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Real Estate Mezzanine and A/B Loans: Structuring and Enforcing Intercreditor and Co-Lender Agreements
Reconciling the Demands and Objectives of Senior and Junior Lenders

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Reconciling the Demands and Objectives of Senior and Junior Lenders

Thursday, September 28, 2017

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KEY NEGOTIATION POINTS BETWEEN SENIOR LENDERS AND MEZZ LENDERS WHERE CONSENSUS HAS ERODED OR THE “BID-ASK SPREAD” HAS WIDENED

It appears that the general consensus regarding core intercreditor agreement terms that would be mutually acceptable to senior lenders and mezz lenders has eroded, due to several factors. Senior lenders encountered a variety of challenges when dealing with mezz lenders during the downturn in the economy and the real estate markets in the 2007 to 2013 period. Actions of certain “rogue” opportunistic distressed debt buyers and the lack of development and real estate management expertise of hedge-fund type foreclosing mezzanine lenders were perceived as harmful to the senior lenders interest in preserving their capital and in meeting their legitimate expectations in terms of exercising their default remedies. The high profile Stuyvesant case was a leading example of what can go wrong for a senior lender in dealing with a mezzanine lender. Hoping to learn from their past mistakes and to reduce their exposure to risk or loss stemming from the presence of mezzanine loans in their mortgage loan transactions, a number of the senior lenders set out to change their approach to the negotiation of intercreditor agreements on certain key points.

This trend has been more pronounced when the senior lenders are originating to hold the mortgage loan for their own portfolios (so-called “portfolio lenders”). Capital markets lenders looking to originate and sell mortgage loans through securitization of the mortgage loan and sale to third party mezz lenders (or retention of the mezz loans for their own account) have been less aggressive towards mezz lenders as they are in effect making a market for mezz loans and positions taken that impair the marketability of such mezz loans to potential mezz loan purchasers can adversely impair the business plan of such capital markets loan originators.

The thrust of the senior lenders on such key issues includes, without limitation, the following:

1. Disqualified Persons. (Slides 22-23) Senior lenders are seeking to prohibit all of the following persons from becoming a party to the transaction with the senior lender if such person or any of its affiliates falls within certain proscribed categories. Such prohibited persons consist of the mezz lenders or any successor or assign thereof (including a transferee of the mezz loan, any purchaser at a mezz loan foreclosure sale or any person acquiring the equity collateral
in lieu of such a foreclosure), any property manager retained by such successor or assign, and any person who provides a replacement guaranty upon such foreclosure or assignment in lieu. Ostensibly the proscribed categories are aimed at weeding out the rogues or bad actors, but the senior lenders have expanded this concept in a number of ways to seek to limit such successors and assigns solely to persons who from an underwriting standpoint the senior lenders are comfortable doing business with. This concept is in effect attempting to import to a mezz loan foreclosure under the Uniform Commercial Code the kind of approval rights that a senior lender would have in a loan assumption transaction. In a nutshell, this approach creates a host of problems of mezz lenders, for reasons that can include: (a) exclusion of highly qualified bidders due to lack of senior lender approval thereof or some remote affiliate tripping some disqualification clause; (b) exposure of the mezz lender to liability to the borrower for conducting a commercially unreasonable foreclosure sale; (c) inability of the mezz lender to complete a foreclosure timely and to thereupon cure within deadlines imposed by senior lenders on mezz lender cures, due to the requirement of interactive procedures involving the senior lender review and approval of such persons (senior lender may demand approval rights and delivery to senior lender of open ended due diligence materials, but not commit to any finite timetable for issuance of senior lender approval); and (d) obstacles in terms of the mezz lender being able to conduct due diligence to confirm whether the potential bidders or other parties subject to such standards, together with all of their respective affiliates, comply with the objective criteria included in such requirements, as measured over periods that can reach back 25 years or more or even from the dawn of time (for a worldwide based real estate organization that may have a history of corporate mergers, the affiliates requirement can be an simply unmanageable).

To the extent that a mezz lender agrees to such a provision at all, such provision needs to contain solely objective criteria (not the senior lender smell test or reference to the senior lender’s undisclosed proprietary criteria), that is readily verifiable by mezz lender, does not involve a web of companies (such sister or cousin affiliates, is limited to a short duration of time, such as 7 or 10 years, does not include “offenses” such as defaulting on any loan, doing a loan workout or, perhaps (given the tumultuous real estate markets since 2007) getting foreclosed upon or transferring a property to a lender pursuant to a deed in lieu. Suing a lender for lender liability or filing for voluntary bankruptcy or reorganization are of a different character and may be directly within the scope of the senior lenders’ legitimate concerns. Given that senior lenders are loathe to publish a “bad actor list” for fear of exposure to liability or controversy for branding certain persons as unacceptable to do business with, some senior lenders who are looking to get beyond objective criteria seek to get a broad right of approval over the person taking title to and/or managing the mortgaged property through mezz foreclosure or over the person who will provide the replacement carveout guaranty. In certain cases regarding replacement carveout guarantors, a senior lender seeking this right will offer to qualify its approval rights with a reasonableness requirement in those cases where all of the objective criteria are met. From a mezz lender’s standpoint, any such approval right, however qualified, is problematic, and mezz lender needs to limit the qualifications for each of the qualified transferee taking title, the replacement guarantor and the replacement property manager solely to objective criteria that is feasible for the mezz lender itself to diligence and satisfy without senior lender approval. Additionally, senior lenders sometimes demand that a mezz lender itself meet a Disqualified Person test at the time the intercreditor is signed and also at the time of mezz loan foreclosure.
This in effect is a covenant for the mezz lender and its affiliates not to engage in any activity that would result in the mezz lender becoming a Disqualified Person for the duration of the loans, breach of which covenant would operate to prevent the mezz lender from making a credit bid in a mezz loan foreclosure. This should be resisted by mezz lenders, who once approved should be permanently qualified, and if at all allowed should exclude any potentially disqualifying litigation that relates to the intercreditor agreement of the loans themselves, so the mezz lender is not further handicapped in enforcing its rights under the intercreditor agreement or disputing matters between senior lender and mezz lender pertaining to the subject transaction.

An example of the definition of a Disqualified Person proposed by a senior lender recently reads as follows:

“Disqualified Person” means any Person if, at the time as of which a determination is required under the terms of this Agreement:

(i) such Person, or any Person that Controls such Person or is Controlled by such Person, is, or has been within the last seven (7) years, a debtor in a Proceeding in which such Person voluntarily filed a bankruptcy petition;

(ii) such Person, or any Person that Controls such Person or is Controlled by such Person, to the knowledge of the Person seeking the applicable approval or as determined by Senior Lender, has ever been convicted of, or pleaded guilty to, a felony involving dishonesty or fraud; or

(iii) such Person or any holder of direct or indirect legal or beneficial ownership interests in such Person, or any Person that Controls such Person or is Controlled by such Person (provided that for purposes of this clause (iii) the term “Controls” and “Controlled” shall not include clause (i) of the definition of “Control”) is a Person that would not qualify, based on Senior Lender’s then current proprietary criteria, to be an obligor on any financing originated, provided or acquired by Senior Lender.

2. Purchase Options. (Slides 19-20) Senior lenders are seeking to limit mezz lender purchase options in a number of ways.

One limitation sought to be imposed is to restrict the mezz lender’s right to purchase the senior loan to a very short period that expires quickly after a senior loan event of default, after which mezz lender has no purchase right. Mezz lenders should oppose this strongly, as the purchase right is the ultimate fallback protection after all of the other possibilities have been exhausted – senior loan default waiver or cure, senior loan workout, mezz foreclosure and cure. These processes take time to play out and the mezz lender should not lose its right to purchase until either the senior loan foreclosure is completed or, after senior lender negotiates with borrower and is in a position to accept a deed in lieu of foreclosure, adequate notice thereof is given to the mezz lender and a reasonable time is afforded for the mezz lender to purchase the senior loan is provided.
A second aspect of a senior lender seeking to get the mezz lender out of the way so that the senior lender can exercise its remedies is the demand that mezz lender agree that if the senior lender negotiates a deed in lieu with the borrower and the mezz lender does not purchase the senior loan that the mortgage borrower can grant a deed in lieu to the senior lender without incurring full recourse personal liability under the mezz loan for a violative transfer. This forces the mezz lender to have to buy the senior loan or be at risk of a complete loss of its investment. The mezz lender would far prefer that the senior lender have to conduct a mortgage loan foreclosure in which the mezz lender would recover a portion of its investment if the winning bidder pays a purchase price in excess of the senior loan. It is typical for mezz loan documents to provide for full recourse in the event of a deed in lieu and many mezz lenders will not agree to a release of liability for a deed in lieu in favor of senior lender, but will agree that a senior loan foreclosure that goes through the bidding process does not give rise to recourse under the mezz loan.

3. **Replacement Guarantors.** (Slides 24-25) Senior lenders are seeking to assure that under all circumstances its mortgaged property collateral will be controlled directly or indirectly by a creditworthy person who has provided a carveout recourse guaranty to the senior lender. In the context of a foreclosure being run by a mezz lender and changes being made to ownership and control of the mortgaged property, it is difficult for a senior lender to cover every possibility in this regard. The senior lenders have sought to introduce some new concepts into intercreditor agreements in their effort to achieve this objective.

(a) One of these concepts is the “Deemed Replacement Guarantor”, which requires a creditworthy entity (either the mezz lender or an entity that majority owns and controls the mezz lender) to undertake from the date of the intercreditor agreement to agree in writing that it shall be liable for the recourse carveouts in the event of a foreclosure or assignment in lieu (or exercise of voting control of the mortgage borrower) unless and until a replacement carveout guaranty is provided to senior lender by a person that meets the tests for a replacement guarantor. This will provide credit support for senior lender in the event of a mezz foreclosure and the occurrence of events that trigger carveout recourse, and will motivate the mezz lender to make sure it delivers to senior lender the required replacement guaranty from the winning bidder in the mezz foreclosure. However, it cannot assure senior lender that upon a mezz foreclosure the person in control of the mortgaged property will have signed and delivered the replacement carveout guaranty and will thus be more likely to be deterred from engaging in bad acts. For a similar reason, mezz lenders are resisting the Deemed Replacement Guarantor concept, because if it ever came into effect under circumstances where someone other than a mezz lender affiliate controlled the mortgaged property, the mezz lender would have exposure for that person’s bad acts. Other examples of situations where the mezz lender would have concern are that the person delivering the replacement guaranty had a strong net worth but fell a little short of meeting the required financial strength for the replacement guarantor. In that case, a senior lender would have a hard time proving how it was damaged by that fact in a lawsuit against the mezz lender for failure to provide a qualifying replacement guaranty from a replacement guarantor. The outcome would be very different if the result was that the mezz lender was itself on the hook for bad acts as the Deemed Replacement Guarantor. A related requirement proposed by senior lenders is that if the mezz lender transfers its loan, the transferee would have to provide a
replacement carveout guaranty from a Deemed Replacement Guarantor as a condition of such transfer.

(b) A second concept put forth by senior lenders is the requirement that the replacement guaranty not just be delivered to senior lender as a condition of the mezz loan foreclosure, but that it be delivered to senior lender by a specified number of days prior to the mezz loan foreclosure, to become effective upon such foreclosure. In the context of multiple bidders, this means that each bidders must sign and deliver is Replacement Carveout Guaranty prior to the foreclosure sale date. Provisions will state that only the winning foreclosure bidders affiliate’s guaranty will become effective and all of the other guaranties will be returned by senior lender. This provision has not been particularly controversial as between senior lenders and mezz lenders.

(c) A more subtle angle taken by senior lenders is to have the replacement guarantor sign a replacement carveout guaranty under which the replacement guarantor agrees to full recourse for a violative transfer that occurs after (or on or after) the mezz foreclosure and to provide in the intercreditor agreement that failure to satisfy any and/or all of the mezz foreclosure conditions and requirements constitutes a transfer violation under the senior loan documents. It is essential for mezz loan counsel to pre-negotiate the form of replacement carveout guaranty to be signed by each of the potential mezz foreclosure bidders and to expressly provide therein that it does not cover the mezz loan foreclosure itself or the satisfaction of any of the conditions or requirements set forth in the intercreditor agreement with respect to such mezz loan foreclosure. Otherwise, the winning bidder at the mezz foreclosure sale faces the prospect that the senior lender will contend that the replacement guarantor is fully liable for the senior loan on a recourse basis for failure to satisfy the post-foreclosure requirements (and that senior lender will contend that such violative transfer occurred post-foreclosure during the period covered by the replacement guaranty).

