



907 How to Effectively Manage Real Estate Risk

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Principal, General Counsel
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Philip W. Lee

Senior Counsel - Office of General Counsel
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Faculty Biographies

Charles E. Garner II

Charles E. Garner II is principal, investment and development for CIM in Bethesda, Maryland. He is responsible for CIM's investment activities in the eastern United States and is a member of CIM's investment committee and asset management committee. His responsibilities include sourcing and structuring investments, managing joint venture relationships and overseeing value creation strategies, project operations, and dispositions. He joined CIM after working closely with CIM in various capacities, including originating Federal Realty's partnership with CIM and managing that relationship for Federal Realty.

Mr. Garner has 18 years of real estate experience and has been involved in over \$1.5 billion of real estate transactions including the acquisition, joint venture investment, disposition and equity, and debt financing of more than 100 properties nationwide. Prior to joining CIM, Mr. Garner was senior vice president with Walker & Dunlop, vice president, acquisitions with Federal Realty Investment Trust, vice president and treasurer with The Stout & Teague Companies and began his career as a CPA in the Washington, DC office of PricewaterhouseCoopers.

Mr. Garner holds a B.S. degree from Tulane University's A.B. Freeman School of Business.

Daniel L. Goodkin

Dan Goodkin is the principal, general counsel of CIM Group, Inc. in Hollywood, California. He is responsible for, among other things, overseeing the company's legal/risk management issues, including, advising the company on the structuring of its investments, drafting the company's contracts as to their allocation of risk between CIM and its affiliates, borrowers, partners, tenants, licensees, vendors, professional service providers, and contractors, and developing the company's policies and procedures. Mr. Goodkin is also responsible for negotiating with the company's insurers and obtaining coverage and policies that properly reflect the company's risk.

Prior to joining the CIM as a principal, Mr. Goodkin was a real estate and construction litigator and trial attorney and was the chair of his firm's real estate and construction litigation department. As part of his practice, he litigated cases on such varied topics such as real estate finance, partnership, construction, homeowner association, broker, and landlord-tenant disputes. Mr. Goodkin was previously voted one of Southern California's super lawyers in the real estate section of Los Angeles Magazine.

Mr. Goodkin is a member of the executive committee and current editor of the Real Property Review of the real estate section of the Los Angeles County Bar Association. Mr. Goodkin has also presented multiple seminars in his area of expertise for other real estate and construction practitioners and trade groups.

Mr. Goodkin received his BA in Economics from the University of California Los Angeles and received his JD from Loyola Marymount University.

Philip W. Lee

Philip W. Lee is senior counsel for Nationwide Insurance in Columbus, Ohio. His responsibilities include advising various Nationwide business units and affiliates on a wide range of legal issues related to facilities management and real estate investments, including commercial mortgage loans, loan work-outs and foreclosures, real estate sales and acquisitions, leasing, construction, and environmental issues.

Prior to joining Nationwide, Mr. Lee was an associate with the law firm of Thompson Hine LLP, in Columbus, Ohio, where his practice focused on environmental law, zoning, and commercial real estate transactions. Before becoming an attorney, he was the founder and president of SiteScan, Inc., an environmental consulting company.

Mr. Lee is a former member of the board of directors of the Central Ohio chapter of the National Association of Industrial and Office Properties (NAIOP) and is currently an adjunct professor at Columbus State Community College where he has taught both environmental law and general real estate law. He is a co-author of Environmental Due Diligence for Commercial Lenders a reference book that was first published by Warren Gorham & Lamont in 1996.

Mr. Lee received a B.S. from Ohio University in Athens, Ohio and his law degree from the Capital University Law School in Columbus, Ohio.



907 & Managing Real Estate Risk

Daniel Goodkin

Philip Lee

Charles Garner

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Acquisitions & Dispositions

- Key Clauses
 - Confidentiality Agreements, Letters of Intent, Exclusive Negotiation Agreements, Pre-Negotiation Agreements
 - Purchase Price, Terms & Timing of when to go “Hard”
 - Representations and Warranties (Property vs. Entity)
 - Due Diligence Period & Purpose (Free Look or to Confirm Specifics)
 - Conditions Precedent to Closing
 - Termination Rights
 - Default Remedies (Liquidated Damages vs Specific Performance)
 - Assumption of Occurrences/Assignment of Insurance Policies
 - Assignment of Contracts relating to Construction

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● You may also want to include this language in your LOI.

- _____ expressly reserves the right, at its sole discretion, to reject any or all expressions of interest or offers with respect to the Proposed Transaction and/or to terminate discussions with any person at any time, with or without notice and there is no obligation on behalf of CIM to negotiate and/or to negotiate in good faith whatsoever.



- If our proposals as set forth above are acceptable to you, we would appreciate your signature on the enclosed copy of this letter indicating that you are in accord. At such time as you have signed this letter, we will proceed to prepare a draft Purchase Agreement embodying the terms hereof; however, this letter should not be construed by you as an offer to purchase or a binding agreement for the sale of the Property. Rather, it is an expression of our current interest in purchasing the Property in accordance with the terms and conditions set forth above. Any actions taken and expenses incurred prior to entering into a Purchase Agreement are taken at a party's own risk, and will not be deemed to evidence the existence of a contract, nor shall they give rise to any claim against the other, including without limitation any claim for reimbursement of such expenses. The parties each expressly assume the risk that during any negotiation they may incur fees and/or expenses, or that they may forego other business opportunities or transactions, as a result of the transaction contemplated herein. The fact that they may incur such expenses, and/or forego such opportunities, shall not, under any circumstances, give rise to a claim against the other, nor shall this letter or any other conduct of Buyer constitute any form of estoppel to require, or commitment to include, within the Purchase Agreement, any provisions herein.



Termination Clause

- This Agreement shall terminate automatically and without fee or penalty (a) upon a sale of the entire Property, (b) upon any termination of the Developer's Affiliate as the Operating Member under the Operating Agreement, or (c) upon the consummation of any Buy-Sell in which Managing Member is the Purchasing Member. Owner shall have the further right, by written notice to Developer, to terminate this Agreement, without fee or penalty (x) for Cause, (y) at any time after the 3rd anniversary of the date of this Agreement or (z) should Developer fail, based on Developer's breach of an express covenant of this Agreement (and therefore not as a result of any violation of the DDA as of the date of this Agreement), to achieve any of the deadlines set forth in the DDA for the Block 3 Site not later than that date which Owner reasonably determines is necessary to permit Owner sufficient time to remedy such failure and achieve the progress milestone in timely fashion, upon no less than thirty (30) days' prior written notice to Developer, which termination shall be effective as of the date set forth in any notice of termination delivered to Developer. Developer shall have the right, by written notice to Owner, to terminate this Agreement, without fee or penalty upon any material breach of this Agreement by Owner (provided that such breach is not the result of any breach of the Operating Agreement by the Operating Member), upon no less than thirty (30) days' prior written notice to Owner, which termination shall be effective as of the date set forth in any notice of termination delivered to Owner. No such terminations shall affect the right of either party to exercise all rights and remedies provided under Applicable Law, including the right, if applicable, to seek damages from the other party after a termination based on any breach of this Agreement.



Termination (continued)

- 1.1.1 Final Accounting.
 - Within sixty (60) days of the termination of this Agreement (the "Post-Termination Period"), Developer shall be obligated to deliver to Owner a final accounting, which shall cover the period from the date of this Agreement to the termination date (and which shall specifically identify any and all expenses which have been incurred in connection with the Project as of the date thereof but which have yet to be paid); provided, however, that if such termination date shall be a date other than the last day of a calendar month, the final accounting shall be prepared as of the last day of the month in which such termination occurs. The final accounting shall be audited by a consultant retained by Owner in accordance with Section 6.19 below.
- 1.2 General Assistance.
 - During the Post-Termination Period, Developer shall otherwise assist Owner and any other person designated by Owner in any manner which Owner shall reasonably require to become familiar with the Project and all matters relating thereto.



Assignment of Contracts

"It is established that a provision in a contract or a rule of law against assignment does not preclude the assignment of money due or to become due under the contract [citations] or of money damages for the breach of the contract." (*Trubowitch v. Riverbank Canning Co.* (1947) 30 Cal.2d335, 339-340 [182 P.2d 182].) Cases and commentators have applied this principle to the assignment of benefits under an insurance policy. (See *Westoil Terminals Co. v. Harbor Ins. Co.* (1999) 73 Cal.App.4th, 634, 641 [86 Cal.Rptr.2d 636]; *Quemetco, supra*, 24 Cal.App.4th at p. 502; *Greco v. Oregon Mut. Fire Ins. Co., supra*, "191 Cal.App.2d at p. 682; Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶ 7.431, p. 7A-114



Assignment of Insurance

- **Indemnities.** Seller hereby agrees to indemnify, protect, defend and hold harmless Buyer from and against any and all claims, liabilities, losses, costs, damages, or expenses (including, without limitation, reasonable attorneys' fees and costs) arising out of or resulting from any occurrence, or any breach or default by landlord under the terms of the Tenant Leases first arising, prior to the Effective Date. Buyer hereby agrees to indemnify, protect, defend and hold harmless Seller from and against any and all claims, liabilities, losses, costs, damages or expenses (including, without limitation, reasonable attorney's fees and costs) arising out of or resulting from any occurrence, or any breach or default by Buyer under the terms of the Tenant Leases first arising, on or after the Effective Date.
- **Assumption.** With respect to the Tenant Leases and the obligations of the Landlord thereunder, Buyer hereby assumes the obligations of the Landlord under the Tenant Leases with respect to those acts, omissions and circumstances first occurring after the Effective Date.



Development/Entitlement/Costs

● Key Clauses

- Duties and scope of work
- The term & termination rights
- Type and amount of personnel and services to be performed, including the hiring of consultants
- The hiring of the entitlement team
- Working with the redevelopment agency
- Obtaining permits
- Construction management
- Inspection/reporting
- Sale of units
- Quality control
- Scope of authority
- Provisions related to fees
- Cost overruns and audit rights

● Development Member's Position

● Managing Member's Position

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Finance/Loans

● Key Risk Management Clauses In Commercial Mortgage Loans

- Defaults & Remedies
- Property Insurance
- Escrow Accounts
- Indemnities
- Non-Recourse Provisions & Carve-Outs

● Lender's Position

- Maintain the Collateral
- Make Payments on Time
- Keep the Collateral Adequately Insured

● Borrower's Position

- Get Notice of Defaults & Opportunity to Cure
- Non-Recourse w/No Carve-Outs
- Flexibility in Leasing
- Prompt Responses from Lender

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Design/Construction

- Key Risk Management Provisions In Design & Construction Contracts
 - Insurance & Bonding
 - Default & Termination
 - Payment Schedule
 - Delays



Insurance & Bonding

- Property Insurance
- Liability Insurance
- Errors & Omissions Insurance
- Builders Risk Insurance
- Payment Bonds
- Performance Bonds



Default & Termination

- What constitutes a default?
- How do you declare a default?
- How long does it take to terminate the contract?
- Can the owner terminate the contract w/o cause?
- If the owner terminates the contract, what is the contractor entitled to?



Payment Schedule

- When is payment made?
- How is pay requested?
- What information is required in the pay request?
- What if there is a pay dispute?
- What if a pay request is late?



Delays

- What is a justifiable delay?
- Will there be an adjustment in the contract sum?
- Will there be an extension of time?
- How will delays be documented?



Commercial Leasing

- Key Risk Management Clauses In Commercial Loan Documents
 - Insurance
 - Indemnification

Other Important Risk Management Provisions:

- Compliance w/Laws
- Environmental Issues
- Destruction & Condemnation
- Default & Remedies
- Holdover



Insurance Provisions

Landlord

LL wants to insure LL's real property from any damage (casualty) and to be protected from liability arising from any event (an act or omission), wherever it occurs (on the leased premises or elsewhere in the building or in common areas). LL does not want to insure T's property or protect T from any liability.

Tenant

T only wants to insure T's personal property (and possibly TI paid for by T) from any casualty and to be protected from liability arising out of any event that occurs on the leased premises. T does not want to insure LL's property and T wants to be protected from liabilities arising from events that occur anywhere other than on the leased premises.



Indemnification

What is it?

- A promise to reimburse another for a loss suffered because of a third party's act.
- An indemnification from an insolvent company is worthless.
- Both parties would like to be indemnified for everything and provide no indemnification in return.
- Neither party should have to indemnify the other for the negligent or criminal acts or omissions of the other party, its employees, agents or contractors.
- Resolution:
LL should indemnify T from those liabilities over which LL has control and that are insured against (or that LL should be insured against). T should indemnify LL from those liabilities over which T has control and that are insured against (or that T should be insured against).



Compliance w/Laws

- Who is responsible for complying with which laws?
- Could LL or T incur liability due to the other party's failure to comply with applicable laws?
- Representation or indemnification?
- ADA – Who is responsible for making the leased premises ADA compliant? What about the common areas? Is this cost passed through as an operating expense or is it a capital improvement?



Environmental Issues

- Are there pre-existing environmental concerns?
- Could T be held liable for preexisting contamination?
- What is the LL's remedy if a T contaminates LL's property?
- What is the real risk? To the T? To the LL?



Destruction & Condemnation

- If the building burns down, is destroyed in an earthquake or is taken by eminent domain, what are the continuing obligations of LL and T under the lease?
- As the T, can you terminate your lease?
- Is there an abatement of rent?
- Does the LL have to rebuild?
- How long does the LL have to rebuild?



Default & Remedies

- If a really serious problem arises with the premises, with a T or with a LL, what can you do about it?
- Is legal action your only recourse or do you have any practical remedies?
- T's remedies are important, but often very limited.
- Mortgage restrictions.



Holdover

- Your current lease expires, but construction of your new premises is not completed. Can you holdover in your current space?
- What's it going to cost?
- What are the risks?
- If you don't negotiate a holdover provision in your lease at commencement, you are at the LL's mercy.
- From the LL's perspective, you want to be able to recover damages if a prospective tenant is lost when an existing tenant holds over or to be able to proceed with a legal eviction if a quality tenant is waiting to occupy the space.



Shifting Risk

- Claims/Litigation waterfall
 - Identify what types of claims by investors, third parties, and entities in privity of contract.
- Indemnity
 - Vicarious liability
 - Liability for other's negligence
 - Shared liability
- Exculpation/Limits of Liability
 - Waiver
 - Limitation of remedies
 - Limitation of damages
- Insurance
 - Professional liability
 - General liability
 - EPLI
 - Waiver of Subrogation
 - Additional Insured Endorsements
 - Preserving the Shifting of Risk with Policies and Procedures



- Potential Email Notice: If any _____ entity, whether as equity investor or lender, and any recipient of this communication have any contractual relationship, whether pursuant to a letter of intent, limited liability operating agreement, limited partnership agreement, loan documents or otherwise, then this communication is made in furtherance of that relationship and in accordance with such documentation and shall not be deemed to modify or amend the foregoing.



- Potential Advice to Clients or Employees: Use the word “approve” or “consent” when you are corresponding with _____ about such matters. For example: “_____, please be advised that _____ approves your _____ to begin the _____ for _____”, rather than “_____, let’s get going with _____ . . .”



Practical Advice Dealing with Principals & other Business Representatives

- Know who you're dealing with—A good reputation goes a long way (as does a bad one)
- Good professional assistance with relevant experience (legal, business, environmental, engineering, financial, etc.)—see the big picture, know the goals and what is important, and be a “deal” lawyer
- Try to be a “revenue item”
- Come with a well thought out game plan and make recommendations and/or decisions

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Practical Advice Dealing with Principals & other Business Representatives (continued)

- Try to be proactive in educating business people in terms of litigation risks—the law is not black and white
- Keep the transaction structure simple (if at all possible)
- Know their objectives (and make yours known)
- Think REPEAT BUSINESS!

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CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (this "Agreement") is made this ___ day of _____, 200_ by and between _____ ("Receiving Party", which definition shall include any entity which such entity may represent or be represented by with respect to the [describe the transaction] (the "Proposed Transaction")), and [name applicable entity] (collectively, "Disclosing Party", which definition shall include such entity's management company, officers, employees, affiliates and any other representatives), with respect to the Proposed Transaction.

1. **Definitions of Terms & Conditions.** Receiving Party declares its interest in exploring the possibility of entering into the Proposed Transaction. It is understood and agreed that certain business information proprietary to Disclosing Party, which Disclosing Party considers confidential, may be provided or disclosed to Receiving Party. In consideration of Receiving Party being granted access to the Confidential Information (as defined below), Receiving Party agrees to the following terms and conditions.

2. **Term of Agreement.** The term of this Agreement shall be for a twelve (12) month period commencing on the date hereof. Any and all obligations of Receiving Party set forth herein with respect to the Confidential Information shall survive any termination of this Agreement for a period of four (4) additional years.

3. **Definition of Confidential Information.** Confidential information ("Confidential Information") shall mean any information, technical data, records, books of accounts, bank records, financial records, employee records, documents, agreements, licenses, contracts, customer lists, operating statements, statements of assets or operations, any other financials statements, architectural or engineering information, banking information, management, partnership or related agreements, or any other information related to Disclosing Party, provided by Disclosing Party before or after the date hereof to Receiving Party or any of its employees, agents or other representatives (collectively, "Representatives"), directly or indirectly, in writing, orally or through the inspection of assets or records. The term Confidential Information shall also include all notes, analyses, compilations, studies, interpretations or other material prepared by Receiving Party or its Representatives based, in whole or in part, on any information furnished by Disclosing Party.

Confidential Information does not include information which (a) is in Receiving Party's possession prior to or at the time of disclosure by Disclosing Party (as shown by its records, immediately prior to the time of disclosure), (b) is public knowledge prior to the disclosure to Receiving Party, (c) after it has been disclosed by Disclosing Party to Receiving Party, becomes public knowledge other than as a result of any unauthorized disclosure by Receiving Party and/or its Representatives, or (d) is approved for release by written authorization of Disclosing Party.



Question & Answers

4. **Purpose of Confidential Information.** Receiving Party and its Representatives agree to use the Confidential Information solely for the express purpose of exploring the possibility of entering into the Proposed Transaction. Receiving Party and its Representatives will hold and treat this Confidential Information in the strictest confidence and will not, directly or indirectly, disclose or permit anyone else to disclose this Confidential Information or any part of the Confidential Information to any other person or entity without prior written authorization of Disclosing Party, nor will anyone use or permit the use of this Confidential Information in any fashion or manner detrimental to or in conflict with the interest of Disclosing Party.

Receiving Party and its Representatives agree they will take reasonable security measures and use reasonable care to preserve and protect the secrecy of and to avoid disclosure or the use of the Confidential Information other than as permitted hereby. Receiving Party and its Representatives agree to promptly advise Disclosing Party, in writing, of any misappropriation or misuse by any person or entity of such Confidential Information which may come to their attention.

5. **Return of Confidential Information.** Any Confidential Information which has been furnished by Disclosing Party to Receiving Party will be promptly returned to Disclosing Party by Receiving Party, accompanied by all copies of such documentation made by Receiving Party or its Representatives, upon Disclosing Party's decision to terminate discussions regarding the Proposed Transaction. Receiving Party and its Representatives will immediately destroy any documents, analyses, memoranda, notes and any other writings that Receiving Party or its Representatives may have prepared in connection with the Confidential Information: (a) in the event Receiving Party does not proceed with the Proposed Transaction with Disclosing Party within a reasonable time, or (b) at any earlier time upon written notice from Disclosing Party.

6. **Violation of Agreement.** Nothing herein contained shall be deemed to limit or restrict the rights of Disclosing Party to assert claims against Receiving Party and/or its Representatives for violations of this Agreement by Receiving Party and/or its Representatives. Receiving Party shall be liable for any violations of this Agreement by its Representatives.

7. **Legal Matters.** If Receiving Party or its Representatives are requested or required (by oral questions, interrogatories, request for information documents in legal proceedings, subpoenas, civil investigative demands or similar processes) to disclose: (a) any Confidential Information, or (b) any information relating to its opinion, judgment or recommendation concerning the Disclosing Party, it is agreed that Receiving Party will provide Disclosing Party with prompt notice of such request or requirement so that Disclosing Party may seek a protective order or other appropriate remedy, waive Receiving Party's and its Representative's compliance with the provisions of this Agreement, or both.

8. **Breach of Agreement.** It is understood and agreed that money damages would not be sufficient remedy for any breach of this Agreement by Receiving Party or its Representatives and that Disclosing Party shall be entitled, without the requirement of posting a bond or other security (which requirement Receiving Party and its Representatives hereby waive), to specific performance and injunctive or other equitable relief as a remedy for any such breach. Such remedy shall not be deemed to be the exclusive remedy for any such breach of the Agreement, but shall be in addition to all other remedies available at law or in equity to Disclosing Party. Receiving Party also agrees to reimburse Disclosing Party for all costs and expenses, including attorney's fees, incurred by Disclosing Party in enforcing the obligations hereunder.

9. **Indemnification.** Receiving Party agrees to reimburse, indemnify, defend and hold Disclosing Party harmless from any damage, claim, demand, suit, action, loss, cost, liability or expense (including attorney's fees) suffered or incurred or which may be made or brought against Disclosing Party as a result of, with respect to, or arising out of a breach or non-fulfillment or a threatened breach or non-fulfillment of this Agreement by Receiving Party or its Representatives.

10. **Non-Disturbance.** Receiving Party and its Representatives agree not to make any inquiry of or enter into any negotiation with any person who may have any interest in the Proposed Transaction or the property that is the subject thereof (including without limitation Disclosing Party's investor(s) and lender(s)), with any property manager of such property, with any employee of the property manager of such property or the Disclosing Party, or with any tenants or any mortgagee without the prior written authorization of Disclosing Party. Further, Receiving Party and its Representatives shall not inspect any such property without prior authorization of Disclosing Party; it being understood that it will be disruptive to tenants, Disclosing Party, and employees of the property manager, unless each inspection is scheduled and organized by the Disclosing Party.

11. **Investigations.** Receiving Party and its Representatives will conduct their own investigation of those matters that they deem appropriate in order to evaluate the Proposed Transaction. Disclosing Party has made no representation or warranty, expressed or implied, as to the accuracy or completeness of any of the information provided to Receiving Party and its Representatives. No legal commitment or obligation shall arise by reason of any of the information provided to Receiving Party or its Representatives. Any projections and pro-forma budgets contained therein represent estimates based upon assumptions considered reasonable. No representations or warranties, expressed or implied, are made that actual results will conform to such projections. There are also no representations as to any legal, tax, financial, environmental or physical matters relating to the Proposed Transaction. The information will be provided subject to errors, omissions and changes in the information and is subject to modification or withdrawal. Furthermore, any information provided shall not be deemed a representation of the state of affairs of Disclosing Party.

12. **Disclosing Party's Rights.** Disclosing Party expressly reserves the right, at its sole discretion, to reject any or all expressions of interest or offers with respect to the Proposed Transactions and/or to terminate discussions with any person at any time, with or without notice.

13. **Severability.** If any provision hereof or the application thereof to any circumstance is found unenforceable, invalid or illegal, such provision shall be deemed deleted from this Agreement or not applicable to such circumstance, as the case may be, and the remainder of this Agreement shall not be affected or impaired thereby.

14. **Governing State.** This Agreement shall be governed by the laws of the State of _____.

15. **Miscellaneous.** This Agreement may not be amended or terminated in any manner except by an instrument in writing, executed by all parties.

16. **Authorization.** The undersigned hereby represents and warrants that (s)he is authorized to execute this Agreement on behalf of Receiving Party and that this Agreement when executed, shall become a valid and binding obligation of the Receiving Party, enforceable in accordance with its terms.

IN WITNESS HEREOF, this Agreement has been executed as of the date set forth above.

