



**Tuesday, October 26**  
**9:00am-10:30am**

## **507 - Commercial Loan Restructuring Strategies**

**Robert Jones**  
*Partner*  
Patton Boggs

**Andrea Mattei**  
*Vice President*  
Wyndham Worldwide Corporation

**Pat Mooney**  
*Senior Vice President*  
Wells Fargo

**Deborah Ryan**  
*Partner*  
Patton Boggs

## Faculty Biographies

**Alan Benjamin**

Orrick, Herrington & Sutcliffe LLP

**Paul Fried**

Traxi, LLC

**Robert Jones**

Robert W. Jones is a partner with Patton Boggs LLP in Dallas, Texas.

For years, Mr. Jones has counseled clients, including financial institutions and other capital providers, throughout the nation on matters involving distressed debt, debtor-in-possession or exit financing in bankruptcies, the acquisition of companies or assets in a bankruptcy, out-of-court restructurings, and lender liability matters. In addition, Mr. Jones has represented a number of publicly held companies in their Chapter 11 proceedings. Those companies have been engaged in a wide range of businesses, including banking, insurance, savings and loan, real estate public and private syndication, construction, casinos, oil and gas, nursing home ownership and management, hardware, and environmental clean up.

Recently, Mr. Jones obtained favorable new legal precedent on behalf of clients before the US Court of Appeals for the Fifth Circuit, the US District Court for the Southern District Court of New York, and the US Court of Appeals for the Ninth Circuit, including a reconsideration and reversal of previous precedent by the Ninth Circuit sitting en banc.

Mr. Jones received his BA from the University of Houston and his JD from Stanford University, where he was an editor of the Stanford Law Review.

**Edward Krasnove**

Griffin Fletcher & Herndon LLP

**Andrea Mattei**

Wyndham Worldwide Corporation

**Pat Mooney**

Wells Fargo

**Deborah Ryan**

Deborah Ryan serves as co-chair of Patton Bogg's business department and is the immediate past chair of the real estate practice group, based in Dallas, Texas. She has devoted a significant portion of her practice to the acquisition and renegotiation of large multistate portfolios of real estate, partnership interests, and debt instruments; real estate

construction lending; and development or redevelopment of high profile downtown properties, including historic properties, many of which involve economic incentives from cities and counties in the form of tax increment financing, tax abatements or other economic development tools. She has worked on numerous acquisitions of iconic real estate including the acquisition of the Chrysler Building for a sovereign wealth fund.

Ms. Ryan has a strong working relationship with the City of Dallas, including the mayor's office, city council, city manager, city attorney's office and departments throughout the city. Throughout the course of her career and from her years of practicing in the Dallas region, Ms. Ryan has developed a strong network of relationships at the City of Dallas and regularly engages with the city on matters of all size and scope.

She is a member of the Dallas, Texas Bar Association and ABA as well as The Real Estate Council. She is a director of Downtown Dallas.

Ms. Ryan received her BA from the University of Illinois and her JD from Southern Methodist University, Dedman School of Law.

## Commercial Loan Restructuring Strategies

<p>Andrea Mattei Vice President – Legal Wyndham Worldwide Corporation</p>	<p>Pat Mooney Senior Vice President Wells Fargo Bank</p>
<p>Robert Jones Partner, Bankruptcy Patton Boggs, LLP</p>	<p>Deborah C. Ryan Partner, Real Estate Patton Boggs, LLP</p>

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### Topics Covered:

1. Due Diligence
2. ABC's for the Board of Directors
3. Partnership Issues
4. Mezz Debt
5. Let's Make a Deal
6. Strategies During Negotiations
7. Lender Liability
8. Pre-Negotiation Agreements
9. Forbearance Agreements
10. Workout Structures
11. Bankruptcy

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### Due Diligence

- Review loan documents, partnership agreements and other operative documents.
- Is this Mezz debt? Study Intercreditor Agreement.
- Check existing title policies.
- Run updated title and conduct UCC searches.
- Check choice of law provisions and determine applicable law.
  - How quickly can lender foreclose?
- Is there a guarantor? Does the guarantor have assets?
- Are there grounds for a lender liability claim?

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### ABC's for the Board of Directors

- Fiduciary Duty
  - The basic duties of directors to act in good faith and exercise informed oversight continue to apply, even to stressed companies.
  - Do directors owe duties to creditors if the company is insolvent?
    - The Delaware Supreme Court says "no".
  - Directors' duty to shareholders is to maximize enterprise value.
  - Directors' strategy, if it is an exercise of reasonable business judgment, does not have to succeed.
- Sale of Company
  - Once Directors decide to sell control of the company, they are charged with getting the best sale price for stakeholders (the *Revlon* doctrine).

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### ABC's for the Board of Directors (cont.)

- Deepening Insolvency
  - Deepening insolvency has been rejected by most courts as an independent cause of action, but may be a theory of damages for other claims, such as fraud or negligence.
- D&O Insurance
  - Consider insurance coverage for officers and directors that will remain unaffected by a bankruptcy filing.
- Attorney-Client Privilege
  - In the event of a bankruptcy filing, the attorney-client privilege as to pre-filing communications – and the ability to waive it – belong to the trustee of the bankruptcy estate.

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### ABC's for the Board of Directors (cont.)

- New Corporate Structures, Such as Real Estate SPE's
  - Limited partnership controls second tier entities, which control individual asset-level subsidiaries.
  - Debt at each level.
  - Each entity has independent directors or managers, who are directed to consider only interests of their entity and its creditors.
  - Designed to insulate financial position of each entity from problems of affiliates.
  - Designed to make each entity "bankruptcy remote".
  - But Delaware law governs, and independent managers can act only to extent permitted by applicable law.

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**ABC's for the Board of Directors (cont.)**

- That means must consider interests of shareholders in exercising fiduciary duties.
- *General Growth* case
  - Not only *can* decisionmakers take into account interest of the group as a whole, but perhaps *must* do so.
  - Not inappropriate to replace independent managers, new managers then authorize bankruptcy filing.

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**Partnership Issues**

- The Lender isn't the only party you need to worry about.
- Sometimes your partners are a bigger problem.
- What are rights of General Partners vs. Limited Partners? What are their respective obligations?
- Whose consent is required to give the collateral back or fund a capital call? Who can force a specific action? Read the LLC or Partnership Agreements.
- Is litigation between partners likely? If so, the partners and the partnership need separate counsel.
- What are motivations of partners? Who has guarantees? Who is worried about reputation?
- Theories:
  - Breach of Contract
  - Fiduciary Duty

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**Mezz Debt**

- Know your loan documents (Mezz and First Lien) and Intercreditor Agreement.
- Issues to consider: What result triggered by what action? Does a demand letter from a Lender trigger a default by another?
- What is the impact on the First Lien Lender if Mezz Lender forecloses? Impact on Mezz Lender? Borrower?

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## Let's Make a Deal

- Once you've completed due diligence and know the strengths and weaknesses of your position, then you need to determine:
  - What do you need (extension [time], debt forgiveness, additional capital)?
  - From whom (lender, partners)?
- Don't jump to the top (demand letters, foreclosure, bankruptcy are last resorts).

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## Strategies During Negotiations

- Each situation is different; trade deal points carefully.
  - Decide where you want to finish before you choose where to start.
  - Don't readily release guaranties.
  - Borrower's and Guarantors' incentive to perform.
- Get control of rents.
  - War chest for Borrower.
  - Use of blocked account.
  - Certain costs can be funded as part of agreed budget.
- Set up detailed budget for:
  - Cost to complete any construction, e.g., base building and/or tenant improvements for new leases.
  - Interest.
  - Operating costs, taxes, tenant fix-up.

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## Lender Liability Judgments

Case	Judgment
<i>Farrah Manufacturing Co., Inc. v. State Nat'l Bank of El Paso</i> , State District Court, El Paso, Texas, 1982	\$19,000,000
<i>LeMaire v. Mbank Abilene, N.A.</i> , State District Court, Fort Bend County, Texas, 1986	\$69,000,000 (reduced to \$18,000,000 on appeal)
<i>Humble Exploration Co. of Dallas v. Abilene Nat'l Bank</i> , State District Court, Dallas County, Texas, 1986	\$32,000,000
<i>Robinson v. McAllen State Bank</i> , State District Court, Hidalgo County, Texas 1987	\$59,000,000
<i>1601 McCarthy Blvd LLC v. GMAC Commercial Mortgage Co.</i> , State Superior Court, California, 2005	\$40,000,000 (\$7.8 million liability, \$33 million punitive)
<i>First Alliance Mortgage Co. v. Lehman Commercial Paper, Inc.</i> , State District Court, California, 2006	Approx. \$5,000,000
<i>Southeast Bank N.A. v. Atrio Consolidated Industries Inc.</i> , State District Court of Appeals, Florida, 1983	\$12,000,000 (\$3 million compensatory, \$9 million punitive)

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### Lender Liability Theories

- Breach of Contract (Number one theory)
  - Failure to fund or renew loan
  - Oral commitments / representations
  - Modification of contract by course of dealing
- Good Faith and Fair Dealing
  - Under Common Law
  - Under the UCC (cannot waive)
- Breach of Fiduciary Duty
- Fraud and Misrepresentation
- Wrongful Foreclosure

- DTPA
- Negligent Loan Processing and Administration
- Economic Duress (business coercion)
- Tortious Interference
- Antitrust and Anti-tying
- Environmental Laws
- RICO
- Punitive Damages
- Equitable Subordination (Bankruptcy)
- Theory of Deepening Insolvency

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### Pre-Negotiation Agreements

- Clarify Lender's right to walk away at anytime and not be bound to reach an agreement or to recommence negotiations.
- Discussions are without prejudice to any party's rights.
- Discussions may be terminated at any time.
- Protect confidentiality of settlement negotiations and provide that such negotiations are not admissible in court.
- Require a formal written loan modification agreement executed by the parties before any agreement is binding.
- Confirmation of who has authority to negotiate on behalf of Borrower and Guarantors.