4. Mezzanine Lender Experience and Creditworthiness. (Slide 22) Similar to the Deemed Replacement Guarantor concept, but broader in its intended scope, is the goal of senior lenders to have a creditworthy person be responsible for any breach of the intercreditor agreement by mezz lender. The genesis of this goal stems from a number of adverse experiences that senior lenders had with mezz lenders in the last real estate downturn. The presence of mezz lenders in a transaction, mezz lender approval rights, and sponsor recourse to mezz lenders for cooperating with senior lender remedies added complications and bogged down negotiations between senior lenders and senior loan borrowers. Mezz lenders in some cases took control of projects that such mezz lenders lacked the real estate expertise to properly develop and manage. Mezz lenders often were simply SPEs, whose sole asset was the mezz loan itself, such that the senior lender lacked a financially responsible party to look to for accountability for a breach of the intercreditor agreement. These experiences have motivated senior lenders to alter the previously common practice of deeming a mezz lender (in the definition of Qualified Transferee) to meet the requirements that were otherwise applicable to Qualified Transferees, which include itself having, or being majority owned and controlled by a parent that has, both a specified level of experience in the ownership of, or lending to, projects that are similar in use, scope and size as the subject property and a substantial net worth and liquidity of at least a specified amount. Some senior lenders are seeking to take this a step further, seeking to require that the mezz
lender itself meet such financial criteria, or obtain a guaranty from a creditworthy parent of the mezz lender’s obligations under the intercreditor agreement. Mezz lenders are pushing back on this demand, as this is a change from long-accepted market practice, it runs contrary to the goal of many mezz lenders to minimize liability in a transaction by using SPEs, and such mezz lenders may not have a creditworthy parent willing to provide such a guaranty. Mezz lenders need to carefully consider whether they meet the experience tests set forth in the Eligibility Requirements definition in the intercreditor agreement to make sure they or their parent qualify, and amend such provision as needed to assure it meets the qualification tests. For example, a mezz lender may have made many residential apartment loans but may be engaging in its first condo conversion loan and thus potentially not qualify under certain language unless it is modified to broaden the language pertaining to qualifying prior experiences.

5. Curing Senior Loan Defaults/Stuyvesant Case. (Slide 28) A key component of the court’s decision to issue a temporary injunction barring mezz foreclosure in the Stuyvesant case was that the mezz lender had to cure the senior loan monetary default as a condition to such foreclosure, which in the case of the matured senior loan meant that the mezz lender would have to pay off the senior loan in full in order to foreclose. That interpretation was contradictory to what many experienced market participants understood the applicable intercreditor agreements to mean. It was particularly onerous in the case of Stuyvesant where the property value was $1 billion lower than the senior loan amount. However, as can be seen from the fact that after the court’s ruling the senior lender bought out the mezz lender for the price the mezz lender paid for a mezz loan that was even more out of the money, the court’s ruling stood a material chance of being overturned. The tack taken by a number of senior lenders in the ensuing years is to attempt to enshrine the court’s holding in the Stuyvesant case by negotiating for intercreditor provisions that grant to the senior lender rights and impose on the mezz lender burdens that are consistent with the court’s holding in Stuyvesant. These include the following:

(a) As a condition to mezz foreclosure, the mezz lender will be required to cure all monetary defaults, including payment of the senior loan at maturity. Sometimes the senior lenders will exclude amounts payable due to senior loan acceleration, but even in that case such a requirement puts a mezz lender in a very difficult position as regards senior loans at the time of their scheduled maturity – where the mezz lender to foreclose and acquire ownership of the mortgage borrower and indirectly the mortgaged property, the mezz lender could arrange a refinance of the senior loan at market rates. If instead the mezz lender only has the option of paying off the senior lender as a means of curing such maturity default or buying the senior loan, then the mezz lender will need to find more expensive bridge capital to finance the purchase or payoff of a defaulted senior loan in a distress situation where the borrower remains in place. This type of distress investment capital is scarcer to obtain and more expensive, and will not be able to be replaced with standard property refinancing until the mezz lender forecloses out the mezz borrower.

(b) As a condition to mezz foreclosure, a number of senior lenders are seeking to condition mezz loan foreclosure on cure by the mezz lender of all senior loan defaults that can be cured without taking possession of the property. This can be problematic for a mezz lender with respect to any non-monetary default that does not require possession to cure. Normally the applicable notice and cure period in the intercreditor would afford to the mezz lender 30 days to...
cure after notice, or such longer time as would be reasonably necessary to effectuate such cure. Conditioning mezz loan foreclosure upon curing such non-monetary defaults in effect cuts off the mezz lender cure period on the date of its foreclosure, or bars such foreclosure until such cure is effectuated. Where a senior loan borrower has multiple defaults, some of which require the mezz lender to get possession of the property to cure, the mezz lender may be put in a possession where it cannot proceed timely to foreclose and get possession due to the existence of other defaults that do not require possession but are in the process of being cured. Mezz lenders should resist the requirement that senior loan non-monetary defaults be cured as a condition to mezz loan foreclosure.

6. Conditions Precedent and Conditions Subsequent to Mezz Loan Foreclosure. (Slide 15) There are only a couple of key conditions to mezz loan foreclosure that a mezz lender can endeavor to satisfy prior to or concurrently with a mezz loan foreclosure, namely making sure that the winning bidder is a Qualified Transferee, delivering to senior lender a replacement carveout guaranty from a replacement guarantor that meets the requisite tests, curing monetary defaults other than maturity defaults, and delivering to senior lender a certificate that such requirements have been complied with. Virtually all other requirements pertaining to mezz foreclosure set forth in intercreditor agreements can only be fulfilled post-mezz loan foreclosure and therefore should be set forth in an intercreditor agreement as covenants, or conditions to the senior loan continuing in place on a non-defaulted basis notwithstanding the mezz loan foreclosure. Such post-foreclosure requirements can generally only be satisfied by the winning bidder at the mezz foreclosure sale, rather than by the mezz lender (who, unless such mezz lender is the winning bidder, is out of the picture). Such post-foreclosure conditions often include, among other things, setting up a hard cash management if not already in place, delivering a non-consolidation opinion to senior lender regarding the qualified transferee, curing defaults any then uncured defaults including defaults that can only be cured upon taking possession of the property, and entering into a property management agreement with a qualified property manager. A typical deadline for achieving these requirements is 30 days after the mezz foreclosure sale. A number of senior lenders are pushing in intercreditor agreements for related provisions that pose material risks for mezz lenders. These include:

(a) Requiring the mezz lender as a condition to foreclosure to provide a certificate that all of the requirements relating to the mezz foreclosure set forth in the intercreditor agreement have been satisfied, or will be timely satisfied. For those requirements to be satisfied after the mezz loan foreclosure, mezz lender may have no control over satisfaction of such requirements and there is the potential that even with best efforts some requirements such as curing all senior loan defaults that require possession to cure will not be timely cured by the winning foreclosure bidder. Accordingly, this certification requirement should be divided into two parts: mezz lender certifies at the time of the mezz foreclosure sale as to the pre-foreclosure items, and the winning bidder is to provide a certification at the end of the 30 day period post-foreclosure (assuming that it is in a position to confirm satisfaction as of that date). Failure to so certify by the mezz lender as to the limited number of pre-foreclosure requirements is an acceptable condition to foreclosure.

(b) As regards the failure of the winning bidder to satisfy the post-foreclosure requirements (including among such requirements failure to timely deliver the post-foreclosure
certification) has increasingly become a source of contention. One leading senior lender has taken the position that such post-foreclosure requirements constitute “conditions subsequent”, with the implication that if they are not timely satisfied, the mezz foreclosure sale can be unwound. It is improbable that a UCC sale can be unwound after the fact for failure to timely satisfy a series of post-foreclosure requirements and such an unwinding presents immense complications for the parties.

7. Appointment of a Replacement Qualified Property Manager. (Slide 15) As discussed above, a requirement in connection with a mezz foreclosure is that the successful bidder at such foreclosure appoint a replacement property manager within 30 days after the foreclosure sale that meets the criteria an approved property manager. A change in how some senior lenders are approaching a somewhat parallel provision has created an obstacle to the foreclosure purchaser’s ability to satisfy this requirement. Mezz lenders have traditionally had the right to cause the replacement of a property manager as provided under the mezz loan documents, but if there was an event of default (perhaps beyond the mezz lender’s default cure period), or some other basis existed under the senior loan documents entitling senior lender to remove and replace the property manager, then the senior lender was given the right to make a superseding appointment. While installing a property manager may be key to a mezz lender getting control of a property and effectuating a senior loan default cure, such that the existing provisions could be problematic, the new demands by some senior lender that senior lender be given the exclusive right to appoint a property manager if its right to remove and replace the property manager was triggered under the senior loan documents would render it impossible for the foreclosure purchaser to meet the foreclosure requirement that the foreclosure purchasers appoint such a new qualified property manager within such 30 day period. When pressed on this issue, some senior lenders qualified the exclusivity such that it would not be effective to the extent it interfered with mezz lender’s obligation to appoint timely a replacement property manager.

8. Exercise of Remedies Against a Common Guarantor. (Slide 14) Some senior lenders are getting more aggressive in terms of restricting the right of a mezz lender to exercise remedies against a common guarantor. In general mezz lenders have come to accept that if a senior lender is pursuing a claim against a common guarantor (a person who has provided guarantees to both senior lender and mezz lender), any amounts recovered by the mezz lender would under specified circumstances have to be turned over by the mezz lender to the senior lender, to be applied to project costs or to the senior loan, or to be held as collateral for the senior loan. Now some senior lenders are taking the position that if the senior loan is pursuing a claim against the common guarantor or has notified the common guarantor of an outstanding claim, the mezz lender is barred from asserting remedies against the common guarantor. This in effect grants immunity to the common guarantor in its dealings with the mezz lender, resulting in substantial loss of bargaining power on the part of mezz lender and impairment of the deterrent effect of mezz lender’s recourse carveouts in mezz lender’s dealings with mezz borrower and the common guarantor. Accordingly, mezz lender should resist this change.

9. Voting Rights. (Slide 17) During the last downturn senior lenders realized that certain mezz lenders were using pre-foreclosure voting rights granted to the mezz lenders as a means of controlling senior borrower actions while evading the requirement to provide a
replacement guaranty. As an example, if a mezz lender exercised voting control and caused the senior loan borrower to file for voluntary bankruptcy, there would not have occurred a triggering event that would have required the mezz lender to provide a replacement guaranty that would have made such mezz lender fully liable on a recourse basis for the senior loan. There were covenants in intercreditor agreements where the mezz lender would agree to not cause the senior loan borrower to file for voluntary bankruptcy, but a senior lender’s ability to prove its damages for breach of such covenant is speculative and therefore perhaps not enforceable. To close this gap in senior lender protections, senior lenders have changed intercreditor provisions regarding mezz loan foreclosure to include the exercise of voting control rights by the mezz lender. To a large degree the mezz lending community has accepted this change. Such change has materially reduced the value of mezz lender obtaining a pledge of voting rights because mezz lenders will be generally loathe to go on the hook for carveout recourse while the mezz borrower still owns the pledge equity collateral.

BEP
MJW
SAMPLE NEGOTIATED PROVISIONS

SAMPLE NEGOTIATED CLAUSE #1

Section 12. RIGHTS OF CURE.