For Receiving Party:

By: _____
 Authorized Signatory

Name:
 Its:

Address:

Phone:
 Facsimile:

Rider A

The term "Informational Materials" does not include information which (i) is or becomes generally available to the public other than as a result of a disclosure by Potential Purchaser or its Related Parties in violation of this agreement, (ii) was previously known to Potential Purchaser free of any obligation to keep it confidential prior to its being furnished to Potential Purchaser pursuant hereto, (iii) becomes available to Potential Purchaser from a source other than _____ or Owner provided that such source is not known to Potential Purchaser to be bound by a confidentiality agreement with respect to such information, or (iv) is independently developed by Potential Purchaser without breach of this agreement.

Rider B

In the event that Potential Purchaser or any of its Related Parties are requested or required (by oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or other similar process) to disclose any of the Informational Materials, Potential Purchaser shall provide the Owner with prompt written notice of any such request or requirement so that the Owner may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this agreement. If, in the absence of a protective order or other remedy or the receipt of a waiver by the Owner, Potential Purchaser or any of its Related Parties are nonetheless legally compelled to disclose Informational Materials, Potential Purchaser or its Related Parties may, without liability hereunder, disclose that portion of the Informational Materials which is legally required to be disclosed, provided that Potential Purchaser exercises reasonable efforts to preserve the confidentiality of the Informational Materials, including, without limitation, by cooperating with the Owner to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded the Informational Materials.

Rider C

Owner shall disclose all material facts and/or conditions actually known to Owner. Potential Purchaser shall be entitled to rely on the representations and warranties made to it by Owner in any final purchase agreement, should such an agreement be fully executed by the parties.

Rider D

The term of this agreement shall be for one year following the date hereof, following which all obligations hereunder shall cease and be of no further force or effect.

Pre-Negotiation Letter
[LETTERHEAD]

[Add Date Here]

_____, Suite _____

Re: Lease Agreement dated _____ (the "Lease") between
_____, a _____ ("Landlord"), and
_____, a _____ ("Tenant"), with respect to
premises (the "Premises") consisting of approximately _____ rentable
square feet in the Building commonly known as _____ (the
"Building")

Gentlemen:

The term of your Lease is currently set to expire on _____ (the "Expiration Date"). On the Expiration Date, Tenant is required to surrender possession of the Premises to Landlord in accordance with the terms of the Lease.

Tenant has requested that Landlord enter into discussions and negotiations with Landlord concerning the possible renewal or extension of the current Lease term beyond the Expiration Date. Landlord is willing to enter into discussions with you regarding extension of the Lease term on the following terms and conditions:

(1) All prior and future discussions and negotiations between Landlord and Tenant with respect to the renewal of the Lease or any other matters in any way related to the Lease or Tenant's occupancy of the Premises shall be solely for the purpose of exploring possible mutually acceptable terms and conditions under which the Lease term may be extended, and for no other purpose. Landlord shall not be bound by any proposal or suggested course of action advanced in connection therewith, and Landlord shall have no liability for failing to negotiate, discuss or otherwise reach agreement.

(2) Although it is the present intention of Landlord to negotiate in good faith and to consider entering into a mutually acceptable agreement with respect to extending the Lease term and certain matters related thereto, Landlord, in its sole and absolute discretion, may terminate such negotiations and discussions at any time and for any reason (or no reason at all). Upon such termination, the respective rights and obligations of Tenant with respect to the Premises shall be only those set forth in the current Lease.

(3) Until such time as a written agreement extending the Lease term is executed and delivered, Landlord expressly reserves all rights and remedies that it may have with respect to the Lease, specifically including without limitation the right to commence at any time following the Expiration Date an action to terminate the Lease and remove Tenant from the Premises, without any notice or grace period other than as set forth in the Lease being afforded to Tenant, whether or not discussions or negotiations are then ongoing. If Landlord permits Tenant to remain in possession of the Premises beyond the Expiration Date, Tenant

shall occupy the Premises as a tenant at will and shall, upon notice from Landlord at any time, vacate and surrender the Premises to Landlord in accordance with the terms of the Lease.

(4) No agreement as to any matter shall be implied or inferred as a result of any discussions or negotiations that may take place, or as a result of any request for information or documentation, or any acceptance, review or analysis thereof, unless and until a written agreement as to such matter has been fully executed and delivered by Landlord. Without limiting the generality of the foregoing, no preliminary agreement as to any issue reached in the course of any negotiations or discussions that may take place shall be binding against Landlord unless contained in a written agreement executed and delivered by Landlord.

(5) Tenant is hereby advised that in most instances the representatives negotiating on behalf of Landlord will not have final authority to bind Landlord and will need to seek and obtain formal approval from others prior to entering into a binding agreement on behalf of Landlord. Nothing set forth in this letter shall be deemed to require any such representative to submit any proposal for such approval.

(6) Tenant shall keep the existence and content of any and all negotiations and discussions that may take place with respect to a possible modification of the Lease term strictly confidential, and to not disclose any of the foregoing to any person or entity for any purpose whatsoever, without the prior written consent of the Landlord.

By initiating or continuing discussions with Landlord regarding the extension of your Lease term, you will be deemed to have accepted the preceding terms and conditions in their entirety.

Please do not hesitate to contact the undersigned if you have any questions.

Sincerely,

By: _____

Name: _____

Its: _____

LETTER OF INTENT

VIA FACSIMILE

_____, 200_

Re: _____

Ladies and Gentlemen:

CIM Urban Real Estate Fund, LP ("CIM") is pleased to submit this proposal to acquire _____ (the "Property").

Seller _____

Buyer CIM, or assignee

Property _____

Purchase Price \$_____, all cash at closing [(subject, however, to Buyer's ability to secure financing for the acquisition)]

Contingency Period Buyer shall have ___ days after mutual execution of a Purchase and Sale Agreement (the "Definitive Agreement") to determine the feasibility of purchasing the Property (the "Contingency Period"). During the Contingency Period, Buyer shall investigate, but not be limited to, the following contingency items:

- a. title and survey
- b. entitlements/zoning/use
- c. environmental issues
- d. CC&R's and REA's
- e. leases, licenses and other contracts and warranties
- f. franchise/management and related agreements

- g. structural and building systems
- h. financing

If for any reason Buyer disapproves of any of the above contingency items during the Contingency Period, the transaction will be terminated.

Deposit Upon execution of the Definitive Agreement, Buyer will deposit into escrow the sum of \$_____, which will be held in escrow until closing, but will become non-refundable following the expiration of the Contingency Period.

Receipt of Documents Upon execution of the Definitive Agreement, CIM shall receive from Seller the following documents:

- a. ALTA survey
- b. Current title report
- c. As-built plans and specifications, including tenant build-outs
- c. Declarations of CC&R's and REA's
- d. Environmental (including phase I and asbestos) studies
- e. Structural reports
- f. Appraisal reports on the Property
- g. Real and personal property/lease tax information
- h. Leases, lease guarantees, subleases (if any), licenses and other warranties and contracts
- i. Any franchise or management and related agreements
- j. Certified rent roll, security deposit and delinquency list
- k. Year to date and prior three-years' operating and financial statements
- l. Special use permits, building permits, certificates of occupancy and all entitlement documents; any tax incentive/abatement agreements and development agreements with governmental agencies shall be assigned at closing
- m. Geo-technical reports of the Property; flood hazard information
- n. Subdivision map, all development /zoning site plans (approved by City) and entitlement applications, stipulations and ordinances
- o. Property management records
- p. Other items reasonably requested by Buyer

Buyer will be allowed right-of-access to the Property during the Contingency Period.

Closing Expenses Seller will pay sales, transfer, rental and similar taxes imposed by the city and/or county and/or other governmental authorities and provide extended coverage ALTA coverage with the standard title insurance premium paid by Seller and costs of all endorsements and extended coverage paid by Buyer. Buyer and Seller will share equally escrow charges and other closing costs. Property income and expense will be pro-rated in customary fashion with all delinquent rent, if any, assigned at closing. All other pro-rations per local custom.

Closing Closing will occur not later than ___ days following the expiration of the Contingency Period.

Title Insurance Title insurance shall be provided by Old Republic Title Company.

[1031 Exchange] Buyer intends to use Buyer's proceeds from a sale of another property to exchange for the Property pursuant to IRC section 1031. Seller will cooperate will Buyer in this regard at no cost to Seller.]

This proposal is not an offer and is not otherwise binding, but is intended as the basis for the preparation of a Definitive Agreement. The Definitive Agreement will be subject to review and approval by Buyer and Seller and their respective counsel and only a fully executed Definitive Agreement will constitute a binding agreement.

Sincerely,

By: _____

By: _____

AGREEMENT TO NEGOTIATE EXCLUSIVELY

THIS AGREEMENT TO NEGOTIATE EXCLUSIVELY (this "Agreement") is entered into this day of _____, 2005, by and between the _____, a _____ (the "Agency"), and _____, a _____ ("_____"), on the terms and provisions set forth below.

WITNESSETH THAT:

WHEREAS, _____ has expressed interest in property located in the area of the City _____ (the "Site");

WHEREAS, The Site is within the _____ Project Area and is depicted on the attached site plan identified as Exhibit A (the "Site Plan"); and

WHEREAS, The _____ has requested exclusive right to negotiate a _____ (the "_____") for redevelopment of property within the TOD zone, and will assist in the acquisition process of City, _____, quasi public and privately owned parcels within the zone; and

WHEREAS, The _____ has requested to partner with and to negotiate a disposition and development agreement (the "_____") pertaining to Agency and _____ within the _____ to implement the _____, and will assist _____ in the acquisition of adjacent lots owned by private parties within the _____; and

WHEREAS, Agency has not granted any person or entity any rights or commitments whatsoever with respect to the Site; and

WHEREAS, The parties acknowledge that in order for the _____ to be developed on the Site, the City of _____ (the "City") General Plan land use and zoning designations affecting the Site would have to be amended and such amendments require considerations and approvals independent from this Agreement that may not be granted.

NOW THEREFORE, in consideration of the mutual undertakings herein, the parties agree as follows:

§ 100 Exclusive Negotiation.**§ 101 Good Faith Negotiations**

101.1 The Agency and _____ agree for the Negotiation Period (as that term is defined in Section 103 below) to negotiate diligently and in good faith to prepare a mutually acceptable _____ and/or other appropriate agreement(s) (collectively, the "Development Documents") to be considered for execution by and between the Agency and _____, in the manner set forth herein, with respect to developing the _____ on the Site.

101.2 The Agency represents and warrants that the recitals contained in this Agreement are true and correct. The Agency further represents and warrants that during the Negotiation Period, the Agency will not negotiate with any other person or entity regarding the Site or enter into an agreement regarding the development of the Site without the prior written consent of _____, which consent may be withheld in _____'s sole discretion; provided that the foregoing shall not be deemed to prevent the Agency from furnishing to anyone public records pertaining to the Site. Notwithstanding the

Agreement to Negotiate Exclusively (TRP v4)

foregoing, _____ acknowledges that its rights hereunder are subject to the Agency's obligations under State law, including, but not limited to the conduct or disposition of any proceedings which require notice and a public hearing, the California Environmental Quality Act and the requirements for _____ and/or the Agency to obtain certain approvals from other public entities. The obligation to negotiate in good faith requires that _____ communicate with Agency with respect to those issues for which agreement has not been reached, and in such communication to follow good faith negotiation procedures including meetings, telephone conversations and correspondence, including e-mail. It is understood by the parties that final accord on those issues may not be reached.

§ 102 Required Actions

102.1 Not later than one hundred twenty (120) calendar days from the effective date of this Agreement, _____ shall submit to the Agency a package (the "Development Concept Package") which shall include the following:

(a) the proposed Master Plan, including a description of each development proposed for the Site, including site plan, conceptual building layouts and elevations (each, a "Development" and collectively, the "Developments");

(b) an estimate of development costs with supporting data;

(c) the proposed scheduling of each Development;

(d) the proposed source and method of land acquisition and construction financing; and

(e) the proposed Agency assistance, including the economic justification for it.

102.2 Promptly upon receipt of the Development Concept Package, the Agency shall review the development concept proposed by _____ and may, in the Agency's reasonable discretion, accept it as complete, request reasonable modifications or reject it. If any such items are rejected, the Agency shall provide a list of deficiencies to _____. If the Agency rejects any portion of the Development Concept Package, _____ may elect to either (a) terminate this Agreement upon notice to the Agency, or (b) modify shall modify and resubmit the Development Concept Package to the Agency within thirty (30) calendar days. If _____ elects to modify the Development Concept Package, this process shall be followed until the Agency shall have approved the Development Concept Package. Notwithstanding the foregoing, if the Agency and _____ have not agreed upon the Development Concept Package by January 15, 2006, either the Agency or _____ may terminate this Agreement upon written notice to the other party.

102.3 If the Agency accepts the Development Concept Package as complete, then, within ten (10) days from the date of such acceptance, the Agency and _____ shall continue to negotiate in good faith toward the finalization and execution within the Negotiation Period of _____ the remaining Development Documents. During this period, _____ shall prepare and submit to the Agency an architectural concept of each proposed Development. If the remaining Development Documents have not been entered into on or before the expiration of the Negotiation Period, either the Agency or _____ may terminate this Agreement upon written notice to the other party. If the Development Documents are signed, they shall supersede this Agreement.

102.4 All submittals made by _____ pursuant to this Agreement shall be the sole and exclusive property of _____. To the extent permitted by law, Agency agrees to maintain

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all such submittals made by _____ confidential, and shall not disclose any submittal, or any of the information therein, to any third parties, except that Agency may disclose such submittals and information to its attorneys. In the event this Agreement terminates by reason other than the parties' execution of the Development Documents, Agency agrees to return to _____ all of the submittals provided by _____ hereunder. The obligations of the Agency pursuant to this Section 102.4 shall survive the expiration or earlier termination of this Agreement.

§ 103 Negotiation Period

The duration of this Agreement (the "Negotiation Period") shall be _____, through _____, unless sooner terminated pursuant to the provisions of this Agreement. The Negotiation Period shall be extended by periods of enforced delay, in accordance with Section 701 hereof, and by periods during which Agency is curing a default, in accordance with Section 104 hereof, but not by periods during which _____ is curing a default. Subject to the immediately preceding sentence, the Negotiation Period may only be extended pursuant to an amendment to this Agreement.

§ 104 Deposit

104.1 Concurrently with the execution of this Agreement by the Agency, _____ shall submit to the Agency a good faith deposit (the "Deposit") in the amount of \$ _____ in the form of either cash or an irrevocable letter of credit that is satisfactory to the Agency's legal counsel to ensure that _____ will proceed diligently and in good faith to negotiate and perform all of _____'s obligations under this Agreement. If the Deposit is in the form of an irrevocable letter of credit, _____ shall maintain such letter of credit in full force and effect for the entire Negotiation Period hereunder, and shall extend the letter of credit to the extent this Agreement or various time periods hereunder are extended. The Agency shall have no obligation to earn interest on the Deposit. Any interest earned on the Deposit shall be (i) the sole property of the Agency, if this Agreement is terminated by the Agency as the result of _____'s uncured default hereunder, or (ii) returned to _____, if (a) this Agreement is terminated by _____ as the result of Agency's uncured default, (b) this Agreement is terminated by either party at the expiration of the Negotiation Period, as it may be extended pursuant to the terms hereof, (c) either party terminates this Agreement pursuant to Section 102.2, or (d) Agency and _____ execute the Development Documents.

104.2 In the event _____ fails to negotiate diligently and in good faith, or has failed to timely discharge any other of its responsibilities under this Agreement, the Agency shall give written notice thereof to _____ (a "Default Notice") who shall then have _____ calendar days to commence negotiating diligently and in good faith or, with respect to any other failure, _____ calendar days to cure such failure irrespective of the good faith of _____. Any Default Notice given by the Agency shall specifically list the responsibility that _____ has failed to timely discharge. Following the receipt of such Default Notice and the failure of _____ to thereafter commence negotiating in good faith within such _____ calendar days or to cure any other failure to perform its responsibilities under this Agreement, this Agreement may be terminated by the Agency upon written notice to _____. In the event of such termination by the Agency, for a reason other than the failure of _____ to negotiate in good faith, the Deposit shall be returned to _____ and neither party shall have any further rights against or liability to the other under this Agreement.

THE PARTIES AGREE THAT IN THE EVENT _____ FAILS TO NEGOTIATE DILIGENTLY AND IN GOOD FAITH AND THIS AGREEMENT IS TERMINATED ON THAT BASIS, THE AGENCY WOULD SUSTAIN LOSSES, WHICH WOULD BE UNCERTAIN. SUCH LOSSES WOULD INCLUDE COSTS PAYABLE TO ADVISERS AND STAFF TIME ALLOCATED TO THE PREPARATION OF THIS AGREEMENT AND ITS IMPLEMENTATION,

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AND SUCH VARIABLE FACTORS AS THE LOSS OF OTHER POTENTIAL DEVELOPMENT OPPORTUNITIES WITH RESPECT TO THE SITE, PROVIDING EMPLOYMENT AND INCREASING PRIVATE INVESTMENT. IT IS IMPRACTICABLE AND EXTREMELY DIFFICULT TO FIX THE AMOUNT OF SUCH DAMAGES TO THE AGENCY, BUT THE PARTIES ARE OF THE OPINION, UPON THE BASIS OF ALL INFORMATION AVAILABLE TO THEM, THAT SUCH DAMAGES WOULD APPROXIMATELY EQUAL THE AMOUNT OF THE DEPOSIT (WITH ANY INTEREST EARNED THEREON), AND SUCH AMOUNT SHALL BE RETAINED BY THE AGENCY AS ITS SOLE AND EXCLUSIVE REMEDY IN THE EVENT THIS AGREEMENT IS TERMINATED BY THE AGENCY DUE TO _____'S FAILURE TO NEGOTIATE IN GOOD FAITH. IN THE EVENT OF ANY OTHER UNCURED DEFAULT BY EITHER PARTY TO THIS AGREEMENT, THE SOLE AND EXCLUSIVE REMEDY OF THE NON-DEFAULTING PARTY SHALL BE TO TERMINATE THIS AGREEMENT, IN WHICH EVENT THE DEPOSIT SHALL BE RETURNED TO _____ AND NEITHER PARTY SHALL HAVE ANY FURTHER RIGHTS AGAINST OR LIABILITY TO THE OTHER UNDER THIS AGREEMENT.

_____ AND THE AGENCY SPECIFICALLY ACKNOWLEDGE THIS LIQUIDATED DAMAGES PROVISION BY THEIR SIGNATURE BELOW:

Agency

104.3 In the event the Agency fails to negotiate diligently and in good faith, or fails to promptly review and accept as complete, request reasonable modifications to, or reject, _____'s Development Concept Package, pursuant to Section 102 of this Agreement, _____ shall give a Default Notice thereof to the Agency, which shall then have _____ calendar days to commence negotiating in good faith or, with respect to a failure pursuant to Section 102 of this Agreement, _____ calendar days to cure irrespective of the good faith of Agency. Following the receipt of such notice and the failure of the Agency to thereafter commence negotiating diligently and in good faith within such _____ calendar days or to cure a failure pursuant to Section 102 within _____ calendar days, this Agreement may be terminated by _____. In the event of such termination by _____, the Agency shall return the Deposit and all interest earned thereon to _____, and neither party shall have any further rights against or liability to the other under this Agreement.

104.4 Upon termination of this Agreement (i) by either party at the expiration of the Negotiation Period or such extension thereof as may be hereafter approved in writing by the parties, (ii) by either party pursuant to Section 102.2, (iii) by reason of an enforced delay pursuant to Section 701 hereof, or (iv) upon execution by the Agency and _____ of the Development Documents, then concurrently therewith, the Deposit and all interest earned thereon shall be returned to _____ and neither party shall have any further rights against or liability to the other under this Agreement.

§ 200 Development Concept

§ 201 Scope of Development

The negotiations hereunder shall be based on a development concept for the Site, encompassing both a high-quality transit oriented development zone (the "TOD") and a traditional town center zone (the "TC") for residential and commercial mixed uses.

§ 202 _____'s Findings, Determinations, Studies and Reports

Upon reasonable notice, as from time-to-time requested by the Agency, _____ agrees to make oral and written progress reports advising the Agency on all matters and all studies being

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made by _____. Further, at thirty (30) day intervals from the beginning of the Negotiation Period, _____ shall provide an oral and/or written report to the Agency, which may be submitted via e-mail, concerning its progress in preparing site plans, floor plans, elevations and time schedules for development of the Site. Said reports shall be submitted to the person listed in Section 705 hereof.

§ 300 Potential Agency Assistance

As of the date of this Agreement, the scope and extent of Agency assistance, if any, with respect to the development of the Site is undetermined. Said Agency assistance, if any is provided, will be determined based on the concept of feasibility during the Negotiation Period and specified within the Development Documents. Only the Agency Board may commit the Agency to any type or level of assistance.

§ 400 _____

§ 401 Nature of _____ is a _____ that is duly qualified to do business in _____.

§ 402 Office of _____

 Attn: _____

§ 403 Assignment

_____, without prior written approval of the Agency, shall not assign this Agreement, which the Agency shall grant or refuse at its sole discretion.

§ 404 Changes in _____ Entity

Any significant change in the principals, associates, partners, joint ventures, negotiators, development manager, and directly involved managerial employees of _____ is subject to the approval of the Agency. However, for the purpose of entering into the Development Documents, _____ may include a partner and/or nominate a replacement entity as long as such entity's members are substantially the same as _____'s.

§ 500 _____'s Financial Capacity

§ 501 Development Concept

Prior to execution of the Development Documents, _____ shall submit to the Agency reasonably satisfactory evidence of its ability to meet its responsibilities relative to financing and completing the Development(s).

§ 502 Construction Financing

_____ 's proposed method of obtaining construction financing for the development of the Site shall be submitted to the Agency pursuant to Section 102 of this Agreement.

§ 600 Agency Responsibilities

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§ 601 Public Meeting

Any Development Document resulting from the negotiations hereunder shall become effective only after and if the Development Document has been considered and approved by the Agency Board and signed by the Chairman, or other designated Agency official, after a public meeting of the Agency Board called for such purpose.

§ 700 Special Provisions

§ 701 Enforced Delay; Extension of Times of Performance

In addition to specific provisions of this Agreement, performance by any party hereunder shall not be deemed to be in default, where delays or defaults are due to acts of God, inclement weather, the elements, accident, casualty, labor disturbances, unavailability or delays in delivery of any product, labor, fuel, service or materials, failure or breakdown of equipment, strikes, lockouts, or other labor disturbances, acts of the public enemy inclusive of terrorist attack, orders or inaction of any kind from the government of the United States, the State of California, or any other governmental, military or civil authority (other than Agency, to the extent that such orders or inaction affect Agency's obligations, performance or rights under this Agreement), war, insurrections, riots, epidemics, landslides, lightning, droughts, floods, fires, earthquakes, arrests, civil disturbances, explosions, freight embargoes, lack of transportation, breakage or accidents to vehicles, or any other inability of any party hereto, whether similar or dissimilar to those enumerated or otherwise, which are not within the control of the party claiming such inability or disability, which such party could not have avoided by exercising due diligence and care and with respect to which such party shall use all reasonable efforts that are practically available to it in order to correct such condition; provided, however, that no party hereto shall be entitled to any extension of time pursuant to this Section 701 due to any event or condition caused by a party's inherent financial condition or financial inability to pay its monetary obligations when due (as distinguished from a party's inability to make a payment by reason of a bank's failure or some other external cause not associated with such party's financial condition). An extension of time for any such cause shall only be for the period of the enforced delay, which period shall commence to run from the time of the commencement of the cause. Agency and _____ may also extend times of performance under this Agreement in writing. The parties to this Agreement agree to consider requests for extensions with the intent that all parties cooperate in good faith toward the fulfillment of the responsibilities encompassed by this Agreement.