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### Pre-Negotiation Agreements (cont.)

- Provide for Borrower's acknowledgment that the loan documents are still in force and that Lender may continue enforcement of remedies.
- Confirmation of the amount of all debt (hidden loans?).
- May include an obligation for Borrower to pay Lender's expenses incurred in connection with workout discussions, investigation and documentation.
- May include: (i) acknowledgement by Borrower of defaults; (ii) Borrower's release and waiver of any defenses; (iii) confirmation of Guarantor's liability (note: these provisions may be counter-productive).

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### Forbearance Agreements

- Under a Forbearance Agreement, Lender does not waive defaults, but agrees not to exercise its remedies for a specific period of time, subject to Borrower's satisfaction of certain conditions.
- Lender must get something in return.
  - Document Borrower's defaults.
  - Eliminate the need for further notices if Borrower defaults again.
  - Resolve any loan deficiencies.
  - Limit Borrower's lender liability claims.
  - Establish Lender's absolute control over income streams (lock box, cash sweeps, absolute title to rents).
  - Modify the terms of the loan, such as interest rate, payment of fees, and discounted payoff.
  - Add new representations and warranties from Borrower.
  - Add bankruptcy waivers, covenants, stipulations and mitigants.

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### Forbearance Agreements (cont.)

- Is a waiver of bankruptcy-related rights in the Forbearance Agreement enforceable?
- Can the Lender withstand a preference attack on features of the Forbearance Agreement that improve the Lender's position?

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### Workout Structures

- Extension with re-balancing. Are all partners in agreement on capital calls?
- Extension with release of undesirable collateral (Release condos in mixed-use projects)
- Master lease to meet lease up requirements
- Pretend and Extend
- Extend or Forbearance to allow borrower to sell
- Short sale
- A/B note structure (real note and hope note)
- Deed in Lieu
- Friendly Foreclosure

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### Bankruptcy

- Bankruptcy is attractive when you can't "Make a Deal" or obtain all necessary consents needed to restructure.
- Recent examples of consent issues:
  - Competitor coming into credit facility
    - Loan agreement may give Borrower a veto over assignments to Borrower's competitors
    - Loan agreement may be silent as to a Lender selling participations in its debt
    - Can Lender sell a 90% participation in its debt to the Borrower's competitor?
  - Equity holder coming into credit facility
    - All voting pro rata
    - "Required Lenders" is 51% of commitments
    - Events of default exit
    - Borrower's equity-private distressed equity investor

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### Bankruptcy (cont.)

- "Loan to own" Lender acquires more than 51% of outstandings, at price far below par
- Agent Lender and "Loan to own" Lender get cross
- Equity owner purchases Loan to own Lender position
- Equity owner provides notices to all parties that Required Lenders are:
  - Waiving existing events of default
  - Amending loan documents to strip out all covenants
  - Instructing agent to take no enforcement action, and include equity owner on all Lender calls

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### Trends in Bankruptcy Restructuring

- Pre-Packaged Plans
  - Advantages of Pre-Packaged Plans
    - Reduce litigation costs
    - Minimize time in bankruptcy
    - Enhance prospect of "business as usual"
  - Disadvantages of Pre-Packaged Plans
    - Not good for operationally flawed company
    - Risk that bankruptcy court finds pre-bankruptcy disclosures inadequate
- Pre-Negotiated Plans
  - Advantages of Pre-Negotiated Plans
    - Eliminate risk of flawed solicitation process
    - Minimizing negative publicity
    - Minimizes judicial scrutiny
    - Provides protections of bankruptcy court order

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Trends in Bankruptcy Restructuring (cont.)

- Lock-Up Agreements
- Pre-Negotiated 363 Asset Sales
  - “Stalking horse” lined up prior to bankruptcy filing.
  - Allows negotiation while management not absorbed with bankruptcy process.
  - Provides assurance of business continuity.
- Reinstatement
  - Many companies cannot obtain new loans on the same favorable terms previously available to them during credit boom.
  - Lenders often object to reinstatement because it deprives them of opportunity to exit deal or renegotiate at current market rates.
  - Many covenants and restrictions as drafted may present little obstacle to reinstatement of prepetition loans.
- Disguised New Value Plans

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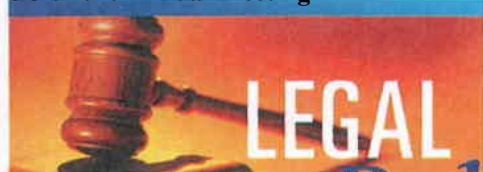
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## Bulletin

# As Purpose of Forbearance Agreements Change, So Will Terms

BY ROBERT W. JONES, PARTNER, & BRENT MCILWAIN, ASSOCIATE, PATTON BOGGS LLP

While the rate of Chapter 11 bankruptcy filings has slowed over the past few years, bad credits have continued. Because of an abundance of available credit and strong equity markets, however, most lenders have found that a defaulted credit previously headed for Chapter 11 now is poised to be refinanced or otherwise rescued by additional equity or subordinated debt.

Consequently, when a default occurs, lenders have grown accustomed to providing borrowers with time to explore refinancing options, obtain funds on a subordinated basis, and/or obtain equity support. The mechanism for providing borrowers with additional time is usually a forbearance agreement. The end of the forbearance period generally coincides with receipt of the payoff letter.

If credit tightens in the future as a result of interest rate fluctuations, restrictions on presently unregulated sources of capital, or other factors, and if the equity markets become increasingly less willing to rescue troubled companies, the ultimate end to the defaulted credit inevitably will be Chapter 11. When it appears that a defaulted credit is headed down the path to bankruptcy, the goal of most lenders in dealing with the troubled company shifts from “getting out” to “getting out whole.”

As a result, the forbearance agreement that recently has been just a document pre-dating the payoff will become a document providing the borrower time to restructure in a manner advantageous to the existing lender, while also providing that lender an opportunity to improve its position.

As the purpose of entering into forbearance agreements changes so, too, will the

terms. Lenders will ask for more concessions from borrowers in return for agreements to forbear. With more aggressive terms included in future forbearance agreements, the scrutiny of those terms by bankruptcy courts likely will increase.

This article explores two particular forbearance related issues that may attract such scrutiny if troubled companies and their lenders find themselves in Bankruptcy Court. The first issue is the enforceability of a waiver of rights by a borrower in the forbearance agreement. The second is the ability of a lender to withstand a preference attack regarding features of a forbearance agreement that improve the lender's position.

**The court noted that nothing in the Bankruptcy Code guarantees a debtor the right to have the automatic stay continue throughout the case.**

### Enforceability of Waivers

Asking 10 practitioners whether a pre-filing waiver of the automatic stay is enforceable is likely to result in a fairly even split of opinion. Some practitioners will likely say that such a waiver is “void” as against public policy. Others will respond that the answer “depends on the facts.” There is support for both positions.

One of the most forceful decisions rejecting the pre-filing waiver of the automatic stay is the *Matter of Pease*, 195 B.R. 431 (Bankr. D. Neb. 1996). In *Pease*, the borrowers entered into a pre-filing agreement with their lender that included provisions prohibiting the debtors from filing a bankruptcy petition or, if one was filed, resisting a motion for relief from the automatic stay. Of course, the debtors

ultimately filed bankruptcy and subsequently opposed the lender's request for relief from the automatic stay.

The court held in favor of the debtors, concluding that “a pre-bankruptcy waiver of the automatic stay...is unenforceable, per se ....” *Id.* at 433. The court in this case held that (i) the debtors pre-petition did not have the capacity to act on behalf of the debtor in possession, (ii) the Bankruptcy Code prohibits contractual clauses arising upon the filing of a petition, and (iii) the Bankruptcy Code extinguishes the right that parties may have under state law to contract around federal bankruptcy law provisions.

Other courts have taken a different view. The court in *In re Shady Grove Tech Center Associates*, 227 B.R. 422 (Bankr. D. Md. 1998), provided a succinct outline of factual circumstances that could lead to enforcement of pre-filing waivers of the automatic stay. In *Shady Grove*, a borrower entered into a forbearance agreement that provided it with time, additional money, and a deferral of payments. In return, the borrower agreed that it would not oppose a motion for relief from the automatic stay if the borrower became a debtor in Chapter 11 bankruptcy.

When the borrower did become a debtor, the court upheld the waiver, holding that (i) the borrower was sophisticated and understood the waiver, (ii) the lender provided significant consideration in connection with the forbearance agreement, (iii) the waiver did not prejudice other parties in interest, and (iv) the debtor had no reasonable prospect of reorganization. The court further held that upholding such a waiver would encourage restructuring agreements between sophisticated parties.

