDER OR BORROWER ARISING OUT OF OR RELATING TO THIS NOTE MAY AT LENDER'S OPTION BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW, AND BORROWER WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND BORROWER HEREBY IRREVOCABLY SUBMITS TO THE**



**JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING.  
BORROWER DOES HEREBY DESIGNATE AND APPOINT:**

Corporation Service Company (CSC)  
1180 Avenue of the Americas, Suite 210  
New York, NY 10036-8401

**AS ITS AUTHORIZED AGENT TO ACCEPT AND ACKNOWLEDGE ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW YORK, NEW YORK, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE MAILED OR DELIVERED TO BORROWER IN THE MANNER PROVIDED HEREIN SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON BORROWER IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW YORK. BORROWER (I) SHALL GIVE PROMPT NOTICE TO LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (II) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW YORK, NEW YORK (WHICH SUBSTITUTE AGENT AND OFFICE SHALL BE DESIGNATED AS THE PERSON AND ADDRESS FOR SERVICE OF PROCESS), AND (III) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW YORK, NEW YORK OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR.**

**ARTICLE 10: NOTICES**

All notices or other written communications hereunder shall be delivered in accordance with Article 14 of the Loan Agreement.

**ARTICLE 11: JOINT AND SEVERAL LIABILITY**

If Borrower consists of more than one Person, the obligations and liabilities of each such Person shall be joint and several.

**[NO FURTHER TEXT ON THIS PAGE]**

IN WITNESS WHEREOF, Borrower has duly executed this Note as of the day and year first above written.

BORROWER:

WHR LLC, a Hawaii limited liability company

By: Tower Development, Inc., a Hawaii corporation, its co-manager

By: 

Name: Stuart L. Miller

Title: President



KOBAYASHI SUGITA & GODA, LLP  
Attorneys at Law

Bert T. Kobayashi, Jr.\*  
Alan M. Goda\*  
  
John R. Aube\*  
Charles W. Gall\*  
Neal T. Gota  
Charles D. Hunter  
Robert K. Ichikawa\*  
Christopher T. Kobayashi\*  
Jonathan A. Kobayashi  
Jan M. L. Y. Kutsunai\*  
David M. Louie\*  
Nicholas R. Monlux  
Jonathan S. Moore  
Aaron R. Mun  
Bruce A. Nakamura\*

Kenneth M. Nakasone\*  
Harry Y. Oda  
Gregory M. Sato\*  
Jesse W. Schiel\*  
Craig K. Shikuma\*  
Lex R. Smith\*  
Joseph A. Stewart\*  
Brian D. Tongg  
David B. Tongg\*  
Caycie K. G. Wong

\*A Law Corporation

Of Counsel:  
Kenneth Y. Sugita\*  
Wendell H. Fujii\*  
Clifford K. Higa\*  
Burt T. Lau\*  
John F. Lezak\*  
Larry L. Myers\*  
David Y. Suzuki\*  
Maria Y. Wang  
  
Kaylee K. Correa  
Sianha M. Gualano  
Austin H. Jim On  
Stephen G. K. Kaneshiro  
Travis Y. Kuwahara  
Ryan D. Louie  
Zachary K. Shikada  
Timothy T. Silvester

June 21, 2023

Chair Dawn N.S. Chang and  
Members of the Board of Land and Natural Resources  
Board of Land and Natural Resources  
P.O. Box 621  
Honolulu, Hawai'i 96809-0621  
[blnr.testimony@hawaii.gov](mailto:blnr.testimony@hawaii.gov)

Re: Written Testimony in Support of Conservation District Use  
Application (CDUA) OA-3913 State of Hawaii - Diamond  
Head Breakwater Safety Project Seaward of Tax Map Key:  
(1) 3-1-041:005, Kaaławai, Honolulu, Oahu;  
BLNR Meeting June 23, 2003, Agenda Item K-2

Dear Chair Dawn N.S. Chang and Members of the Board of Land and Natural Resources:

This letter is written to the Board of Land and Natural Resources (“**Board**”) on behalf of my client, the Doris Duke Foundation for Islamic Art (“**DDFIA**”) in support of the proposed CDUA application of the State of Hawaii (“**State**”) referenced above, which will be considered by the Board at the Board meeting on June 23, 2003. I write this letter to provide comments regarding certain legal issues which have arisen in prior discussions of similar applications regarding such a project and may arise regarding this application.