(a) Notice of Senior Default. Prior to accelerating the Senior Loan or commencing any Enforcement Action by reason of an Event of Default under the Senior Loan Documents, Senior Lender shall provide written notice of the default which would permit Senior Lender to accelerate the Senior Loan or commence any other Enforcement Action or the circumstances constituting or giving rise to the Event of Default, as applicable, to each of the Junior Lenders and any Loan Pledgees entitled to notice thereof, whether or not Senior Lender is obligated to give notice thereof to Borrower (each, a “Senior Loan Default Notice”) and shall provide each of the Junior Lenders and any such Loan Pledgees notice of the failure of any Junior Lender or such Loan Pledgee to exercise the cure rights provided in Section 12(b) or (c). In the event Senior Lender has delivered a Senior Loan Default Notice that has not been cured by a Junior Lender pursuant to Section 12, Senior Lender shall provide Junior Lenders with copies of any and all material notices relating to such Event of Default, pleadings, agreements, motions and briefs served upon, delivered to or with any party to any Enforcement Action and otherwise keep Junior Lenders reasonably apprised as to the current status of any Enforcement Action, provided, that Senior Lender’s compliance with its obligations under this sentence shall not in and of itself constitute a condition to completing an Enforcement Action (or otherwise give rise to any right of any Junior Lender to, or to move or otherwise seek to, stay, delay, postpone, prevent or otherwise interfere with such Enforcement Action), so long as such Enforcement Action is otherwise implemented in accordance with the terms and provisions of this Agreement. Except in connection with Borrower’s failure to repay the Senior Loan in full in cash on the maturity date thereof, Senior Lender shall permit Junior Lenders an opportunity to cure such default in accordance with the provisions of this Section 12 and shall not accelerate the Senior Loan (other than pursuant to any automatic acceleration provided for in the Senior Loan Documents) or commence an Enforcement Action on account of such default unless such cure is not effectuated within the applicable cure periods provided for in Section 12(b) or (c). In the event Borrower fails to repay the Senior Loan in full in cash on the maturity date thereof, each of the Junior Lenders shall have the right to purchase the Senior Loan (and all rights thereunder) pursuant to the terms, and subject to the conditions, provided in Section 12(e) below. Prior to or concurrently with undertaking any curative action with respect to the Senior Loan, a Junior Lender shall provide Senior Lender and Senior Junior Lender with written notice thereof. Senior Lender shall keep Junior Lenders reasonably apprised as to the status of any Enforcement Action.
(b) Senior Loan Monetary Cure Period. If the default identified in a Senior Loan Default Notice is a monetary default relating to a liquidated sum of money, each Junior Lender shall have until ten (10) Business Days after the later of (i) the receipt by it from Senior Lender of the Senior Loan Default Notice and (ii) the expiration of Borrower’s cure period with respect to such default provided in the Senior Loan Documents, if any, to cure such monetary default (the “Monetary Cure Period”). In the event a Junior Lender elects to cure any such monetary default, such Junior Lender shall (x) reimburse Senior Lender for any interest charged by Senior Lender on any required (pursuant to an applicable pooling and servicing or trust and servicing agreement in connection with a Securitization) advances for the Senior Loan (including Protective Advances) for amounts which Borrower would be obligated to pay under the Senior Loan Documents together with payment of all other amounts then due under the Senior Loan Documents (excluding any late charges or fees or default interest), and (y) with respect to any liquidated sum of money due with respect to such monetary default first due and payable pursuant to the Senior Loan Documents after the delivery of a Senior Loan Default Notice, such Junior Lender shall pay or cause to be paid such sum, in the amount notified to such Junior Lender by Senior Lender, not more than five (5) Business Days after receipt of such notice from Senior Lender, in accordance with the Senior Loan Documents, subject only to any grace period with respect to such sum provided in the Senior Loan Documents and without the additional grace period applicable to such Junior Lender with respect to the initial monetary default pursuant to this Section 12(b), but subject to any notice requirements under the Senior Loan Documents. Each of the Junior Lenders shall only have the right to cure as hereinabove set forth with respect to monthly scheduled debt service payments on the Senior Loan no more than six (6) times in any consecutive twelve (12) month period unless Junior Lender making such cure payments has commenced and is continuing to diligently pursue its rights against such Junior Lender’s Equity Collateral. In the event more than one Junior Lender cures any monetary default in accordance with the terms of this Section 12(b), Senior Lender hereby agrees (x) to accept the cure from the junior most Junior Lender and (y) to return to Senior Junior Lender within three (3) Business Days of accepting such cure from the junior most Junior Lender any funds tendered by Senior Junior Lender. The cure period for a Junior Lender with respect to a monetary default shall run concurrently with the cure period for the other Junior Lender with respect to such monetary default and in no event shall such cure periods run sequentially. Notwithstanding the foregoing, if a Junior Lender elects to pursue such cure of defaults involving monthly scheduled debt service payments as set forth above and thereafter either fails to make the required cure payments or fails to diligently pursue its rights against such Junior Lender’s Equity Collateral, then notwithstanding any earlier election of the remaining Junior Lender not to cure the defaults involving monthly scheduled debt service payments, the other Junior Lender shall be entitled to succeed to all such cure rights, upon written notice to Senior Lender, so long as the other Junior Lender promptly commences and thereafter diligently pursues its rights against its Equity Collateral as required above and otherwise satisfies the provisions of this Section 12(b). If the default referenced in a Senior Loan Default Notice has been cured such that there is no longer an Event of Default under the Senior Loan Documents, Junior Lenders shall have the same Monetary Cure Period with respect to any future Senior Loan Default Notice. Notwithstanding anything to the contrary contained herein, with respect to any cure of a Senior Loan default effectuated by a Junior Lender in which such Junior Lender was not obligated to pay default interest and/or late fees, if such Junior Lender subsequently completes a foreclosure of such Junior Loan, it shall not be required to pay default interest or late fees as they relate to any default so cured.

(c) Senior Loan Non-Monetary Cure Period. If the default identified in the Senior Loan Default Notice is of a non-monetary nature Junior Lenders shall have the following cure periods (the “Non-Monetary Cure Period”):

(i) Subordinate Junior Lender shall have until the later of (A) ten (10) Business Days after the receipt by Subordinate Junior Lender of a Senior Loan Default Notice and (B) ten (10) Business Days after the expiration of Borrower’s cure period, if any, for such non-monetary default provided in the Senior Loan Documents, to cure such non-monetary default; and
(ii) if Subordinate Junior Lender does not exercise such cure rights, then Senior Junior Lender shall have until the later of (A) ten (10) Business Days after the receipt by Senior Junior Lender from Senior Lender of notice that Subordinate Junior Lender failed to exercise the right to cure the default specified in a Senior Loan Default Notice and (B) twenty (20) Business Days after the expiration of Borrower’s cure period, if any, for such non-monetary default provided in the Senior Loan Documents, to cure such non-monetary default.

Notwithstanding the applicable Non-Monetary Cure Period with respect to each Junior Lender, if (i) a non-monetary default identified in a Senior Loan Default Notice is susceptible of cure but cannot reasonably be cured within such applicable Non-Monetary Cure Period or, if not susceptible of cure within the applicable Non-Monetary Cure Period, a Junior Lender is diligently pursuing foreclosure of its Equity Collateral (subject to any applicable stay) and (ii) curative action, which may include, in the case of a non-monetary default that is not susceptible of cure during the applicable Non-Monetary Cure Period, an Equity Collateral Enforcement Action, was promptly commenced and is being diligently pursued by a Junior Lender (subject to any applicable stay), such Junior Lender shall be given such additional period of time as is reasonably necessary for such Junior Lender in the exercise of due diligence to cure such non-monetary default for so long as (W) Borrower or such Junior Lender makes or causes to be made timely payment of Borrower’s regularly scheduled monthly principal and/or interest payments under the Senior Loan and any other amounts due under the Senior Loan Documents (other than any late charges or fees or default interest accruing other than by reason of any failure to make such regularly scheduled monthly principal and/or interest payments in a timely manner), (X) such additional period of time does not exceed ninety (90) days, unless such non-monetary default is of a nature that cannot be cured within such ninety (90) days, in which case, such Junior Lender shall have such additional time as is reasonably necessary to cure such non-monetary default, provided that such Junior Lender is continuously and diligently pursuing a cure of such non-monetary default, (Y) such default is not caused by a Proceeding of Borrower or any other applicable Borrower Party, and (Z) during such Non-Monetary Cure Period or any extension thereof pursuant to this sentence, there is no material impairment to the value, use or operation of the Premises taken as a whole as reasonably determined by Senior Lender in good faith as a result of such non-monetary default that cannot be cured within five (5) Business Days following receipt of written notice by Junior Lender describing such material impairment in reasonable detail. If a Junior Lender has commenced exercising any such cure right during a Non-Monetary Cure Period and elects not to proceed with such cure, such Junior Lender shall promptly notify Senior Lender and Senior Junior Lender, and Senior Junior Lender shall be deemed in compliance with the terms hereof if it commences curing such event (which may include, in the case of a non-monetary default that is not susceptible of cure during the applicable Non-Monetary Cure Period, commencing an Equity Collateral Enforcement Action) within five (5) Business Days following receipt of written notice of such election not to proceed with such cure by Junior Lender and otherwise complies with the provisions of this Section 12(c). If Junior Mezzanine Lender is exercising its cure right, it shall consult with Senior Junior Lender and keep Senior Junior Lender informed as to its progress. The Non-Monetary Cure Period and any additional cure period granted hereunder to a Junior Lender electing to cure a non-monetary default of Borrower shall automatically terminate upon (x) the commencement of a voluntary Proceeding involving Borrower or any other applicable Borrower Party, (y) a consent to an involuntary Proceeding by Borrower or any other applicable Borrower Party, or (z) the failure of Borrower or the applicable Borrower Party to have an involuntary Proceeding against it or such Borrower Party discharged, stayed or dismissed within ninety (90) days of filing thereof.

(d) Senior Junior Loan Default Notice. Prior to accelerating the Senior Junior Loan or commencing any Equity Collateral Enforcement Action by reason of an Event of Default under the Senior Junior Loan Documents, Senior Junior Lender shall provide written notice of the default which would permit Senior Junior Lender to accelerate the Senior Junior Loan or commence an Equity Collateral Enforcement Action to Subordinate Junior Lender and any Loan Pledgees entitled to notice thereof, whether or not Senior Junior Lender is obligated to give notice thereof to the Senior Junior Borrower under the
Senior Junior Loan (each, a “Junior Loan Default Notice”). Except in connection with such Senior Junior Borrower’s failure to repay the Senior Junior Loan in full in cash on the maturity date thereof, Senior Junior Lender shall permit Subordinate Junior Lender an opportunity to cure such default in accordance with the provisions of Section 12(e) or (f) and shall not accelerate the Senior Junior Loan (other than pursuant to any automatic acceleration provided for in the Senior Junior Loan Documents) or commence an Equity Collateral Enforcement Action on account of such default unless such cure is not effectuated within the applicable cure periods provided for in Section 12(e) or (f). In the event the Senior Junior Borrower fails to repay the Senior Junior Loan in full in cash on the maturity date thereof, Subordinate Junior Lender shall have the right to purchase the Senior Junior Loan (and all rights thereunder, including the right to extend the Senior Junior Loan) pursuant to the terms, and subject to the conditions, provided in Section 14(II) below. Prior to or concurrently with undertaking any curative action with respect to the Senior Junior Loan, Senior Junior Lender shall provide the Subordinate Junior Lender with written notice thereof. Senior Junior Lender shall keep Subordinate Junior Lender reasonably apprised as to the status of any Equity Collateral Enforcement Action, provided, that Senior Junior Lender’s compliance with its obligations under this sentence shall not in and of itself constitute a condition to completing an Equity Collateral Enforcement Action (or otherwise give rise to any right of any Subordinate Junior Lender to, or to move or otherwise seek to, stay, delay, postpone, prevent or otherwise interfere with such Equity Collateral Enforcement Action), so long as such Equity Collateral Enforcement Action is otherwise implemented in accordance with the terms and provisions of this Agreement.

(e) Junior Loan Monetary Cure Period. If the default identified in the Junior Loan Default Notice is a monetary default relating to a liquidated sum of money, Subordinate Junior Lender shall have until ten (10) Business Days after the later of (i) the receipt by it from Senior Junior Lender of the Junior Loan Default Notice and (ii) the expiration of the Senior Junior Borrower’s cure period provided in the Senior Junior Loan Documents with respect to such default, if any, to cure such monetary default (such period, the “Junior Loan Monetary Cure Period”). In the event that Subordinate Junior Lender elects to cure a monetary default under the Senior Junior Loan, (x) Subordinate Junior Lender shall reimburse Senior Junior Lender for any interest charged by Senior Junior Lender on any required (pursuant to an applicable pooling and servicing agreement or trust and servicing agreement or equivalent agreement) advances for the Senior Junior Loan (including Protective Advances) for amounts which the Senior Junior Borrower would be obligated to pay under the Senior Junior Loan Documents together with payment of all other amounts then due under the Senior Junior Loan Documents (excluding any late charges or default interest), and (y) with respect to any liquidated sum of money first due and payable pursuant to the Senior Junior Loan Documents after the delivery of a Junior Loan Default Notice, Subordinate Junior Lender shall pay such sum, in the amount notified to Subordinate Junior Lender by Senior Junior Lender, not more than five (5) Business Days after receipt of such notice from Senior Junior Lender, in accordance with the Senior Junior Loan Documents, subject only to any grace period with respect to such amount provided in the Senior Junior Loan Documents and without any additional grace period to the initial monetary default pursuant to this Section 12(e), but subject to any notice requirements under the Senior Junior Loan Documents with respect to such liquidated sum of money (and the receipt by such Junior Lender of such notice). Subordinate Junior Lender shall have the right to cure as hereinabove set forth with respect to monthly scheduled debt service payments on the Senior Junior Loan no more than six (6) times in any consecutive twelve (12) month period unless Junior Lender making such cure payments has commenced and is continuing to diligently pursue its rights against such Subordinate Junior Lender’s Equity Collateral.