In an earlier case, *In re Club Tower, L.P.*, 138 B.R. 307 (Bankr. N.D. Ga.1991), a

Bankruptcy Court in Georgia reached the same result as the court in *Shady Grove*, utilizing essentially the same factors. In *Club Tower*, the court drew a distinction between pre-filing stay waivers and waivers of a borrower's right to file bankruptcy.

The court noted that nothing in the Bankruptcy Code guarantees a debtor the right to have the automatic stay continue throughout the case, as Congress specifically provided creditors with the ability to seek relief from the automatic stay. Like the court in *Shady Grove*, the court in *Club Tower* stated that enforcement of pre-petition stay waivers encouraged settlements and out-of-court restructuring, recognizing that Chapter 11 might not always be the best or most efficient mechanism for such a restructuring.

Admittedly, the parameters set by the courts in *Shady Grove* and *Club Tower* are not easily met, and most of the cases enforcing pre-filing waivers tend to be single-asset real estate cases. But the lessons of those cases are important to practitioners as they consider the terms to include in forbearance agreements.

*Shady Grove*, *Club Tower*, and similar cases demonstrate that a lender cannot receive the benefit of a pre-filing stay waiver without providing significant consideration to the

borrower — time, money, or deferral of payments. Moreover, a lender cannot expect that the waiver will be enforced to the detriment of other creditors, meaning that a stay waiver as to collateral in which a borrower has substantial equity likely will not be enforced.

### **Avoidability of Forbearance Provisions**

A borrower presumably requests forbearance from a lender because it believes that with more time it can create more value, not only for its lender, but also for other creditors. What does the lender receive in exchange for granting additional time? The list could be endless but often includes additional fees, additional collateral, an injection of capital, an increased interest rate, or accelerated payments on the debt. Essentially, a lender wants the same thing that a borrower wants — an improved position. But once a filing occurs, the improved position gained by a lender may be subject to a preference attack under Section 547 of the Bankruptcy Code.

A transfer is potentially avoidable as a preference to the extent that it was made on account of antecedent debt within 90 days prior to the bankruptcy filing, while the borrower was insolvent. 11 U.S.C. Section

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## LEGAL BULLETIN

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547(b). Arguably, most of the wish list items for a lender could fit within the standard definition of a preference.

A lender confronted with the potential for such a preference claim will immediately state that it simply received a benefit in exchange for providing the borrower with a benefit: critical time. Such a lender has articulated what is commonly referred to as the "new value" defense to a preference. That defense has had some success in defending against forbearance related preferences claims, provided that the new value is quantifiable.

There are two distinct new value defenses under Section 547. The first provides a transferee a defense to a preference if the transfer was a *contemporaneous* exchange for new value. 11 U.S.C. Section 547(c)(1). The second is known as the *subsequent* new value defense. It provides a transferee a defense if, after the transfer, the transferee provides the borrower new value that is not secured by an

otherwise unavoidable security interest. 11 U.S.C. Section 547(c)(4).

The Bankruptcy Code specifically defines "new value." 11 U.S.C. Section 547(2). Because that definition centers on a creditor providing money or money's worth to a borrower, courts have been reluctant to hold that a creditor's mere forbearance from exercising remedies constitutes a contemporaneous exchange for new value. That is because simply agreeing to forbear does not, by itself, provide quantifiable value. See *Drabkin v. A.I. Credit Corp.*, 800 F.2d 1153, 1159 (D.C. Cir. 1986).

### Courts have been reluctant to hold that a creditor's mere forbearance from exercising remedies constitutes a contemporaneous exchange for new value.


However, courts have recognized the subsequent new value defense in connection with a forbearance in which the measure of the additional time is quantifiable. In *re Omniplex Communications Group, L.L.C.*, 297 B.R. 573 (Bankr. E.D. Mo. 2003), is instructive in this regard. In *Omniplex*, a lessor that had provided equipment to a debtor asserted that its forbearance from exercising rights against the equipment constituted subsequent new value to the debtor and therefore was a defense to preferential payment made to the lessor. The creditor's committee and debtor in the case argued, however, that because the equipment was unassembled and not being used, it was of little to no value to the debtor.

The court agreed with the lessor, holding that the fact that the debtor had possession and the opportunity to use the equipment for several months rent free constituted new value, quantified by the amount of rent not paid for those months. That holding is important because the court disregarded the fact that the equipment was not actually being used. Instead, it held that the debtor's opportunity and intention to use the equipment in the future constituted new value, quantified by the amount of the unpaid rent.

While it may be difficult to fit a typical forbearance agreement neatly into the stricture of the new value defense to a preference, if a borrower receives a quantifiable benefit each day, week, or month that elapses while the lender is not exercising its rights, the defense can be available to the extent of that quantifiable benefit.

### Conclusion

Whether attempting to structure a forbearance agreement in a manner to include a waiver of rights or anticipating subsequent preference attacks, the most important aspect of a forbearance is establishing a factual record supporting the parties' actions. Starting with a complete recitation of the facts leading up to the forbearance — from details regarding defaults, actions that have been taken, and actions that will not be taken under the forbearance, to stipulations regarding value — a complete record can only increase the likelihood of success in utilizing a forbearance agreement as desired.

Of course, a debtor can always disavow any facts as recited in the agreement. But the more complete the facts and stipulations are, the more difficult it will be for a debtor to assert contradictory evidence later. 

Robert W. Jones is a partner and Brent R. McIlwain is an associate in the Dallas office of Patton Boggs LLP. Jones can be reached at (214) 758-3583 or [rwjones@pattonboggs.com](mailto:rwjones@pattonboggs.com). McIlwain can be reached at (214) 758-3581 or [bmcilwain@pattonboggs.com](mailto:bmcilwain@pattonboggs.com).



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## PRE-NEGOTIATION AGREEMENT

This Pre-Negotiation Agreement (this "Agreement") is entered into as of June \_\_\_\_, 2009, by and among JPMorgan Chase Bank, N.A., a national banking association, as successor-in-interest to Washington Mutual Bank ("Lender"), \_\_\_\_\_, a \_\_\_\_\_, and \_\_\_\_\_, a \_\_\_\_\_ (referred to herein individually and collectively as "Borrower"), \_\_\_\_\_, an individual \_\_\_\_\_ (referred to herein individually and collectively as "Guarantor"). References herein to the "Borrower Parties" means Borrower, Guarantor, and anyone acting on behalf of any of them, and each of their respective successors and assigns.

In consideration of the agreements set forth in this Agreement, which consideration the parties hereto agree is adequate and sufficient, the parties agree as follows:

1. Negotiations. Borrower and Lender have commenced or are about to commence discussions and negotiations, and other communications from time-to-time, often using various media (collectively, the "Negotiations") concerning certain obligations ("Obligations") Borrower has to Lender in connection with those certain loans described on Exhibit A to this Agreement (collectively, the "Loans"). The Loans are evidenced and/or secured by certain agreements, including, but not limited to, promissory notes, loan agreements, security agreements, deeds of trust, mortgages, guaranties, and other documents and instruments executed in connection with the Loans (as applicable, the "Loan Documents"). During the course of the Negotiations, Borrower and Lender intend to discuss various courses of action which may be in Borrower's and Lender's mutual interests, with a view to compromise and settlement by the parties of disputes and controversies between or among Lender and Borrower. Except as provided below in this paragraph, the parties expressly stipulate and agree that both the content and the existence of statements and communications among the parties created during such Negotiations shall remain protected and no part of any oral or written communication from Lender during such Negotiations shall be admissible or subject to discovery in any case or proceeding, including, without limitation, any arbitration or mediation, or be used for any other purpose, including, without limitation, proof of admissions of liability. The foregoing prohibition is intended to be broader than the restrictions on admissibility contained in Rule 408 of the Federal Rules of Evidence and analogous state law rules or doctrines. Notwithstanding the foregoing, (i) this paragraph shall not pertain to information which, in the absence of this Agreement, would be available for inspection or review by Lender pursuant to the Loan Documents; and (ii) this Agreement itself (without regard to any other evidence of conduct or communications of any nature whatsoever) shall be admissible in a judicial, dispute resolution or similar proceeding involving one or more of Borrower, Guarantor or Lender. Lender may conduct Negotiations or other communication with Borrower or any Guarantor or any other person or entity obligated to Lender with respect to the indebtedness evidenced by the Loan Documents and any other person or entity affiliated with Borrower or Guarantor or representing Borrower or Guarantor, with or without the participation of Borrower or an Guarantor, and all parties hereto consent to such Negotiations or other communications. Either Borrower or Lender, in its sole and absolute discretion, may terminate the Negotiations at any time and for any reason and, upon such

termination, each party's obligations to one another shall be only according to the express terms of the Loan Documents, as modified, if at all, by an executed written agreement that complies with the provisions of Paragraphs 3 and 4 of this Agreement.