§ 702 Real Estate Commissions

The parties acknowledge that no real estate broker, agent or finder is involved in this transaction. If any claims for brokers' or finder's fees for the consummation of this Agreement arise, then _____ hereby agrees to indemnify, save harmless and defend Agency from and against such claims if they shall be based upon any statement or representation or agreement by _____, and Agency hereby agrees to indemnify, save harmless and defend _____ from and against such claims if they shall be based upon any statement, representation or agreement made by Agency.

§ 703 Press Releases

_____ agrees to discuss any press releases with a designated Agency representative prior to disclosure in order to assure accuracy and consistency of the information. The Agency shall not make any press release without the prior approval of _____.

§ 704 Nondiscrimination

Agreement to Negotiate Exclusively (TRP v4)

With respect to _____'s obligations and performance hereunder, _____ shall not discriminate in any matter on the basis of race, creed, color, religion, gender, material status, national origin or ancestry.

§ 705 Notice

All notices given or required to be given hereunder shall be in writing and addressed to the parties set out below, or to such other address as may be noticed under and pursuant to this paragraph. Any such notice shall be considered served when actually received by the party intended, whether personally served or sent postage prepaid by registered or certified mail, return receipt requested.

Agency: _____

_____:

§ 706 Other Agreements

This Agreement supersedes any previous agreements entered into between _____ and the Agency or any discussions or understandings between _____ and the Agency with respect to the Site.

§ 707 Warranty of Signators

The signatories to this Agreement represent and warrant that they have the authority to execute this Agreement on behalf of the principles they purpose to represent.

§ 708 Modifications

No modifications or amendments to this Agreement shall be deemed effective unless and until executed by all parties hereto.

§ 800 Limitations of This Agreement

By its execution of this Agreement, the Agency is not committing itself to or agreeing to undertake: (a) disposition of land to _____; or (b) any other acts or activities requiring the subsequent independent exercise of discretion by the Agency, the City of _____ or any department thereof.

This Agreement is not a contract for the sale, lease, transfer, conveyance, excavation, improvement, development, subdivision or land use or zoning change of the Site and does not in any way constitute a disposition of property or transfer of control over property by the Agency. Execution of this Agreement by the Agency is merely an agreement to enter into a period of negotiations according to the terms hereof, reserving final discretion and approval by the Agency as to any Development Document and all proceedings and decisions in connection therewith.

Nothing in this Agreement is intended to or shall be construed to establish a currently existing limited liability co _____ny, partnership, joint venture, business association, or other entity between the parties, nor to constitute any party the agent of any other party.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first set forth in this Agreement.

By: _____
By: _____
Name: _____
Its: _____

AGENCY:

By: _____

ATTEST:

By: _____
Agency Secretary

EXHIBIT A
SITE PLAN

EXHIBIT B
LIST OF PARCELS

Agreement to Negotiate Exclusively (TRP v4)

Agreement to Negotiate Exclusively (TRP v4)

CIM URBAN REAL ESTATE FUND, L.P.

6922 Hollywood Boulevard, Suite 90028
 Los Angeles, California 90024
 Telephone: (323) 860-4900
 Fax: (323) 860-4901

7315 Wisconsin Avenue, Suite 215 East
 Bethesda, Maryland 20814
 Telephone: (301) 469-3582
 Fax: (301) 469-3581

**JOINT VENTURE
 LOI FORM**

_____, 200_

 Attention: _____

Re: _____

Gentlemen:

This letter outlines the basic terms and conditions upon which CIM Urban Real Estate Fund, L.P. and its affiliates ("CIM") is willing to consider and discuss with _____ and its affiliates ("Principal") a joint venture equity investment (the "Transaction") for the Project and upon terms and conditions set forth in the attached Term Sheet and the Schedules attached to such Term Sheet (collectively, the "Term Sheet"). In this letter terms will be used as defined in the Term Sheet.

The Term Sheet sets forth in Section "B" thereof a Transaction Overview. Upon the execution by Principal of this letter and the deposit of any amounts described herein, CIM intends to proceed with its due diligence. Principal will make available to CIM and its consultants all requested documentation and access to all of Principal's properties, financial and other business and background information, consultants and agents, in a timely manner, as reasonably requested during the course of the due diligence process. CIM may in its sole and absolute discretion terminate such due diligence and elect not to proceed with the financing at any time.

The conditions to any closing of the Transaction by CIM include, but are not limited to:

1. Receipt of all necessary committee approvals of CIM.
2. Satisfactory completion (in CIM's sole and absolute discretion) of CIM's closing/underwriting requirements and CIM's real estate and legal due diligence review (including title, survey, hazard/rent interruption insurance, tenant estoppel letters, lease abstracts, environmental report and structural report). CIM must approve the firms preparing the environmental and other outside reports and such reports must be (a) dated within six (6) months of the Closing Date; and (b) addressed directly to CIM or if not addressed to CIM, Principal must obtain reliance letters which are satisfactory to CIM.
3. Satisfactory completion (in CIM's sole and absolute discretion) of a market study/studies confirming the viability of the Property.
4. Satisfaction of all other conditions set forth in the Term Sheet and any other conditions that CIM may require during its diligence or at any time prior to Closing.

As previously noted, the Transaction contemplated by CIM is subject to, among other things, completion of CIM's due diligence. Upon your timely acceptance and execution of this letter and its timely return to CIM (the date upon which CIM receives the foregoing being hereinafter referred to as the "Commencement Date"), CIM will enter a due diligence period ("Due Diligence Period") commencing on the date of CIM's receipt of such items and ending thirty (30) days following receipt by CIM of each of the due diligence materials identified on Exhibit "A" attached to the Term Sheet. At the end of the Due Diligence Period (the "Notification Date"), CIM will give notice as to whether (i) CIM desires to terminate this letter (which CIM may elect to do in CIM's sole and absolute discretion) or (ii) CIM desires to proceed with the Transaction subject to satisfaction of the closing conditions identified in the previous paragraph. If CIM elects to proceed, it will provide Principal written notice of such election no

_____, 200_
 Page 2

later than the Notification Date, along with any other conditions determined during the Due Diligence Period. If CIM does not elect in writing to proceed by the close of business (Los Angeles time) on the Notification Date, Principal will have the right to terminate this letter [THE FOLLOWING IS ONLY TO BE INSERTED IN SPECIFIC DEALS - NEVER IN THE FIRST DRAFT: and Principal will further have the right to terminate this letter at any time after the ninetieth (90th) day following the date on which Principal advises CIM that CIM may begin incurring legal fees for drafting the Transaction documents, in each case so long as Principal has negotiated and attempted to close the Transaction in good faith and in a timely manner END OF INSERT].

In connection with CIM's due diligence, Principal will, not later than two (2) business days following the Commencement Date, prepare and deliver to CIM (to the extent not previously provided to CIM), the due diligence materials identified on Exhibit "A" attached to the Term Sheet. Principal will also make available other documentation, in a timely manner, as reasonably requested during the course of the due diligence process. Sponsor shall execute and deliver in conjunction with the Due Diligence materials, the Credit Report Authorization And Release (see Exhibit "B" attached to the Term Sheet) for each Principal.

* * * Binding Agreements * * *

Notwithstanding the non-binding nature of this letter and the Term Sheet with respect to the matters outlined above and in the Term Sheet, each Principal covenants and agrees that as a material inducement to CIM to consider the Transaction, the following provisions are intended to be binding on Principal:

A. Closing Fees, Costs and Expenses; Deposit

Except as set forth in the next sentence, each party hereto will be obligated to pay its own respective out-of-pocket fees, costs and expenses related to the Transaction and the due diligence related thereto, including all fees and expenses of its counsel (including internal counsel), consultants (including affiliated entities) and third party fees and expenses, title report fees and costs, survey costs, and costs incurred in obtaining and/or reviewing due diligence materials (including environmental and engineering reports) and travel costs of their personnel or representatives. In the event the Transaction closes, the foregoing costs and expenses may be funded from the proceeds of the funding provided by CIM.]

B. Exclusivity

In consideration of the CIM's effort and expense in analyzing this transaction, Principal agrees that as long as CIM is proceeding in good faith to conduct due diligence and/or underwrite the Transaction and/or negotiate formal written documents with regard to the transactions described in this letter and the Term Sheet, and in any event for a period of _____ months from the date of this letter, at all times after the date hereof but prior to the termination of this letter, Principal and its representatives, agents, affiliates and employees will not directly or indirectly make accept, negotiate, entertain or otherwise pursue any offers to sell the Property or to engage in any financing, capital or investment transaction (including, without limitation, any mezzanine debt or equity financings or investments or joint venture agreements (excluding as expressly permitted under the Term Sheet) regarding the Property and the direct or indirect ownership thereof, other than the financing transactions contemplated hereby with CIM and any senior Investor approved by CIM. **PRINCIPAL SHALL PAY TO CIM A TRANSACTION "BREAK-UP" FEE EQUAL TO \$ _____ IN THE EVENT (1) PRINCIPAL BREACHES THIS PARAGRAPH B OR (2) THE TRANSACTION FAILS TO CLOSE FOR ANY REASON OTHER THAN CIM'S FAILURE TO PROCEED IN GOOD FAITH TO UNDERWRITE OR CLOSE THE TRANSACTION, IT BEING AGREED THAT CIM'S DAMAGES OCCASIONED BY SUCH BREACH ARE DIFFICULT, IF NOT IMPOSSIBLE TO ASCERTAIN, AND SUCH PAYMENT TO CIM SHALL NOT CONSTITUTE A PENALTY, BUT SHALL CONSTITUTE AGREED AND LIQUIDATED DAMAGES.**

INITIALS:

Principal _____ Principal _____

____, 200__

C. Confidentiality

Principal will keep, and will instruct and cause its/their agents, advisors and legal counsel to keep, this letter and the Term Sheet and all negotiations with CIM strictly confidential and not disclose same to any third party[except any approved senior Investor], and as required by law or consented to by CIM. Principal will disclose to CIM the names of any agents, advisors and legal counsel to whom this letter and/or the Term Sheet is provided, if any, and Principal agrees that it shall only disclose this letter and the Term Sheet to those agents, advisors or legal counsel who have a need to know.

D. Commissions

Principal represents and warrants to CIM that no Principal has used or dealt with any broker or finder in connection with this letter, the Term Sheet or the Transaction or if they have, Principal agrees to indemnify and hold harmless CIM from any such commissions, finder's fees or similar payments which may be claimed to be due.

E. WAIVER OF TRIAL BY JURY

PRINCIPAL DOES HEREBY KNOWINGLY, VOLUNTARILY, UNCONDITIONALLY, IRREVOCABLY AND INTENTIONALLY FOREVER WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION (WHETHER IN TORT OR CONTRACT) BASED UPON, OR ARISING OUT OF, UNDER OR CONNECTED WITH, IN ANY MANNER WHATSOEVER, THIS LETTER OR THE TERM SHEET.

F. Miscellaneous

This letter and the Term Sheet shall be governed, construed and interpreted in accordance with the laws of the State of New York. Each Principal submits to the jurisdiction of the courts of the State of New York for any legal action or proceeding and agree not to commence any action in any forum other than in New York County. Each Principal hereby represents, warrants, covenants and agrees that: (i) it has the power and authority to execute this letter and the Term Sheet, to bind such Principal hereunder, (ii) the proposed transaction described herein is not the subject of a commitment or term sheet from another third party (Investor or investor); (iii) no other party has a right of refusal or other option or any other rights of any nature whatsoever which could cause the Transaction not to be consummated; and (iv) as to each Principal, neither such Principal nor any of its affiliates or principals have been a party or debtor in any bankruptcy, insolvency or similar proceedings within the last seven (7) years.

G. Term Sheet Not A Commitment

EACH PRINCIPAL, ON BEHALF OF ITSELF AND ITS AFFILIATES, UNDERSTANDS AND AGREES THAT THIS LETTER AND THE TERM SHEET ARE PROVIDED SOLELY FOR DISCUSSION PURPOSES ONLY AND DOES NOT CONSTITUTE A COMMITMENT OR AGREEMENT OF ANY KIND ON THE PART OF CIM. THIS LETTER AND THE TERM SHEET IS NOT BINDING ON CIM AND IS INTENDED TO BE, AND WILL BE CONSTRUED ONLY AS, COMPLETELY NON-BINDING AND NOT AS AN OFFER OR AGREEMENT OF ANY KIND, EXCEPT FOR THE SECTIONS FOLLOWING THE CAPTION "*Binding Agreements*" WHICH SECTIONS SHALL BE BINDING ON PRINCIPAL AND ITS AFFILIATES. PRINCIPAL ACKNOWLEDGES THAT CIM IS RELYING ON THE BINDING NATURE AND ENFORCEABILITY OF SUCH SECTIONS.

Specifically, but without limitation, Principal, on behalf of itself and its affiliates, acknowledges and agrees that unless and until a formal signed commitment letter or formal Transaction documents signed by an authorized signatory of CIM has been formally delivered to Principal, CIM shall have no liability or obligation of any kind whatsoever to them or any third party (including any senior Investor) with respect to the Transaction described in the Term Sheet or any related matters or otherwise. CIM may terminate or withdraw from such discussions at any time and for any reason or no reason in CIM's sole and absolute discretion. Accordingly, this letter and the Term Sheet is delivered subject to the express condition that no verbal or other agreements or offers to agree or commitments which have not received the aforesaid

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requisite CIM approvals or which have not been evidenced by a formal signed commitment or final Transaction documents, shall be asserted to exist in connection herewith or in connection with any discussions or negotiations arising out of or relating to this letter and the Term Sheet or any subsequent term sheets.

Subject to the foregoing, if this letter is acceptable to you, please execute a copy of this letter in the space provided for below and return same to us on or before 5:00 p.m. EST, _____, 200___. If this letter is not so executed and returned to us by such time and date or such funds in such amount are not deposited into the account designated by us as provided in the preceding sentence, then the proposal set forth herein shall be deemed withdrawn and this letter shall be of no further force or effect whatsoever.

We look forward to working with you on this transaction. If you have any questions, please call me at _____.

Very truly yours,

CIM URBAN REAL ESTATE FUND, L.P.,

By: _____
Name:
Title:

AGREED TO AND ACCEPTED
Dated: _____, 200__

[INSERT NAME],
a _____

By: _____
Name:
Title:

TERM SHEET

This Term Sheet ("**Term Sheet**") outlines the basic terms and conditions being considered for a joint venture investment with respect to the Project described in Section "A" ("**Property Description**") below. As more fully set forth in the letter to which this Term Sheet is attached, this Term Sheet is not an offer, commitment or agreement of any kind, and is not binding on the parties referred to herein, except as set forth in the section entitled "**Binding Agreements**" in the letter to which this Term Sheet is attached.

A. Property Description

Project Name: _____

Project Description: A _____ development to be built at _____

Location: _____

Project Capitalization: Subject to the provisions below, the following is the estimated Project capitalization:

Phase I:	
Phase II:	
Total:	

B. Transaction Overview

Sponsor (as defined below) has a[n option] contract to purchase the property at the Location (the "**Property**"), with a closing date presently scheduled for _____, 200____. Sponsor is presently paying the entitlement costs and other costs related to diligence for the Property. Sponsor has requested that Investor provide equity capital upon the terms and conditions set forth herein.

C. Documentation

The Transaction will be documented in a manner satisfactory to Investor.

D. Loan Terms

Investor:	
Sponsor:	The Principals, their wholly-owned affiliates and other persons or entities approved by Investor, as the principal owners of Sponsor. Any person or entity owning a direct or indirect interest in Sponsor must be disclosed and approved by Investor
Principals:	Each of _____ and _____, and other persons or entities designated or approved by Investor, as the principal owners of Sponsor.
Owner:	A Delaware limited liability company whose sole members shall be Investor and Sponsor. If and to the extent required by Senior Lender, Owner will be a bankruptcy remote, single-purpose, single-asset special purpose entity which complies with applicable rating agency requirements and otherwise formed and documented in a manner acceptable to Investor. Owner will be the direct owner of the Property[INSERT IF VARIOUS COMPONENTS TO THE PROJECT: , provided that Investor and Sponsor may agree that the Project will be divided so that the various components of the Project are owned separately by different entities, each such entity owned by Owner and otherwise satisfying the foregoing requirements].

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Management:	Sponsor will be in charge of the day-to-day operations of Owner (as Operating Member), but will be subject to the decision making of the "Managing Member" of Owner, who will be [Investor][both Investor and Sponsor]. Managing Member will have the right to approve (in its good faith discretion) any major decisions (to be defined in the documents) which will include, without limitation: (a) approval over the Business Plan (as defined below) and any deviations therefrom, (b) any transactions, dealings and payments with entities affiliated with Sponsor, Principal and their respective employees or affiliates, (c) all brokerage, management and construction agreements, (d) monthly, quarterly and annual reporting requirements, (e) all major leases, purchase agreements and construction draws, (f) any agreements with the Senior Lender or any other lender and any financing and refinancing arrangements, (g) any decisions relating to bankruptcy or insolvency, (h) the commencement or settlement of any litigation or arbitration (and all decisions related thereto), (i) the admission or withdrawal of any members, and (j) other matters to be set forth in the documents. [Add others?]
Investment Amount:	Up to [\$ _____] [_____% of the Project capitalization approved by Investor]. The Investment Amount will be funded up to \$ _____ with respect to the acquisition [and entitlement] of the Property and up to \$ _____ with respect to the construction and/or development of the Property, in accordance with a budget, and subject to funding conditions, approved by Investor.
Sponsor Equity:	Sponsor will have a minimum equity of the greater of (a) \$ _____, and (b) _____% of the Project capitalization approved by Investor. Such equity will be contributed at Closing and will be maintained through payment in full of the Loan (and subordinated thereto). In addition, Sponsor will be required to fund [ALTERNATIVE 1: all costs in excess of the Approved Budget] [ALTERNATIVE 2: all costs that arise out of the failure of Sponsor to exercise due care or costs that are not reflected in the Approved Budget which constitute Controllable Expenses. "Controllable Expenses" will be defined in the documents to include, without limitation, expenses that a prudent experience developer of projects similar to the Project would have included in a project budget].
[If Applicable] Pre-Closing Funding:	It is acknowledged and agreed that presently an Affiliate of Investor/Sponsor (" Present Owner ") [owns the Property][owns the development rights for the property pursuant to that certain {Development Agreement, dated as of _____, between Present Owner and _____}. Present Owner and/or Investor/Sponsor has, to date, incurred the costs (the " PO Funds ") described on <u>Schedule "I"</u> hereto (the " Present Budget ") and expects that it or Investor/Sponsor will continue the process and will incur additional costs (" Additional PB Costs ") in respect of the Property and the Project through the date of closing hereunder, in accordance with the Present Budget. From and after the date hereof, funding of the costs set forth in the Present Budget will be as follows: [DESCRIBE METHOD, EG., AS FOLLOWS: (a) Principals (directly or through Sponsor) will fund all Additional PB Costs from and after the date hereof until they have funded an amount equal to _____% of the PO Funds; and (b) thereafter, Present Owner and Principals (directly or through Sponsor) will fund remaining amounts _____%/_____, provided that in no event will either party be required to fund more than \$ _____. All fundings hereunder will be a credit against the obligations to fund the Loan Amount and Sponsor Equity, respectively. The Present Budget may be amended by Investor from time to time only with the approval of Principals, which approvals Principals agree not to unreasonably withhold or delay, provided that no approval shall be required to increase the Present Budget by an amount not to exceed _____% of the initial Present Budget. Advances of amounts hereunder shall be funded no later than 5 business days after request. If Principals (directly or through Sponsor) shall fail to timely fund any

NB: This section contemplates that I of Investor or Sponsor is presently funding amounts needed to keep the Project going. Make the appropriate changes to make this section work!!!

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	amounts, then Investor shall have the right to terminate this Term Sheet and the letter to which this Term Sheet is attached and to return to Principals all amounts funded hereunder (without any interest or return or other obligation). In addition, if before closing, Investor or Principal shall determine (in their sole discretion) not to proceed together, then either party may elect to terminate this Term Sheet and the letter to which this Term Sheet is attached and Investor will return to Principals all amounts funded hereunder (without any interest or return or other obligation).
Business Plan:	On or prior to Closing, Investor shall have approved a final business plan for the entitlement, planning, development, construction, leasing and sale of the Project, which will include (1) pre-development plan and costs, (2) development plan and costs, (3) financing plans (bridge, construction, mini-permanent and permanent), (4) leasing, sales, franchising and other parameters, costs and revenues regarding the Project, (5) all budgets, (6) a master timing schedule, and (7) all other matters relating to the Project, to the satisfaction of Investor. The Business Plan may be issued in components. The Business Plan (and its components) will be amended and modified from time to time as requested by Investor and any other amendment or modification will be subject to Investor approval (any reference to Business Plan means the most recently approved business plan (and its components) and amendments and modifications thereto).
Senior Loan:	Sponsor proposes to borrow up to \$ _____ (the "Senior Loan") from a lender to be approved by Investor and Sponsor ("Senior Lender"). It is anticipated that the proceeds of the Senior Loan will be used to purchase the Property and to pay closing costs approved by Investor, and to fund development and construction costs and other amounts approved by Investor. The terms of the Senior Loan and the documentation evidencing, governing and securing the Senior Loan, including intercreditor arrangements, shall be subject to the approval of Investor. Only Sponsor and Principal shall be responsible to execute and deliver guaranties and indemnities required by any lenders.
Closing Date:	The date of closing and full funding of the Transaction (the "Closing") shall occur not later than _____, 200____, but in no event prior to the earlier of (a) not less than 60 days prior written notice and (b) the closing of the Senior Loan.
Investment Management Fees:	Sponsor will pay a Investment Management Fee to a manager selected by Investor, who may be affiliated with Investor ("Loan Manager"), equal to _____% of all construction hard and soft costs (excluding land acquisition and financing costs of the Senior Loan and all other loans and all management fees to Sponsor affiliates) ("Fee Costs"), which fee will be paid on a monthly basis in accordance with a disbursement schedule to be agreed upon (the "Investment Management Fee"). Such fee will initially be paid from disbursements under the Senior Loan, with any catch-up to occur in accordance with the Section entitled "Participation". In addition, Sponsor shall pay all of Loan Manager's out-of-pocket costs and expenses incurred in connection with monitoring the Senior Loan and the Project, its review of construction draws, change orders, construction progress reports, leases, purchase agreements, close of escrow arrangements in connections with sales, property inspections, casualty or condemnation matters or loan defaults.
Construction and Property Management Fees:	Selection or replacement of the property manager and construction manager and fees payable to the property manager and construction manager shall be subject to approval by Investor. The property management agreement and construction and/or development management agreement shall be in a form satisfactory to Investor. Neither Sponsor nor any of the Principals nor any of their affiliates will be entitled to receive any fees, salary or other compensation in connection with the Project, other than a development management fee equal to _____% of all Fee Costs, which fee will be paid on a monthly basis in accordance with a disbursement schedule to be agreed upon (the "Development Fee"). Such fee will initially be paid from disbursements under the Senior Loan, with any catch-up to occur in accordance with the Section entitled "Participation". The fees to any third party construction manager, developer