(f) Junior Loan Non-Monetary Cure Period. If the default identified in the Junior Loan Default Notice is of a non-monetary nature, Subordinate Junior Lender shall have until the later of (i) ten (10) Business Days after the receipt by it of a Junior Loan Default Notice and (ii) ten (10) Business Days after the expiration of Senior Junior Borrower’s cure period, if any, for such non-monetary default provided in the Senior Junior Loan Documents, to cure such non-monetary default (such period, the “Junior Loan Non-Monetary Cure Period”); provided, that (x) if such non-monetary default is susceptible of cure
(prior to or after completion of an Equity Collateral Enforcement Action) but cannot reasonably be cured within the Junior Loan Non-Monetary Cure Period or, if not susceptible of cure within the applicable Junior Loan Non-Monetary Cure Period, Subordinate Junior Lender is diligently pursuing foreclosure of its Equity Collateral, and (y) curative action which may include, in the case of a non-monetary default that is not susceptible of cure during the applicable Junior Loan Non-Monetary Cure Period, an Equity Collateral Enforcement Action, was promptly commenced and is being diligently pursued by Subordinate Junior Lender, Subordinate Junior Lender shall be given an additional period of time as is reasonably necessary for Subordinate Junior Lender in the exercise of due diligence to cure such non-monetary default for so long as (A) Subordinate Junior Lender makes or causes to be made timely payment of Senior Junior Borrower’s regularly scheduled monthly principal and/or interest payments under the Senior Junior Loan and any other amounts due under the Senior Junior Loan Documents (other than any late charges or default interest accruing other than by reason of any failure by Subordinate Junior Lender to make such regularly scheduled monthly principal and/or interest payments in a timely manner), (B) such additional period of time does not exceed ninety (90) days, unless such non-monetary default is of a nature that cannot be cured within such ninety (90) days, in which case, Subordinate Junior Lender shall have such additional time as is reasonably necessary to cure such non-monetary default, provided that Subordinate Junior Lender is continuously and diligently pursuing a cure of such non-monetary default, (C) such default is not caused by a Proceeding of Senior Junior Borrower or any member of the Borrower Group, and (D) during such Junior Loan Non-Monetary Cure Period, there is no material impairment to the value of the Premises as reasonably determined by Senior Junior Lender in good faith as a result of such non-monetary default that cannot be cured within five (5) Business Days following receipt of written notice by Junior Lender describing such material impairment in reasonable detail. The Junior Loan Non-Monetary Cure Period and any additional cure period granted hereunder to Subordinate Junior Lender electing to cure a non-monetary default shall automatically terminate upon (x) the commencement of a voluntary Proceeding involving Borrower or any other applicable Borrower Party or Senior Junior Borrower, (y) a consent or acquiescence to an involuntary Proceeding by Borrower or any other applicable Borrower Party or Senior Junior Borrower, or (z) the failure of Borrower or the applicable Borrower Party or Senior Junior Borrower to have an involuntary Proceeding against it or such Borrower Party, Senior Junior Borrower (other than involuntary Proceedings described in clause (y) of this sentence) discharged, stayed or dismissed within ninety (90) days of the filing thereof.

(g) **No Senior Loan Event of Default.** So long as no Continuing Event of Default shall have occurred and be continuing under the Senior Loan Documents, all funds held and applied pursuant to the Cash Management Agreement and Senior Loan Agreement, including, without limitation, during any Cash Sweep Period shall continue to be applied pursuant thereto and shall not be applied by Senior Lender to prepay the outstanding principal balance of the Senior Loan.

(h) **Copies of Default Notices.** (i) Each Junior Lender shall give Senior Lender and the other Junior Lender notice of any Event of Default under the related Junior Loan, acceleration of its applicable Junior Loan and/or the commencement of any Equity Collateral Enforcement Action under its Junior Loan Documents and, simultaneously with giving such notices to its Junior Borrower, copies of notices given to its Junior Borrower of events that with the passage of time and failure to cure, would result in the occurrence of a “Default” or “Event of Default” under its respective Junior Loan Documents.

(ii) Senior Lender shall give each Junior Lender written notice of any Event of Default, acceleration of the Senior Loan, transfer of the Senior Loan to “special servicing” and/or the commencement of an Enforcement Action under the Senior Loan Documents and, simultaneously with giving such notices to Borrower, copies of notices given to Borrower of events that with the passage of time and failure to cure, would result in the occurrence of a “Default” or “Event of Default” under the Senior Loan Documents.
(i) **Cures, Generally.** (i) Notwithstanding anything to the contrary herein, in the event that Subordinate Junior Lender shall exercise its right under this Section 12 to cure any default (whether monetary or non-monetary) under the Senior Loan and at the time of such cure an Event of Default with respect to the Senior Junior Loan shall be continuing, then Subordinate Junior Lender shall also be required to concurrently cure such Event of Default (whether monetary or non-monetary) under the Senior Junior Loan. Senior Lender may not accept a cure of a default (whether monetary or non-monetary) under the Senior Loan without notice from Senior Junior Lender that Subordinate Junior Lender has cured or will concurrently cure each Event of Default (whether monetary or non-monetary) under the Senior Junior Loan in accordance with the terms of this Section 12.

(ii) Nothing contained in this Section 12 or elsewhere in this Agreement shall obligate any Junior Lender to exercise voting power to direct or cause the direction of the management or policies of any Equity Collateral pursuant to rights granted in the applicable Junior Loan Documents, and in no event shall a Junior Lender be deemed not to be diligently pursuing its rights against such Junior Lender’s Equity Collateral, for the purposes of this Section 12 or otherwise, solely as a result of such Junior Lender failing to exercise such voting power.

(j) **Exercise of Extension Options.** (i) In the event that Borrower or Senior Junior Borrower have not satisfied any of the extension conditions set forth in Section ___ of the Senior Loan Agreement or Section ___ of the Senior Junior Loan Agreement (each such provision, an “Extension Provision”) on or prior to the applicable Maturity Date (the applicable referenced maturity date, the “Applicable Maturity Date”), then upon written request from any Junior Lender delivered to Senior Lender or Senior Junior Lender, as applicable, not less than five (5) Business Days prior to the Applicable Maturity Date (a “Standstill Notice”) Senior Lender and Senior Junior Lender shall stand still and not take any Enforcement Action for a period of forty-five (45) days (subject to earlier termination as provided below) commencing on the Applicable Maturity Date (such period, the “Standstill Period”), provided, Senior Lender’s and Senior Junior Lender’s agreement to standstill shall be conditioned upon (i) the absence of any Continuing Event of Default with respect to the Senior Loan and Senior Junior Loan during the Standstill Period (other than the payment of the principal balance of the Senior Loan and Senior Junior Loan which was due on the Applicable Maturity Date); (ii) no later than three (3) Business Days after the Applicable Maturity Date, Senior Lender and Senior Junior Lender shall receive one or more Interest Rate Cap Agreements meeting the requirements of Section ____ of the Senior Loan Agreement and Section ____ of the Senior Junior Loan Agreement, (iii) the Junior Lender giving the Standstill Notice commences an Equity Collateral Enforcement Action within five (5) Business Days after the Applicable Maturity Date (for which purposes Junior Lender will be deemed to have commenced an Equity Collateral Enforcement Action by delivering a written notice to the applicable Junior Borrower describing the applicable Event(s) of Default under the applicable Junior Loan Documents and including the phrase (or words of similar meaning) “THIS NOTICE CONSTITUTES NOTICE OF THE COMMENCEMENT BY LENDER OF A FORECLOSURE ACTION PURSUANT TO THE UNIFORM COMMERCIAL CODE”) and thereafter diligently pursues the completion of such Equity Collateral Enforcement Action within the Standstill Period; and (iv) no Proceeding shall occur and the Junior Lender seeking to extend the maturity shall not take any of the actions prohibited by Section 12(d)(ii) hereof. The Standstill Period shall terminate automatically and immediately if any of the foregoing conditions are not satisfied, without the requirement of notice to any party, and Senior Lender and Senior Junior Lender shall be entitled to take any and all Enforcement Actions thereafter (subject to the provisions of Section 14 hereof [purchase option]).

(ii) In the event that, subject to any applicable stay, any Junior Lender abandons, or fails to diligently pursue an Equity Collateral Enforcement Action after the Standstill Period has commenced, then the other Junior Lender which subsequently brings an Equity Collateral Enforcement Action shall be entitled to the remaining portion of such Standstill Period; provided that the Standstill Period for such other Junior Lender shall not be less than fifteen (15) days from
the date such Junior Lender is given notice that such prior Equity Collateral Enforcement Action was abandoned or not diligently pursued.

(iii) The completion of any Equity Collateral Enforcement Action by a Junior Lender shall be subject to the compliance by the applicable Junior Lender with the provisions of this Agreement, and provided that such conditions shall be satisfied prior to the expiration of the Standstill Period, then such Junior Lender shall be entitled to exercise the applicable extension option contained in the Senior Loan Agreement and the Senior Junior Loan Agreement.

(iv) The rights granted to the Junior Lenders under this Section 12(j) relate solely to maturity defaults under the Senior Loan and the Senior Junior Loan arising on an Applicable Maturity Date. Such rights have been granted to the Junior Lenders notwithstanding the provisions of Section 12(a) hereof (which states that the Junior Lenders shall not have the ability to cure any maturity defaults) and do not give rise to any other rights of the Junior Lenders with respect to maturity defaults, and such rights are intended to be in addition to, and not in substitution of, the Junior Lenders’ rights to purchase the Senior Loan after a maturity default hereof. Notwithstanding anything in this Section 12(j) to the contrary, in the event that both a Junior Lender and Borrower and each Junior Borrower elects to extend the Applicable Maturity Date pursuant to an Extension Provision, then provided Borrower and each Junior Borrower shall have extended the Applicable Maturity Date, no Junior Lender will have any right to do so under this Section 12(j) (but may extend any subsequent Applicable Maturity Date in accordance with this Section 12(j)).
SAMPLE NEGOTIATED CLAUSE #2

Section 11.

(d) **Bankruptcy.** (i) The provisions of this Agreement shall be applicable both before and after the commencement, whether voluntary or involuntary, of any case, proceeding or other action by or against Borrower, any Borrower Party or any Junior Borrower under any existing or future law of any jurisdiction relating to bankruptcy, insolvency, reorganization or relief of debtors (as to Borrower, any other Borrower Party, any Junior Borrower or any other entity, a “**Proceeding**”).

(ii) For as long as the Senior Loan shall remain outstanding, none of Junior Lenders shall direct or cause, and none of them shall solicit any Person to direct or cause, either Borrower or any other applicable Borrower Party, or any Person which Controls Borrower or any other applicable Borrower Party (the “**Borrower Group**”) to: (1) commence any Proceeding by or against Borrower or any other applicable Borrower Party; (2) institute proceedings to have Borrower or any other applicable Borrower Party adjudicated a bankrupt or insolvent; (3) consent to, or affirmatively acquiesce in, the institution of any Proceeding by or against Borrower or any other applicable Borrower Party; (4) file a petition or consent to the filing of a petition seeking reorganization, arrangement, adjustment, winding-up, dissolution, composition, liquidation or other relief by or on behalf of Borrower or any other applicable Borrower Party; (5) seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for Borrower or any other applicable Borrower Party, the Premises (or any portion thereof) or any other collateral securing the Senior Loan (or any portion thereof); (6) make an assignment for the benefit of any creditor of Borrower or any other applicable Borrower Party; (7) seek to consolidate the Premises or any other assets of Borrower or any other applicable Borrower Party with the assets of any Junior Borrower or any member of the Borrower Group in any Proceeding; or (8) affirmatively take any action in furtherance of any of the foregoing. The terms and provisions of this Section 11(d) apply to each Junior Lender solely in its respective capacity as a Junior Lender. If any Junior Lender (x) commences an Equity Collateral Enforcement Action against any Junior Borrower, and pursuant to such Equity Collateral Enforcement Action such Junior Lender takes title to the Equity Collateral of such Junior Borrower, or (y) exercises voting power to direct or cause the direction of the management or policies of such Equity Collateral pursuant to rights granted in the applicable Junior Loan Documents, from and after the date title to such Equity Collateral is vested in such Junior Lender, or the date such Junior Lender exercises such voting power, as applicable, such Junior Lender shall, in exercising such rights, be bound by the terms and provisions of the respective organizational documents of Borrower or any other applicable Borrower Party and such Junior Borrower regarding bankruptcy and all matters requiring the vote of the independent directors/managers/members of such Junior Borrower and not by the terms of this Section 11(d).