I am the former Attorney General of the State of Hawaii, having served under Governor Neil Abercrombie from 2011 through 2014. I have been a practicing lawyer for the past 45 years, since 1978. I served as the President and Director of the Hawaii State Bar Association, Lawyer Representative for the U.S. Court of Appeals of the Ninth Circuit, Northwest Regional Governor of the National Asian Pacific American Bar Association, Vice Chair of the Hawaii Supreme Court Rule 19 Committee on Judicial Performance, Chair and Director of the Aloha Tower Development Corporation, and on numerous Bench Bar Committees. I served as a Co-Vice Chair on the recent Task Force on Civil Justice Improvements, which revised the Civil Rules for Hawaii’s Circuit Courts.

I have appeared in court many, many times, both in state and federal courts and have handled many cases involving the defense of claims against property owners regarding allegations of catastrophic personal injuries. In the 1990s, I personally defended DDFIA against a lawsuit brought by a Mr. Corpuz, who dived into the ocean area where the breakwater is located and fractured his neck, becoming a quadriplegic. That case and incident, along with others, have previously been cited as reasons to allow the modification of the breakwater. In addition, when I served as Attorney General, I oversaw the handling of numerous lawsuits against the State claiming that the State was responsible for the personal injuries sustained by various individuals, even where explicit warning signs had been clearly posted and maintained.

I offer my comments regarding three legal issues which are important for the Board to consider regarding the CDUA. First, approval of the CDUA would significantly reduce and possibly eliminate the potential for serious injury for members of the public and would reduce the potential risk to the State. Some other public comments have incorrectly stated that the State, as the current owner of the breakwater, does not have a significant risk of liability if someone were to injure themselves by jumping or falling from the breakwater. Second, other public comments have incorrectly claimed that the Board is somehow precluded from considering the CDUA because of prior proceedings where a similar project was not approved, citing to possible legal doctrines of “*stare decisis*,” *res judicata* and/or collateral estoppel. Third, one of the public commentators has claimed that the State has sovereign immunity for any negligence claims which might be brought for personal injury. This is not true, as the State has waived sovereign immunity for tort claims.

**A. Approval of the CDUA Would Reduce the Potential for Serious Injury and the Potential Risk to the State of Hawaii as a Landowner of the Breakwater.**

Under Hawaii law, prudent landowners must consider issues related to risks of injury by visitors to the property, and warn of dangers which exist on the property. This is particularly true in regard to areas where the general public frequently visit, regardless of whether the public is invited or not. While there is some statutory protection for private landowners who allow their property to be used for recreational use, such protections generally are not absolute.<sup>1</sup>

The Hawaii Supreme Court has summarized the legal obligations of a landowner by stating that “an occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual.”<sup>2</sup> The court subsequently expounded by stating: “[I]f a condition exists upon the land which poses an unreasonable risk of harm to persons using the land, then the possessor of the land, if the possessor knows, or should have known of the unreasonable risk, owes a duty to the persons using the land

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<sup>1</sup> See, e.g., HRS §520-3, 6

<sup>2</sup> *Pickard v. City and County of Honolulu*, 51 Haw. 134, 135, 452 P.2d 445, 446 (1969).

to take reasonable steps to eliminate the unreasonable risk, or adequately to warn the users against it.”<sup>3</sup> Further, this concept has ultimately resulted in a number of rulings in Hawaii courts which address the potential liability of a landowner and its obligations to use reasonable care.