2. Status of Obligations. Borrower hereby reaffirms its obligations to Lender under the express terms of the Loan Documents and acknowledges Borrower's default in payment and performance of certain of the Obligations, without defense thereto, as more particularly set forth on Exhibit B to this Agreement. Notwithstanding the commencement or continuation of discussions or negotiations, Lender will not and does not waive the existence of any defaults or events of default under the Loan Documents or any rights and remedies that Lender may have, and the defaults set forth on Exhibit B to this Agreement shall in no way limit any other defaults that may exist under the Loan Documents. Lender shall not be limited or restricted from enforcing any rights or remedies available to it, including, without limitation, commencing judicial or non-judicial foreclosure proceedings, seeking the appointment of a receiver, collecting rents and profits or otherwise exercising its remedies, and Lender expressly reserves all such rights and remedies. Borrower hereby acknowledges and agrees that there have been no modifications to the Loan Documents and the Loan Documents constitute all of the agreements among Lender and Borrower and the Loan Documents continue to constitute Borrower's legal and enforceable obligations. Borrower acknowledges and agrees that no fiduciary or special relationship with Lender is created by this Agreement, the participation of Lender in any of the Negotiations herein contemplated, or otherwise. Borrower specifically acknowledges and agrees that Lender has made no promise, commitment, or representation whatsoever, and Lender does not have any obligation to Borrower to modify the terms of any of the Loans, offer any discounted payoffs of any of the Loans, refinance any of the Loans, grant any forbearances, extend the payment terms of any of the Loans or extend any other financial accommodation to Borrower.

3. Agreements and Amendments Must be Written, Signed, and Receive Final Approval. The discussions between Borrower and Lender may be lengthy and complex. While Borrower and Lender may reach oral agreement or work together on term sheets covering one or more preliminary issues each is trying to resolve, Borrower and Lender acknowledge that neither Borrower nor Lender shall be bound by any verbal agreement, and no rights or liabilities, either expressed or implied, shall arise on the part of the parties hereto, or any third party, unless and until a full agreement has been reduced to writing, subsequently approved in writing by Lender's internal authorities, and fully executed on behalf of Lender and Borrower (as may be applicable, a "Final Agreement"). Borrower and Lender also agree that the terms of this Agreement may only be amended in a writing signed by Borrower and by Lender.

4. Lender's Approval Process. The undersigned representative of Lender does not have the authority to bind Lender to any waiver or modification of, or supplement to, the Loan Documents. If Borrower and Lender reach an understanding about modifying or otherwise restructuring the Obligations or the Loan Documents, Borrower and Lender will summarize such understanding in a nonbinding term sheet which will provide the basis for a recommendation to the appropriate internal authorities of Lender that a loan modification be made. That recommendation may be approved, approved with certain changes, or disapproved. Borrower will be notified in writing of the results of Lender's recommendation and review process, and only after notification of an approval on terms acceptable to both Borrower and Lender and after



full compliance by Borrower with all conditions contained in the term sheet as approved by Lender, including, without limitation, payment of itemized expenses and the preparation and full execution of a final agreement in form and substance acceptable to Lender.

5. Loan Documents Unmodified. Notwithstanding Borrower's and Lender's discussions, correspondence, and conduct to date, and any claims of either party to the contrary, Borrower and Lender agree and acknowledge that the Loan Documents are in full force and effect according to their express terms, and shall so remain unless and until modified by a signed written agreement which complies with Paragraphs 3 and 4 of this Agreement. SPECIFICALLY, BUT WITHOUT LIMITING IN ANY MANNER WHATSOEVER THE GENERALITY OF THE FOREGOING, NOTHING CONTAINED IN THIS AGREEMENT IS INTENDED TO NULLIFY OR OTHERWISE ALTER ANY AGREEMENT OR WAIVER SET FORTH IN THE LOAN DOCUMENTS REGARDING SUCH MATTERS AS WAIVER OF RIGHT TO JURY TRIAL, VENUE OR JURISDICTION OF ANY LAWSUIT OR OTHER PROCEEDING OR ACTION PERTAINING TO THE LOAN AND PROJECT DOCUMENTS OR OBLIGATIONS; PROVIDED, HOWEVER, THAT THIS SENTENCE SHALL NOT LIMIT THE EFFECTIVENESS OF PARAGRAPHS 21 AND/OR 22 OF THIS AGREEMENT.

6. No Waivers by Conduct or Negotiation. Except as expressly provided in this Agreement, no negotiations, communications or conduct, whether undertaken in the process outlined in this Agreement or otherwise shall constitute a waiver of any party's rights or remedies under the Loan Documents or the law, unless and until pursuant to a Final Agreement which complies with the provisions of Paragraphs 3 and 4 of this Agreement. This Agreement shall not be construed as an amendment, novation, accord and satisfaction, estoppel, or waiver of Lender's rights under the Loan Documents. Nothing contained in this Agreement shall limit Lender in initiating, continuing or otherwise proceeding to exercise any right or remedy available to Lender under the Loan Documents or otherwise.

7. Payments. Except as may be set forth in a Final Agreement, if any, Borrower Parties acknowledge that the acceptance or application by Lender at any time of any payment or other amount with respect to an applicable Loan which is less than the full amount owing to Lender with respect to such Loan under the applicable Loan Documents does not waive, amend or alter Borrower Parties' obligations under the applicable Loan Documents, or constitute a satisfaction, accord or settlement of the indebtedness with respect to such Loan.

8. Waiver and Release of Certain Claims. Each party hereto irrevocably waives and releases any and all claims, actions, causes of action, suits, and defenses which such party might hereafter have against the other party for or by reason of any matter, cause or thing whatsoever which relates to the Negotiations contemplated by this Agreement; provided, however, that such waiver and release shall not release either party from any of its obligations under the terms of this Agreement, the Obligations, the Loan Documents, and any written agreement executed in compliance with Paragraphs 3 and 4 of this Agreement. In consideration of Lender's execution of this Agreement and Lender's agreement to participate in Negotiations on the terms set forth in this Agreement, Borrower hereby reaffirms its obligations under the Loan Documents and further waives and releases any defenses thereto.

9. Authorized Representatives. Each of the parties will designate in writing who is his, her or its representative for the Negotiations. The persons whose names, addresses and telephone numbers are listed on Exhibit C to this Agreement have been designated as such representatives as of the date of this Agreement. No other persons shall be authorized to negotiate on behalf of or represent Borrower or Lender, unless and until written confirmation of such person's authority is delivered to the other party. Any party hereto may, by notice to the other, designate additional or substitute representatives. The individuals who sign this Agreement on behalf of Lender and those who conduct the Negotiations on behalf of Lender do not have the authority to bind Lender to any amendment, supplement, or modification of or changes to the Loan Documents or to any waiver or release of, or relief concerning, any provision thereof or any default of or requirement applicable to Borrower thereunder or any right or remedy of Lender thereunder.

10. Lender's Fees and Expenses. In addition to Borrower's reimbursement obligations under the Loan Documents, Borrower shall pay, as and when billed (subject to the next sentence), all fees, costs and expenses incurred by Lender in connection with the negotiation of this Agreement and the Negotiations, including without limitation, attorneys' fees, appraisal fees, inspection costs, engineering and environmental consultant fees, title and housing violation search costs, costs of obtaining certified rent rolls, regardless of whether or not Borrower and Lender reach final agreement for a workout of the Obligations or other modification, supplement, waiver, or other change of the Loan Documents. Payment by or on behalf of Borrower of some or all of such costs and expenses may be required in advance as a condition to proceeding with the Negotiations. Nothing in this Agreement shall be intended or construed to hold Lender liable or responsible for any expenses, disbursements, liabilities, or obligations of any kind or nature under or related to the Loan Documents or related property securing the Loans.

11. Voluntary Agreement; Representation by Counsel. Borrower and Lender represent and warrant that each is represented by legal counsel of their choice, that each has consulted with counsel regarding this Agreement and the agreements, waivers, and releases stated in this Agreement, that each of them is fully aware of the terms of this Agreement, and that each of them has voluntarily and without coercion or duress of any kind executed and delivered this Agreement.

12. Alternative Opportunities. Since the parties recognize that the Negotiations may not produce a mutually acceptable resolution of the overall problem, Borrower must be and is responsible for operating its business in a manner it deems appropriate. In particular, Borrower should not forego acceptable alternative opportunities, if any, while such Negotiations are pending, including without limitation, any refinancing, sale, lease or other disposition of the underlying real estate collateral, and in each case, subject to the terms of the Loan Documents. Borrower acknowledges that it may not in any way rely on, or claim reliance on, the Negotiations.

13. Tolling of Statutes of Limitations. The parties agree that the running of all statutes of limitations or doctrine of laches applicable to any claims or causes of action, including without limitation, all avoidance actions under Chapter 5 of Title 11 of the United States Code, or applicable state fraudulent conveyance statutes that might be brought by or on behalf of (but

not against) Lender in a proceeding under said Title 11 or under applicable law, are tolled and suspended during the period commencing as of the effective date of this Agreement and ending thirty (30) days following receipt of notice terminating the Negotiations described in this Agreement.

14. Notice. All notices given hereunder shall be in writing and sent by certified or registered mail, return receipt requested, by overnight courier service or by facsimile with proper confirmation, to the other parties' authorized representative.

15. Payment Statements. From time to time, Lender may have sent or may send payment statements to Borrower. The payment statements are generated for Borrower's information and convenience only, and the payment statements do not waive, amend or alter the Borrower's obligations under the Loan Documents. To the extent any billing statements do not accurately reflect balances and any charges to which Lender is entitled under the Loan Documents, the Loan Documents shall control.

16. Borrower Cooperation. Borrower will cooperate with Lender, its agents and their representatives, to allow Lender upon one day's notice to conduct environmental site assessments, site inspections, structural studies, audits, appraisals and other evaluations of the property securing the Loans. Furthermore, Borrower agrees to promptly deliver to Lender (in addition to that information already required under the Loan Documents), upon request and in a form acceptable to Lender, current, complete and accurate financial statements for Borrower and Guarantor, and current operating statements, rent rolls, and balance sheets for the operation of the real property securing the Loans. All such information must be signed by the person submitting it and certified as true, correct and complete and shall not be subject to the confidentiality provisions of Paragraph 1 of this Agreement.