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	or property manager will be paid from the Development Fee], except that Sponsor may pay to a third party, without reduction of the Development Fee, an amount in the aggregate not to exceed \$ _____].
Returns on Contributions:	All amounts contributed by the members will earn returns as follows to be paid in accordance with the priorities set forth in the Section below entitled " Participation ": 1. Investment Amount: All portions of the Investment Amount (including PO Funds and Additional PB Amounts) will earn an Internal Rate of Return (based on the actual date of advanced and calculated on a monthly basis) (" IRR ") of ____%. 2. Contribution Advances: To be defined in the documents (to include any funds that Sponsor is obligated to fund but fails to timely fund and any costs incurred in the exercise of rights and remedies) will earn an IRR of ____%.
Participation:	Investor will participate in all cash flow and sales proceeds (net of operating and sales expenses and reserves approved by Investor) from the Project, which will be payable as follows [THIS SECTION NEEDS TO BE ADJUSTED TO THE DEAL]: <ul style="list-style-type: none"> • First, to Investor, until Investor has achieved a _____% IRR on all Contribution Advances. • Second, to Investor, until Investor has achieved a _____% IRR on all Investment Amounts. • Third, to Investor until Investor has received all unpaid Investment Management Fees. • Fourth, to Sponsor until it has received [a _____% IRR on all] [a return of] Sponsor Equity (other than Controllable Expenses). • Fifth, to Sponsor until Sponsor has received all unpaid Development Fees. • Sixth, _____% to Investor and _____% to Sponsor until Investor has received a _____% IRR on all Investment Amounts. • Seventh, to Sponsor until it has received a _____% IRR on all Sponsor Equity. • Eighth, _____% to Investor and _____% to Sponsor of the remainder[, subject to adjustment of these percentages in accordance with a formula to be set forth in the documentation in the event Contribution Advances are made]. <p>Payments to Investor under clauses Fifth through Eighth are herein referred to as "Investor's Participation".</p>
Guaranties:	As noted above, Sponsor and Principal shall be obligated to sign any guaranties and indemnities in connection with the Senior Loan and any other loans (including repayment guaranties, completion guaranties, environmental indemnities and loan carve-out guaranties and indemnities). Investor shall have no obligation to sign such guaranties or indemnities, nor shall it have any obligation to reimburse Sponsor and/or Principal for any payments or claims under any such guaranties and indemnities.
Right of First Refusal/Offer:	The documents shall provide Investor with a right of first refusal to provide any mezzanine financing or equity financing related in any way to the Project or the entities owning interests in the Project, on economic terms not worse to Owner than

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	those offered by third party sources.
Additional Financing:	Except for the Senior Loan, no senior or subordinate financing or similar encumbrances on the Property or equity interests in Property Owner or Sponsor or any constituent partner or member thereof will be allowed either on a secured or unsecured basis, unless approved by Investor.
Structure:	Investor shall have the right to structure the Transaction as a financing, so long as the economic returns to the parties shall not be materially different than as set forth in this Term Sheet. In connection therewith, Investor may require a first priority pledge and security interests in all direct and indirect equity interests (collectively the " <u>Collateral</u> ") in the Sponsor and Owner (if different than Sponsor). Investor may require all of the direct pledgors in the Sponsor and Owner to be bankruptcy remote special purpose entities. In addition, if permitted by the Senior Lender, Owner shall grant Investor a subordinate/second mortgage/deed of trust on the Property.
Transferability:	<p>In General: No direct or indirect transfer of any legal or beneficial interest in the Sponsor will be permitted except in connection with transfers made for estate planning purposes which do not affect the management or control of the Sponsor and which comply with the requirements set forth in the documents. CIM will be permitted to transfer up to 50% of its interest in Owner so long as CIM retains day-to-day operational control of the interests of CIM.</p> <p>Buy-Sell: The documents will contain a buy-sell provision, which may be invoked (a) in the event there is a deadlock in any major decision (which will be defined in the documents) that continues for more than ___ days after written notice by one party to another, [provided that a buy-sell under this provision may not be invoked during the period after construction has commenced until receipt of a certificate of occupancy,] (b) at any time which is ___ months after Closing, or (c) at any time that a "Cause Event" (to be defined in the documents) has occurred in respect of Sponsor or any Principal. The member not initiating the buy-sell will have 15 days to elect to be the buyer or the seller, and the closing under the buy-sell will occur not later than 45 days after any election.</p> <p>Right to Cause a Sale: Investor shall have the right to cause a sale of the Project at any time after ___ months after the Closing[, but not during the period after construction has commenced until receipt of a certificate of occupancy] [___ months after completion of construction and issuance of a certificate of occupancy] [at any time that a "Cause Event" has occurred in respect of Sponsor or any Principal[, but not during the period after construction has commenced until receipt of a certificate of occupancy]], subject to a right of first offer in favor of a non-defaulting non-initiating member who will have 15 days to elect to be the buyer or the seller, and the closing in respect thereof will occur not later than 45 days after any election. If the non-initiating member does not elect to buy without the stated time period, then the initiating member will be authorized to cause the sale of the Property.</p>
Miscellaneous:	<p>The following requirements shall also be satisfied as a condition to the Closing:</p> <ol style="list-style-type: none"> Investor Right to Sell Interests: Investor may, without consent of Sponsor, sell, participate, syndicate or securitize portions of its interest in Owner, so long as Investor retains control of day-to-day matters. Sponsor agrees to cooperate in such sale, participation, syndication or securitization process provided such cooperation does not alter the economics of the transaction. Sponsor acknowledges that Investor may disclose the Sponsor's/Property's and Principal's financial information in connection with such sale, syndication or securitization. Title Insurance: Sponsor agrees that title insurance or a portion acceptable to Investor shall be placed through _____. Documentation: Execution and delivery of satisfactory documents and other

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	<p>transaction documents relating to this transaction (including the surveys, plats zoning and other entitlement approvals and consents, in form and substance satisfactory to Investor) containing such terms and conditions (including affirmative and negative covenants, events of default and other customary capital market and securitization requirements) as Investor deems appropriate for transactions of this type.</p> <ol style="list-style-type: none"> Organizational Documents: Execution and delivery of the organizational documents of Sponsor and its direct and indirect owners in form and substance satisfactory to Investor, containing such terms and conditions (including approval rights, contribution provisions, management provisions, buy-sell and right of first offer provisions) as Investor deems appropriate for transactions of this type. Approvals: Investor's review and approval of the Business Plan, including construction budget, construction contracts (including major subcontracts), general contractor, major subcontractors, architect and architect agreement and sources and uses of all funds (Loan and Sponsor equity). Affiliates: Sponsor shall have disclosed to Investor all fees, commissions and other amounts (collectively, "<u>Affiliate Fees</u>") which have been or will be reimbursed or paid to or paid on behalf of the Sponsor, any Principal(s) or any affiliate of the foregoing in connection with the acquisition or financing of the Property, including, without limitation, amounts paid by the seller of the Property (if applicable) or any affiliate of Seller. All Affiliate Fees shall be deducted from the calculation of the capitalization cost of the transaction for the purpose of determining the Investment Amount and Sponsor's equity contribution. Senior Loan: Both Senior Lender and the amount and all other terms of the Senior Loan must be acceptable to Investor in its sole discretion. All funding conditions of the Senior Loan must be satisfied prior to or at closing and the Senior Investor must provide Investor written confirmation of this requirement. Third Party Consents: Receipt of third-party estoppels, subordination, nondisturbance and attornment agreements, [franchisor comfort agreements,] [condominium formation and other documents,] [covenants, conditions and restriction agreements and reciprocal easement agreements,] and consents as required by Investor. General Construction Matters: All plans and specifications for the construction project must be reviewed and approved by Investor prior to closing. The general contract (either guaranteed maximum or lump sum contract) and all major subcontracts, in form and substance satisfactory to Investor, must be executed prior to closing. The architect, general contractor and each major subcontractor must execute a recognition agreement in favor of Investor which agreement recognizes Investor's right to become the project owner and grants Investor certain notice and cure rights. Payment and Performance Bonds with respect to the general contractor and all major subcontractors must be acceptable to Investor and fully paid for and delivered at closing. Pre-Sales: As a condition of Closing, Sponsor shall have delivered to Investor proof satisfactory to Investor that binding purchase and sales agreements with bona-fide third party purchasers (who will occupy the units) have been entered into with respect to not less than ___ % of the units and providing for purchase prices, on a net basis, for not less than ___ % of the projected net revenues for the Project.] Profit Projections: At the time of Closing, Investor's underwriting shall show profit projections of not less than the greater of (a) \$ ___ million per annum over the projected term, or (b) ___ % of total equity (Principals and Investor).
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EXHIBIT "A"
DUE DILIGENCE MATERIALS

EXHIBIT "B"
CREDIT REPORT AUTHORIZATION AND RELEASE

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COURTROOM RULES

RULE #1:

THE JUDGE IS ALWAYS RIGHT.

RULE #2:

**IF THE JUDGE IS WRONG —
SEE RULE #1.**

Paper Supplement to 907- Managing Real Estate Risk

13.1 Tenant's Insurance Obligations. At all times from and after the Occupancy Date, Tenant shall procure and maintain, at its sole cost and expense, the following policies of insurance:

(a) **Liability.** Commercial general liability insurance with broad form contractual liability coverage and with coverage limits of not less than Two Million Dollars (\$2,000,000) combined single limit, per occurrence, and Five Million Dollars (\$5,000,000) general aggregate, specifically including liquor liability insurance covering consumption of alcoholic beverages by customers of Tenant, if the sale of alcoholic beverages is permitted in the Premises. Such policy shall insure Tenant's performance of the indemnity provisions of this Lease, but the amount of such insurance shall not limit Tenant's liability nor relieve Tenant of any obligation hereunder.

(b) **Workers' Compensation.** Workers' compensation insurance in the amount required by the state in which the _____ is located for the benefit of Tenant's employees.

(c) **Plate Glass.** Insurance covering the full replacement cost of all plate glass on the Premises; Tenant may self-insure such risk upon prior approval of Landlord.

(d) **Equipment.** Boiler and machinery insurance on the Air Conditioning System (or any part thereof) exclusively serving the Premises.

(e) **Tenant's Personal Property and Improvements.** Property insurance covering any peril generally included in the classification "special form coverage" covering all (i) merchandise, (ii) Improvements, and (iii) Personal Property owned or leased by Tenant (or for which Tenant is legally liable) and located in the _____, in an amount not less than ninety percent (90%) of their full replacement cost and with a commercially reasonable deductible not to exceed Five Thousand Dollars (\$5,000). Any policy proceeds shall be used for the repair or replacement of the property damaged or destroyed, unless this Lease is terminated under the provisions of Article 18.

(f) **Business Interruption Insurance.** Loss of income and business interruption insurance in such amounts as will reimburse Tenant or a period of not less than one (1) year for direct or indirect loss of earnings and extra expense attributable to all perils generally included in the property insurance required to be carried by Tenant under this Lease, or attributable to the prevention of access to, or egress from, the Premises, or the _____, or any portion thereof, as a result of such perils.

13.2 Policy Requirements. All policies of insurance provided for herein shall be issued by insurance companies that have a general policyholder's rating of not less than "A" and a financial rating of not less than "VIII" as rated in the most current available "Best's" Insurance Reports, and that have been admitted or qualified to do business in the state where the _____ is located by the insurance commission or other highest board, body or official responsible for overseeing the insurance business in such state. Tenant's general liability policy as required in Section 13.1(a) shall contain cross-liability endorsements. All policies of insurance provided for herein (with the exception of workers' compensation insurance) shall name, by endorsement, Landlord,

and any other entity Licensor may designate as an "additional insured." Certificates of all

insurance required of Tenant hereunder expressly providing for the waiver of subrogation as required in Section 13.4 shall be delivered to Landlord on or before the Occupancy Date. Tenant shall provide to Landlord, at least thirty (30) days prior to expiration, certificates of insurance to evidence any renewal or additional insurance procured by Tenant. All certificates of insurance delivered to Landlord shall contain an agreement by the company issuing said policy to give Landlord twenty (20) days' advance written notice of any cancellation, lapse, reduction or other adverse change respecting such insurance. All commercial general liability insurance, property damage or other casualty policies shall be written as primary policies, not contributory with or secondary to coverage that Landlord may carry.

13.3 Landlord's Insurance Obligation. At all times from and after the Execution Date, Landlord shall maintain in effect insurance providing protection for the following liabilities and/or risks: (a) commercial general liability insurance for bodily injury and property damage arising from Landlord's ownership and/or operation of the _____ with coverage limits selected by Landlord, and (b) loss or damage due to fire and such other perils as Landlord deems appropriate (which may, in Landlord's sole and absolute discretion, include earthquake), covering the _____, exclusive of any item that Tenant is required to insure or any item, building or improvement that another party is required to insure, in an amount that is eighty percent (80%) of its full replacement cost (exclusive of the cost of excavations, foundations, and footings).

ARTICLE 14 INDEMNITY AND EXCULPATION

14.1 Indemnity. Except for Claims arising from Landlord's willful misconduct not otherwise covered by the insurance, Tenant is required to carry under Section 13.1 or the insurance Tenant actually carries, Tenant shall indemnify, protect, defend, and hold Landlord and its Affiliates harmless from and against any and all Claims arising out of or in connection with loss of life, personal injury, property damage, or otherwise arising from (a) the use, occupation, improvement or maintenance of the Premises or the _____ or any work or activity in or about the Premises or _____ by Tenant or its assignees or subtenants or their respective agents, employees, contractors, or licensees, (b) any activity, condition or occurrence in or about the Premises, (c) the filing or potential filing of any mechanic's or material men's lien against the Premises or the _____ in connection with any work done or caused to be done by Tenant, (d) any breach or failure to perform any obligation imposed on Tenant under this Lease, including without limitation, its obligation to comply with Legal Requirements, or (e) any act or omission of Tenant or its assignees or subtenants or their respective agents, contractors, employees, or licensees. Upon notice from Landlord, Tenant shall, at Tenant's sole expense and by counsel satisfactory to Landlord, defend any action or proceeding brought against Landlord by reason of any such Claim. If Landlord and/or its Affiliates are made a party to any litigation commenced by or against Tenant as provided hereinabove, then Tenant shall indemnify, protect, defend, and hold each of such persons harmless from and against any and all Claims arising out of such litigation or incurred or paid by any such person in connection with such litigation.

14.2 Mutual Waivers of Rights. Landlord (for itself and its insurer), waives any rights, including rights of subrogation, and Tenant (for itself and its insurer), waives any rights, including rights of subrogation, each may have against the other party (including such party's Affiliates), and Tenant (for itself and its insurer) waives any rights, including rights of subrogation, it may have against any of the parties to _____ or any of the

additional insureds required to be named under Section 13.2, for compensation of any loss or damage occasioned to Landlord or Tenant arising from any risk generally covered by the "special form coverage" insurance required to be carried by Landlord and Tenant. The foregoing waivers shall be operative only so long as available in the state where the _____ is located. The foregoing waivers shall be effective whether or not the parties maintain the insurance required to be carried pursuant to this Lease.

14.3 Limitations on Landlord's Liability. Notwithstanding Landlord's and/or its Affiliates' negligence (whether active or passive) or breach of this Lease, Landlord and its Affiliates shall not be liable for injury to Tenant's business or loss of income therefrom or for damage that may be sustained by the person, merchandise or Personal Property of Tenant, its employees, invitees, customers, agents or contractors or any other person in or about the Premises, caused by or resulting from fire, steam, electricity, gas, water or rain, which may leak or flow from or into any part of the Premises, or from the breakage, leakage, obstruction, failure, or other defects of the Utility Installations, Air Conditioning System, Chilled Water System, or other components of the Premises or _____, or as a result of the exercise by Landlord of its rights under this Lease, except to the extent that such damage or loss is caused by Landlord's and/or its Affiliates' willful misconduct not otherwise covered by the insurance Tenant is required to carry under Section 13.1 or the insurance Tenant actually carries. Landlord makes no representations or warranties whatsoever with respect to any Air Conditioning System, Chilled Water System, or Utility Installations existing as of the date hereof or in the future. Notwithstanding Landlord's and/or its Affiliates' negligence (whether active or passive) or breach of this Lease, Landlord and its Affiliates shall not be liable in damages or otherwise for any discontinuance, failure or interruption of service to the Premises of Utilities, the Air Conditioning System, the Chilled Water System, or any other services and Tenant shall have no right to terminate this Lease or withhold rent because of the same. Landlord and its Affiliates shall not be liable for any damages arising from any use, act or failure to act of any other tenant or occupant of the _____ or any other third party associated with the _____. In no event shall any of the circumstances described herein be deemed to constitute constructive eviction of Tenant.

In the event Tenant makes any Claim or asserts any cause of action against Landlord and/or its Affiliates as a result of Landlord's default: (a) Tenant's sole and exclusive remedy shall be against the current rents, issues, profits, and other income Landlord receives from its operation of the _____, net of all current operating expenses, liabilities, reserves, and debt service associated with said operation ("Net Income" for purposes of this Section 17.3 only), (b) no other real, personal or mixed property of Landlord, wherever located, shall be subject to levy on any judgment obtained against Landlord, (c) if such Net Income is insufficient to satisfy any judgment, Tenant will not institute any further action, suit, Claim or demand, in law or in equity, against Landlord for or on the account of such deficiency, and (d) Landlord's default shall not constitute consent by Landlord for Tenant to perform or observe such terms, covenants or conditions at Landlord's expense.

The limitations set forth in this Section 14.3 shall be applicable to, and enforceable by, Landlord and/or its Affiliates.

14.4 Obligations Survive. The obligations of this Article 14 shall survive the expiration or earlier termination of this Lease.

PROPERTY MANAGEMENT SERVICE CONTRACT

{Property Name}
6922 Hollywood Blvd., Suite 900
Los Angeles, California 90028

AGREEMENT FOR: {Type of Services}

PROPERTY NUMBER	CODE
{Project #}	{Code}

THIS AGREEMENT ("the Contract") is made this {#} day of {Month}, 2004, between {Contracting Entity} ("Owner"), and {Contractor} ("Contractor").

WITNESSETH, that the Owner and the Contractor, in consideration of the mutual covenants, considerations and agreement herein contained, covenant and agree as follows:

1. Contract Documents: The "Contract Documents" consist of this Contract, the General Conditions, attached hereto as Exhibit "A"; Scope of Work, attached hereto as Exhibit "B"; Fee Schedule, attached hereto as Exhibit "C"; Insurance Requirements, attached hereto as Exhibit "D"; and Summary of the Responsible Contractor Program Policy, attached hereto as Exhibit "E".
2. The Work: The Contractor hereby agrees to furnish Owner with the services described herein and pay for all labor and materials necessary for the furnishing of such services as required by or specified in the Contract Documents, including all work not specifically described, but reasonably inferable from the Contract Documents (the "Work").
3. The Site: The Work is to be performed at: {Address}
4. Term of Agreement: The initial term of this Agreement shall commence on {date}, 2005, and terminate on {date}, 2006, subject to earlier termination as hereinafter provided.
5. Schedule for Performance of Work: Contractor agrees to perform the services described in this Agreement on the following basis:

{Monthly/One Time Service/Annually/Per Exhibit E}

6. Payment Schedule: Payment shall be made within thirty (30) days after the receipt by Owner of an invoice therefore from the Contractor. Invoices shall not be submitted until Work for the invoice period has been performed. The invoice shall include (a) a description of the services performed (b) an itemization of the number of hours of labor performed by Contractor and the hourly rate thereof, and (c) an itemized list of materials and supplies purchased by Contractor, specifying the cost of all materials and supplies. Owner may withhold from payments owed to the Contractor and credit against its account with Contractor sufficient funds (a) to cover the cost of the property damage incurred by Owner as a result of Conduct by Contractor or its subcontractors, agents or employees (b) to indemnify Owner pursuant to the General Conditions attached hereto (c) to compensate Owner for any of the Work rejected by Owner and not remedied by Contractor, and (d) to compensate Owner for any failure by Contractor to comply with any term or condition of the Contract Documents, including, but not limited to, obligation to clean the site.
7. Guarantee: The Contractor warrants to the Owner that the Work will conform to the Contract Documents, will be free from defects, and that any materials or equipment used or installed at the Site will be of good quality, in good working condition for the purpose intended under the Contract Documents and new (unless otherwise required by the Contract Documents). For a period of one (1) year following final acceptance of the Work by Owner, if applicable, if defects should appear in material or workmanship, Contractor shall promptly repair or replace such defects at its sole cost and expense. The warranty period for any repaired or replaced part shall be one (1) year from the date of acceptance of the repaired or replaced part or the warranty period specified by the manufacturer, whichever is greater. This guarantee is in addition to any other guarantee or warranty otherwise provided by law or the Contract Documents.
8. Performance of Work: Contractor shall perform the Work in accordance with all applicable laws, regulations, rules and ordinances. Contractor shall employ only qualified personnel for the purpose of performing its obligations hereunder and shall provide adequate supervision of such employees. If Owner reasonably determines that an employee of Contractor is unsatisfactory for any reason, or unqualified for the task which he or she is performing, said employee shall be replaced by Contractor immediately upon notification thereof from Owner.
9. Inspection of Work: Owner shall have the right to inspect the Work at any time. Neither the making, nor the failure to make, such inspections, nor any express or implied approval of the Work shall relieve Contractor of the responsibility to complete and guarantee the Work as specified in this Agreement. Any Work which, at Owner's sole discretion, is unsatisfactory shall be remedied by Contractor at its sole cost and expense.
10. Governing Law: This Agreement shall be governed by and construed in accordance with the laws of the State of California without reference to the conflict of laws or choice of laws provisions thereof.
11. Independent Contractor: Contractor shall be an independent contractor for all purposes hereunder and shall not hold itself out as an agent or employee of Owner in any context.
12. Waiver: The waiver by Owner of any breach by Contractor of any term, covenant or condition herein shall not be deemed a waiver of any subsequent breach or any breach of any other term, covenant or condition herein by Contractor.
13. General Conditions: This Contract shall be performed in accordance with all of the terms and conditions contained in Exhibit "A", entitled "General Conditions", attached hereto and by this reference incorporated herein. Should the Contract conflict with any provision of the General Conditions, the General Conditions shall control.
14. Contractor's inspection: The Contractor warrants that it has fully inspected and surveyed the Site prior to execution of this Contract, and that the Payment Rate Schedule includes all sums necessary to complete the Work in a timely fashion.
15. Waiver: The waiver by Owner of any breach by Contractor of any term, covenant or condition herein shall not be deemed a waiver of any subsequent breach or any breach of any other term, covenant or condition herein by Contractor.
16. Notice: All notices required under this Contract shall be in writing and shall be deemed to be properly served only upon receipt by:
 - a) {Entity}, 6922 Hollywood Boulevard, Suite 900, Los Angeles, CA 90028 ("Owner")
 - b) {Contractor Name and Address} ("Contractor")

THIS AGREEMENT has been duly executed as of the day and year set forth above.

THIS AGREEMENT may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

EXHIBIT _____
INSURANCE REQUIREMENTS

<<Address>>
<<City, State>>

Contractor and Professional shall maintain in force, at all times during the performance of work, the following policies of insurance and shall be issued by an insurance company having an A. M. Best Rating of A VI or better, and admitted in every state where work is to be performed under the contract.

- a. Commercial General Liability, including products/completed operations, independent contractors and a broad form of general liability extension endorsement with a combined single limit for both bodily injury and property damage of at least \$1,000,000. per occurrence, \$2,000,000. annual aggregate and shall name the following OWNER on endorsement form CG2010 11/85 (or its equivalent) as additional insured with coverage for Completed Operations. ENDORSEMENT PAGES THAT ARE INCOMPLETE OR FAIL TO NAME THE ADDITIONAL INSURED WILL BE RETURNED. A stop payment will be placed on all Invoices until receipt of a complete Endorsement page.

<<List additional insureds here>>
- b. Automobile Liability (including coverage for owned, leased, used, hired or borrowed vehicles) with a combined single limit for both bodily injury and property damage of at least \$500,000. per occurrence; and
- c. Statutory Workers' Compensation Insurance with employers' liability limits of at least \$500,000. (by accident), \$500,000. (by disease per employee), \$500,000. (policy limit by disease)
- d. Each Professional rendering engineering, environmental, architectural, construction management or legal Services shall obtain, pay for, and maintain in full force and effect at all times during performance of the work, Professional Liability Insurance with a limit of \$1,000,000 per claim and in the aggregate.