(iii) In the event that a Junior Lender is deemed to be a creditor of Borrower or any other applicable Borrower Party in any Proceeding: (1) each of the Junior Lenders hereby agrees that it shall not make any election, give any consent, commence any action or file any motion, claim, obligation, notice or application or take any other action in any Proceeding by or against Borrower or any other applicable Borrower Party without the prior written consent of Senior Lender, except to the extent necessary to preserve or realize upon such Junior Lender’s interest in any Separate Collateral pledged to such Junior Lender pursuant to the Junior Loan Documents related to the Junior Loan held by such Junior Lender; provided, however, that any such filing shall not be as a creditor of Borrower or any other applicable Borrower Party unless necessary to permit the filing; (2) **Senior Lender may vote in any such Proceeding any and all claims of such Junior Lender against Borrower or any other applicable Borrower Party, and each of the Junior Lenders**
hereby appoints Senior Lender as its agent, and grants to Senior Lender an irrevocable power of attorney coupled with an interest, and its proxy, for the purpose of exercising any and all rights and taking any and all actions available to such Junior Lender in connection with any case by or against Borrower or any other applicable Borrower Party in any Proceeding, including without limitation, the right to file and/or prosecute any claims, to vote to accept or reject a plan, to make any election under Section 1111(b) of the Bankruptcy Code, provided, however, that with respect to any proposed plan of reorganization including Borrower or any other applicable Borrower Party in respect of which creditors are voting, Senior Lender may vote on behalf of such Junior Lender only if the proposed plan of reorganization would result in Senior Lender’s claims or interests being “impaired” (as such term is defined in the United States Bankruptcy Code); and (3) no Junior Lender shall challenge the validity or amount of any claim against Borrower or any other applicable Borrower Party submitted in such Proceeding by Senior Lender in good faith or any valuations of the Premises, or any portion thereof, or other Senior Loan collateral submitted by Senior Lender in good faith, in such Proceeding or take any other action in such Proceeding, which is adverse to Senior Lender’s enforcement of its claim or receipt of adequate protection (as that term is defined in the Bankruptcy Code). The terms and provisions of this Section 11(d) apply to each Junior Lender solely in its capacity as a Junior Lender. Senior Lender shall not have the rights provided in this Section 12(d)(iii) if Senior Lender is a Prohibited Borrower Transferee. “Prohibited Borrower Transferee” means, in the case of a proposed Transfer of any Junior Loan or Senior Loan as applicable, the transferee of a Transfer that would result in either (x) more than twenty percent (20%) of a Junior Loan or the Senior Loan, as applicable, or (y) a Controlling interest in either of any Junior Loan or the Senior Loan, as applicable, being held by Borrower or any Junior Borrower or any Control Affiliate of Borrower or any Junior Borrower. Notwithstanding anything to the contrary set forth in this Section 11, each of the Junior Lenders shall be entitled to bid at any sale of the Premises pursuant to Section 363 of the Bankruptcy Code or any plan of reorganization; provided that Senior Lender is permitted to credit bid up to the full amount of its claim; and provided further that Junior Lenders shall not and shall not seek to or be permitted to assert any right to credit bid all or any portion of its respective claim.

(iv) For as long as the Senior Junior Loan shall remain outstanding, Subordinate Junior Lender shall not, and shall not solicit any Person to, and shall not direct or cause Subordinate Junior Borrower to, direct or cause Senior Junior Borrower or any Person which Controls the Senior Junior Borrower (as applicable, the “Senior Junior Borrower Group”) to: (1) commence any Proceeding by or against any member of the Senior Junior Borrower Group; (2) institute proceedings to have any member of the Senior Junior Borrower Group adjudicated a bankrupt or insolvent; (3) consent to, or affirmatively acquiesce in, the institution of any Proceeding by or against any member of the Senior Junior Borrower Group; (4) file a petition or consent to the filing of a petition seeking reorganization, arrangement, adjustment, winding-up, dissolution, composition, liquidation or other relief by or on behalf of any member of the Senior Junior Borrower Group; (5) seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for any member of the Senior Junior Borrower Group, or any Separate Collateral for the Senior Junior Loan or any portion thereof; (6) make an assignment for the benefit of any creditor of any member of the Senior Junior Borrower Group; (7) seek to consolidate the Separate Collateral for the Senior Junior Loan or any portion thereof or any other collateral securing the Senior Junior Loan (or any portion thereof); (8) affirmatively take any action in furtherance of any of the foregoing. The terms and provisions of this Section 11(d) apply to Subordinate Junior Lender in its capacity as Subordinate Junior Lender.
(v) In the event that Subordinate Junior Lender is deemed to be a creditor of Senior Junior Borrower in any Proceeding: (1) Subordinate Junior Lender hereby agrees that it shall not make any election, give any consent, commence any action or file any motion, claim, obligation, notice or application or take any other action in any Proceeding by or against any Senior Junior Borrower without the prior written consent of Senior Junior Lender, except to the extent necessary to preserve or realize upon its interest in the Equity Collateral; provided, however, that any such filing shall not be as a creditor of any Senior Junior Borrower unless necessary to permit the filing; (2) Senior Junior Lender may vote in any such Proceeding against Senior Junior Borrower any and all claims of Subordinate Junior Lender, and Subordinate Junior Lender hereby appoints Senior Junior Lender as its agent, and grants to Senior Junior Lender an irrevocable power of attorney coupled with an interest, and its proxy, for the purpose of exercising any and all rights and taking any and all actions available to Senior Junior Lender in connection with any case by or against the Senior Junior Borrower Group in any Proceeding, including without limitation, the right to file and/or prosecute any claims, to vote to accept or reject a plan, to make any election under Section 1111(b) of the Bankruptcy Code, provided, however, that with respect to any proposed plan of reorganization including Senior Junior Borrower in respect of which creditors are voting, Senior Junior Lender may vote on behalf of Subordinate Junior Lender only if the proposed plan of reorganization would result in Senior Junior Lender’s claims or interests being “impaired” (as such term is defined in the United States Bankruptcy Code) with respect to its own Senior Junior Borrower; (3) Subordinate Junior Lender shall not challenge the validity or amount of any claim submitted in such Proceeding by Senior Junior Lender in good faith or any valuations of the Separate Collateral for the Senior Junior Loan or other collateral for the Senior Junior Loan submitted by Senior Junior Lender in good faith, in such Proceeding or take any other action in such Proceeding, which is adverse to enforcement by Senior Junior Lender of its claim with respect to Senior Junior Borrower or receipt of adequate protection (as that term is defined in the Bankruptcy Code); and (4) Subordinate Junior Lender waives any right to object to, and shall be deemed to have consented to: (A) Senior Junior Borrower’s use of any cash collateral to the extent of any consent thereto given by Senior Junior Lender, (B) any request by Senior Junior Lender for adequate protection (as that term is defined in the Bankruptcy Code), (C) any motion by Senior Junior Lender for dismissal of the Proceeding or for relief from the automatic stay (as defined in the Bankruptcy Code), and (D) any request by Senior Junior Lender for post-petition interest. The terms and provisions of this Section 11(d) apply to Senior Junior Lender solely in its capacity as Senior Junior Lender. Senior Junior Lender shall not have the rights provided in this Section 12(d)(v) if Senior Junior Lender is a Prohibited Borrower Transferee.

(vi) Without limiting any restrictions set forth above, each Affiliate Holder agrees (A) that it shall not, and shall not solicit any Person (including, but not limited to, any Junior Borrower, any member of the related Junior Borrower Group or any Junior Lender) to and shall not direct or cause any Person to, and waives any and all rights to: (I) commence any Proceeding by or against its Junior Borrower, (II) institute proceedings to have its Junior Borrower adjudicated a bankrupt or insolvent, (III) consent to, or affirmatively acquiesce in, the institution of any Proceeding by or against its Junior Borrower, (IV) file a petition or consent to the filing of a petition seeking reorganization, arrangement, adjustment, winding-up, dissolution, composition, liquidation or other relief by or on behalf of its Junior Borrower, (V) seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for its Junior Borrower or its Separate Collateral for its Junior Loan (or any portion thereof) or any other collateral securing its Junior Loan (or any portion thereof), (VI) make an assignment for the benefit of any creditor of its Junior Borrower, (VII) seek to consolidate the Separate Collateral for its Junior Loan (or any portion thereof) or any other assets of its Junior Borrower with the assets of the applicable Junior Borrower Group, any other Junior Borrower or Borrower in any Proceeding, or (VIII) take any action in furtherance of any of the foregoing; and (B) that it
shall not, and shall not solicit any Person (including, but not limited to, any Junior Borrower, any member of the related Junior Borrower Group or any Junior Lender) to, and shall not direct or cause any Person to, and waives any and all rights to: (1) make any election, give any consent, commence any action or file any motion, claim, obligation, notice or application or take any other action in any Proceeding by or against any Borrower Party or any Junior Borrower, (2) object to any relief sought by Senior Lender or a Junior Lender in any Proceeding of any Borrower Party or a Junior Borrower, (3) challenge the validity or amount of any claim submitted in any Proceeding by Senior Lender or a Junior Lender in good faith or any valuations of the Premises or other collateral for the Senior Loan or a Junior Loan submitted by Senior Lender or a Junior Lender in good faith in such Proceeding, or take any other action in such Proceeding, which is adverse to enforcement by Senior Lender or a Junior Lender of such Person’s respective claim with respect to any Borrower Party or a Junior Borrower or receipt of adequate protection (as that term is defined in the Bankruptcy Code), (4) provide, participate in, or support any other Person in the provision of, any debtor-in-possession financing to any Borrower Party or a Junior Borrower, (5) file or support any motion for dismissal of the Proceeding or relief from the automatic stay (as defined in the Bankruptcy Code), (6) request any post-petition interest, (7) request adequate protection, (8) request any sale of any Borrower Party’s or a Junior Borrower’s assets, or (9) file, propose, support, accept, or reject any plan of reorganization of any Borrower Party or a Junior Borrower.

(vii) Notwithstanding anything to the contrary contained herein, each Junior Lender shall have the right, in connection with a Proceeding of Borrower or a Junior Borrower, to assert its right to bid on the equity or the assets of Borrower or such Junior Borrower if (i) the Proceeding is a reorganization under Chapter 11 of the Bankruptcy Code and (ii) one or more of the direct or indirect owners of Borrower or such Junior Borrower are going to continue to own a direct or indirect equity interest in Borrower or such Junior Borrower, as applicable, after such reorganization in connection with a “new value” plan”, provided, however, that, if any Junior Lender, or its nominee, shall be the successful bidder, any Transfer of the equity of Borrower or such Junior Borrower in connection therewith shall, for all purposes of this Agreement, be deemed to be a Transfer of title to the Junior Lender of all of the Equity Collateral (with the date of such Transfer of title being treated as if it were the date upon which title is transferred pursuant to a foreclosure or assignment in lieu of foreclosure under the respective Junior Loan), which Transfer shall be conditioned upon the transferee being a Qualified Transferee and a New Guaranty being delivered to Senior Lender by an Acceptable New Guarantor, and following which Transfer the transferee shall be subject to the covenants and obligations set forth in Section of this Agreement.