17. Rents and Profits as Cash Collateral. Borrower and each of its general partners or managing members hereby agree and acknowledge that the rents, income, revenues, accounts, receipts, issues, and profits, and other payments, whether now existing or hereafter arising under or generated by the collateral securing each of the Loans (individually and collectively, the "Rents and Profits") are and shall be deemed a part of Lender's "Cash Collateral" under Section 363 of Title 11 of the United States Code, as amended (the "Bankruptcy Code") in the event that Borrower files a voluntary petition in bankruptcy or is made subject to any involuntary bankruptcy proceeding. In the event of such bankruptcy proceeding, Borrower may not use Cash Collateral without the consent of Lender and/or an order of any bankruptcy court, pursuant to Section 363(b)(2) of the Bankruptcy Code, and Borrower hereby waives any right it may have to assert that Lender's security interest in the Rents and Profits does not constitute Cash Collateral. Lender shall not be deemed to have consented to any use of Cash Collateral unless Lender's consent is evidenced by its counsel's written approval of an order of the bankruptcy court authorizing use of cash collateral; further any such order shall also limit the authorized expenditures of Cash Collateral to the expenses referenced in such order (or referenced in a budget attached thereto in form and substance approved by Lender). Borrower further agrees that if it is determined that any of the rights granted Lender pursuant to the Loan Documents constitute a security interest in or lien against the Rents and Profits, such shall be deemed perfected, "choate," and enforced, without the necessity of making any demand, filing any documents or commencing any proceeding that may otherwise be required under non-bankruptcy

law for the perfection or enforcement of security interests, with such perfection and enforcement being binding upon Borrower and any subsequently appoint trustee in any case under the Bankruptcy Code.

18. No Claims Against Lender. Borrower acknowledges and agrees that it currently holds no claim against Lender, including, but not limited to, setoff recoupment, estoppel waiver, cancellation of instruments, rescission, novation or excuse of performance under the Loan Documents by virtue of any action or inaction of Lender or any predecessors-in-interest to Lender.

19. Survival. The provisions of this Agreement shall survive termination or conclusion of the Negotiations and other actions and events contemplated in this Agreement.

20. Miscellaneous. This Agreement constitutes the entire agreement between Borrower and Lender concerning their negotiations for a workout or loan modification and supersedes any prior or contemporaneous representations, communications, or agreements not contained herein concerning such subjects. This Agreement shall benefit and bind the parties hereto and, as applicable, their respective heirs, successors and assigns. This Agreement shall be governed by Texas law, without giving effect to the principles of conflicts of laws. In the event of any dispute under the terms of this Agreement, the prevailing party shall be entitled to recover all costs and attorneys' fees from the non-prevailing party. This Agreement is the product of both parties and their counsel and shall not therefore be construed for any purpose as a contract drafted by any single party, and shall not be construed against Lender merely because Lender has written it down. This Agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which taken together shall constitute one agreement. The parties hereto agree that their electronically transmitted signatures on this Agreement shall have the same effect as manually transmitted signatures. Each party executing this agreement represents that such party has the full authority and legal power to do so.

21. **WAIVER OF JURY TRIAL. EACH PARTY HERETO WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (I) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (II) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.**

22. **WAIVER OF SPECIAL DAMAGES. TO THE EXTENT PERMITTED BY APPLICABLE LAW, BORROWER SHALL NOT ASSERT, AND HEREBY WAIVES, ANY CLAIM AGAINST LENDER, ON ANY THEORY OF LIABILITY, FOR SPECIAL, INDIRECT, CONSEQUENTIAL OR PUNITIVE DAMAGES (AS OPPOSED TO**

**DIRECT OR ACTUAL DAMAGES) ARISING OUT OF, IN CONNECTION WITH, OR AS A RESULT OF, THIS AGREEMENT OR ANY AGREEMENT OR INSTRUMENT CONTEMPLATED HEREBY, THE TRANSACTIONS, THE LOANS OR THE USE OF THE PROCEEDS THEREOF.**

[Signatures on following pages]

**LENDER:**

JPMORGAN CHASE BANK, N.A.,  
a national banking association

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

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

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

**BORROWER:**

\_\_\_\_\_  
a \_\_\_\_\_

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

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

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

\_\_\_\_\_  
a \_\_\_\_\_

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

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

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

**GUARANTOR:**

By Guarantor's signature below, Guarantor consents to the terms of this Agreement and acknowledges that this Agreement does not alter, amend, diminish, waive or discharge the Borrower's obligations to Lender under the Loan Documents in any way. Guarantor further agrees that this Agreement does not alter, amend, diminish, waive or discharge Guarantor's obligations to the Lender under any guaranty, indemnification, or other agreement, and Guarantor agrees to continue to be bound under the terms of the guaranty, indemnification, or other agreement in the event that the Loan Documents are modified as provided in Paragraphs 3 and 4 of this Agreement, without further notice or consent. To the extent that notice and/or Guarantor's consent may be required as a condition precedent to continued liability under any guaranty, indemnification, or other agreement, such notice and consent are hereby waived. Guarantor agrees that it is bound and shall continue to be bound to Lender under its guaranty, indemnification, or other agreement during the course of the Negotiations and following any termination of the Agreement.

\_\_\_\_\_  
, an individual

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, an individual

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, an individual

**EXHIBIT A**

**Loans**



**EXHIBIT B**

**Defaults**

**EXHIBIT C**

**Representatives**

The authorized representatives of the parties are as follows:

**Lender's Representatives:**

Name:  
Address:  
Phone:  
Fax No.:  
email:

Name:  
Address:  
Phone:  
Fax No.:  
email:

**Borrower's Representatives:**

Name:  
Address:  
Phone:  
Fax No.:  
email:

Name:  
Address:  
Phone:  
Fax No.:  
email:

## FORBEARANCE AGREEMENT

This Forbearance Agreement (this "**Agreement**") is entered into as of \_\_\_\_\_, 2009 (the "**Effective Date**"), by and between \_\_\_\_\_, a \_\_\_\_\_ ("**Borrower**"), and JPMORGAN CHASE BANK, N.A., a national banking association ("**Noteowner**"), successor-in-interest to Washington Mutual Bank ("**Original Lender**") in connection with the Loan (defined below), in light of the following recitals which serve as a basis for this Agreement and are a part of this Agreement for all purposes:

### RECITALS

A. Original Lender made a loan to Borrower on or about \_\_\_\_\_, \_\_\_\_\_, in the original stated principal amount of \$ \_\_\_\_\_ (the "**Loan**").

B. Reference is made to the following documents in connection with the Loan: (i) that certain Loan Agreement (the "**Loan Agreement**"), dated \_\_\_\_\_, \_\_\_\_\_, by and between Borrower and Original Lender; (ii) that certain Promissory Note (the "**Note**"), dated \_\_\_\_\_, \_\_\_\_\_, in the original principal amount of \$ \_\_\_\_\_, made by Borrower, payable to the order of Original Lender; (iii) that certain Deed of Trust and Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing (the "**Deed of Trust**"), dated \_\_\_\_\_, \_\_\_\_\_, recorded in the Real Property Records of \_\_\_\_\_ County, Texas in Volume \_\_\_\_\_, Page \_\_\_\_\_, executed by Borrower to \_\_\_\_\_, Trustee, covering certain property more particularly described therein (the "**Property**"), to secure payment of the Note and performance by Borrower of certain other obligations in connection with the Loan; [and (iv) that certain Payment and Performance Guaranty (the "**Guaranty**"), dated \_\_\_\_\_, \_\_\_\_\_ by \_\_\_\_\_ ("**Guarantor**").] The Loan Agreement, the Note, the Deed of Trust, [the Guaranty] and all other documents executed in connection therewith are collectively herein referred to as the "**Loan Documents**." All undefined capitalized terms used herein shall have the meanings set forth in the Loan Agreement.

C. Noteowner purchased the Loan from the Federal Deposit Insurance Corporation as receiver for Original Lender.

D. Borrower currently is indebted and obligated to Noteowner pursuant to the terms of the Loan Documents.

E. Borrower currently is in default under the Loan Documents as a result of the following matters (collectively, the "**Existing Specified Defaults**"): (i) Borrower's failure to pay certain amounts now due and payable to Noteowner; (ii) Borrower's failure to \_\_\_\_\_, as required by Section \_\_\_\_\_ of the Loan Agreement; and (iii) \_\_\_\_\_, as required by Section \_\_\_\_\_ of the Loan Agreement. As a result of the Existing Specified Defaults, without any waiver or limitation of any other existing defaults under the Loan Documents, certain Events of Default have occurred and continue to exist under the Loan Documents.

F. By reason of the existence of the Existing Specified Defaults, Noteowner has full legal right to exercise its rights and remedies under the Loan Agreement and other Loan

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Documents. Such remedies include, but are not limited to, the right to accelerate the Indebtedness.