All policies must be maintained at the same levels of coverage for a period of two (2) years beyond the completion of services and contain language requiring insurer to provide those entities referenced above, with a thirty- (30) day written notice of cancellation, non-renewal or material change of the policy. If Contractor or Professional fails to furnish any insurance certificates, Owner is authorized to purchase the required insurance and the same will apply in the event of failure by subcontractor to notify same of cancellation, non-renewal or material change of the policy.

Send via fax to the ATTENTION OF: _____ at _____

Revised: 8/12/2005

Policy No.: MGL0141644
ASEC STRUCTURES, INC.

Mt Hawley Insurance Company

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED - OWNERS, LESSEES OR
CONTRACTORS (FORM C)**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

All persons or organizations where required by written contract

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

To the extent required under contract, this policy will apply as primary insurance to additional insureds scheduled above and other insurance which may be available to such additional insureds will be non-contributory.

Section IV., Condition 4., of this policy is amended accordingly.

All other Terms and Conditions of this Policy remain unchanged.

CGL 216 (04/98)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WAIVER OF SUBROGATION ENDORSEMENT DEDUCTIBLE POLICY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization: Where required by written contract.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

The TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US Condition (Section IV – COMMERCIAL GENERAL LIABILITY CONDITIONS) is amended by the addition of the following:

We waive any right of recovery we may have against the person or organization shown in the Schedule above because of payments we make for injury or damage arising out of your operations or your work done under a written contract with that person or organization.

All other terms and conditions of this Policy remain unchanged.

Policy Number: BK01366724

Owners, Lessees or Contractors (Form B)
ADDITIONAL INSURED

Change(s) Effective: 08/03/2005

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY. This endorsement modifies insurance policy under the following:

LIABILITY COVERAGE PART:

	Schedule
Name of Person or Organization:	

SECTION II - WHO IS AN INSURED is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

CL/BF 22 40 03 95

POLICY NUMBER:

**COMMERCIAL GENERAL LIABILITY
CG 20 26 11 85**

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – DESIGNATED PERSON OR
ORGANIZATION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

SCHEDULE

Name of Person or Organization:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented to you.

CG 20 26 11 85
© Insurance Services Office, Inc., 1984

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

ADDITIONAL INSURED-OWNERS, LESSEES OR CONTRACTORS-SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following.

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

CIM/7046 Hollywood, L.P., CIM California Urban RE Fund GP III, LLC, CIM Urban Real Estate Fund, L.P., CIM Urban Fund GP, LLC

RE: Job #7084-A, Studio/Retail Demo 7046 Hollywood Blvd., Los Angeles CA 90028

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

A. Section II - Who Is An Insured is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

(1) All work including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be Performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed; or

B. With respect to the insurance afforded to these additional insureds, the following exclusion is added:

(2) That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

2. Exclusions

This insurance does not apply to "bodily Injury" or "property damage" occurring after:

California Suppression Systems, Inc., dba Calprotection
POLICY NUMBER: ALP711160-05

COMMERCIAL
GENERAL LIABILITY
CG 20 10 10 01

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

CIM402 Santa Monica, L.P., CIM Urban RE Fund GP V, LLC, CIM Urban Real Estate Fund, LP, CIM Urban Fund GP, LLC CIM Group, Inc.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

A. Section II - Who Is An Insured is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

B. With respect to the insurance afforded to these additional insureds, the following exclusion is added:

2. Exclusions

This insurance does not apply to "bodily injury" or "property damage" occurring after:

(1) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations, has been completed; or

(2) That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CG 20 10 10 01

© ISO Properties, Inc., 2000

POLICY NUMBER: MGL0138836

COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES or CONTRACTORS [Form C]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

All persons or organizations as required by written contract.

(if no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

To the extent required under contract, this policy will apply as primary insurance to additional insureds scheduled above and other insurance which may be available to such additional insureds will be non-contributory.

Section IV., Condition 4., of this policy is amended accordingly.

All other Terms and Conditions of this Policy remain unchanged.

CGL-216 (04/98)

Page 1 of 1


ACORD CERTIFICATE OF LIABILITY INSURANCE		OP ID: GV SERIE-1	DATE (MM/DD/YYYY) 03/25/04
PRODUCER: Bolton & Company CA License #0008309 1901 N. Solar Drive #150 Oxnard CA 93036 Phone: 805-988-1455 Fax: 805-988-0114		THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.	
INSURED		INSURERS AFFORDING COVERAGE	NAIC #
Seeley Brothers 1400 Moonstone Brea CA 92821		INSURER A: Mt. Hawley Insurance Company INSURER B: Fireman's Fund Insurance INSURER C: INSURER D: INSURER E:	21873

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSURED / LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YYYY)	POLICY EXPIRATION DATE (MM/DD/YYYY)	LIMITS
A	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PRO <input type="checkbox"/> LOC	MGL0138836	04/01/04	04/01/05	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 50,000 MED EXP (Any one person) \$ 5,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMPOP AGG \$ 1,000,000
B	AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS	MZX80826107	04/01/04	04/01/05	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
	GARAGE LIABILITY <input type="checkbox"/> ANY AUTO				AUTO ONLY - EA ACCIDENT \$ OTHER THAN AUTO ONLY: EA ACC \$ AGG \$
B	EXCESS/UMBRELLA LIABILITY <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE DEDUCTIBLE \$ RETENTION \$	XSM0086161353	04/01/04	04/01/05	EACH OCCURRENCE \$ 5,000,000 AGGREGATE \$ 5,000,000
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below				WC STATUTORY LIMITS \$ OTHER \$ E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$
	OTHER				

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS
 * 10 Day Notice of Non Payment of Premium *
 Re: #04-102, Peterson Building Repairs. Street Retail West 7, LP; CIM Group Inc., and CIM Group, LLC are named as Additional Insured per form #CGL 216 (04/98).

CERTIFICATE HOLDER	CANCELLATION
c/o CIM/Hollywood, LLC Property Manager 6922 Hollywood Blvd., #312 Hollywood CA 90028	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30* DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES. AUTHORIZED REPRESENTATIVE: 

Milt Policzer

213 974-8966

p. 1

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213 974-8966

p. 2

1 ERNEST J. FRANCESCHI, JR.
 2 A LAW CORPORATION
 Ernest J. Franceschi, Jr. (State Bar No. 112893)
 3 445 South Figueroa, 26th Floor
 Los Angeles, California 90071
 Telephone: (213) 612-7723
 4 Facsimile: (213) 612-7724

Case assigned to
 Judge ERNEST J. FRANCESCHI, JR.

FILED
 LOS ANGELES SUPERIOR COURT
 JUL 13 2005
 JOHN A. CLARKE, EXECUTIVE OFFICER/CLERK
 BY: J. SURGA, DEPUTY

5 Attorney for Plaintiff, UNIVERSAL CONCRETE CUTTING, INC.

6
 7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 8 **FOR THE COUNTY OF LOS ANGELES - CENTRAL DISTRICT**
 9 **(UNLIMITED)**

10
 11 UNIVERSAL CONCRETE CUTTING,
 INC., a Corporation,

12 Plaintiff,

13 vs.

14 CERTAIN UNDERWRITERS AT
 15 LLOYDS, LONDON, a Foreign
 Insurance Entity, Type Unknown;
 16 PETER CORRICK, an individual; and
 DOES 1 through 100, inclusive,

17 Defendants.

CASE NO. BC336518
 COMPLAINT FOR TORTIOUS BREACH
 OF INSURANCE CONTRACT; AND
 BREACH OF THE IMPLIED COVENANT
 OF GOOD FAITH AND FAIR DEALING
 DEMAND FOR TRIAL BY JURY

18
 19
 20 COMES NOW Plaintiff, UNIVERSAL CONCRETE CUTTING, INC. and for cause of
 21 action against Defendants, and each of them, alleges as follows:

22 **GENERAL ALLEGATIONS**

23 **COMMON TO ALL CAUSES OF ACTION**

24 1. At all times mentioned herein, Plaintiff UNIVERSAL CONCRETE CUTTING,
 25 INC., was and now is a corporation organized and existing under the laws of the state of
 26 California, with its principle place of business in the County of Los Angeles;

27 ///

28 ///

COMPLAINT FOR TORTIOUS BREACH OF INSURANCE CONTRACT

1 2. At all times mentioned herein, Defendant CERTAIN UNDERWRITERS AT
 2 LLOYDS, LONDON [hereinafter referred to as "UNDERWRITERS"] was and now is a foreign
 3 business organization, type unknown, with its principal place of business in London, England.

4 3. Plaintiff is informed and believes and thereon alleges that Defendant PETER
 5 CORRICK is an individual residing in the state of California and doing business in the County
 6 of Los Angeles as an insurance adjuster.

7 4. That at all times mentioned herein, Defendant PETER CORRICK was an agent,
 8 servant, or employee of his co-defendant UNDERWRITERS and at all times mentioned
 9 herein was acting in the course and scope of his agency or employment with the
 10 UNDERWRITERS' Defendant.

11 5. That at all times mentioned herein, the true names and capacities, whether
 12 individual, corporate, associate or otherwise of the Defendants sued herein as DOES 1
 13 through 100, inclusive and each of them, are unknown to Plaintiff who therefore sues said
 14 Defendants by such fictitious names.

15 6. Plaintiff is informed and believes and thereupon alleges that each of the
 16 Defendants named herein as a DOE is legally responsible in some manner for the events
 17 described below and Plaintiff will seek leave of Court to state the true names and capacities
 18 of said Defendants once same have been ascertained by Plaintiff.

19 7. Plaintiff is informed and believes and thereon alleges that at all times mentioned
 20 herein, Defendants, and each of them, were the agents and servants of each of the other
 21 Defendants, and doing the things herein alleged, were acting within the course and scope of
 22 such agency or employment.

23 8. On September 2, 2003, Plaintiff entered into a contract of insurance with
 24 UNDERWRITERS for a commercial business policy, Certificate No. BG19703 (hereinafter
 25 referred to as the "POLICY"), a copy of which is attached hereto and made a part hereof by
 26 reference as *Exhibit 1*.

27 9. Pursuant to the terms of the POLICY, certain enumerated equipment was
 28 covered against loss or theft, to wit:

COMPLAINT FOR TORTIOUS BREACH OF INSURANCE CONTRACT

- 1 1. A 2003 Skip loader 1S180, Serial No. 190895;
- 2 2. A 2002 Skip loader 1S180W/;
- 3 3. A 2002 Braker, Serial No. 5599; and
- 4 4. A 1999 Backhoe, No. 1B115, Serial No. 31017246

5 10. That on or about November 3, 2003, the entry gate to Plaintiff's principal
6 premises was broken into and a trailer, a bob-cat and other equipment valued collectively at
7 \$42,600.00 was stolen.

8 11. On December 3, 2003, Plaintiff's remote storage facility was broken into and
9 another bob-cat, along with three other items of equipment, valued collectively at \$30,500.00
10 was stolen.

11 12. Immediately following each of the foregoing thefts, Plaintiff notified
12 UNDERWRITERS of same and made demand of UNDERWRITERS under the policy for
13 payment of said losses.

14 13. Defendants, and each of them, have refused to pay loss benefits to Plaintiff on
15 the ground the title to the stolen equipment was held in the name of "Universal Construction,
16 Inc." and that Plaintiff UNIVERSAL CONCRETE does not have a "insurable interest" in the
17 stolen equipment. Defendant's position is as follows:

18 "The investigation has revealed that Universal Construction and
19 Universal Concrete are separate corporations all owned primarily
20 by the same shareholders. According to documentation provided,
21 all of the stolen equipment was purchased and paid for by
22 Universal Construction on behalf of Universal Concrete because
23 Universal Concrete did not have sufficient credit to purchase the
24 equipment. The invoices for the purchase of the various items
25 subject to the theft all indicate that the purchaser of the items was
26 Universal Construction. Moreover, all of the tax returns that have
27 been provided by your company indicate that Universal
28 Construction and not your company depreciated all of the

1 equipment on your books for tax purposes. Also, your company
2 has not provided any documentation to indicate that the subject
3 equipment was rented or leased from Universal Construction,
4 thus, it is apparent from all of the aforementioned information that
5 your company is not the owner of any of the equipment subject
6 to the claim."

7 14. Plaintiff alleges that Universal Construction is the alter ego of UNIVERSAL
8 CONCRETE. Both companies occupy the same business premises, use the same
9 employees and have the same ownership. Corporate separateness is not observed, the
10 assets and equipment of each company are used interchangeably and there is commingling
11 of monies.

12 15. Having denied Plaintiff's claim for loss under the policy, Defendant offered
13 Plaintiff the sum of \$2,500.00 as follows:

14 "Notwithstanding the above, Underwriters also issued to your
15 company a business personal property policy with limits of
16 \$50,000.00. However, insomuch as your company did not own
17 any of the equipment subject to either of the thefts, Underwriters'
18 liability would be limited to the sum or \$2,500.00 as set forth in
19 paragraph 5(b) of the Commercial Property policy. This provision
20 limits coverage to property of others in your company's care,
21 custody or control at the described premises to the sum of
22 \$2,500.00. Insomuch as the theft from the remote storage was
23 not a "described premises" in the policy, the \$2,500.00 limit does
24 not have to be paid for this theft claim. Thus, it is the
25 Underwriters' position that since the equipment subject to the
26 claim at the described location (725 Battery Street, San Pedro,
27 California), was not owned by your company, and would be
28 construed as "property of others," a policy provision set forth

1 above would require Underwriters to pay to your company the
 2 sum of \$2,500.00. "

3 16. By reason of the foregoing, Plaintiff comes now and states the following causes
 4 of action:

5 **FIRST CAUSE OF ACTION**

6 **(For Tortious Breach of Insurance Contract)**

7 17. Plaintiff repeats and realleges the contents of paragraphs 1 through 16, above,
 8 as though set forth fully and at length herein and makes the same a part of this cause of this
 9 action.

10 18. By the provisions of the POLICY, Defendant represented to Plaintiff that if
 11 Plaintiff complied with all the terms and conditions of the POLICY, Defendant would pay to
 12 Plaintiff the amount of damages up to the POLICY limit which he was entitled to recover for
 13 specifically enumerated equipment set forth in the POLICY of insurance for which specific
 14 premiums were charged. Plaintiff duly complied with all the terms and conditions of the
 15 POLICY on its part to be performed and as a result of a theft of the aforementioned
 16 equipment, Plaintiff became entitled to receive from Defendant UNDERWRITERS a monetary
 17 value of the stolen equipment specifically set forth in the coverage part Declarations of the
 18 subject POLICY.

19 19. Defendants above-stated representation in its POLICY was false and fraudulent
 20 in that Defendant UNDERWRITERS never intended to compensate Plaintiff for loss of any
 21 of the covered equipment. At the time Defendant entered into insurance contract with
 22 Plaintiff, Defendant willfully concealed the above-facts all for the purpose of defrauding and
 23 deceiving Plaintiff in inducing it to purchase the POLICY of insurance and pay substantial
 24 premiums for illusory coverage.

25 20. Plaintiff at the time the representation was made, believed it to be true and in
 26 reliance on it, was induced to, and did enter into the contract with Defendant; had Plaintiff
 27 known the true facts, it would not have purchased the POLICY.
 28

1 21. That at all times herein mentioned, Defendants, and each of them, actually knew
 2 or had reason to believe from facts known to them, that the two companies Universal
 3 Concrete and Universal Construction were the alter egos of each other and that although
 4 legal title to the stolen equipment was held in the name of Universal Construction, Plaintiff had
 5 a substantial insurable interest in the subject property. Moreover, Plaintiff alleges, that
 6 Defendants, and each of them, by virtue of agreeing to insure the specified stolen property
 7 and accepting premium payments from Plaintiff, Defendants are estopped to deny that
 8 Plaintiff has a substantial and legitimate insurable interest in the subject property.

9 22. Notwithstanding Defendants' knowledge of its obligation to pay Plaintiff for the
 10 loss of the property, Defendant offered Plaintiff only the sum of \$2,500.00. Plaintiff rejected
 11 this offer and demanded sole reimbursement for the loss. For the sole purpose of compelling
 12 Plaintiff to accept a lesser sum in settlement of its claim, or be persistent in seeking more, to
 13 incur substantial detriment, delay and additional expenditures in pursuing enforcement of its
 14 claim, all during which time Defendant would retain use of the money, Defendant in breach
 15 of its covenant of good faith and fair dealing intentionally, maliciously and oppressively,
 16 refused and failed to pay Plaintiff the full benefits due under the terms of the Policy.

17 23. As a direct and legal result of Defendant's wrongful conduct as herein alleged,
 18 Plaintiff was compelled at its own expense to replace the stolen equipment and continue to
 19 honor its monthly obligations under the finance contract for the equipment stolen.

20 24. In committing the acts described in this Complaint, Defendants acted in
 21 conscious disregard of Plaintiff's rights and were guilty of malice, oppression and fraud, as
 22 specifically described hereinabove. The conduct of Defendants warrants an assessment of
 23 punitive damages in an amount appropriate to punish Defendants and deter others from
 24 engaging in similar wrongful conduct.

25 WHEREFORE, UNIVERSAL CONCRETE CUTTING, INC. prays for judgment against
 26 Defendants as follows:

- 27 1. For general damages in an amount as will be shown at time of trial;
- 28 2. For prejudgment interest at the legal rate;

Milt Policzer

213 974-8966

P.7

Prepared by: Phillip W. Lee
ACC's 2005 Annual Meeting
October 17-19

907 - How to Effectively Manage Real Estate Risk

LEASING

● Key Risk Management Clauses In Commercial Loan Documents

- Insurance
- Indemnification

Other Important Risk Management Provisions:

- Compliance w/Laws
- Environmental Issues
- Destruction & Condemnation
- Default & Remedies
- Holdover

Insurance

LL wants to insure LL's real property from any damage (casualty) and to be protected from liability arising from any event (an act or omission), wherever it occurs (on the leased premises or elsewhere in the building or in common areas). LL does not want to insure T's property or protect T from any liability.

T only wants to insure T's personal property (and possibly TI paid for by T) from any casualty and to be protected from liability arising out of any event that occurs on the leased premises. T does not want to insure LL's property and T wants to be protected from liabilities arising from events that occur anywhere other than on the leased premises.

Sample Insurance Provision:

Insurance.

- (a) Landlord agrees to carry and maintain the following insurance during the Term:
 - (i) Special form property insurance on the Building and the Building Complex [*or similar terms defined in the lease*], and all Tenant Improvements paid for by Landlord for the full replacement cost;
 - (ii) Commercial general liability insurance against claims for property damage, personal injury and contractual liability, arising from events occurring in, on or about the Building or the Building Complex (excluding the Premises), with a combined single limit of not less than Two Million Dollars (\$2,000,000); and
 - (iii) Worker's compensation insurance, covering Landlord's employees, in amounts required by law.

- 1 3. For punitive and exemplary damages;
- 2 4. For costs and attorney fees incurred herein;
- 3 5. For such other and further relief as this Court may deem just and proper.

4 Dated: July 6, 2005

ERNEST J. FRANCESCHI, JR.
A LAW CORPORATION

By: Ernest J. Franceschi, Jr.
Attorney for Plaintiff

DEMAND FOR JURY TRIAL

10 Plaintiff UNIVERSAL CONCRETE CUTTING, INC hereby demands a trial by jury in
11 the within action.

12 Dated: July 6, 2005

ERNEST J. FRANCESCHI, JR.
A LAW CORPORATION

By: Ernest J. Franceschi, Jr.
Attorney for Plaintiff

COMPLAINT FOR TORTIOUS BREACH OF INSURANCE CONTRACT

All such insurance shall be procured from an insurance company or companies rated A or better and authorized to do business in the State where the Premises are located. All such policies (except worker's compensation) shall name Tenant as an additional insured, and Landlord shall make a good faith effort to provide Tenant with thirty (30) days written notice (or otherwise, as soon as possible) prior to cancellation or material alteration of any such policy. To the extent permitted by applicable law, all insurance maintained by Landlord shall be primary to any insurance provided by Tenant. If requested in writing, Landlord shall provide certificate(s) of such insurance to Tenant upon commencement of the Term and as soon as possible upon any renewals.

- (b) Tenant agrees to carry and maintain the following insurance, at its own cost, during the Term:
- (i) Special form property insurance on Tenant's property and the contents of the Premises, including Tenant Improvements paid for by Tenant, for the full replacement cost;
 - (ii) Commercial general liability insurance, including coverage for property damage, personal injury and contractual liability, arising from events occurring in, on or about the Premises, with a combined single limit of not less than Two Million Dollars (\$2,000,000);
 - (iii) Workers' compensation insurance, covering Tenant's employees, in amounts required by law.

All such insurance shall be procured from an insurance company or companies rated A or better and authorized to do business in the State where the Premises are located. All such policies (except worker's compensation) shall name Landlord as an additional insured, and Tenant shall make a good faith effort to provide Landlord with thirty (30) days written notice (or otherwise, as soon as possible) prior to cancellation or material alteration of any such policy. To the extent permitted by applicable law, all insurance maintained by Tenant shall be primary to any insurance provided by Landlord. If requested in writing, Tenant shall provide certificate(s) of such insurance to Landlord upon commencement of the Term and as soon as possible upon any renewal.

- (c) Each party agrees to use its best efforts (but without being obligated to incur any additional expense) to include in each of the insurance policies required above, a waiver of the insurer's right of subrogation against the other party, or if such waiver should be unobtainable or unenforceable: (i) an express agreement that such policy shall not be invalidated if the insured waives the right of recovery against any party responsible for a casualty covered by the policy before casualty; or (ii) any other form of permission for the release of the other party. Notwithstanding the foregoing and to the extent permitted by said insurance policies, each party hereby releases the other party with respect to any claim (including a claim for negligence or indemnity) which it might otherwise have against the other party for loss, damage or destruction with respect to its property (including the Building, the Building Complex, the Premises, and rental value or business interruption) occurring during the Term, or Renewal Term, if applicable,

of this Lease, to the extent to which it is insured (or required to be insured) under this Lease.

Indemnification

Definition: A promise to reimburse another for a loss suffered because of a third party's act.

Sample Indemnification Provision:

Damage to Property, Injury to Person.

- (a) Tenant, for itself and its legal representatives, successors and assigns, as a material part of the consideration to be rendered to Landlord under this Lease, hereby indemnifies and agrees to defend and hold harmless Landlord, its members, and their agents, employees, affiliates, contractors, legal representatives, successors and assigns, from any and all claims of liability for any injury or damage to any person or property whatsoever occurring: (i) on or in the Premises; and (ii) in, on or about the Building, the Building Complex or any part thereof, to the extent such injury or damage is caused by, arises out of or results from the [*gross negligence? Be careful, this works both ways!*] negligence of Tenant, any of Tenant's agents, contractors, employees, licensees or invitees or from any breach or default in the performance of any obligation on Tenant's part to be performed under the terms of this Lease. Such indemnities shall include by way of example, but not limitation, all costs, reasonable attorneys' fees, expenses and liabilities incurred in or about any such claim, action or proceeding.
- (b) Landlord, for itself and its legal representatives, successors and assigns, as a material part of the consideration to be rendered to Tenant under this Lease, hereby indemnifies and agrees to defend and hold harmless Tenant, its agents, employees, affiliates, contractors, and legal representatives, successors and assigns, from any and all claims of liability for any injury or damage to any person or property whatsoever occurring: (i) in, on or about the Building, the Building Complex or any part thereof; and (ii) on or in the Premises to the extent such injury or damage is caused by the [*gross negligence?*] negligence of Landlord, its agents, contractors, employees, licensees or invitees or from any breach or default in the performance of any obligation on Landlord's part to be performed under the terms of this Lease. Such indemnities shall include by way of example, but not limitation, all costs, reasonable attorneys' fees, expenses and liabilities incurred in or about any such claim, action or proceeding.