SAMPLE NEGOTIATED CLAUSE #3

Section 14. **RIGHT TO PURCHASE SENIOR LOAN AND THE SENIOR JUNIOR LOAN.**

I. **Purchase Option Event With Respect to Senior Loan.**

(c) If an Event of Default has occurred under the Senior Loan, the Senior Loan has been accelerated, any Enforcement Action has been commenced under the Senior Loan Documents, a Proceeding has been commenced against Borrower or any Borrower Party, or the Senior Loan is a “specially serviced mortgage loan” under the applicable pooling and servicing agreement or trust and servicing agreement as a result of an Event of Default under the Senior Loan (each of the foregoing, a “Purchase Option Event”), Senior Lender shall provide prompt written (and concurrent) notice of the same to Junior Lenders (the “Purchase Notice”) (provided that, in no case shall Senior Lender be obligated to send more
than one (1) Purchase Notice to each Junior Lender in respect of any single event or occurrence as to which such Event of Default, Enforcement Action and/or the Senior Loan becoming a “specially serviced mortgage loan” relates) and, upon ten (10) Business Days’ prior written notice (a “Purchase Election Notice”) to Senior Lender (and the other Junior Lender), either Junior Lender (individually or collectively pursuant to any applicable Co-Lender Agreement) shall have the right to purchase for cash, in whole but not in part, (A) the Senior Loan for a price equal to the sum of (without duplication) the outstanding principal balance thereof, together with all accrued interest, and other amounts due thereon (including, without limitation, (i) any unreimbursed required (pursuant to an applicable pooling and servicing agreement or trust and servicing agreement in connection with a Securitization) advances (including Protective Advances) made by Senior Lender or any servicer for amounts which Borrower is obligated to pay under the Senior Loan Documents, (ii) post-petition interest, (iii) any interest charged by Senior Lender or any servicer on any required (pursuant to an applicable pooling and servicing agreement or trust and servicing agreement in connection with a Securitization) advances, (iv) any workout fee, special servicing fee or liquidation fee payable to the special servicer pursuant to an applicable pooling and servicing agreement or a trust and servicing agreement in connection with a Securitization, provided, that (w) in no event shall special servicing fees exceed 0.25% per annum, (x) any workout fees to the extent they exceed one-half of one percent (0.5%) of each collection of interest and principal received on the Senior Loan shall be excluded, (y) any liquidation fee to the extent it exceeds one half of one percent (0.5%) of any liquidation proceeds received on the Senior Loan shall be excluded, and (z) any such workout fee or liquidation fees shall be excluded if the Senior Loan is purchased within ninety (90) days of the date on which the Purchase Notice was given to the applicable Junior Lender, and (v) all reasonable costs and expenses (including reasonable legal fees and expenses) actually incurred by Senior Lender or any servicer in enforcing the terms of the Senior Loan Documents, but excluding any yield maintenance premiums, prepayment fees or premiums, any exit fees, any liquidated damage amount, any spread maintenance charges, any late charges or any default interest (the “Loan Purchase Price”), and (B) the Senior Junior Loan Purchase Price (defined in subparagraph (b) below). Notwithstanding the foregoing, the failure of Senior Lender to provide notice to any Junior Lender of the occurrence of a Purchase Option Event shall have no adverse effect on Senior Lender other than the resulting extension of the time in which the Purchase Election Notice may be given.

(f) The closing under this Section 14(I) of the purchase of the Senior Loan by Senior Junior Lender, or, where the Subordinate Junior Lender is the buyer, of the Senior Loan and Senior Mezzanine Loan, shall take place on the tenth (10th) Business Day after the giving of the Purchase Election Notice pursuant to this Section 14(I) (or on any earlier date agreed to by the buyer and the seller, or required under Section 14(I)(d)(ii)(A) below).

(g) Notwithstanding anything to the contrary contained in Section 14(I), Subordinate Junior Lender may not give a Purchase Election Notice pursuant to Section 14(I)(a) or any other provision of this Section 14(I) unless Subordinate Junior Lender simultaneously gives a Junior Loan Purchase Election Notice pursuant to Section 14(II)(a). If Subordinate Junior Lender is purchasing the Senior Junior Loan pursuant to this Section 14(I), the time periods set forth in this Section 14(I), rather than the time periods set forth in Section 14(II), shall control.

(h) If: (i) both Junior Lenders give a Purchase Election Notice on the same date, then only the Purchase Election Notice of the Subordinate Junior Lender shall be effective (provided that if Subordinate Junior Lender fails to consummate such purchase in accordance with this Section 14(I) within ten (10) Business Days after the giving of such Purchase Election Notice, then the Senior Junior Lender shall have the exclusive rights to give a Purchase Election Notice and purchase the Senior Loan on the same terms as are described in Section 14(I)(d)(ii)(C) below), and/or (ii) Senior Junior Lender gives a Purchase Election Notice and thereafter, but prior to the closing pursuant to such Purchase Election Notice, Subordinate Junior Lender gives a Purchase Election Notice, then Subordinate Junior Lender shall have the
exclusive right to purchase the Senior Loan in accordance with the provisions of this Section 14(I), provided that:

(A) Subordinate Junior Lender closes such purchase, and the other purchases referred to in clause (B) below, on or before the date that is ten (10) Business Days after Subordinate Junior Lender gave its Purchase Election Notice;

(B) Concurrently with the purchase of the Senior Loan, Subordinate Junior Lender shall purchase the Senior Junior Loan from Senior Junior Lender for a price equal to the sum of (without duplication) the outstanding principal balance thereof, together with all accrued interest, and other amounts due thereon (including, without limitation, (i) any unreimbursed Protective Advances required to be made (pursuant to an applicable trust and servicing agreement or equivalent agreement) by Senior Junior Lender or any servicer for amounts which the Senior Junior Borrower is obligated to pay under the Senior Junior Loan Documents and post-petition interest, (ii) any interest charged by Senior Junior Lender or any servicer on any advances on the Senior Junior Loan for amounts which the Senior Junior Borrower would be obligated to pay under the Senior Junior Loan Documents, (iii) any workout fee, special servicing fee or liquidation fee payable to any special servicer of the Senior Junior Loan, but excluding any workout fee or liquidation fees if the Senior Junior Loan is purchased within ninety (90) days of the date on which the Purchase Notice for the Senior Loan was given to Subordinate Junior Lender, and (iv) all reasonable costs and expenses (including reasonable legal fees and expenses) actually incurred by Senior Junior Lender in enforcing the terms of the Senior Junior Loan Documents, but excluding any prepayment fees or premiums, any exit fees, any liquidated damage amount, any spread maintenance or yield maintenance charges, any late charges or any default interest) (the “Senior Junior Loan Purchase Price”); and

(C) if the closing of purchase of the Senior Loan and Senior Junior Loan does not occur within ten (10) Business Days after the Senior Junior Lender gave a Purchase Election Notice (other than as a result of a default or breach by the seller), then Subordinate Junior Lender’s Purchase Election Notice shall be deemed invalid, and for ten (10) Business Days thereafter Senior Junior Lender shall have the exclusive right to give a Purchase Election Notice and, if Senior Junior Lender does so, Senior Junior Lender shall have the exclusive right to purchase the Senior Loan for a period of ten (10) Business Days after it gives such Purchase Election Notice.

(i) Concurrently with payment to Senior Lender of the Loan Purchase Price, Senior Lender shall deliver or cause to be delivered to the Junior Lender exercising the purchase right hereunder all Senior Loan Documents held by or on behalf of Senior Lender and will execute in favor of such Junior Lender or its designee assignment documentation, in form and substance reasonably acceptable to such Junior Lender, at the sole cost and expense of such Junior Lender, to assign the Senior Loan and its rights under the Senior Loan Documents (without recourse, representations or warranties, except for representations as to the outstanding balance of the Senior Loan, the power and authority to enter into the applicable assignment documentation and as to Senior Lender’s ownership and not having previously assigned, transferred, participated or encumbered its rights in the Senior Loan as of the consummation of the assignment of the Senior Loan). Concurrently with payment to Senior Junior Lender of the Senior Junior Loan Purchase Price for the Senior Junior Loan, Senior Junior Lender shall deliver or cause to be delivered to Subordinate Junior Lender all Senior Junior Loan Documents held by or on behalf of Senior Junior Lender and will execute in favor of Subordinate Junior Lender or its designee assignment documentation, in form and substance reasonably acceptable to such Subordinate Junior Lender, at the sole cost and expense of Subordinate Junior Lender to assign the Senior Junior Loan and its rights under the
Senior Junior Loan Documents (without recourse, representations or warranties, except for several representations from each Person then constituting Senior Junior Lender as to the outstanding balance of the Senior Junior Loan, such Person’s respective power and authority to enter into the applicable assignment documentation and as to such Person’s respective ownership and not having previously assigned, transferred, participated or encumbered such Person’s respective rights in the applicable portion of the Senior Junior Loan being assigned by such Person).

(j) The right of each Junior Lender to purchase the Senior Loan (and, in the case of Subordinate Junior Lender, the Senior Junior Loan) shall automatically terminate (x) to the extent such right arose with respect to a specific Purchase Option Event, if such Purchase Option Event ceases to exist (including, if Senior Lender terminated its Enforcement Action and no other Purchase Option Event exists), or (y) upon a transfer of all of the Premises by foreclosure sale, sale by power of sale or delivery of a deed in lieu of foreclosure in accordance with paragraph (g) below; provided, however, that in no event shall Senior Junior Lender have less than thirty (30) days to deliver a Purchase Election Notice following delivery by Senior Lender to such Junior Lender of the Purchase Notice, it being acknowledged and agreed that each Junior Lender shall be entitled to bid at foreclosure as permitted by applicable law.

(k) With regard to Senior Lender’s right to accept a deed in lieu to the Premises, notwithstanding anything to the contrary contained herein, but subject to the last sentence of this Section 14(I)(g), Senior Lender and the Junior Lenders agree that the following procedures shall control:

(i) Senior Lender shall not accept (or cause any nominee or designee to accept) a deed-in-lieu of foreclosure without first providing each Junior Lender with at least twenty-five (25) Business Days’ prior written notice (a “DIL Notice”) of Senior Lender’s good faith intention to accept a deed-in-lieu within the thirty (30) day period following delivery of such DIL Notice, provided, however, a DIL Notice may not be issued by Senior Lender prior to the occurrence of a Purchase Option Event and delivery of a Purchase Notice;

(ii) for thirteen (13) Business Days following the delivery of a DIL Notice, each Junior Lender or its designee shall have the right to notify the other Junior Lender and Senior Lender that such notifying Junior Lender or its designee desires to purchase the Senior Loan for the Loan Purchase Price and otherwise in accordance with the above provisions of this Section 14(I) (such notice constituting a Purchase Election Notice), and, if the notifying Junior Lender is the Subordinate Junior Lender, such notice (such notice constituting a Junior Loan Purchase Election Notice) shall state that the notifying Junior Lender desires to purchase the Senior Mezzanine Loan for the Senior Junior Loan Purchase Price simultaneously with its purchase of the Senior Loan;

(iii) if both Junior Lenders give such notice within the thirteen (13) Business Days following delivery of a DIL Notice (and regardless of which Junior Lender is the first to give such notice), then the Subordinate Junior Lender shall have the exclusive right during the five (5) Business Day period following the date on which the Subordinate Junior Lender gives such notice to purchase the Senior Loan for the Senior Loan Purchase Price and the Senior Junior Loan for the Senior Junior Loan Purchase Price, and otherwise in accordance with the provisions of this Section 14(I) (it being agreed that in no event shall the Senior Junior Lender close its purchase of the Senior Loan prior to the expiration of such five (5) Business Day period and then may do so only if Subordinate Junior Lender fails to purchase the Senior Loan and Senior Mezzanine Loan prior to such date, other than by reason of the default of the Senior Lender or Senior Junior Lender, as applicable);

(iv) if no Junior Lender consummates the purchase described in the immediately preceding subparagraph (ii) within the twenty-five (25) Business Day period following delivery of
a DIL Notice (other than by reason of the default of Senior Lender), Senior Lender shall have the right, for thirty (30) days after the expiration of twenty-five (25) Business Day period, to accept such deed-in-lieu of foreclosure; and

(v) if Senior Lender does not accept such deed-in-lieu of foreclosure prior to the expiration of such thirty (30) day period described in the immediately preceding subparagraph (iv), Senior Lender shall thereafter not accept a deed-in-lieu of foreclosure without again complying with all of the provisions of this Section 14(I)(g).

Notwithstanding anything to the contrary in the foregoing, Senior Lender may not give a DIL Notice during any Monetary Cure Period or Non-Monetary Cure Period and nothing contained herein shall otherwise limit the rights of Junior Lender to purchase the Senior Loan prior to the actual delivery of a deed in lieu pursuant to Section 14(I).