G. Noteowner has properly accelerated the maturity of the indebtedness evidenced by the Loan Documents.

**H. [Borrower has requested Noteowner to pass the foreclosure of the Property scheduled for \_\_\_\_\_, \_\_\_\_\_, and Noteowner has agreed to pass such foreclosure, subject to the terms and conditions more particularly described in this Agreement.]**

I. Borrower has requested that Noteowner forbear from exercising its rights and remedies under the Loan Agreement and other Loan Documents, and Noteowner has agreed to forbear, subject to the terms and conditions more particularly described in this Agreement.

### AGREEMENT

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

1. Payments by Borrower.

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

(i) **Accrued and unpaid interest on the Note through \_\_\_\_\_, in the amount of \$ \_\_\_\_\_; and**

(ii) **A fee in the amount of \$ \_\_\_\_\_.]**

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

(b) On or before the execution and delivery of this Agreement by Borrower, Borrower shall pay to Noteowner the additional amount of \$ \_\_\_\_\_, representing Noteowner's estimate, as of \_\_\_\_\_, \_\_\_\_\_, of **[(i) ad valorem taxes, and penalties and interest associated therewith, in respect of the Property for the calendar year \_\_\_\_\_, plus (ii) the sum due \_\_\_\_\_ in relation to \_\_\_\_\_].** On Noteowner's receipt of such \$ \_\_\_\_\_ amount, Noteowner will use commercially reasonable diligence to apply such amount toward such taxes, penalties, interest and other sums in such manner as Noteowner determines, in its sole discretion. In the event such \$ \_\_\_\_\_ amount is insufficient to satisfy all of such taxes, penalties, interest and other sums, Borrower shall promptly pay and fully satisfy, prior to \_\_\_\_\_, \_\_\_\_\_, any and all of such taxes, penalties, interest and other sum that remain unpaid.

In the event any portion of such \$ \_\_\_\_\_ amount is held by Noteowner following the full payment of such taxes, penalties, interest and other sums by Noteowner, such portion shall be held in suspense by Noteowner and applied from time to time, in Noteowner's sole discretion, to any accrued and unpaid interest on the Note and any other sums due Noteowner under the Loan Documents and this Agreement. Borrower shall not be entitled to any interest on any of such \$ \_\_\_\_\_ amount held by Noteowner. In the event any portion of such \$ \_\_\_\_\_ amount is held by Noteowner following the full and final satisfaction of all sums due Noteowner under the Loan Documents and this Agreement, Noteowner shall return such portion to Borrower within thirty (30) days after its receipt from Borrower of written request therefor.

(c) On or before the execution and delivery of this Agreement by Borrower, Borrower shall pay to Patton Boggs LLP the amount of \$ \_\_\_\_\_, which amount shall evidence the estimated attorney's fees and disbursements incurred on behalf of Noteowner in the collection of the indebtedness evidenced by the Note through \_\_\_\_\_, \_\_\_\_\_.

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

All of such payments by Borrower pursuant to this paragraph shall be made by wire transfer of immediately available federal funds.

## 2. Agreement to Forbear.

(a) Forbearance. During the period (the "**Forbearance Period**") commencing on the Effective Date and ending on the earlier to occur of: (X) 5:00 p.m. (Central Time) on \_\_\_\_\_, \_\_\_\_\_; or (Y) the date that any Forbearance Default (defined below) occurs, and subject to the other terms and conditions of this Agreement, Noteowner agrees that it will forbear from exercising any right or remedy arising as a result of the Existing Specified Defaults [**forbear from foreclosing the Property on \_\_\_\_\_, \_\_\_\_\_ and at any time during the Forbearance Period**], in consideration of Borrower's agreements, covenants, releases and waivers contained in this Agreement. Upon the expiration or termination of the Forbearance Period: (i) such forbearance shall automatically terminate; (ii) Noteowner shall be entitled to exercise any and all of its rights and remedies under this Agreement, the Loan Agreement and the other Loan Documents without further notice; and (iii) the Indebtedness shall be automatically accelerated and immediately due and owing without further notice. Borrower agrees that Noteowner shall have no obligation to extend the Forbearance Period.

(b) No Waiver, Restatement or Amendment. Notwithstanding Noteowner's agreement to forbear set forth in Section 1(a) above: (i) such forbearance by Noteowner is not intended, shall not constitute and shall not be construed or interpreted to constitute a waiver of the Existing Specified Defaults, or of any other default which may now or hereafter exist under the Loan Documents; (ii) this Agreement and such forbearance by Noteowner shall not constitute a reinstatement of the indebtedness evidenced by the Note and secured by the Deed of Trust; and (iii) this Agreement and such forbearance by Noteowner shall not constitute an amendment or modification of the Loan Documents. All other rights of the Noteowner contained in the Loan Documents shall remain in full force and effect.

(c) No Future Loans. Borrower acknowledges that nothing in this Agreement shall be construed as creating any obligation whatsoever on the part of Noteowner to make any loans or other extensions of credit to or for the benefit of Borrower.

3. Note Balance. Borrower acknowledges and agrees that [as of \_\_\_\_\_, immediately following the application of the payment of the accrued interest described in Section 1(a)(i) above: (i) the principal indebtedness outstanding under the Note is \$ \_\_\_\_\_; (ii) there is no interest accrued but unpaid on the Note, but interest shall continue to accrue from and after \_\_\_\_\_, \_\_\_\_\_, as provided in the Note; and (iii)] all interest charged, paid or received on the Loan Documents is not in excess of the maximum legal amount of interest that can be charged on the Loan Documents under all applicable laws. Subject to Section 7(a) and Section 11 below, Borrower acknowledges and agrees that all costs incurred by Noteowner in connection with this Agreement, any further posting of the Property for a nonjudicial foreclosure, and any other costs incurred by Noteowner in connection with the collection of the indebtedness evidenced by the Loan Documents shall be added to and included in the indebtedness evidenced by the Loan Documents.

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

5. Stipulations, Bankruptcy and Waiver of Automatic Stay.

(a) Borrower acknowledges and stipulates as follows: (i) the Existing Specified Defaults exist under the Loan Documents; (ii) the Borrower has received all notices in accordance with the Loan Documents and the Texas Property Code; (iii) the maturity of the indebtedness evidenced by the Note and secured by the Deed of Trust has been properly accelerated; (iv) except as specifically and expressly provided in this Agreement to the contrary, Noteowner is fully entitled to foreclose its lien under the Deed of Trust; (v) Borrower has at all times been represented by competent counsel of its own choosing in the negotiation, execution and delivery of this Agreement, including the provisions set forth below regarding relief from the automatic stay in bankruptcy; and (vi) Borrower understands its rights under Title 11 of the United States Code, as amended, and applicable common law, and voluntarily and intentionally agrees to the provisions of this Agreement that relinquish or limit such rights in exchange for the consideration of Noteowner entering into this Agreement.

(b) Borrower agrees that if it (i) files with any bankruptcy court of competent jurisdiction or becomes the subject of any petition under Title 11 of the U.S. Code, as amended, (ii) becomes the subject of any order for relief issued under such Title 11 of the U.S. Code, as amended, (iii) files or becomes the subject of any petition seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency, or other relief for debtors, (iv) seeks, consents to or acquiesces in the appointment of any trustee, receiver, conservator or liquidator, or (v) becomes the subject of any order, judgment or decree entered by

any court of competent jurisdiction approving a petition filed by or against Borrower for any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency, or relief for debtors, then Noteowner shall thereupon be entitled to immediate termination of the automatic stay provisions of 11 U.S.C. §362, thereby granting Noteowner complete relief in allowing Noteowner to exercise all of its legal rights and remedies, including without limitation, the right to foreclose the lien created in the Deed of Trust, judicially or nonjudicially, or any other right or remedy afforded under the Loan Documents, at law, in equity or otherwise, and Borrower agrees not to directly or indirectly oppose or otherwise defend against Noteowner's efforts to gain relief from the automatic stay or to foreclose the Property subsequent to the Forbearance Period. Borrower further agrees that Noteowner shall be entitled as aforesaid to the lifting of the automatic stay without the necessity of an evidentiary hearing, without the necessity or requirement of Noteowner to establish or prove the value of the Property covered by the Deed of Trust, or the necessity to prove the lack of adequate protection of Noteowner's interest in the Property covered by the Deed of Trust, and the lifting of the automatic stay pursuant hereto by an appropriate bankruptcy court shall be deemed for cause pursuant to §362(d)(1) of the Bankruptcy Code.

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

7. Conditions Precedent to Effectiveness of Agreement. This Agreement shall not be effective against Noteowner unless and until each of the following conditions precedent for the sole benefit of Noteowner have been satisfied in Noteowner's sole discretion or waived in writing by Noteowner:

(a) Payment of the Costs and Expenses of Noteowner. Borrower shall have paid to Noteowner all of costs and expenses (including attorneys fees and expenses) of Noteowner incurred in connection with the negotiation and preparation of this Agreement; and

(b) Organizational Proceedings. All organizational proceedings taken in connection with the transactions contemplated by this Agreement and all documents, instruments and other legal matters incident thereto shall be satisfactory to Noteowner and its counsel.

8. Representations and Warranties. Borrower represents and warrants to Noteowner as follows:

(a) Recitals. The Recitals in this Agreement are true and correct in all respects.

(b) Incorporation of Representations. All representations and warranties of Borrower in the Loan Agreement and the other Loan Documents are incorporated herein in full by this reference and are true and correct as of the date hereof, except to the extent that such representation or warranty expressly relates to an earlier date.