One such case is *Levy v. Kimball*,<sup>4</sup> in which the plaintiff had slipped and fallen off a seawall owned by the State of Hawaii, which “had acquired an easement over [a] seawall for the express purpose of providing a path for public travel.”<sup>5</sup> The Hawaii Supreme Court held that the dangerous condition of the seawall imposed upon the State, at minimum, a duty to warn of the obvious danger of slipping and falling off the seawall while using it as a thoroughfare, for which purpose it was provided by the State. *Id.* at 500, 443 P.2d at 145.

Further, the Hawaii Supreme Court has noted that even the plaintiff’s subjective knowledge of the fact that a condition is dangerous is not necessarily sufficient to preclude a claim for damages by the injured party. Instead, the court found that “a landowner retains a duty to the plaintiff if the plaintiff’s injury was foreseeable.”<sup>6</sup> Further, the court noted that the issue as to the foreseeability by the landlord was one to be decided by the jury, stating: “the characterization of the danger as known or obvious is fact-intensive and depends on the circumstances involved in each case. We believe such an assessment should be reserved for the jury, unless reasonable minds could not differ.”<sup>7</sup>

Plaintiffs’ attorneys, relying upon case law such as that discussed above, frequently claim in lawsuits that landowners were negligent for failing to warn persons who visit their lands of foreseeable dangers on their lands. Such attorneys frequently retain experts to testify that the landowners failed to provide adequate warnings, even where signs have been clearly posted or other precautions taken. Whether signs or other precautions are adequate is generally held by the courts to be a question of fact, which requires a jury or judge trial. As such, these claims generally result in settlement or a landowner having to take a case all the way to trial, with the risk of an adverse verdict.

The CDUA contains substantial information that prior efforts, such as erecting a fence and posting warning signs, have been unsuccessful to discourage jumping and other unsafe and risky behavior by members of the public. Consequently, the removal of the breakwater and the placement of a rock revetment at the base of the seawall in the area, as contemplated by the CDUA, appear to be necessary physical modifications which will eliminate certain hazards and discourage and reduce the likelihood of visitors to the area jumping from the breakwater and/or the seawall, thus reducing the likelihood of future injuries. By reducing the prospect of future injuries, these

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<sup>3</sup> *Corbett v. Ass’n of Apartment Owners of Wailua Bayview Apartments*, 70 Haw. 415, 417, 772 P.2d 693, 695 (1989).

<sup>4</sup> 50 Haw. 497, 443 P.2d 142 (1968).

<sup>5</sup> *Id.* at 498, 443 P.2d at 144.

<sup>6</sup> *Id.* at 144, 267 P.3d at 1249 (2011).

<sup>7</sup> *Id.* at 146, 267 P.3d at 1251 (2011).

physical modifications will also have the benefit of reducing the potential risks facing the State as a landowner.

**B. Under Hawaii Law, Administrative Agencies are to Review Permit Applications on their Merits and Are Not Precluded From Making Decisions Which Differ From Prior Decisions.**

Another issue that has been raised in some public comments regarding the CDUA is whether the Board is somehow precluded from granting the CDUA because of its prior denial of a similar application in 2019. The doctrine of *stare decisis* is, in general, a principle that provides that when a question of law has already been settled by the court of last resort, i.e. the Hawaii Supreme Court for Hawaii State law issues, it forms a precedent which is not afterward to be departed from or lightly overruled.<sup>8</sup> However, the Hawaii Supreme Court has noted that an administrative agency is free to determine how much precedential effect to give prior adjudicatory matters,<sup>9</sup> so that the principle of *stare decisis* does not prohibit or bar a decision by the Board regarding the CDUA in this matter.