II. Purchase Option Event With Respect to Senior Junior Loan.

(a) If an Event of Default has occurred under the Senior Junior Loan, the Senior Junior Loan has been accelerated, any Equity Collateral Enforcement Action has been commenced under the Senior Junior Loan Documents, a Proceeding has been commenced against Senior Junior Borrower under the Senior Junior Loan or a Purchase Option Event shall have occurred (a “Junior Loan Purchase Option Event”), Senior Junior Lender shall provide prompt written notice of the same to Subordinate Junior Lender (the “Junior Loan Purchase Notice”) (provided that, (x) in no case shall Senior Junior Lender be obligated to send more than one (1) Junior Loan Purchase Notice in respect of any single event or occurrence as to which such Event of Default and/or Enforcement Action relates), and, upon fifteen (15) Business Days’ prior written notice to Senior Junior Lender (a “Junior Loan Purchase Election Notice”), Subordinate Junior Lender shall have the right to purchase for cash, in whole but not in part, the Senior Junior Loan for the Senior Junior Loan Purchase Price. Notwithstanding the foregoing, the failure of Senior Junior Lender to provide notice to Subordinate Junior Lender of the occurrence of a Junior Loan Purchase Option Event shall have no adverse effect on Senior Junior Lender other than the resulting extension of the time in which the Junior Loan Purchase Election Notice may be given. If Subordinate Junior Lender has elected to purchase the Senior Junior Loan that is subject to the Junior Loan Purchase Option Event and fails to complete such purchase within fifteen (15) Business Days after it delivers a Junior Loan Purchase Election Notice to Senior Junior Lender (other than as a result of a default or breach by a seller of the Senior Junior Loan), then such Junior Loan Purchase Election Notice shall be deemed invalid and Subordinate Junior Lender shall cease to have any right to purchase the Senior Junior Loan in connection with the applicable Junior Loan Purchase Option Event.

(b) Concurrently with payment to Senior Junior Lender of the Senior Junior Loan Purchase Price, Senior Junior Lender shall deliver or cause to be delivered to Subordinate Junior Lender all Senior Junior Loan Documents held by or on behalf of Senior Junior Lender and will execute in favor of Subordinate Junior Lender or its designee assignment documentation, in form and substance reasonably acceptable to Subordinate Junior Lender, at the sole cost and expense of Subordinate Junior Lender, to assign the Senior Junior Loan and its rights under the Senior Junior Loan Documents (without recourse, representations or warranties, except for representations as to the outstanding balance of the Senior Junior Loan, the power and authority to enter into the applicable assignment documentation and as to Senior Junior Lender’s ownership and not having previously assigned, transferred, participated or encumbered its rights in the applicable portion of the Senior Junior Loan being assigned by such Person as of the consummation of the assignment of the Senior Junior Loan, unless such participation or encumbrance will be released prior to the transfer).
(c) The right of Subordinate Junior Lender to purchase the Senior Junior Loan shall automatically terminate (x) to the extent such right arose with respect to a specific Junior Loan Purchase Option Event, if such Junior Loan Purchase Option Event ceases to exist (including, if Senior Junior Lender terminated its Equity Collateral Enforcement Action and no other Junior Loan Purchase Option Event then exists), or (y) upon a Realization Event with respect to the Equity Collateral covered by the Senior Junior Loan Documents; provided, however, that in no event shall Subordinate Junior Lender have less than thirty (30) days following notice by Senior Junior Lender to Subordinate Junior Lender of the occurrence of a Junior Loan Purchase Option Event to elect to purchase the Senior Junior Loan and Senior Junior Lender agrees not to acquire title to its Equity Collateral within such thirty (30) day period, it being acknowledged and agreed that Subordinate Junior Lender shall be entitled to bid at foreclosure as permitted by applicable law.

(d) With regard to Senior Junior Lender’s right to accept (or cause any nominee or designee to accept) a conveyance or assignment in lieu of foreclosure, notwithstanding anything to the contrary contained herein, but subject to the last sentence of this Section 14(II)(d), Senior Junior Lender and Subordinate Junior Lender agree that the following procedures shall control:

(i) Senior Junior Lender shall not accept (or cause any nominee or designee to accept) a conveyance or assignment in lieu of foreclosure without first providing Subordinate Junior Lender with at least twenty (20) Business Days prior written notice (a “CIL Notice”) of Senior Junior Lender’s good faith intention to accept a conveyance or assignment-in-lieu within the thirty (30) day period following such notice, provided that a CIL Notice may not be issued by Senior Junior Lender prior to the occurrence of a Purchase Option Event and delivery of such notice;

(ii) for twelve (12) Business Days following the delivery of a CIL Notice, Subordinate Junior Lender or its designee shall have the right to notify Senior Junior Lender that Subordinate Junior Lender or its designee desires to purchase the Senior Junior Loan for the Junior Loan Purchase Price and otherwise in accordance with the above provisions of this Section 14(II) (such notice constituting a Junior Loan Purchase Election Notice);

(iii) if Junior Lender fails to consummate such purchase during the ten (10) Business Day period following delivery of the Junior Loan Purchase Election Notice (other than by reason of the default of Senior Junior Lender), Senior Junior Lender shall have the right, for thirty (30) days after the expiration of the such twenty (20) Business Day period, to accept such conveyance or assignment-in-lieu of foreclosure, and

(iv) if Senior Junior Lender does not accept such conveyance or assignment-in-lieu of foreclosure prior to the expiration of such thirty (30) day period described in the immediately preceding subparagraph (iii), Senior Junior Lender shall thereafter not accept a conveyance or assignment-in-lieu of foreclosure without again complying with all of the provisions of this Section 14(II)(d).

Notwithstanding anything to the contrary in the foregoing, Senior Junior Lender may not give a CIL Notice during any Junior Loan Monetary Cure Period or Junior Loan Non-Monetary Cure Period and nothing contained herein shall otherwise limit the rights of Subordinate Junior Lender to purchase the Senior Junior Loan prior to the actual delivery of a conveyance or assignment-in-lieu of Foreclosure pursuant to Section 14(II).

III. General Provisions.
(a) Each Junior Lender covenants not to enter any agreement with Borrower or any Junior Borrower or any respective Affiliate of any of the foregoing to purchase the Senior Loan or any Junior Loan pursuant to this Section 14 or in connection with any refinancing of the Senior Loan or any Junior Loan in any manner designed to avoid or circumvent the provisions of the Senior Loan Documents or any of the Junior Loan Documents relating to the payment of a prepayment fee, exit fee, late charge, default interest, liquidated damages or yield maintenance charge in connection with a prepayment of the Senior Loan or a Junior Loan.

(b) Notwithstanding any provision of this Agreement to the contrary, if Senior Mezzanine Lender purchases the Senior Loan pursuant to the provisions of this Section 14, then (i) the right of Junior Mezzanine Lender to purchase the Senior Loan or the Senior Mezzanine Loan pursuant to this Section 14, (ii) the cure rights granted to Junior Mezzanine Lender pursuant to Section 12, and (iii) the approval rights of the Junior Mezzanine Lender under Section 8 shall all immediately and automatically terminate (and Junior Mezzanine Lender shall have no further rights under Sections 8, 12, and 14).

SAMPLE NEGOTIATED CLAUSE #4

Section 5. FORECLOSURE OF SEPARATE COLLATERAL.

(a) Mezzanine Lender shall not complete a foreclosure, assignment in lieu thereof or other realization upon the Equity Collateral (including, without limitation, obtaining title to the Equity Collateral or selling or otherwise transferring the Equity Collateral) or take Active Control without a Rating Agency Confirmation unless the transferee of title to the Equity Collateral is a Qualified Transferee. Promptly after the transfer of title to the Equity Collateral, such transferee of the Equity Collateral shall cause the Premises to be managed by a Qualified Manager. If not in place prior to the transfer of title to the Equity Collateral, upon the written request of Senior Lender, hard cash management will be implemented under the Senior Loan promptly after the transfer of title to the Equity Collateral (upon the same terms and conditions, and with identical reserves, set forth in the Senior Loan Documents as of the date hereof, except that all references therein with respect to payments to the Mezzanine Lender or in connection with, or for the benefit of, the Mezzanine Loan shall be ignored and removed therefrom and of no further force or effect). Additionally, if a non-consolidation opinion was delivered in connection with the closing of the Senior Loan, the transferee of the Equity Collateral shall deliver a new non-consolidation opinion relating to the transferee acceptable to Senior Lender and meeting the then-current criteria of the Rating Agencies within ten (10) Business Days after such transfer of title to the Equity Collateral. The Mezzanine Lender shall provide notice of the transfer to Senior Lender and, after a Securitization, the Rating Agencies, together with an officer’s certificate from an officer of Mezzanine Lender, certifying that all conditions set forth in this Section 5(a) to be satisfied on or before the transfer of title to the Equity Collateral have been satisfied. With respect to all conditions set forth in this Section 5(a) to be satisfied after the transfer of title to the Equity Collateral, the transferee of title to the Equity Collateral shall within thirty (30) days after such transfer provide one or more additional officer’s certificates to Senior Lender and, after a Securitization, the Rating Agencies, certifying that all such conditions have been satisfied. Senior Lender may request reasonable evidence that the foregoing requirements have been satisfied. Additionally, as a condition precedent to the taking of Active Control or the completion of a foreclosure or other realization upon the Equity Collateral, an Acceptable New Guarantor (hereinafter defined) shall, at least five (5) days prior to the taking of Active Control or the completion of a foreclosure or other realization, (i) execute and deliver to Senior Lender new guaranties (individually and collectively, the “New Guaranty”) in the respective forms attached hereto as Exhibit E, pursuant to which New Guaranty the Acceptable New Guarantor (hereinafter defined) shall undertake the obligations and liabilities that may arise thereunder with respect to events first arising from and after the date of such Transfer of title to the Equity Collateral or the taking of Active Control (provided, however, that, any such New Guaranty
The Acceptable New Guarantor shall only be liable with respect to a New Guaranty to be provided by reason of the exercise of Active Control, the Acceptable New Guarantor shall only be liable with respect to any act, omission, fact or circumstance first occurring upon or following such exercise of Active Control to the extent that any such obligations or liabilities arise or result from, or were effected through, such exercise of Active Control. As used in this Agreement, the term “Acceptable New Guarantor” means a Person that (A) directly or indirectly (x) owns not less than five percent (5%) of the equity interests in and (y) controls (which, for these purposes, shall mean having, at a minimum, the ability to veto and block any decision, action or omission which could trigger liability under the New Guaranty) the transferee of title to the Equity Collateral (provided, however, that, if the transferee of title to the Equity Collateral is one of the Qualified Transferees identified in clauses (i) or (ii) of the definition thereof, then, in such case only, such Person need only control (as described in this sentence) such transferee), (B) has a net worth (excluding such Person’s interest in the Premises) of at least $100,000,000 and liquid assets of at least $20,000,000 (it being acknowledged that the terms “net worth” and “liquid assets” shall have the respective meanings ascribed to such terms in the Senior Guaranty), (C) would not be in breach of Section ____ of the Senior Loan Agreement and is not a Prohibited Person, and (D) is not then the subject of a Proceeding.

(b) Mezzanine Lender may take any Equity Collateral Enforcement Action in accordance with the provisions of Section 5(a) hereof, provided, however, that, (i) Mezzanine Lender shall, prior to commencing any Equity Collateral Enforcement Action, give the Senior Lender prior written notice of the default which would permit Mezzanine Lender to commence such Equity Collateral Enforcement Action, (ii) Mezzanine Lender shall provide Senior Lender with copies of any and all material notices, pleadings, agreements, motions and briefs served upon, or delivered to any party to any Equity Collateral Enforcement Action and otherwise keep Senior Lender reasonably apprised as to the status of any Equity Collateral Enforcement Action and (iii) if and to the extent that Mezzanine Lender or any Qualified Transferee acquires all of the ownership interest in Borrower pursuant to an Equity Collateral Enforcement Action, then upon, from and after the vesting of title thereto, this Agreement shall terminate with respect to Mezzanine Lender or such Qualified Transferee.