Compliance With Laws

Although both LL and T want each other to comply with all applicable laws for obvious reasons, it is even more important to designate who is responsible (at least under the lease) for compliance with certain laws such as the ADA or environmental laws that could impose significant liabilities on one or both parties. LLs will usually resist representing that the premises (or the entire project) are in compliance with "all applicable laws", but Ts should try very hard to get this representation.

A possible compromise is for the T to obtain an indemnification (without the representation of compliance) for any non-compliance for which LL agrees to accept responsibility. Keep in mind that a representation of compliance, the allocation of liability for compliance in a lease, or an indemnification for damages arising from noncompliance, does not mean that the other party (or both T and LL) are not *legally* liable for compliance.

Sample Compliance with Laws Provision:

Compliance with Laws.

- (a) Landlord's Compliance. Landlord represents and warrants that to the best of Landlord's knowledge, the Premises, Building Complex, Project Common Area(s) and tenant improvements installed by Landlord are, [Tenant clause: *and throughout the term of this Lease shall be maintained*], in substantial compliance with all "Applicable Laws"¹. In the event that Landlord is found to be in breach of this representation or warranty, Landlord shall, at Landlord's expense, promptly take all actions necessary to achieve compliance.
- (b) Tenant's Compliance.
- (i) Tenant shall not use the Premises in any manner that would: (1) unreasonably impair the ability of Landlord to obtain, at standard rates, any insurance policy required under the terms of any lease or mortgage to which this Lease is subordinate; (2) impair the appearance, character or reputation of the Building Complex; (3) cause the discharge of any materials into the Building HVAC, sewer or plumbing systems or into any other vents or drains that are not designed to receive such materials; (4) impair, interfere with or unreasonably disturb any of the Building services, operations, or other occupants of the Building Complex; (5) create waste in, on or around the Premises or the Building Complex.
- (ii) Tenant shall maintain compliance with all Applicable Laws, but only to the extent that such compliance is: (1) not directly related to the physical condition of the Premises, the Building or the Building Complex as constructed and improved by Landlord; and (2) is required due to Tenant's

¹ "Applicable Laws" shall mean all laws, statutes, ordinances, rules and regulations that are now in force or that may hereafter be enacted or promulgated by any public authority with jurisdiction over the Premises, Building Complex, Project Common Area or activities conducted thereon and shall specifically include, but shall not be limited to, those related to the protection of human health, safety and the environment (e.g., CERCLA, RCRA, OSHA), and those enacted or promulgated pursuant to the Americans with Disabilities Act ("ADA").

specific use of the Premises and with which only the occupant of the Premises can comply (e.g., employment laws, ADA, maximum occupancy, workplace smoking, illegal business operations, etc).

- (c) Indemnity. Landlord agrees to indemnify, defend and hold Tenant harmless from and against any claims, losses or causes of action arising out of Landlord's failure to comply with any Applicable Laws as required by subsection (a) above. Tenant agrees to indemnify, defend and hold Landlord harmless from and against any claims, losses or causes of action arising out of Tenant's failure to comply with any Applicable Laws as required by subsection (b) above. [*Comment: Always look for reciprocal indemnities. If one party is asking for indemnification, the other party should be willing to give an equal indemnity in return.*]
- (d) Patriot Act Compliance. Tenant represents to Landlord, and Landlord represents to Tenant, that the representing party is not (and such party is not engaged in this transaction on behalf of) a person or entity with which either party is prohibited from doing business pursuant to any law, regulation or executive order ("Anti-Terrorism Laws"²) pertaining to national security and; such party has not violated and, to the best of such party's knowledge it is not under investigation for, the violation of any Laws pertaining to money laundering, as those Laws are more particularly described below. [*Although you may be strictly liable for violating one or more of these laws if you do enter into a lease with a Prohibited Person, this provision may give you a cause of action against the other party and may allow you to terminate the lease.*]

Environmental Issues

Environmental provisions can be the longest, most unreasonable and most complex provisions in a commercial lease. Neither party wants anything to do with environmental liabilities and wants the other party to indemnify them from any potential environmental liability that could, under the most unlikely of circumstances, ever occur. The simple reality is that the LL should accept liability for any environmental conditions created by the LL and the T should accept liability for environmental conditions created by the T. That's the easy part.

What about pre-existing contamination? What about contamination migrating from off-site? What about contamination that is caused by a third party? Although neither LL nor T is likely to assume any of these liabilities in the lease, if the contamination interferes with T's use of the premises, T should insist on some kind of practical remedy (*i.e.*, termination rights). A more serious problem arises when environmental conditions created by a LL, T or a third party and the responsible party is insolvent. Who pays for the clean-up? As a LL, are you going to

² "Anti-Terrorism Laws", as referenced above, shall specifically include, but shall not be limited to, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 (aka, the USA Patriot Act); Executive Order 13224; the Bank Secrecy Act, 31 U.S.C. Section 5311 et. seq.; the Trading with the Enemy Act, 50 U.S.C. App. Section 1 et. seq.; the International Emergency Economic Powers Act, 50 U.S.C. Section 1701 et. seq.; sanctions and regulations promulgated pursuant thereto by the Office of Foreign Assets Control ("OFAC"), as well as laws related to the prevention and detection of money laundering in 18 U.S.C Sections 1956 and 1957.

lose your other tenants? As a T, what happens if you have to terminate your lease early? What about your TI investment? What recourse do you have under the lease? At law?

Mold is another issue. The liability for mold remediation (and possibly personal injury) usually centers upon the *cause or source* of the moisture that allowed the mold to grow in the first place. If the moisture can be attributed to a source that the LL had the obligation to maintain under the lease and the LL had notice of the moisture problem, and failed to respond promptly, the liability should fall on the LL. On the other hand, if the source of the moisture is under T's control (*i.e.*, a sink in the leased premises that regularly overflows) and the T fails to respond promptly or notify the LL of the need for repairs, the liability should fall on the T. In reality, any protections that a T seeks for mold can be extremely difficult to obtain. On the other hand, LL wants T to assume the obligation to provide LL with prompt notice of any moisture or water issues.

Sample Environmental Provisions:

Environmental Conditions.

(a) Defined Terms

Hazardous Substance(s) - all substances (whether naturally occurring or man-made) that upon release, exposure, ingestion or inhalation, are generally considered by the scientific community to be detrimental to human health or the environment, including, but not limited to, petroleum (and its by-products) and all substances regulated or classified as "hazardous" or "toxic" under any Environmental Law (as that term is defined below). Specifically excluded from this definition are those substances that are stored, used and discarded in unregulated quantities and that are routinely and customarily used by consumers, in commercial offices or in retail operations (*i.e.*, toner cartridges, consumer cleaning products, non-industrial batteries, etc.). [*Comment: Does this include mold? Why not identify mold specifically?*]

Environmental Law(s) - any federal, state, or local law, rule, regulation, order, regulatory guidance document or standard (including standards adopted by any nationally recognized professional organization that develops health and safety standards, including, but not limited to, ANSI, NIOSH and ASHRE) that pertains to the protection of human health or the environment, including, but not limited to, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. Sections 6901, *et seq.* [*The long, exhaustive list of every environmental law known to mankind is not necessary – the identification of CERCLA is necessary.*]

Environmental Claims - all liabilities, including, but not limited to claims, damages, causes of action, notices or orders originating from private parties or governmental entities that are related to Hazardous Substances or Environmental Laws, including the cost of assessment, response, compliance with, settling or defending same (including the reasonable and customary fees and expenses of attorneys, consultants, contractors and experts).

Environmental Condition - an Environmental Condition shall consist of: (a) a violation of any Environmental Law; and/or (b) any condition that creates a verifiable threat to human health, the environment, or that has an adverse effect on the value of the Premises and that can be attributed to the presence of Hazardous Substances on the Premises.

Premises - for the limited purposes of this Section, the term "Premises" shall include the leased space; the building in which the leased space is located (if the leased space is not the entire building); the building site; the land on which the building is located (both surface and subsurface), air, surface water and groundwater directly associated therewith.

(b) Representations and Warranties

Tenant represents and warrants to Landlord that Tenant, including Tenant's employees, agents and contractors, will not use, store, generate, treat, transport, release or dispose of any Hazardous Substance on or about the Premises in violation of any Environmental Law or cause or create an Environmental Condition on the Premises.

Landlord represents and warrants to Tenant that to the best of Landlord's knowledge: (a) no Hazardous Substances have been used, stored, generated, treated, transported (to or from), or released on or about the Premises, in violation of any Environmental Law; (b) the Premises are not subject to any pending or proposed Environmental Claims; and (c) Landlord, including Landlord's employees and agents, will not use, store, generate, treat, transport, release or dispose of any Hazardous Substance on or about the Premises in violation of any Environmental Law or cause or create an Environmental Condition on the Premises.

(c) Indemnification

The indemnification obligations of Tenant and Landlord set forth below shall survive the expiration or earlier termination of this Lease.

Tenant shall indemnify, defend and hold Landlord harmless against any Environmental Claims related to the Premises that are the direct or indirect result of Tenant's actions. Furthermore, Tenant shall remedy or compensate Landlord for any damages to Landlord's property (real or personal) resulting from any such action.

Landlord shall indemnify, defend and hold Tenant harmless from any Environmental Claims related to the Premises that are the direct or indirect result of Landlord's actions. Furthermore, Landlord shall remedy or compensate Tenant for any damages to Tenant's property (real or personal) resulting from any such action.

(d) Notice

Tenant shall provide Landlord with written notice within 24 hours of: (i) receipt of any communication from any third party concerning Hazardous Substances or an Environmental Condition that is in any way related to the Premises; or (ii) the occurrence of any event (including, but not limited to, a spill or release involving Hazardous Substances) that could reasonably be anticipated to result in the creation of an Environmental Condition on the Premises.

(e) Remedies

Upon Tenant's default under any of the representations or warranties set forth herein, Landlord, in addition to all rights and remedies provided at law or in equity, shall have all of the remedies for a default by Tenant that are set forth in this Lease.

Upon Landlord's default under any of the representations or warranties set forth herein, Tenant, in addition to all rights and remedies provided at law or in equity, shall have all of the remedies for a default by Landlord that are set forth in this Lease.

Destruction & Condemnation

If the building burns down, is destroyed in an earthquake or is taken by eminent domain, what are the continuing obligations of LL and T under the lease? Although this is an unlikely event, the consequences are severe and the relative rights and obligations of the parties should be contemplated in advance.

Sample Destruction & Condemnation Provision:

Damage or Destruction to Building.

- (a) In the event that the Premises or the Building Complex are damaged by fire or other casualty and the repairs necessary to restore the Premises or the Building Complex to substantially the same condition it was in before the casualty occurred can be completed within one hundred twenty (120) days after the occurrence of such casualty, Landlord [*to the extent that insurance proceeds are made available for this purpose,*] shall diligently proceed to repair the damage at Landlord's expense. Within thirty (30) days after such casualty Landlord shall provide Tenant with notice of the time required to complete such repairs ("Repair Notice"). Until such repairs are substantially completed, Tenant's Base Rent [*and Additional Rent*] shall be abated in an amount that justly and proportionately compensates Tenant for any disruption of Tenant's business operations. If Landlord estimates that it cannot make such repairs within one hundred twenty (120) days or if such repairs are not completed within one hundred twenty (120) days or if such repairs are not completed within one hundred twenty (120)

days, Tenant shall have the option of terminating this Lease by providing written notice to Landlord within thirty (30) days after Tenant's receipt of Landlord's Repair Notice or the date on which it becomes evident that such repairs will not be completed within one hundred twenty (120) days. Landlord shall not be obligated to repair any damage to Tenant's Property, including furniture, fixtures or equipment removable by Tenant under the provisions of this Lease or any improvements installed in the Premises by or on behalf of Tenant (with the exception of the original Tenant improvements installed by Landlord on behalf of Tenant, which [*to the extent that insurance proceeds are made available for this purpose,*] Landlord will repair at Landlord's expense).

- (b) If the Premises are substantially and materially damaged during the final year of the Term or the final year of any Renewal Term previously exercised by Tenant, Tenant shall have the right to terminate this Lease within thirty (30) days of the date of the casualty by sending written notice to Landlord. In any event, the total destruction of the Building shall automatically terminate this Lease.

Condemnation.

- (a) **Total Condemnation.** If the entire Premises should be taken for a public or quasi-public use under power of eminent domain, or transferred under threat thereof, this Lease shall terminate and Base Rent, Additional Rent and all other charges shall be apportioned as of the date of actual physical possession by the condemning authority.
- (b) **Partial Condemnation.** If any portion of the Premises, Building or Building Complex shall be permanently taken for a public or quasi-public use or purpose under the power of eminent domain, or voluntarily transferred under threat thereof, and such partial taking renders the remainder of the Premises, Building or Building Complex unsuitable for Tenant's business operations, Tenant may elect to either terminate this Lease as of the actual date of physical possession by the condemning authority, or to remain in possession of the remainder of the Premises, provided, however, that Tenant shall give Landlord written notice of its election within thirty (30) days after the date of Landlord's written notification to Tenant of the condemnation. In the event that Tenant elects to remain in possession, then Landlord shall reconstruct the remainder of the Premises, Building or Building Complex as appropriate, to a condition reasonably equivalent to the condition existing prior to such taking. Subject to an adjustment of Base Rent as set forth below, this Lease shall then continue full force and effect.
- (c) **Abatement of Base Rent.** If any portion of the Premises shall be taken for a public or quasi-public use or purpose and Tenant elects to remain in possession as provided above, the Base Rent shall be equitably adjusted as of the date of such taking and during any period of repair or reconstruction.
- (d) **Condemnation of Common Area.** If any portion of the common area in the Building Complex shall be taken for a public or quasi-public use under the power

of eminent domain, or transferred under threat thereof, and such taking deprives Tenant of reasonable access to the Premises or sufficient parking, then Tenant shall have the right to terminate this Lease by providing Landlord at least thirty (30) days written notice.

- (e) **Damages Awarded.** Except as otherwise provided herein, all damages awarded on account of any condemnation or taking, or transfer under threat thereof, under the power of eminent domain, of the Premises, the Building Complex, or any portion thereof, shall be the sole property of Landlord; provided, however, that Tenant shall be entitled to receive any award made for the taking of any of Tenant's Property under the power of eminent domain; for damages caused thereto; for relocation costs, and/or for interruption of Tenant's business.
- (f) **Effect of Termination.** In the event this Lease is terminated pursuant to any of the provisions of this section, the effective date of such termination shall be the date upon which Tenant vacates the Premises. All Rent, Additional Rent and other charges payable on the part of Tenant to Landlord hereunder shall be paid through the effective date of such termination. After such payment, and as of the effective date of such termination, the parties shall thereupon be released from all further liability hereunder, except that Landlord shall refund any security deposit made by Tenant and make an equitable refund to Tenant of any unearned or unused rental that was paid in advance.
- (g) **Temporary Condemnation.** If any part of the Premises, common area, or other portion of the Building, or any interests or rights of use therein are taken for a public or quasi-public use or purpose, or under or in connection with the threat thereof, for a limited period of time ("**Temporary Taking**"), the Base Rent for the part of the Premises not taken shall be abated in an amount that justly and proportionately compensates Tenant for any disruption of Tenant's business operations that occurs as a result of the Temporary taking. If the Temporary Taking is of such a nature that it prevents Tenant from operating its business in the Premises, and if the Temporary Taking exceeds a consecutive period of ninety (90) days, Tenant may terminate this Lease at any time within thirty (30) days after possession is taken by providing written notice thereof to Landlord.

Default & Remedies

If a really serious problem arises with the premises, with a T or with a LL, what can you do about it? Is legal action your only recourse (which means a lot of wasted time and money!) or do you have any practical remedies?

Sample Default & Remedies Provision:

Default.

- (a) **Tenant Defaults.** The following events (herein referred to as an "Event of Default") shall constitute a default by Tenant hereunder:
- (1) Tenant shall fail to pay when due any installment of Rent, Additional Rent or any other amounts payable hereunder and such failure shall continue for a period of ten (10) days after [*Tenant's receipt of written notice thereof from Landlord*] the date such payment was due;
 - (2) This Lease of the Premises or any part thereof shall be taken upon execution or by other process of law directed against Tenant, or shall be taken upon or subject to any attachment at the instance of any creditor or claimant against Tenant, and said attachment shall not be discharged or disposed of within ninety (90) days after the levy thereof;
 - (3) Tenant shall file a petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency act of any state or foreign country, or shall voluntarily take advantage of any such law or act by answer or otherwise, or shall be dissolved or shall make a general assignment for the benefit of creditors;
 - (4) Involuntary proceedings under any such bankruptcy law or insolvency act or for the dissolution of Tenant shall be instituted against Tenant, or a receiver or trustee shall be appointed for all or substantially all of the property of Tenant, and such proceedings shall not be dismissed or such receivership or trusteeship vacated within ninety (90) days after such institution or appointment;
 - (5) Tenant shall fail to perform any of the other agreements, terms, covenants or conditions hereof on Tenant's part to be performed (other than the obligation to pay Rent or any other charges payable hereunder), and such nonperformance shall continue for a period of thirty (30) days after receipt of Tenant's receipt of written notice from Landlord; provided, however, that if Tenant cannot reasonably cure such nonperformance within thirty (30) days, Tenant shall not be in default if it commences to cure such default within said thirty (30) days and diligently pursues the same to completion;
 - (6) Tenant shall fail to obtain the release of any mechanic's lien or other type of lien attributable to an act or omission of Tenant, as required herein.
- (b) **Landlord's Remedies.** Upon the occurrence of an Event of Default, and in addition to any other remedies now or hereafter available to Landlord at law or in equity, Landlord shall have the right, at its election, then or at any time thereafter and while any such Event of Default shall continue, either:

- (1) To give Tenant written notice of Landlord's intention to terminate this Lease on the date specified therein, which date shall be no sooner than thirty (30) days after Tenant's receipt of such notice. On the date specified in such notice, Tenant's right to possession of the Premises shall cease and this Lease shall thereupon be terminated without prejudice to Landlord's rights as described below; or
 - (2) Should Landlord elect to terminate this Lease and re-enter the Premises, Landlord shall exert a commercially reasonable, good faith effort to mitigate Landlord's damages and relet the Premises or any part thereof for such term (which may be greater or less than the period which would otherwise have constituted the balance of the Term of this Lease) and on such commercially reasonable conditions (which may include concessions of free rent [*not to exceed sixty (60) days,*] and commercially reasonable allowances for alteration and repair of the Premises) as Landlord, in its sole and absolute [*reasonable*] discretion, may determine, and Landlord may collect and receive the rents therefor.
 - (3) In the event that Landlord elects to terminate this Lease and take possession of the Premises as permitted in this Section ____, Tenant shall pay to Landlord: (i) the Rent and other sums as herein provided, which would be payable hereunder if such termination or repossession had not occurred, less; (ii) the net proceeds, if any, of any reletting of the Premises after deducting all Landlord's expenses actually incurred in connection with such reletting, including all reasonable and customary repossession costs, brokerage commissions, court costs, attorneys' fees, repair costs and expenses of preparing the Premises for such reletting. If, in connection with any reletting, the new lease term extends beyond the Term, or the premises covered thereby include other premises not part of the Premises, a fair and equitable apportionment of the rent received from such reletting and the expenses incurred in connection therewith as provided aforesaid will be made in determining the net proceeds from such reletting. Tenant shall pay such rents and other sums to Landlord monthly on the days on which the Base Rent would have been payable hereunder if such termination or repossession had not occurred.
 - (4) After an Event of Default by Tenant, Landlord may sue for or otherwise collect all rents, issues and profits payable under all subleases on the Premises, including those past due and unpaid.
 - (5) After an Event of Default by Tenant, Landlord may, without terminating this Lease, enter upon the Premises without prejudice to any other remedies, and do whatever Tenant is obligated to do under the terms of this Lease. Tenant agrees to reimburse Landlord on demand for any reasonable expenses that Landlord may incur in effecting compliance with the Tenant's obligations under this Lease.
 - (6) No failure by Landlord to insist upon the strict performance of any agreement, term, covenant or condition hereof or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent during the continuance of any such breach, shall constitute a waiver of such agreement, term, covenant or condition. No waiver of any breach shall affect or alter this Lease, but each and every agreement, term, covenant and condition hereof shall continue in full force and effect with respect to any other than existing or subsequent breach thereof.
 - (7) Nothing contained in this Section __ shall limit or prejudice the right of Landlord to prove and obtain as liquidated damages in any bankruptcy, insolvency, receivership, reorganization or dissolution proceeding, an amount equal to the maximum allowed by any statute or rule of law governing such proceeding and in effect at the time when such damages are to be proved, whether or not such amount be greater, equal to or less than the amounts recoverable, either as damages or rent, referred to in any of the preceding provisions of this Section __.
 - (8) Whenever any Base Rent, Additional Rent or any other sums due hereunder remain unpaid more than ten (10) days after the due date thereof, Tenant shall pay to Landlord an administrative charge equal to five percent (5%) of the amount due to compensate Landlord for the costs and expenses associated with handling a delinquent account.
 - (9) In addition to all other rights and remedies, Landlord shall be entitled to receive from Tenant the unamortized portion of the value of any Tenant Improvements paid for by Landlord or Leasing Commissions paid by Landlord; it being understood and agreed that such payment was made on the condition and basis that Tenant fully perform all obligations and covenants under this Lease for the Term. The amortization rate to be used in this calculation shall be 8% per annum amortized over the Term of this Lease. The value of the Tenant Improvements shall be determined based on the actual cost of the completed Tenant Improvements.
- (c) Landlord's Default; Tenant's Remedies. In the event that Landlord fails to fulfill or perform any of Landlord's obligations as set forth in this Lease, Tenant may:
- (1) Provide Landlord with written notice of any such failure and the action required to correct such failure. In the event Landlord fails to commence such work and diligently pursue it to completion within ten (10) days after receipt of Tenant's notice, then Tenant shall have the right, but not the obligation, to perform such acts and expend on Landlord's account, such funds to perform such work as is reasonably required. The funds so expended shall be due and payable to Tenant by Landlord within thirty (30) days after receipt of Tenant's invoice for the costs incurred. The invoice shall include reasonable documentation of all costs incurred. In the event Landlord fails to pay any such invoice within thirty (30) days as provided herein, Tenant may deduct the amount due from the next

installment or installments of Base Rent due to Landlord [*this set-off provision can be problematic for Landlords due to certain mortgage provisions*]; or,

- (2) Should any Landlord default render the Premises unsuitable for its Permitted Use, in whole or in part, for a period of three (3) or more consecutive days, Base Rent shall be equitably abated for the total number of days that the Premises are not suitable for the Permitted Use set forth in this Lease [*once again, this set-off provision can be problematic for Landlords due to certain mortgage provisions*].
- (d) Each right and remedy provided for in this Lease shall be cumulative and in addition to every other right or remedy provided for in this Lease, now or hereafter existing at law or in equity or by statute or otherwise, including, but not limited to, suits for injunctive or declaratory relief. The exercise or commencement of the exercise by Landlord or Tenant of any one or more of the rights or remedies provided for in this Lease, shall not preclude the simultaneous or subsequent exercise by Landlord or Tenant or any other rights or remedies provided for herein. All costs incurred by Landlord or Tenant in connection with collecting any amounts or damages owing by Landlord or Tenant pursuant to the provisions of this Lease or to enforce any provision of this Lease, including by way of example, but not limitation, reasonable attorneys' fees and court costs (from the date any such matter is turned over to an attorney), shall also be recoverable by the prevailing party.

Holdover

Your current lease expires, but construction of your new premises is not completed. Can you holdover in your current space? What's it going to cost? What are the risks? If you don't negotiate a holdover provision in your lease at commencement, you are at the LL's mercy. From the LL's perspective, you want to be able to recover damages if a prospective tenant is lost when an existing tenant holds over or to be able to proceed with a legal eviction if a quality tenant is waiting to occupy the space.