As the United States Supreme Court stated, the decision to proceed by “general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”<sup>10</sup> Similarly, the Hawaii Supreme Court has affirmed the position that “agencies are allowed the broad discretion to choose whether to develop policy by rule-making or adjudication.”<sup>11</sup>

In *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969), the United States Supreme Court held that *stare decisis* is subject to a “qualified role . . . in the administrative process.”<sup>12</sup> Thus, while an agency has the ability to make its decisions precedential, it also has the ability to reconsider prior decisions. The reasons for authorizing an agency to move in a different direction from a previous decision are plentiful, as the United States Supreme Court stated:

[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be resolved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a

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<sup>8</sup> *Robinson v. Ariyoshi*, 65 Haw. 641, 653, 658 P.2d 287, 297 (1982) (“Under the rule of *stare decisis*, where a principle has been passed upon by the court of last resort, it is the duty of all inferior tribunals to adhere to the decision, without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment.”).

<sup>9</sup> *In re Application of Hawaiian Elec. Co., Inc.*, 81 Hawai‘i 459, 467, 918 P.2d 561, 569 (1996), as amended (July 11, 1996).

<sup>10</sup> *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

<sup>11</sup> 81 Haw. 459, 918 P.2d 561 (1996).

<sup>12</sup> *Id.*

particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain the power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.<sup>13</sup>

Here, we understand that the Board has actually ruled to deny a prior CDUA for a similar project on one occasion. Although a second CDUA for such a project was submitted, we understand it was withdrawn before any action by the Board. There is no indication in the prior denial by the Board of a single CDUA regarding a similar project that there was an intention to make such a decision precedential or forever unchanging. With respect to the State's request in this matter, neither the general principle of *stare decisis* nor any pronouncement of precedent by the Board relative to its prior decisions precludes the Board from considering this CDUA on its merits despite a prior denial. Moreover, circumstances have changed, as 1) the State is now the owner of the breakwater and submerged lands area, and faces potential liability for claims of personal injury; and 2) additional time has passed demonstrating that reasonable efforts short of physical modifications have been unsuccessful in discouraging the risky behavior of some people who come to the area.

Similarly, to the extent that there are any concerns regarding the doctrines of *res judicata* or collateral estoppel precluding the Board from approving the CDUA, those doctrines would similarly not prevent such an approval.

The doctrine of *res judicata* provides “that the judgment of a court of competent jurisdiction is a bar to a new action in another court between the same parties or their privies concerning the same subject matter. It precludes the relitigation, not only of the issues that were actually litigated in the first action, but also of all grounds of claim and defense which might have been litigated in the first action but were not litigated or decided.”<sup>14</sup> The Hawaii Supreme Court has held that the “doctrines of *res judicata* and collateral estoppel also apply to matters litigated before an administrative agency.”<sup>15</sup>

Under Hawaii law, the doctrine of *res judicata* applies when: 1) the claim or cause of action asserted in the present action was or could have been asserted in the prior action, 2) the parties in the present action are identical to, or in privity with, the parties in the prior action, and 3) a final judgment on the merits was rendered in the prior action.<sup>16</sup> *Res judicata* and collateral estoppel principles are applicable to matters litigated before administrative agencies when (1) the

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<sup>13</sup> *Chenery*, 332 U.S. at 202-03.

<sup>14</sup> *Santos v. State, Dept. of Transp., Kauai Div.*, 64 Haw. 648, 651-52, 646 P.2d 962, 965 (1982).

<sup>15</sup> *Id.* at 653, 646 P.2d at 966.

<sup>16</sup> *Dannenberg v. State*, 139 Haw. 39, 59, 383 P.3d 1177, 1197 (2016)

administrative agency acts in a judicial capacity, (2) the agency resolves disputed issues of fact properly before it, and (3) the parties have an adequate opportunity to litigate.<sup>17</sup> This standard was echoed by the United States Supreme Court, which stated: “When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.”<sup>18</sup>

As the Hawaii Supreme Court wrote “res judicata and collateral estoppel . . . apply to [only those] matters *litigated* before an administrative agency.”<sup>19</sup> In other words, these principles “are tempered . . . by the prerequisite that a plaintiff have a full and fair opportunity to litigate the relevant issues.”<sup>20</sup>