(c) Nothing contained herein shall limit or restrict the right of Mezzanine Lender to exercise its rights and remedies, at law, in equity, or otherwise, in order to realize on any Separate Collateral that is not Equity Collateral (including exercising any remedy against Guarantor under the Mezzanine Guaranty (a “Guaranty Claim”)) and to apply the proceeds therefrom as it deems appropriate in its sole discretion (i.e., without payment subordination), provided, however, Mezzanine Lender hereby agrees that it shall give Senior Lender at least ten (10) days prior written notice (the “Guaranty Notice”) before exercising any rights or remedies with respect to a Guaranty Claim (other than the giving of notices of default and statements of overdue amounts) and that (i) it shall not commence any action or proceeding against such Guarantor in connection with the Mezzanine Loan or otherwise seek to collect any amounts or otherwise assert or enforce any rights or remedies (other than the giving of a notice reserving Mezzanine Lender’s rights) against such Guarantor in connection with the Mezzanine Loan (x) during any period when there is a Continuing Senior Loan Event of Default in existence and any outstanding claim that has been filed by Senior Lender against Guarantor or (y) if there is a Continuing Senior Loan Event of Default in existence and any outstanding claim by Senior Lender of which Guarantor has been notified in connection with the Senior Loan (which notification may be given at any time prior to, concurrently with, or after delivery of the Guaranty Notice), which claim has not been fully satisfied and, in the case of this clause (y), Senior Lender files a claim within twenty (20) Business Days after the giving of such notice, and (ii) if there is a Continuing Senior Loan Event of Default in existence and Senior Lender asserts any claim against Guarantor in connection with the Senior Loan following the taking by Mezzanine Lender of any action described in the preceding clause (i), and Senior Lender notifies Mezzanine Lender in writing that Senior Lender has asserted (or is about to assert) such claim, then Mezzanine Lender may continue any such any
action of the type described in the preceding clause (i), provided, that, Mezzanine Lender shall, with respect to any amounts recovered pursuant to such action on or after the date of delivery of such notice by Senior Lender, promptly pay over to Senior Lender any such amounts for application by Senior Lender in accordance with the provisions of the Senior Loan Documents and prior to such remittance, Mezzanine Lender shall hold such amounts in trust for Senior Lender. Any right of payment of Mezzanine Lender under a Guaranty Claim shall be subject and subordinate in all respects to the rights and claims of Senior Lender against such Guarantor.

(d) In the event Mezzanine Lender (or its designee or nominee) or any purchaser that is a Qualified Transferee obtains title to the Equity Collateral pursuant to and in accordance with Section 5(a) of this Agreement, Senior Lender hereby acknowledges and agrees that (i) any such transfer of title to the Equity Collateral shall not constitute a breach or default under the Senior Loan Documents and (ii) any Transfer or assumption fee set forth in the Senior Loan Agreement shall be waived in connection with such transfer, provided, however, that all reasonable, out-of-pocket expenses incurred by Senior Lender in connection with any such transfer shall be paid by Mezzanine Lender and/or any such Qualified Transferee. Mezzanine Lender acknowledges and agrees that Senior Lender is relying on (x) the transfer of title to the Equity Collateral to a Qualified Transferee and (y) the delivery to Senior Lender of the New Guaranty by the Acceptable New Guarantor (said requirements set forth in the foregoing clauses (x) and (y) hereinafter referred to, respectively, as the “QT Transfer Requirement” and the “Acceptable New Guaranty Requirement”). In the event that Mezzanine Lender seeks to conduct a Transfer of the Equity Collateral pursuant to a foreclosure, assignment in lieu thereof or other realization upon the Equity Collateral without satisfying the QT Transfer Requirement and the Acceptable New Guaranty Requirement, Mezzanine Lender acknowledges that the same will cause irreparable harm to Senior Lender and Senior Lender shall be entitled to seek a temporary restraining order, preliminary injunction or other similar equitable relief to stop and enjoin same. Notwithstanding anything to the contrary contained in the Senior Loan Agreement or other Senior Loan Documents, in the event that any transferee acquires the Equity Collateral other than in compliance with the material provisions, requirements and conditions of said Section 5(a), including, without limitation, the QT Transfer Requirement and the Acceptable New Guaranty Requirement, such Transfer not so in compliance shall constitute an immediate Event of Default under the Senior Loan Documents.

(e) To the extent that Mezzanine Lender or any Qualified Transferee acquires the Equity Collateral in accordance with the provisions and conditions of this Agreement, Mezzanine Lender or such Qualified Transferee shall acquire the same subject to the Senior Loan and the terms, conditions and provisions of the Senior Loan Documents for the balance of the term thereof, which shall not be accelerated by Senior Lender solely due to such acquisition and shall remain in full force and effect. Within ten (10) Business Days following such acquisition, Mezzanine Lender or such Qualified Transferee shall cause Borrower to reaffirm in writing, subject to such exculpatory provisions as shall be set forth in the Senior Loan Documents, all of the terms, conditions and provisions of the Senior Loan Documents on Borrower’s part to be performed. For the avoidance of doubt, the parties acknowledge and agree that nothing contained herein shall require the cure of any default or Event of Default under the Senior Loan as a condition precedent to the exercise of any remedies by Mezzanine Lender under the Mezzanine Loan, including the commencement and completion of a foreclosure of against the Equity Collateral, provided, however, that nothing in this Section 5(e) is intended as (1) a waiver of or by Senior Lender of any such Event of Default or of any rights or remedies Senior Lender may have as a result of such Event of Default or otherwise under the Senior Loan Documents at law or in equity or (2) any agreement on the part of Senior Lender to extend the term of the Senior Loan or otherwise modify any Senior Loan Documents in any respect. Notwithstanding the foregoing, in the event that, as of the date of transfer of the Equity Collateral pursuant to the provisions of this Section 5 to Mezzanine Lender or a Qualified Transferee, a non-monetary default shall remain uncured under the Senior Loan that was not susceptible to cure without
foreclosure of the Equity Collateral, the transferee of such Equity Collateral shall have the right to cure such non-monetary default under the Senior Loan in accordance with the terms and provisions hereof.

(f) In the event Mezzanine Lender or any purchaser that is a Qualified Transferee obtains title to the Equity Collateral pursuant to and in accordance with this Section 5, Senior Lender hereby agrees that it will use commercially reasonable efforts to cooperate with Mezzanine Lender or such Qualified Transferee to effect the amendment of the Senior Loan Documents to make substantively consistent changes to the existing permitted Affiliate transfer provisions contained therein to reflect the organizational structure of Mezzanine Lender or such Qualified Transferee, as applicable, and such Person’s Affiliates in lieu of that of Borrower and its Affiliates, and to refer thereafter to Mezzanine Lender or such Qualified Transferee, as applicable, and such Person’s respective Affiliates instead of Borrower or its Affiliates; provided, that such amendments shall provide substantively the same protections to Senior Lender as the existing provisions of the Senior Loan Agreement.

(g) Nothing contained in this Section 5 is intended (i) to limit any Loan Pledgee’s right under its financing documents with Mezzanine Lender to foreclose against Mezzanine Lender; provided that such Loan Pledgee complies with the applicable provisions of Section 15, or (ii) if any such Loan Pledgee has foreclosed under its financing documents as aforesaid, to limit such Loan Pledgee’s right to foreclose against Mezzanine Borrower’s interest in the Separate Collateral; provided that such Loan Pledgee complies with the applicable provisions of Section 4 and this Section 5.

“Qualified Manager” shall mean either: (A) Manager; (B) _______; (C) ________; (D) _______________ (so long as, in the case of the foregoing clauses (A) through (D), such Person is not the subject of a bankruptcy or similar insolvency proceeding); (E) a property manager of the Premises which (i) is a reputable management company having at least five (5) years’ experience in the management of commercial properties with similar uses as the Premises and in the jurisdiction in which the Premises are located, (ii) has, for at least five (5) years prior to its engagement as property manager, managed at least (5) properties of the same property type as the Premises, (iii) at the time of its engagement as property manager has leasable square footage of the same property type as the Premises equal to the lesser of (X) 1,000,000 leasable square feet and (Y) five (5) times the leasable square feet of the Premises and (iv) is not the subject of a bankruptcy or similar insolvency proceeding; or (F) in the discretion of Senior Lender (and following a Securitization, the applicable Rating Agencies), a reputable and experienced management organization possessing experience in managing properties similar in size, scope, use and value as the Premises.

“Qualified Transferee” means (i) ________________, so long (x) the beneficiary of, and owner of 100% of the equity interest in, _____________ is, directly or indirectly, the _________________ or other Persons that satisfy the Eligibility Requirements, and (y) _______________ is managed by _______________, as fund manager, or any replacement fund manager of _______________ that is reasonably acceptable to Senior Lender, (ii) any other private real estate fund investment trust established and authorized under the laws of _______________ (an “Alternate Trust”), so long (x) the beneficiaries of, and owners of not less than 51% of the equity interest in, the Alternate Trust are, directly or indirectly, Persons that satisfy the Eligibility Requirements and institutional in nature (such as, by way of example, but not by way of limitation, investment banks, insurance companies or commercial banks) and (y) the Alternate Trust is managed by either (A) ______ or (B) another fund manager that is reasonably acceptable to Senior Lender, or (iii) one or more of the following:

(A) a real estate investment trust, bank, saving and loan association, investment bank, insurance company, trust company, commercial credit corporation, pension plan, pension fund or pension advisory firm, mutual fund, government entity or plan, provided that any such Person referred to in this clause (A) satisfies the Eligibility Requirements;
(B) an investment company, money management firm or “qualified institutional buyer” within the meaning of Rule 144A under the Securities Act of 1933, as amended, or an institutional “accredited investor” within the meaning of Regulation D under the Securities Act of 1933, as amended, provided that any such Person referred to in this clause (B) satisfies the Eligibility Requirements;

(C) an institution substantially similar to any of the foregoing entities described in clauses (iv)(A) or (iv)(B) that satisfies the Eligibility Requirements;

(D) any entity (1)(x) which owns not less than forty percent (40%) of the equity interests of, or (y) whose equity interests are not less than forty percent (40%) owned by, and (2) which Controls, is Controlled by, or is under common Control (as defined in clause (ii) of such definition) with, any of the entities described in clauses (i), (ii), (iii) or (iv)(A), (iv)(B) or (iv)(C) above or (iv)(E) below;

(E) an investment fund, limited liability company, limited partnership or general partnership (a “Permitted Investment Fund”) where a Permitted Fund Manager or an entity that is otherwise a Qualified Transferee under clauses (iv)(A), (B), (C) or (D) of this definition investing through a fund with committed capital of at least $250,000,000 acts as the general partner, managing member or fund manager and at least 50% of the equity interests in such Permitted Investment Fund are owned, directly or indirectly, by one or more of the following: the Mezzanine Lender, a Qualified Transferee under clauses (iv)(A), (B), (C) or (D) of this definition, an institutional “accredited investor” within the meaning of Regulation D promulgated under the Securities Act of 1933, as amended, and/or a “qualified institutional buyer” or both within the meaning of Rule 144A promulgated under the Securities Exchange Act of 1934, as amended, provided such institutional “accredited investors” or “qualified institutional buyers” that are used to satisfy the 50% test set forth in this clause (E) satisfy the financial tests in clause (i) of the definition of Eligibility Requirements; or

(F) any other lender or Person that has been approved as a Qualified Transferee by the Rating Agencies pursuant to, and for the purposes of, this Agreement.

Notwithstanding anything to the contrary contained in this definition of Qualified Transferee, in no event shall any Prohibited Person, Borrower, Mezzanine Borrower, any Borrower Party, any tenants-in-common, any Delaware Statutory Trust or any Crowd-Funded Entity be deemed or permitted to be a “Qualified Transferee” for the purposes of this Agreement.

“Eligibility Requirements” means, with respect to any Person, that such Person (i) has total assets (in name or under management or advisement) in excess of $600,000,000 and (except with respect to a pension advisory firm, asset manager, registered investment adviser, manager or similar fiduciary) capital/statutory surplus or shareholder’s equity in excess of $250,000,000 and (ii) is regularly engaged in the business of (A) making or owning (or, in the case of a pension advisory firm, asset manager, registered investment adviser, manager or similar fiduciary, regularly engaged in managing investments in) loans secured by commercial real estate similar in size, scope, use and value as the Premises (including mezzanine loans to direct or indirect owners of commercial properties, which loans are secured by pledges of direct or indirect ownership interests in the owners of such commercial real estate) or (B) operating commercial properties or making investments in commercial real estate similar in size, scope, use and value as the Premises.