(c) Corporate Power; Authorization. Borrower has the organizational power, and has been duly authorized by all requisite organizational action, to execute and deliver this Agreement and to perform its obligations hereunder and thereunder. This Agreement has been duly executed and delivered by Borrower.

(d) Enforceability. This Agreement is the legal, valid and binding obligation of Borrower, enforceable against Borrower in accordance with its terms.

(e) No Violation. Borrower's execution, delivery and performance of this Agreement does not and will not (i) violate any law, rule, regulation or court order to which Borrower is subject; (ii) conflict with or result in a breach of Borrower's organizational documents or any agreement or instrument to which Borrower is party or by which it or its properties are bound; or (iii) result in the creation or imposition of any lien, security interest or encumbrance on any property of Borrower, whether now owned or hereafter acquired, other than liens in favor of Noteowner.

(f) Obligations Absolute. The obligation of Borrower to repay the Indebtedness, together with all interest accrued thereon, is absolute and unconditional, and there exists no right of set-off or recoupment, counterclaim or defense of any nature whatsoever to payment of the Indebtedness.

(g) Full Opportunity for Review; No Undue Influence. Borrower (i) fully understands the terms of this Agreement and the consequences of the issuance hereof; (ii) has been afforded an opportunity to have this Agreement reviewed by, and to discuss this Agreement with, such attorneys and other persons as Borrower may wish; and (iii) has entered into this Agreement of its own free will and accord and without threat or duress. This Agreement and all information furnished to the Noteowner is made and furnished in good faith, for value and valuable consideration. This Agreement has not been made or induced by any fraud, duress or undue influence exercised by Noteowner or any other person.

(h) No Other Defaults. Other than the Existing Specified Defaults, no Event of Default exists under the Loan Agreement or any of the Loan Documents, as amended hereby. Borrower is in full compliance with all other covenants and agreements contained in the Loan Agreement and other Loan Documents.

9. Default. Each of the following shall constitute a "Forbearance Default" hereunder:

(a) the existence of any Event of Default (other than the Existing Specified Defaults) or other default by Borrower, Guarantor, or any subsidiary thereof under the Loan Agreement, the other Loan Documents, or any other agreement with Noteowner [**or any other bank or lender**];



(b) Borrower shall fail to keep or perform any of the covenants or agreements contained herein;

(c) Borrower shall contest any term, provision, or acknowledgement contained in this Agreement or any other Loan Document;

(d) any representation or warranty of Borrower herein shall be false, misleading or incorrect in any material respect; or

(e) the occurrence or existence of a material adverse change in the business, assets, condition or prospects (financial or otherwise) of Borrower from the date of this Agreement.

10. Effect and Construction of Agreement. Except as expressly provided in this Agreement, all terms and provisions of the Loan Agreement and other Loan Documents are hereby ratified and confirmed and shall be and shall remain in full force and effect in accordance with their respective terms, and this Agreement shall not be construed to:

(a) amend or modify the terms and provisions of the Loan Agreement or the other Loan Documents;

(b) impair the validity, perfection or priority of any lien or security interest securing the Indebtedness;

(c) waive, modify, or impair any rights, powers or remedies of Noteowner under the Loan Agreement and other Loan Documents upon termination of the Forbearance Period;

(d) modify, amend, extend, consolidate, spread, restate, alter, change or revise any interest or repayment provisions of the Loan Documents;

(e) constitute an agreement by Noteowner or otherwise require Noteowner to extend the Forbearance Period, or grant additional forbearance periods, or extend the term of the Loan Agreement or the time for payment of any of the Indebtedness; or

(f) make any loans or other extensions of credit to Borrower after termination of the Forbearance Period.

In the event of any inconsistency between the terms of this Agreement and the Loan Agreement or any of the other Loan Documents, this Agreement shall govern. Borrower acknowledges that it has consulted with counsel and with such other experts and advisors as it has deemed necessary in connection with the negotiation, execution and delivery of this Agreement. This Agreement shall be construed without regard to any presumption or rule requiring that it be construed against the party causing this Agreement or any part hereof to be drafted.

11. Expenses. Borrower shall pay to Noteowner all costs, fees and expenses of it and its attorneys incurred in connection with the negotiation, preparation, administration and enforcement of, and the preservation of any rights under, this Agreement, the Loan Agreement

and the other Loan Documents, and the transactions and other matters contemplated hereby and thereby.

12. WAIVER, INDEMNITY AND RELEASE OF CLAIMS. BORROWER REPRESENTS AND WARRANTS THAT IT HAS NO SET-OFF, COUNTERCLAIM, DEFENSE, CROSS-COMPLAINT, CLAIM, DEMAND OR OTHER CAUSE OF ACTION (HEREINAFTER REFERRED TO COLLECTIVELY AS "CLAIMS") AGAINST NOTEOWNER WHICH ARISE OUT OF THE TRANSACTIONS EVIDENCED BY THE LOAN AGREEMENT OR THE OTHER LOAN DOCUMENTS, ANY TRANSACTIONS THAT WERE RENEWED OR EXTENDED BY THE LOAN AGREEMENT OR LOAN DOCUMENTS, ANY OTHER TRANSACTION WITH NOTEOWNER, OR WHICH COULD BE ASSERTED TO REDUCE OR ELIMINATE ALL OR ANY PART OF BORROWER'S LIABILITY TO REPAY THE INDEBTEDNESS OR TO SEEK AFFIRMATIVE RELIEF OR DAMAGES OF ANY KIND OR NATURE FROM NOTEOWNER, IRRESPECTIVE OF WHETHER ANY SUCH CLAIMS ARISE OUT OF CONTRACT, TORT, VIOLATION OF LAW OR REGULATIONS, OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY CONTRACTING FOR, CHARGING, TAKING, RESERVING, COLLECTING OR RECEIVING INTEREST IN EXCESS OF THE HIGHEST LAWFUL RATE APPLICABLE, THE EXERCISE OF ANY RIGHTS AND REMEDIES UNDER THE LOAN AGREEMENT OR ANY OF THE LOAN DOCUMENTS, THE NEGOTIATION FOR AND EXECUTION OF THIS AGREEMENT AND ANY SETTLEMENT NEGOTIATIONS. TO THE EXTENT THAT ANY CLAIMS MAY EXIST, WHETHER KNOWN OR UNKNOWN, SUCH ARE HEREBY WAIVED AND RELEASED BY BORROWER. FURTHERMORE, BORROWER, ON BEHALF OF BORROWER, ITS RESPECTIVE SUCCESSORS, AGENTS, ATTORNEYS, OFFICERS, DIRECTORS, ASSIGNS AND PERSONNEL AND LEGAL REPRESENTATIVES, DOES HEREBY RELEASE, REMISE, ACQUIT AND FOREVER DISCHARGE NOTEOWNER AND ITS EMPLOYEES, AGENTS, REPRESENTATIVES, CONSULTANTS, ATTORNEYS, FIDUCIARIES, SERVANTS, OFFICERS, DIRECTORS, PARTNERS, PREDECESSORS, SUCCESSORS AND ASSIGNS, SUBSIDIARY CORPORATIONS, PARENT CORPORATIONS, AND RELATED CORPORATE DIVISIONS (ALL OF THE FOREGOING HEREINAFTER REFERRED TO COLLECTIVELY AS THE "RELEASED PARTIES"), FROM ANY AND ALL ACTIONS AND CAUSES OF ACTION, JUDGMENTS, EXECUTIONS, SUITS, DEBTS, CLAIMS, DEMANDS, LIABILITIES, OBLIGATIONS, DAMAGES AND EXPENSES OF ANY AND EVERY CHARACTER, KNOWN OR UNKNOWN, DIRECT AND INDIRECT, AT LAW OR IN EQUITY, OF WHATSOEVER KIND OR NATURE, WHETHER HERETOFORE OR HEREAFTER ARISING, FOR OR BECAUSE OF ANY MATTER OR THINGS DONE, OMITTED OR SUFFERED TO BE DONE BY ANY OF THE RELEASED PARTIES PRIOR TO AND INCLUDING THE DATE OF EXECUTION HEREOF, AND IN ANY WAY DIRECTLY OR INDIRECTLY ARISING OUT OF OR IN ANY WAY CONNECTED TO THIS AGREEMENT, THE LOAN AGREEMENT OR THE LOAN DOCUMENTS, IRRESPECTIVE OF WHETHER ANY SUCH CLAIMS ARISE OUT OF CONTRACT, TORT, VIOLATION OF LAW OR REGULATIONS OR OTHERWISE, INCLUDING BUT NOT LIMITED TO, ANY CONTRACTING FOR, CHARGING, TAKING, RESERVING, COLLECTING OR RECEIVING INTEREST IN EXCESS OF THE HIGHEST LAWFUL RATE APPLICABLE, THE EXERCISE OF ANY RIGHTS AND REMEDIES UNDER THE LOAN AGREEMENT OR ANY OF THE LOAN DOCUMENTS, THE NEGOTIATION FOR AND EXECUTION OF