In the course of submitting its original CDUA to the BLNR, the Foundation never fully and fairly litigated the relevant issues. Specifically, the Foundation never presented evidence or argument at a contested hearing. Unlike in *Leong v. Hilton Hotels Corp.*,<sup>21</sup> where the court found the plaintiff had fully and fairly litigated by taking advantage of “evidentiary hearings and numerous appeals”, the Foundation did not participate in a contested case concerning the issues in its previously-filed CDUA. Instead, soon after its application was denied, the Foundation conveyed the submerged lands at issue to the State, and the Foundation’s application was procedurally terminated. For this reason, there was also no final judgment or determination by the Board.<sup>22</sup>

Furthermore, the full and fair litigation of an issue requires appellate review. Not only did the Foundation never present evidence or argument, but the Board’s denial was never reviewed by an appellate body. “Hawaii courts [will] not give preclusive effect to [administrative] proceedings” where the decision has gone “unreviewed.”<sup>23</sup> The “relative competence and responsibility . . . as between an administrative agency and a court” counsel against giving preclusive effect to any agency determination absent judicial review.<sup>24</sup>

Ultimately, the BLNR’s denial was not a final judgment or determination in any sense of finality. Factual findings were not entered, the legal issues had not been litigated, an administrative law judge or similar entity had not issued an opinion on the merits, and no appellate body, either

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<sup>17</sup> *Santos* at 653, 646 P.2d at 966.Id.

<sup>18</sup> *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966).

<sup>19</sup> *Santos* at 654, 646 P.2d at 966 (1982) (emphasis added).

<sup>20</sup> *Pele Def. Fund v. Paty*, 73 Haw. 578, 600, 837 P.2d 1247, 1261 (1992).

<sup>21</sup> 698 F.Supp. 1496 (D. Haw. 1988).

<sup>22</sup> *See Dannenberg v. State*, 139 Hawaii 39, 60, 383 P.3d 1177, 1198 (2016) (applying res judicata and collateral estoppel only where “the particular issue in question was . . . finally decided”) (emphasis added).

<sup>23</sup> *Carroll v. Maui Cnty.*, 866 F.Supp. 459, 464-65 (D. Haw. 1994).

<sup>24</sup> *State v. Alvey*, 67 Haw. 49, 54, 678 P.2d 5, 8-9 (1984).



administrative or judicial, had reviewed any legal or factual aspects of the denial. Because the fairness requirements and legal elements for res judicata and collateral estoppel were not present in the course of the Foundation's initial application, the Board's previous denial has no preclusive effect.

Because each application is based on the case-specific facts of that application, denial of one application in the past will not preclude subsequent consideration and approval of a similar application. Thus, the BLNR has discretion to make a different decision this time.

**C. The State of Hawaii Does Not Have Sovereign Immunity as a Landowner of the Breakwater.**

One of the comments recently submitted regarding the CDUA claims that the State has sovereign immunity for any claims for personal injury. This comment is wrong. The doctrine of sovereign immunity provides that the State "is immune from suit for money damages, except where there has been a 'clear relinquishment' of immunity and the State has consented to be sued." *Office of Hawaiian Affairs v. State*, 110 Hawai'i 338, 356, 133 P.3d 767, 785 (2006) (quotation marks and citation omitted); *Chun v. Bd. of Trs. of Emps.' Ret. Sys. of Haw.*, 106 Hawai'i 416, 432, 106 P.3d 339, 355 (2005). However, in this case, the State has waived its sovereign immunity by statute under the State Tort Liability Act. HRS § 662-2 reads in full:

The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Because the State is the owner of the breakwater, pursuant to HRS § 662-2 it is liable to persons who might be injured "to the same extent as a private individual under like circumstances". Consequently, the State cannot rely upon the doctrine of sovereign immunity for liability protection, and should take action to reduce the potential risk of injuries in the area by approving the proposed CDUA project.

Thank you for the opportunity to provide these comments in support of CDUA OA-3913.

Very truly yours,



DAVID M. LOUIE, ESQ.

for

KOBAYASHI SUGITA & GODA, LLP