Sample Holdover Provision:

Holding Over.

Tenant shall vacate the Premises upon the expiration or earlier termination of this Lease [, *except as the parties may otherwise agree*]. If Tenant does not vacate the Premises upon the expiration or earlier termination of this Lease and holds over with [*or without*] Landlord's consent, Tenant shall become a tenant from month-to-month, subject to all of the terms of this Lease as may reasonably be applicable to such month-to-month tenancy, except that Tenant shall pay monthly Base Rent (plus all other charges), in an amount that is equal to one hundred ten percent (110%)

of the Base Rent plus all other charges for the first six (6) months and, thereafter, one hundred twenty five percent (125%) of the Base Rent (plus all other charges) as provided herein (the "Holdover Rent") [*This is a Tenant friendly clause. Most LLs will want T to pay 200% or more as well as reserving all other remedies available to get possession of the premises if necessary.*]. Such tenancy shall continue until terminated by Landlord or Tenant by providing the other party with at least thirty (30) days written notice prior to the last day of the calendar month intended as the date of termination of such month-to-month tenancy. Such Holdover Rent shall be Landlord's sole and exclusive remedy in the event of a holdover by Tenant [*LL will want to avoid this limitation of remedies, but this is critical to the T. T could be held liable for consequential damages arising from LLs loss of a major tenant due to the holdover.*].

FINANCING & LOAN DOCUMENTS

Lender's Position

- Maintain the Collateral – Lender's primary security in the event of a loan default is the property and other collateral under the loan. It is in Lender's best interest to make sure that Borrower has the funds available to perform routine maintenance. This is usually accomplished with various escrow accounts controlled by Lender.
- Make Payments on Time – Lender not only wants the loan payments made on time, but Lender wants Borrower to make insurance and tax payments on time as well. Again, this is usually accomplished with escrow accounts controlled by the Lender.
- Keep the Collateral Adequately Insured – It only makes sense that if the Lender is relying on the collateral for security, Lender wants that collateral adequately insured. Lender also wants to control the application of any insurance proceeds (will insurance proceeds be spent to restore the property or to pay down the loan balance?).

Borrower's Position

- Get Notice of Defaults & Opportunity to Cure – Default remedies can be severe. Borrowers should insist on written notice and a reasonable opportunity to cure the defaults. Most Lenders will not provide a notice or cure period for monetary defaults.
 - Non-Recourse w/No Carve-Outs – Most commercial mortgage loans are “non-recourse”, meaning there is no personal liability for members, managers or shareholders; only the borrowing entity is liable under the loan documents. However, most loan documents also contain what are called “carve-outs”, which are carve-outs from the non-recourse provision. For the specified carve-outs, individuals and guarantors can be held personally liable. For that reason, it is in the Borrower's best interest to limit the carve-outs as much as possible.
 - Flexibility in Leasing – Most loan documents contain a provision that requires the Lender's consent to major (if not all) leases. This may not only add significant time and complexity to the lease negotiation process, but it could cost the Borrower a key tenant.
 - Prompt Responses from Lender – This applies to every matter that requires the Lender's review, consent or approval (*i.e.*, leases, SNDAs, etc.). Get a reasonable time limit on the response time from the Lender.
- Key Risk Management Clauses In Commercial Mortgage Loans
 - Defaults & Remedies
 - Insurance
 - Escrow Accounts
 - Maintenance; Environmental
 - Non-Recourse Provisions & Carve-Outs

Defaults & Remedies

Sample Promissory Note Provision:

Default.

If Borrower defaults in the payment of principal, interest and/or any other obligations arising under this Note or any of the other Loan Documents, or if Borrower defaults in the performance of any of the other terms, covenants or conditions contained in this Note or in any of the other Loan Documents, then, at the option of Lender, the entire outstanding principal balance of this Note (together with all accrued unpaid interest) and all other obligations arising under this Note or any of the other Loan Documents, may be accelerated by Lender and become immediately due and payable, regardless of the Maturity Date. All amounts then due shall bear interest after maturity (whether by acceleration or otherwise) at the lesser of either: (i) the highest rate of interest then allowed by applicable laws; or (ii) the then applicable interest rate of this Note plus five hundred (500) basis points.

During the existence of any default, Lender may apply any funds received, including but not limited to insurance proceeds or condemnation awards, to any amount then due and owing under this Note or any of the other Loan Documents, as Lender may determine in Lender's sole and absolute discretion. Neither this right nor the exercise of this right, shall serve to cure the default or preclude Lender from exercising its option to accelerate the entire Loan.

With respect to any Non-Monetary Default (as hereinafter defined), Lender's right to accelerate the maturity of the Loan shall be conditioned upon Lender giving Borrower written notice of such Non-Monetary Default and a thirty (30) day period, after the date of such notice, within which to cure such Non-Monetary Default, unless such Non-Monetary Default cannot reasonably be cured within said thirty (30) day time period, in which event Borrower shall have an extended period of time to complete the cure, provided that has commenced to cure the default within said thirty (30) day period and Borrower is, in Lender's sole judgment, not diminishing or impairing the value of the Property and is diligently pursuing a cure to completion. Any notice required hereunder shall be given as provided in the Mortgage. Lender shall have no obligation to give Borrower notice of, or any period to cure, any Monetary Default (as hereinafter defined) or any Incurable Default (as hereinafter defined) prior to exercising Lender's right to accelerate the maturity of the Loan and to exercise all other rights and remedies available to Lender at law or in equity. “Monetary Default” shall mean any default that can be cured by the payment of money, including but not limited to, the payment of principal and interest due under this Note and the payment of taxes, assessments and insurance premiums when due (as provided in the Mortgage). “Non-Monetary Default” shall mean any default that is not a Monetary Default or an Incurable Default. “Incurable Default” shall mean: (i) any voluntary or involuntary sale, assignment, mortgaging or transfer of the Property or interest therein in violation of the covenants of the Mortgage; or (ii) if Borrower, or any person or entity comprising Borrower, should make an assignment for the benefit of creditors, become insolvent, or file (or have filed against it) a petition in bankruptcy (including but not limited to, a petition seeking a rearrangement or reorganization).

During any period of default and regardless of any cure period applicable to such default, the Mortgage or any of the other Loan Documents in which either: (i) Borrower is permitted to take an action without Lender's consent; or (ii) Lender's consent is to be exercised reasonably, Lender's consent shall be required and shall be granted or withheld in Lender's sole and absolute discretion.

Sample Mortgage Provision:

Time Is Of The Essence: Monetary And Non-Monetary Defaults.

23. It is understood by Borrower that time is of the essence hereof in connection with all obligations of Borrower herein, in the Note, the Assignment and any of the other Loan Documents.

Lender, at its sole option, may declare the Loan evidenced by the Note, as well as all other monies secured hereby, including, without limitation, all Prepayment Premiums (to the extent permitted by the laws of the State of [insert State]) and late payment charges, to be forthwith due and payable, in the event:

- (i) Borrower defaults in the payment of any monthly installment of the Note, whether of principal or interest, or both, or in the payment of any other sums of money referred to herein or in the Note, promptly and fully when the same shall be due, without notice or demand from Lender to Borrower in regard to such Monetary Default (as hereinafter defined);
- (ii) Borrower breaches or defaults on any one of the terms, covenants, conditions and agreements of the Note, this Mortgage, the Assignment or any other Loan Documents evidencing or securing the Note or the Loan; or in the event that each and every one of said terms, covenants, conditions and agreements is not otherwise either duly, promptly and fully discharged or performed, and any such Non-Monetary Default (as hereinafter defined) remains uncured for a period of thirty (30) days after Written Notice thereof has been delivered from Lender to Borrower; unless such Non-Monetary Default cannot be cured within said thirty (30) day period, in which event Borrower shall have an extended period of time to complete cure, provided that action to cure such Non-Monetary Default is promptly commenced within said thirty (30) day period, and Borrower is, in Lender's sole judgment, not diminishing or impairing the value of the Property, and is diligently pursuing a cure to completion.
- (iii) Any default occurs in the performance of any covenant or obligation of Borrower or any other party under any indemnity or guaranty delivered to Lender in connection with the Loan and such default continues beyond the expiration of applicable notice and cure periods.

Upon the occurrence of any one of the above events, and at the option of Lender, the principal of and the interest accrued on the Loan (as evidenced by the Note) and all other sums secured by this Mortgage shall immediately become due and payable as if all of said sums of money were originally stipulated to be paid on such day. In addition, Lender may avail itself of

all rights and remedies provided by law and may foreclose or prosecute a suit at law or in equity as if all monies secured hereby had matured prior to its institution, anything in this Mortgage or in the Note to the contrary notwithstanding. Lender shall have no obligation to give Borrower notice of, or any period to cure, any Monetary Default or any Incurable Default (as hereinafter defined) prior to exercising its rights, powers, privileges and remedies to accelerate the maturity of the Loan secured hereby.

As used herein, the term "Monetary Default" shall mean any default which can be cured by the payment of money such as, but not limited to, the payment of principal and interest due under the Note, taxes, assessments and insurance premiums when due as provided in this Mortgage. As used herein, the term "Non-Monetary Default" shall mean any default that is not a Monetary Default or an Incurable Default. As used herein, the term "Incurable Default" shall mean either: (i) any voluntary or involuntary sale, assignment, mortgaging, encumbering or transfer in violation of the covenants contained herein; or (ii) if Borrower, or any person or entity comprising Borrower or any guarantor or indemnitor of the Loan, should make an assignment for the benefit of creditors, become insolvent, or file a petition in bankruptcy (including but not limited to, a petition seeking a rearrangement or reorganization) which is not dismissed within thirty (30) days after the filing of same.

Lender may institute an action to foreclose this Mortgage as to the amount so declared due and payable, and thereupon, the Property shall be sold according to law to satisfy and pay the same, together with all costs, expenses and allowances thereof, including, without limitation, Reasonable Attorneys' Fees. The Property may be sold in one parcel, several parcels or groups of parcels, and Lender shall be entitled to bid at the sale, and, if Lender is the highest bidder for the Property or any part or parts thereof, Lender shall be entitled to purchase the same. The failure or omission on the part of Lender to exercise the option for acceleration of maturity of the Note and foreclosure of this Mortgage following any default as aforesaid or to exercise any other option or remedy granted hereunder to Lender when entitled to do so in any one or more instances, or the acceptance by Lender of partial payment of the Loan secured hereby, whether before or subsequent to Borrower's default hereunder, shall not constitute a waiver of any such default or the right to exercise any such option or remedy, but such option or remedy shall remain continuously in force. Acceleration of the maturity of the Note, once claimed hereunder by Lender, at the option of Lender, may be rescinded by written acknowledgment to that effect by Lender, but the tender and acceptance of partial payments alone shall not in any way either affect or rescind such acceleration of maturity, nor act as a waiver, accord and satisfaction, modification, novation or similar defense.

Insurance

Sample Mortgage provision:

Hazard Insurance.

8. To continuously, during the term of this Mortgage, keep the Improvements, the Fixtures and Personal Property, now or hereafter existing, erected, installed and located in or upon the Real Property, insured with extended coverage insurance against loss or damage resulting from fire, windstorm, flood, sinkhole, earthquake and such other hazards, casualties, contingencies and perils including, without limitation, other risks insured against by persons operating like properties in the locality of the Property, or otherwise deemed necessary or advisable by Lender, on such forms and with such deductibles as may be required by Lender, covering the Property in the amount of the full replacement cost thereof, less excavating and foundation costs, and covering all loss or abatement of rental or other income, without a provision for co-insurance, in an amount equal to the scheduled rental income of the Property for at least twelve (12) months, or if applicable, business interruption insurance in an amount sufficient to pay debt service on the Note, operating expenses, taxes and insurance on the Property for a period of twelve (12) months, and covering loss by flood (if the Property lies in a Special Flood Hazard Area as designated on the Department of Housing and Urban Development's Maps, or other flood prone designation) in an amount equal to the outstanding principal balance of the Loan secured hereby or such other amount as approved by Lender, and earthquake insurance with a deductible amount of no more than ten percent (10%) of the policy amount, if the Property is located within one-half (1/2) mile of an Alquist-Priolo Special Earthquake Study Zone or if, in the judgement of Lender's inspecting architect, the Property lies in an area of anticipated significant seismic activity. All such insurance shall be carried with a company or companies licensed to do business in the state where the property is located, which is acceptable to Lender, which company or companies shall have a rating at the time this Mortgage is executed equivalent to at least A:X as shown in the most recent Best's Key Rating Guide. The original policy or policies and renewals thereof (or, at the sole option of Lender, duplicate originals or certified copies thereof), together with receipts evidencing payment of the premium therefor, shall be deposited with, held by and are hereby assigned to, Lender as additional security for the Loan secured hereby. Each such policy of insurance shall contain a noncontributing loss payable clause in favor of and in a form acceptable to Lender, and shall provide for not less than thirty (30) days prior Written Notice to Lender of any intent to modify, non-renew, cancel or terminate the policy or policies, or the expiration of such policies of insurance. If the insurance required under this Paragraph 8 or any portion thereof is maintained pursuant to a blanket policy, Borrower shall furnish to Lender a certified copy of such policy, together with an original Evidence of Insurance Certificate (Acord Form 27) for hazard insurance indicating that Lender is an insured under such policy in regard to the Property and showing the amount of coverage apportioned to the Property, which coverage shall be in an amount sufficient to satisfy the requirements hereof. Not less than fifteen (15) days prior to the expiration dates of each policy required of Borrower hereunder, Borrower will deliver to Lender a renewal policy or policies marked "premium paid" or accompanied by other evidence of payment and renewal satisfactory to Lender. In the event of foreclosure of this Mortgage or other transfer of title to the Property in extinguishment of the Loan secured hereby, all right, title and interest of Borrower, in and to any insurance policies then in force including any rights to unearned premiums, and in and to insurance proceeds then payable, shall pass to the purchaser or grantee.

In the event of loss by reason of hazards, casualties, contingencies and perils for which insurance has been required by Lender hereunder, Borrower shall give immediate notice thereof

to Lender. Lender is hereby irrevocably appointed attorney-in-fact coupled with an interest, for Lender to, at its option, make proof of loss and/or to file a claim thereunder. Each insurance company concerned is hereby notified, authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and Lender jointly, and Borrower hereby authorizes Lender to adjust and compromise any losses for which insurance proceeds are payable under any of the aforesaid insurance policies and, after deducting the costs of collection, to apply the proceeds of such insurance, at its option either: (a) to the restoration or repair of the insured Improvements, and the Fixtures and Personal Property, provided that, in the opinion and sole discretion of Lender, such restoration or repair is reasonably practical and, provided further, that, in the opinion and sole discretion of Lender, either: (i) the insurance proceeds so collected are sufficient to cover the cost of such restoration or repair of the damage or destruction with respect to which such proceeds were paid; or (ii) the insurance proceeds so collected are not sufficient alone to cover the cost of such restoration or repair, but are sufficient therefor when taken together with funds provided and made available by Borrower from other sources; in which event Lender shall make such insurance proceeds available to Borrower for the purpose of effecting such restoration or repair; but Lender shall not be obligated to see to the proper application of such insurance proceeds nor shall the amount of funds so released or used be deemed to be payment of or on account of the Loan secured hereby, or (b) to the reduction of the Loan secured hereby, notwithstanding the fact that the amount owing thereon may not then be due and payable or that said Loan is otherwise adequately secured, in which event such proceeds shall be applied at par against the Loan secured hereby and the monthly payment due on account of such Loan shall be reduced accordingly. None of such actions taken by Lender shall be deemed to be or result in a waiver or impairment of any equity, lien or right of Lender under and by virtue of this Mortgage, nor will the application of such insurance proceeds to the reduction of the Loan serve to cure any default in the payment thereof. In the event of foreclosure of this Mortgage or other transfer of title to the Property in extinguishment of the Loan secured hereby, all right, title and interest of Borrower in and to any insurance policies then in force including any rights to unearned premiums and in and to insurance proceeds then payable, shall pass to the purchaser or grantee.

In case of Borrower's failure to keep the Property properly insured as required herein, Lender, its successors or assigns, may, at its option (but shall not be required to) acquire such insurance as required herein at Borrower's sole expense.

Notwithstanding anything set forth in this Paragraph 8 to the contrary, in the event of loss or damage to the Property by fire or other casualty for which insurance has been required by Lender and provided by Borrower, and the amount of such loss or damage does not exceed fifty percent (50%) of the unpaid principal balance of the Note, Lender hereby agrees to allow the proceeds of insurance to be used for the restoration of the Property and to release such insurance proceeds to Borrower as such restoration progresses, provided:

(a) Borrower is not in default under any of the terms, covenants and conditions of this Mortgage, the Note or any of the other Loan Documents;

(b) The Improvements, after such restoration, shall be at least eighty percent (80%) leased pursuant to leases approved in writing by Lender;

(c) The plans and specifications for the restoration of the Property are approved in writing by Lender in advance;

(d) At all times during such restoration, Borrower has deposited with Lender funds which, when added to the insurance proceeds received by Lender, are sufficient to complete the restoration of the Property in accordance with the approved plans and specifications, and all applicable building codes, zoning ordinances, regulations and Accessibility Laws, and further, that the funds retained by Lender are sufficient to complete the restoration of the Property as certified to Lender by Lender's inspecting architect/engineer;

(e) Borrower provides suitable completion, payment and performance bonds, builders' all risk insurance, and all necessary licenses and permits for such restoration in form and amount acceptable to Lender;

(f) The insurer under such policies of fire or other casualty insurance does not assert any defense to payment under such policies against Borrower, any tenant, or third party of Borrower with regard to of the Property;

(g) Lender shall have the option, upon the completion of such restoration of the Property, to apply any surplus insurance proceeds remaining after the completion of such restoration, at par, to the reduction of the outstanding principal balance of the Note; notwithstanding the fact that the amount owing thereon may not then be due and payable or that said Loan is otherwise adequately secured;

(h) The funds held by Lender shall be disbursed no more often than once per month and in not more than five (5) increments of not less than Fifty Thousand and 00/100 Dollars (\$50,000.00) each, except the final disbursement of such funds which may be in an amount less than Fifty Thousand and 00/100 Dollars (\$50,000.00);

(i) Lender's obligation to make any such disbursement shall be conditioned upon Lender's receipt of written certification from Lender's inspecting architect/engineer (whose fees shall be reimbursed to Lender by Borrower) that all construction and work for which such disbursement is requested has been completed in accordance with the approved plans and specifications and in accordance with all applicable building codes, zoning ordinances and all other local, state or federal laws, codes, ordinances, statutes, rules and regulations, and, further, that Borrower has deposited with Lender sufficient funds to complete such restoration in accordance with subparagraph 8(d) above; and

(j) Lender shall be entitled to require and to impose such other conditions to the release of such funds as would be customarily or reasonably be required and imposed by local construction lenders for a project of similar nature and cost.

Liability Insurance.

9. To carry and maintain such commercial general liability insurance as may from time to time be required by Lender, taking into consideration the type of property being insured and the corresponding liability exposure, on forms, with deductibles, in amounts and with such

company or companies licensed to do business in the state where the Property is located and as may be acceptable to Lender. All such commercial general liability insurance shall be carried with a company or companies which have a rating at the time this Mortgage is executed equivalent to at least A:X as shown in the most recent Best's Key Rating Guide. The original policy or policies and all renewals thereof (or, at the sole option of Lender, duplicate originals or certified copies thereof), together with a Certificate of Insurance (Acord Form 25S) and receipts evidencing payment of the premium therefor, shall be deposited with, held by and are hereby assigned to, Lender as additional security for the Loan secured hereby. Such policy or policies of insurance shall name Lender as an additional insured and shall provide for not less than thirty (30) days prior Written Notice to Lender of any intent to modify, cancel, non-renew, or terminate the policy or policies or the expiration of such policy or policies of insurance. Not less than fifteen (15) days prior to the expiration dates of each policy or policies required of Borrower hereunder, Borrower will deliver to Lender a renewal policy or policies marked "premium paid" or accompanied by other evidence of payment and renewal satisfactory to Lender. In the event of foreclosure of this Mortgage or other transfer of title to the Property in extinguishment of the Loan secured hereby, all right, title and interest of Borrower, in and to any insurance policies then in force including any rights to unearned premiums, and in and to insurance proceeds then payable, shall pass to the purchaser or grantee.

In case of Borrower's failure to keep the Property properly insured as required herein, Lender, its successors or assigns, may, at its option (but shall not be required to) acquire such insurance as required herein at Borrower's sole expense.

Escrow Accounts

Sample Mortgage Provision:

Funds Held By Lender For Taxes, Assessments, Insurance Premiums, And Other Charges.

17. In order to more fully protect the security of this Mortgage, Borrower shall deposit with Lender, together with and in addition to each monthly payment due on account of the Loan evidenced by the Note, an amount equal to one-twelfth (1/12) of the annual total of such taxes, assessments, insurance premiums and other charges (all as estimated by Lender in its sole discretion) so that, at least thirty (30) days prior to the due date thereof, Lender shall be able to pay in full all such taxes, assessments, insurance premiums and other charges as the same shall become due. Lender may hold the sums so deposited without paying interest, commingle same with its general funds and/or apply the same to the payment of said taxes, assessments, insurance premiums or other charges as they become due and payable. If at any time the funds so held by Lender are insufficient to pay such taxes, assessments, insurance premiums or other charges as they become due and payable, Borrower shall immediately, upon notice and demand by Lender, deposit with Lender the amount of such deficiency. The failure on the part of Borrower to do so shall entitle Lender, at Lender's sole option, to make such payments in accordance with the rights and pursuant to the conditions elsewhere provided in this Mortgage. Whenever any default exists under this Mortgage, Lender may, at Lender's sole option but without an obligation so to do, apply any funds so held by Lender pursuant to this Paragraph 17 toward the payment of the Loan secured hereby, notwithstanding the fact that the amount owing thereon may not then

be due and payable or that the Loan may otherwise be adequately secured, in such order and manner of application as Lender may elect.

Maintenance; Environmental

Sample Mortgage Provision:

Preservation and Maintenance of Property; Accessibility; Hazardous Waste.

3. (a) To keep all Improvements now existing or hereafter erected on the Real Property in good order and repair, and not to do or permit any waste, impairment or deterioration thereof or thereon, nor to alter, remove or demolish any of the Improvements or any Fixtures and Personal Property attached or appertaining thereto, without the prior written consent of Lender, nor to initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance or other public or private restrictions limiting or defining the uses which may be made of the Property or any part thereof, nor to do or permit any other act whereby the Property shall become less valuable, be used for purposes contrary to applicable law or be used in any manner which will increase the premium for or result in a termination or cancellation of the insurance policies hereinafter required to be kept and maintained on the Property. In furtherance of, and not by way of limitation upon, the foregoing covenant, Borrower shall effect such repairs as Lender may reasonably require, and from time to time make all needful and proper replacements so that the Improvements, Appurtenances, Fixtures and Personal Property will, at all times, be in good condition, fit and proper for the respective purposes for which they were originally erected or installed. In connection with the making of such repairs, Borrower shall use contractors who are properly licensed, who carry workers' compensation insurance and appropriate liability insurance, who generally have a good reputation for completing their work in a neat, prompt and workmanlike manner, and use only new or re-manufactured goods of a quality as good or better than that originally used on the Property. As provided herein, Borrower shall insure that no liens are filed against the Property that relate in any way to the repair work provided for herein.