THIS AGREEMENT, OR ANY SETTLEMENT NEGOTIATIONS (ALL OF THE FOREGOING HEREINAFTER REFERRED TO COLLECTIVELY AS THE “**RELEASED MATTERS**”); AND BORROWER HEREBY COVENANTS AND AGREES NEVER TO INSTITUTE ANY ACTION OR SUIT AT LAW OR IN EQUITY, NOR INSTITUTE, PROSECUTE, OR IN ANY WAY AID IN THE INSTITUTION OR PROSECUTION OF, ANY CLAIM, ACTION OR CAUSE OF ACTION, RIGHTS TO RECOVER DEBTS OR DEMANDS OF ANY NATURE AGAINST ANY OF THE RELEASED PARTIES ARISING OUT OF OR RELATED TO ANY RELEASED PARTY’S OMISSIONS, STATEMENTS, REQUESTS OR DEMANDS IN ADMINISTERING, ENFORCING, MONITORING, COLLECTING OR ATTEMPTING TO COLLECT, THE OBLIGATIONS, INDEBTEDNESS AND OTHER OBLIGATIONS OF BORROWER TO NOTEOWNER. BORROWER SHALL INDEMNIFY AND HOLD THE RELEASED PARTIES HARMLESS FROM ANY AND ALL LOSSES, LIABILITIES, CLAIMS, DAMAGES, COSTS AND EXPENSES (INCLUDING REASONABLE ATTORNEYS’ FEES) TO WHICH ANY OF THEM MAY BECOME SUBJECT WHICH ARISE FROM OR RELATE TO THIS AGREEMENT, ANY OF THE LOAN DOCUMENTS, ANY ACTION OR ALLEGED ACTION OR EFFORT TAKEN OR ALLEGED TO HAVE BEEN TAKEN BY BORROWER IN CONNECTION WITH THE USE, OPERATION, OR MANAGEMENT OF THE PROPERTY, AND ANY ACTION OR FORBEARANCE CONTEMPLATED UNDER THIS AGREEMENT. THE OBLIGATIONS OF BORROWER UNDER THIS SECTION SHALL SURVIVE THE REPAYMENT OF THE INDEBTEDNESS AND THE PERFORMANCE OF ITS OBLIGATIONS UNDER THE LOAN DOCUMENTS. BORROWER ACKNOWLEDGES THAT THE AGREEMENTS IN THIS SECTION ARE INTENDED TO BE IN FULL SATISFACTION OF ALL OR ANY ALLEGED INJURIES OR DAMAGES TO BORROWER, ITS SUCCESSORS, AGENTS, ATTORNEYS, OFFICERS, DIRECTORS, ASSIGNS AND PERSONAL AND LEGAL REPRESENTATIVES ARISING IN CONNECTION WITH THE RELEASED MATTERS. BORROWER REPRESENTS AND WARRANTS TO NOTEOWNER THAT IT HAS NOT PURPORTED TO TRANSFER, ASSIGN OR OTHERWISE CONVEY ANY RIGHT, TITLE OR INTEREST OF BORROWER IN ANY RELEASED MATTER TO ANY OTHER PERSON AND THAT THE FOREGOING CONSTITUTES A FULL AND COMPLETE RELEASE OF BORROWER’S CLAIMS WITH RESPECT TO ALL RELEASED MATTERS.

13. **EXCULPATION.** BORROWER ACKNOWLEDGES AND AGREES THAT NOTEOWNER SHALL NOT BE DEEMED OR CONSTRUED TO HAVE ASSUMED ANY RESPONSIBILITY OR LIABILITY FOR THE PROPERTY, OR THE MANAGEMENT, OPERATIONS OR LEASING THEREOF. BORROWER ACKNOWLEDGES AND AGREES THAT NO RELEASED PARTY HAS DONE ANYTHING IN CONNECTION WITH THE USE, OPERATION, OR MANAGEMENT OF THE PROPERTY WHICH CAUSED ANY HARM OR DAMAGE TO THE PROPERTY, BORROWER, ANY TENANT, OCCUPANT, VISITOR, OR EMPLOYEE OF BORROWER OR THE PROPERTY. NOTEOWNER SHALL NOT BE DEEMED OR CONSTRUED TO BE A MORTGAGEE IN POSSESSION AS A RESULT OF THIS AGREEMENT, OR ANY ACTIONS TAKEN BY NOTEOWNER OR BORROWER PURSUANT HERETO.

14. **No Waiver: Strict Performance.** Borrower acknowledges and agrees that (i) no failure or delay by Noteowner in exercising any right, power or remedy under this Agreement or under any of the Loan Documents shall operate as a waiver thereof, (ii) no failure or delay by

Noteowner to insist upon the strict performance by Borrower of any term, condition, covenant or agreement or to exercise any right, power or remedy as a result of the breach thereof shall constitute a waiver of any such term, condition, covenant or agreement or of any breach thereof or preclude Noteowner from insisting on the strict performance thereof, (iii) no single or partial exercise of any right, power or remedy of Noteowner shall preclude further exercise of any right, power or remedy, and (iv) the acceptance by Noteowner of a partial payment of any amount due under the terms hereof shall not preclude Noteowner from requiring the full and timely payment of any and all amounts due under the terms hereof or any of the Loan Documents.

15. Further Assurances. Borrower agrees to execute, acknowledge, deliver, file and record such further certificates, instruments and documents and do all other acts and things, as Noteowner may reasonably request or as may be reasonably necessary or advisable to implement and carry out the intents and purposes of this Agreement and to perfect and protect the liens and security interests created by the Loan Agreement and other Loan Documents.

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

17. Benefit of Agreement. This Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties hereto, their respective successors and assigns, except that Borrower may not assign or transfer any of its rights or obligations hereunder without the prior written consent of Noteowner. No other person or entity shall be entitled to claim any right or benefit hereunder, including, without limitation, the status of a third-party beneficiary of this Agreement.

18. Integration. This Agreement, together with the Loan Agreement and other Loan Documents, constitutes the entire agreement and understanding among the parties relating to the subject matter hereof, and supersedes all prior proposals, negotiations, agreements and understandings relating to such subject matter. In entering into this Agreement, Borrower acknowledges that it is relying on no statement, representation, warranty, covenant or agreement of any kind made by the Noteowner or any of its employees or agents except for the agreements of Noteowner set forth herein. **THE LOAN AGREEMENT AND THE OTHER LOAN DOCUMENTS AND THIS AGREEMENT REPRESENT THE FINAL AGREEMENT BETWEEN THE PARTIES HERETO AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN AGREEMENTS BETWEEN THE PARTIES.**

19. Severability. If any clause or provision of this Agreement is or should ever be held to be illegal, invalid or unenforceable under any present or future law applicable to the terms hereof, then and in that event, it is the intention of the parties hereto that the remainder of this Agreement shall not be affected thereby, and that in lieu of each such clause or provision of this Agreement that is illegal, invalid or unenforceable, such clause or provision shall be

judicially construed and interpreted to be as similar in substance and content to such illegal, invalid or unenforceable clause or provision, as the context thereof would reasonably suggest, so as to thereafter be legal, valid and enforceable.

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

21. Counterparts; Telecopied Signatures. This Agreement may be executed in any number of counterparts and by different parties to this Agreement on separate counterparts, each of which, when so executed, shall be deemed an original, but all such counterparts shall constitute one and the same agreement. It shall not be necessary in making proof of this Agreement to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, each of the parties hereto. Any signature delivered by a party by facsimile transmission shall be deemed to be an original signature hereto.

22. Notices. Any notices with respect to this Agreement shall be given in the manner provided for in the Loan Agreement.

23. Survival. All representations, warranties, covenants, agreements, undertakings, waivers and releases of Borrower contained herein shall survive the termination of the Forbearance Period and payment in full of the obligations of Borrower under the Loan Agreement and other Loan Documents.

24. Amendment. No amendment, modification, rescission, waiver or release of any provision of this Agreement shall be effective unless the same shall be in writing and signed by the parties hereto.

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

26. Ratification of Liens and Security Interest. Borrower hereby acknowledges and agrees that the liens and security interests of the Loan Agreement and the other Loan Documents are valid, subsisting and enforceable liens and security interests and are superior to all liens and security interests other than those exceptions approved by Noteowner in writing, if any.

27. No Commitment. Borrower agrees that Noteowner has not made any commitment or other agreement regarding the Loan Agreement or other Loan Documents, except as expressly set forth in this Agreement. Borrower warrants and represents that Borrower

will not rely on any commitment, further agreement to forbear or other agreement on the part of Noteowner unless such commitment or agreement is in writing and signed by Noteowner.

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

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

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

**[Signature Pages Follow]**

The parties hereto have executed this Agreement to be effective as of the Effective Date.

**BORROWER:**

\_\_\_\_\_  
a \_\_\_\_\_

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

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

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

**NOTEOWNER:**

JPMORGAN CHASE BANK, N.A.,  
a national banking association

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



**Guarantor's Acknowledgment**

By Guarantor's signature below, Guarantor consents to the terms of this Agreement and acknowledges that this Agreement does not alter, amend, diminish, waiver or discharge Borrower's obligations to Noteowner under the Loan Documents in any way. Guarantor further agrees that this Agreement does not alter, amend, diminish, waive or discharge Guarantors obligations to Noteowner under any guaranty, and Guarantor agrees to continue to be bound under the terms of the Guaranty. To the extent that notice and/or Guarantor's consent may be required as a condition precedent to continued liability under any guaranty, such notice and consent are hereby waived. Guarantor agrees that it is bound and shall continue to be bound to Noteowner under the Guaranty during the Forbearance Period and following the termination of the Forbearance Period.

**Consented and Agreed to this \_\_\_ day of, 2009:**

**GUARANTOR:**

\_\_\_\_\_,  
a \_\_\_\_\_

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

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

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



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