(b) Borrower at all times shall keep the Property and ground water of the Property free of Hazardous Materials (as hereinafter defined) and any liens arising in connection therewith. Borrower shall not and shall not knowingly permit its tenants or any third party requiring the consent of Borrower to enter the Property, to use, generate, manufacture, treat, store, release, threaten release, transport on or over, emit or dispose of Hazardous Materials in, on, over, under or about the Property including the ground water of the Property in violation of any federal, regional, state or local law, code, ordinance, statute, rule, regulation, decision or order currently in existence or hereinafter enacted or rendered (hereinafter collectively referred to as "Hazardous Waste Laws"). Borrower shall give Lender prompt Written Notice (as hereinafter defined) of any claim by any person, entity, or governmental agency that a significant release or disposal of Hazardous Materials has occurred in, on, over, under or about the Property, including the ground water of the Property, in excess of those permitted by the Hazardous Waste Laws, whether caused by the Borrower, tenant or any third party. Borrower, through its professional engineers and at Borrower's sole cost, shall promptly and thoroughly investigate any suspected release of Hazardous Materials in, on, over, under or about the Property, including the ground water of the Property. Borrower shall forthwith remove, repair, remediate, clean up,

and/or detoxify any Hazardous Materials found in, on, over, under or about the Property or in the ground water of the Property to the extent such actions are required by any applicable Hazardous Waste Laws, and whether or not Borrower was responsible for the existence of the Hazardous Materials in, on, over, under or about the Property or the ground water of the Property. Hazardous Materials shall include, but not be limited to, substances defined as "hazardous substances," "hazardous materials," or "toxic substances" in The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by The Superfund Amendments and Reauthorization Act of 1986, The Hazardous Materials Transportation Act, The Resource Conservation and Recovery Act of 1976, as amended by The Used Oils Recycling Act of 1980, The Solid Waste Disposal Act amendment of 1984, The Toxic Substances Control Act, The Clean Air Act, The Clean Water Act, or in any other Hazardous Waste Laws. In addition, Borrower shall not incorporate any underground storage tanks into the Real Property without the prior written consent of Lender, and shall insure that all tanks currently on the Real Property comply with current Hazardous Waste Laws and underground storage tank regulations and are properly registered.

Borrower hereby agrees to indemnify Lender and hold Lender harmless from and against any and all losses, liabilities, damages, injuries, costs, expenses, fines, fees and claims of any and every kind whatsoever paid, incurred or suffered by, or asserted against, Lender for, with respect to, or as a direct or indirect result of, the presence in, on, over, under or about, or the escape, seepage, leakage, spillage, discharge, emission or release from, the Property of any Hazardous Materials (including, without limitation, any losses, liabilities, damages, injuries, costs, expenses or claims asserted or arising under any Hazardous Waste Laws), regardless of the source of origination and whether or not caused by, or within the control of, Borrower.

Liability under this Paragraph 3(b) and similar provisions in this Mortgage and the other Loan Documents concerning Hazardous Materials shall survive repayment of the Note and satisfaction of this Mortgage; provided, however, Borrower shall have no liability under this Paragraph 3(b) regarding Hazardous Materials if either (i) the Property becomes contaminated subsequent to Lender's acquisition of the Property by foreclosure, acceptance by Lender of a deed in lieu thereof, or subsequent to any transfer of ownership of the Property which was approved or authorized by Lender in writing, pursuant to this Mortgage, provided that such transferee assumes in writing all of the obligations of Borrower with respect to Hazardous Materials pursuant to the Loan Documents, or (ii) at such time Borrower provides Lender with an environmental assessment report acceptable to Lender, in Lender's sole discretion, showing the Property to be free of Hazardous Materials and not in violation of any Hazardous Waste Laws. The burden of proof under this Paragraph 3(b) with regard to establishing the date upon which any Hazardous Materials was released in, on, over, under or about the Property shall be upon Borrower.

(c) Borrower at all times shall maintain the Property in full compliance with all federal, state, county, regional or local laws, codes, ordinances, rules, regulations, decisions and orders currently in existence or hereafter enacted or rendered, governing accessibility for the disabled, including but not limited to: The Architectural Barriers Act of 1968; The Rehabilitation Act of 1973; The Fair Housing Act of 1988; The Americans with Disabilities Act; and The (insert State) Elimination of Architectural Barriers Act (hereinafter collectively referred to as the "Accessibility Laws").

Borrower hereby agrees to indemnify Lender and hold Lender harmless from and against any and all losses, liabilities, damages, injuries, costs, expenses and claims of any and every kind whatsoever paid, incurred or suffered by, or asserted against Lender for, with respect to, or as a direct or indirect result of, the non-compliance of the Property with the Accessibility Laws whether or not caused by, or within the control of, Borrower.

Liability under this Paragraph 3(c) and similar provisions in this Mortgage and the other Loan Documents concerning Accessibility Laws shall survive repayment of the Note and satisfaction of this Mortgage; provided, however, shall not be liable under this Paragraph 3(c) for compliance with any Accessibility Laws if such Accessibility Laws first become effective, or such violations result from alterations or improvements to the Property that are performed subsequent to Lender's acquisition of the Property by foreclosure or acceptance of a deed in lieu thereof or subsequent to any transfer which was approved or authorized by Lender pursuant to this Mortgage, provided that such transferee assumes in writing all obligations pertaining to the Accessibility Laws pursuant to this Mortgage and the other Loan Documents.

(d) Lender, and/or its agents, shall have the right and shall be permitted, but shall not be required, at all reasonable times, to enter upon and inspect the Property to insure compliance with the foregoing covenants, and any and all other terms, covenants, conditions and agreements set forth in this Mortgage.

Non-Recourse Provisions & Carve-Outs

Sample Promissory Note Exculpation provision (an almost identical provision is also included in the Mortgage):

Exculpation.

The liability of Borrower with respect to the payment of principal and interest under this Note shall be "non-recourse" and Lender's source of satisfaction of Borrower's obligations under this Note and the other Loan Documents shall be limited to the Property and Lender's receipt of the rents, issues and profits from the Property and any other collateral pledged as security, now or hereafter held by Lender. Lender shall not seek to procure payment out of any other assets of Borrower or any person or entity comprising Borrower, or to seek judgment (except as hereinafter provided) for any funds that are or may be payable under this Note or any of the other Loan Documents, as well as any claim or judgment (except as hereafter provided) for any deficiency remaining after foreclosure of the Mortgage. Nothing herein contained shall be deemed to be a release or impairment of the Loan evidenced by this Note or the security intended by the other Loan Documents, or be deemed to preclude Lender from exercising its rights to foreclose the Mortgage or to enforce any of its other rights or remedies under the Loan Documents [**including but not limited to the guaranty from _____ to _____ executed as of the date as this Note (the "Guaranty")**].

It is expressly understood and agreed that the limitation on liability described above shall in no way affect or apply to the continued personal liability of Borrower and Borrower's general partners for all sums due to:

(1) fraud or material misrepresentation made in or in connection with the Loan application, this Note or any of the other Loan Documents;

(2) failure to pay taxes, assessments and any other governmental impositions prior to delinquency, or to pay for labor, materials or any other charges that could result in liens on any portion of the Property;

(3) the misapplication of (i) proceeds of insurance covering any portion of the Property; or (ii) proceeds of the sale, condemnation or transfer in lieu of condemnation of any portion of the Property; or (iii) rentals received by or on behalf of Borrower subsequent to the date on which Lender makes written demand therefor pursuant to the terms, conditions or remedies set forth in any of the Loan Documents;

(4) causing or permitting waste to occur in, on or about the Property, and failing to maintain the Property, except for ordinary wear and tear;

(5) failure to return to Lender all unearned advance rentals and security deposits that have been paid by tenants of the Property to the extent that such fees have not been refunded to or forfeited by such tenants;

(6) failure to return to Lender any and all sums paid to Borrower by any tenant of the Property which sums permit the tenant to terminate its lease or otherwise abandon or vacate its leased premises;

(7) loss by fire or any other casualty to the extent not compensated by insurance proceeds collected by or remitted to Lender;

(8) failure to return, or failure to reimburse Lender for, all Fixtures and Personal Property (as defined in the Mortgage) owned by Borrower and taken from the Property by or on behalf of Borrower out of the ordinary course of business, and not replaced by items with values equal to or greater than the values of the Fixtures and Personal Property so removed;

(9) all court costs and Reasonable Attorneys' Fees (as hereinafter defined) actually incurred by Lender for which Borrower is liable pursuant to the terms of this Note or the terms of any of the other Loan Documents;

(10) all costs and expenses, including returning the Property to its prior condition, including but not limited to the proper removal, transportation and disposal of Hazardous Materials (as defined in the Mortgage): (i) found on the Property in excess of legal limits; or where removal or remediation is otherwise required by any governmental entity; to which exposure is limited or regulated by any governmental authority; or that could pose a hazard to the health or safety of the occupants of the Property or the general public and regardless of the source of origination (including sources off the Property that have migrated onto the Property or into its groundwater); and (ii) violations or breaches by Borrower of any indemnity or other agreement of Borrower to hold Lender harmless from and against any and all losses, liabilities, damages, injuries, costs and expenses of any kind arising as a result of the presence and/or removal of Hazardous Materials and from the violation of Hazardous Waste Laws (as defined in the Mortgage). Borrower shall not be liable under this section if the Property becomes

contaminated subsequent to Lender's acquisition of the Property by foreclosure or acceptance of a deed in lieu of foreclosure, or subsequent to any transfer of ownership of the Property that was approved by Lender pursuant to the Mortgage. Liability under this subparagraph (10) shall extend beyond repayment of the Loan and compliance with the terms of the Note and Mortgage unless, at such time, Borrower provides Lender with an environmental assessment report that is acceptable to Lender, in Lender's sole and absolute discretion, reasonably demonstrating that the Property is free of Hazardous Materials and is not subject to any violation of Hazardous Waste Laws. The burden of proof under this subparagraph with regard to establishing the date upon which any such Hazardous Materials were placed or appeared in, on or under the Property, shall be upon Borrower.

(11) any and all costs and expenses: (i) incurred in order to cause the Property to comply with any applicable Accessibility Laws (as defined in the Mortgage) and (ii) associated with violations or breaches by Borrower of any indemnity or other agreements by Borrower to hold Lender harmless from and against any and all losses, liabilities, damages, injuries, costs or expenses of any kind arising as a result of non-compliance with any applicable Accessibility Laws. Borrower shall not be liable under this section for compliance with any applicable Accessibility Laws that first become effective, or for any violation of any applicable Accessibility Laws resulting from alterations or improvements to the Property, that are performed subsequent to Lender's acquisition of the Property by foreclosure or acceptance of a deed-in-lieu of foreclosure or subsequent to any transfer of ownership of the Property that was approved by Lender pursuant to the Mortgage; and

(12) failure to remit to Lender any amounts under any letter of credit (or any renewals and/or replacements thereof) supplied by Borrower to Lender in connection with the Loan, this Note or any of the other Loan Documents in the event that the institution issuing such letter of credit becomes insolvent, files or has filed against it any bankruptcy or similar proceeding or is closed (either temporarily or permanently), is placed in receivership, conservatorship or liquidation by the Federal Deposit Insurance Corporation, Resolution Trust Corporation or any other governmental or quasi-governmental entity, or otherwise fails or refuses to honor such letter of credit.

[ADD THE FOLLOWING IN STATES WHERE APPLICABLE]

(13) failure to timely pay any amounts payable for all state documentary stamp taxes and intangible personal property taxes (if any) that may be levied or assessed against the Loan, this Note, or any of the other Loan Documents, together with all accrued interest, penalties or changes.

The obligations of Borrower in subparagraphs (1) through (12) [or (13)] above, except as specifically provided in subparagraphs (10) and (11), shall survive the repayment of the Loan evidenced by this Note and satisfaction of the Mortgage.

Notwithstanding anything to the contrary contained in this Note or in the other Loan Documents, until the Guaranty referenced above is released by Lender, the exculpation and non-recourse provisions of this section shall not be effective and Borrower shall be personally, fully and completely liable for the repayment of the Loan as evidenced by this Note and performance under the Loan Documents.

Full Recourse

Notwithstanding any provisions in this Note to the contrary, including without limitation the provisions set forth in the section above captioned "Exculpation", Borrower and the general partners of Borrower (if any) shall be personally liable, jointly and severally, for the entire indebtedness evidenced by this Note (including all principal, interest and other charges) in the event that Borrower: (i) violates the covenant governing the placing of subordinate financing on the Property as set forth in Paragraph 31 of the Mortgage, or (ii) violates the covenant restricting transfers of interests in the Property or transfers of ownership interests in Borrower as set forth in Paragraph 30 of the Mortgage.

Design/Construction

● **Key Risk Management Provisions In Design & Construction Contracts**

- **Insurance & Bonding** – Owner wants the Contractor and any subcontractors to carry adequate property casualty insurance and liability insurance. If any design work is being done as part of the project, the Owner will want the design professional to carry E&O insurance. The Contractor will want the Owner to carry builder's risk insurance.
- **Default & Termination** – The Owner wants the right to declare a default and terminate the contract as soon as possible if a problem arises so a new contractor can be brought in to finish the job. Of course the Contractor will want written notice and a reasonable opportunity to cure the default. The parties also need to address what the Contractor is entitled to recover in the event of contract termination. This usually depends on whether the termination was or was not for cause.
- **Payment Schedule** – It must be clear when the Contractor is entitled to payment and for what amount. Is the project simple enough where a simple invoice will do, or is a request for payment (that requires design professional and owner's review and approval) more appropriate? What about disputes over the amount requested? Conditional or unconditional lien waivers should be obtained whenever payment is made.
- **Alternative Dispute Resolution** – ADR may or may not be desirable, depending on your perspective. On one hand, ADR may be desirable for disputes where the monetary value of the dispute is too low to justify litigation. On the other hand, the relatively low cost of mediation may encourage one or both parties to mediate every single dispute that arises. You are not bound by the AAA rules and procedures and can customize an ADR provision that fits your needs.
- **Delays** – How will you handle the inevitable delays? What is an acceptable delay? Will there be an extension of time and an adjustment of the contract sum for acceptable delays? Just an extension with no adjustment of the contract sum? What documentation will be required.

Sample Construction Contract Follows:

PART I - ANNUAL SERVICES/SMALL PROJECT CONTRACT

(This Part I is to be used in conjunction with Part II, which consists of the General Conditions to the Contract)

Section 1.0 Basic Terms.

- (a) **"Owner" and Notice Address:** [Redacted]
Attn: [Redacted]
Phone: [Redacted]
Fax: [Redacted]
e-mail: [Redacted]
- (b) **"Contractor" and Notice Address:** [Redacted]
Attn: [Redacted]
Phone: [Redacted]
Fax: [Redacted]
e-mail: [Redacted]
- (c) **"Effective Date"** This Contract shall be effective as of [this is usually the date the contract was executed].
- (d) **"Expiration Date"** This Contract shall terminate on [this may be the Completion Date or may be later if the Contractor is to perform other projects].
- (e) **"Site" and Location:** As identified in the Proposal. (See, Section 4.0 below)
- (f) **"Contract Price"** As identified in the Proposal. (See, Section 4.0 below)

Section 2.0 Contract Documents. The following documents constitute the "Contract Documents":

- (a) This Part I - Annual Services/Small Project Contract;
- (b) The general conditions to the Annual Services/Small Project Contract ("Part II - General Conditions");
- (c) The specifications, plans or request for proposal (as issued by the Owner, if any);
- (d) The contractor/services provider requirements provided by Owner ("Contractor Requirements"); and
- (e) The proposal for the Work that is to be supplied by Contractor to the Owner ("Proposal").

Collectively, the above referenced documents comprise the "Contract". To the extent that this Annual Services/Small Project Contract and any other Contract Documents (including any attached exhibits) are in direct conflict, this Contract for Annual Services/Small Project shall be controlling.

Section 3.0 The Work. The "Work" consists of the services and/or materials to be provided by Contractor as more particularly described in the Proposal.

Section 4.0 Term. This is a contract for the provision of services and/or materials that may be provided continuously over the term of this Annual Services/Small Project Contract or intermittently on distinct projects. The beginning and ending dates shall be determined as follows: (a) Work on specific projects shall commence on the "Commencement Date" and be completed on or before the "Completion Date", as those terms are defined in a separate Proposal that shall be provided to Owner by Contractor; and (b) The provision of ongoing services shall commence on the Effective Date and end on the Expiration Date of this Annual Services/Small Project Contract, as set forth above. All Work performed by the Contractor between from the Effective Date through the Expiration Date is to be governed by the terms and conditions of this Contract.

Section 5.0 Billing; Payment. Owner shall make payment to Contractor as set forth in Section 2.0 of the General Conditions, unless other provisions are specifically set forth in the Proposal.

Section 6.0 Insurance. Contractor shall carry and maintain at Contractor's cost, the insurance coverages set forth in Section 10.0 of the General Conditions, unless other provisions are specifically set forth below. Insert any Special Insurance provisions here, including any payment or performance bond requirements, E&O coverage, etc.

Section 7.0 Underground Obstructions; Utilities. If any excavation is to be conducted as part of the Work or if the Work could otherwise reasonably be expected to impact existing utilities serving the Site (underground or aboveground), Contractor shall identify and accurately locate all utilities serving the Site and Contractor assumes all liability for any damages, including but not limited to personal injury, arising from Contractor's failure to properly identify and protect such utilities.

Section 8.0 Confidentiality: Contractor shall ensure that any information disclosed to or obtained by Contractor in connection with its Work under this Contract shall not be disclosed to others, in whole or in part, without the prior written consent of Owner, and shall be used solely for the purpose for which such information was provided and for no other purpose whatsoever.

Section 9.0 Notices. Notices to the respective parties shall be sent to the addresses set forth in Section 1.0 above and shall be deemed to have been received: (a) on the actual date of receipt if sent by overnight courier or registered/certified mail return receipt requested; or, (b) on the date that the receiving party provides the sending party written confirmation of receipt of the notice if sent by facsimile. Notice by any other means shall not be deemed to be effective notice.

Section 10.0 Execution in Counterparts. This Contract may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which shall constitute one Contract. To facilitate execution of this Contract, the parties may execute and exchange counterparts of the signature page to this Contract by facsimile. Until such time as both parties are in receipt of a fully executed and complete Contract, neither party shall have any rights or obligations towards the other party.

Section 11.0 Site Access; Scheduling. Contractor is hereby granted a limited right-of-entry to the Site for the sole purpose of completing the Work. Access to the building, scheduling the Work, and building security issues shall be coordinated prior to commencing any Work on the Site with the Owner contact. Contractor shall be responsible for obtaining the name and contact information of Owner's contact person from Owner prior to commencing work. Any keys, access cards and/or pass codes issued to Contractor for access to complete the Work pursuant to this Agreement must be returned to Owner immediately upon completion of the Work or the earlier termination of this Agreement. Owner reserves the right to (a) withhold final payment from Contractor until such time as all such keys, access cards and/or pass codes have been returned; or (b) if thirty (30) days have passed since the completion of the Work or earlier termination of this Agreement, Owner may deduct the actual cost of changing the locks or access codes from the amount owing to Contractor.

IN WITNESS WHEREOF, the Owner and Contractor have executed this Contract as of the dates indicated below.

OWNER:	CONTRACTOR:
_____	Contractor's copy not to be signed
By: _____	By: _____
Print Name: _____	Print Name: _____
Its: _____	Its: _____
Date: _____	Date: _____

ATTACHMENTS:

- Part II - General Conditions to the Annual Services/Small Project Contract
- A - Specifications, plans or the request for proposal (as issued by the Owner, if any)
- B - Contractor's Proposal
- C - Nationwide Contractor/Service Provider Requirements

*NOTE: Owner and Contractor must also sign the General Conditions attached to this Contract.

PART II - GENERAL CONDITIONS

Section 1.0 Contract Documents. These GENERAL CONDITIONS ("General Conditions"), by and between Nationwide Mutual Insurance Company ("Owner") and Contractor (as identified below), are an integral part of the "Contract Documents", which consist of: (a) The Annual Services/Small Project Contract; (b) these General Conditions; (c) Nationwide Contractor Requirements; and (d) the Proposal. The Contract Documents shall collectively comprise the "Contract". These General Conditions supersede and replace any general conditions provided by Contractor that may be included in, or attached to, Contractor's Proposal.

Section 2.0 Contract Price; Payment. The Contract Price for the Work, as set forth in the Proposal, shall be all inclusive and shall specifically include, but shall not be limited to: (a) all applicable taxes; (b) the cost of all licenses, permits, approvals and inspections necessary to complete the Work; (c) any dumpster, dump fees, hauling or disposal fees incurred by the Contractor; and (d) the cost of meeting all of the requirements set forth in the Contract. Payment of any undisputed amounts shall be made to Contractor (a) within thirty (30) days after Owner's receipt of a complete invoice that complies with the terms of the Proposal; or (b) otherwise pursuant to the payment schedule set forth in the Proposal.

Section 3.0 Compliance with Laws; Hazardous Conditions; Safety Issues. The Work shall be completed in compliance with all applicable federal, state and local laws, rules and regulations, including, but not limited to, all laws related to the protection of human health and safety and protection of the environment (including all applicable OSHA and EPA regulations). **THE CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR DEVELOPING, MAINTAINING AND ENFORCING COMPLIANCE WITH ALL WORKER/WORKPLACE SAFETY PROGRAMS AND PROCEDURES REQUIRED BY LAW OR OTHERWISE NECESSARY TO COMPLETE THE WORK IN A SAFE MANNER.** Contractor shall be solely liable for any claims, fines, fees, penalties or other liabilities arising from Contractor's failure to perform the work in a safe manner; comply with all such laws, rules or regulations; or to effectively develop, maintain and enforce an adequate worker/workplace safety program. Contractor shall: (a) take all necessary and appropriate actions to protect Contractor, Contractor's employees, agents, vendors, subcontractors; Owner, Owner's property and Owner's employees, agents, vendors; and all third parties that lawfully have access to the Premises or to public areas adjacent to the Premises, from exposure to any unsafe conditions that may be associated with the work performed by Contractor; (b) provide Owner with immediate notice of any notices, citations, property damage or personal injuries occurring on (or adjacent to) the Premises or that are in any way associated with the Work; and (c) promptly notify Owner upon discovering any Hazardous Substances³ or conditions at the Premises that were not previously disclosed to Contractor by Owner.

Section 4.0 Representations and Warranties. Contractor hereby represents and warrants to Owner that: (a) Contractor is familiar with the laws, rules, and regulations applicable to the Work; (b) Contractor has thoroughly reviewed the Contract Documents and has obtained in writing, from Owner, clarification of any terms or conditions contained therein that Contractor found to be in conflict, in error, inconsistent or unclear; (c) Contractor has inspected the premises where the Work will be performed (the "Site") and found existing site conditions to be consistent with the Work described and the Contract Documents; (d) Contractor is sufficiently experienced with the Work to be performed and shall supply a sufficient number of qualified personnel (certified and licensed as required by any applicable law, rule or regulation) necessary to complete the Work as provided herein; and (e) Contractor is not, and Contractor is not engaged in this transaction on behalf of, a person or entity with which Owner is prohibited from doing business pursuant to any law, regulation or executive order pertaining to national security ("National Security Laws")⁴ and Contractor has not violated and, to the best of Contractor's knowledge Contractor is not under investigation for, the violation of any Laws pertaining to money laundering, as those Laws are more particularly described in the footnote below.

³ As used herein, the term "Hazardous Substances" shall have the same meaning as set forth in §101(14) of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") as amended and shall also include: (a) "Pollutants" and "Contaminants" as defined by the CERCLA; (b) substances defined as "Toxic" by the Toxic Substances Control Act ("TSCA") and, (c) petroleum, petroleum by-products and its constituents.

⁴ "National Security Laws", as referenced above, shall specifically include, but shall not be limited to, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 (aka, the USA Patriot Act); Executive Order 13224; the Bank Secrecy Act, 31 U.S.C. Section 5311 et. seq.; the Trading with the Enemy Act, 50 U.S.C. App. Section 1 et. seq.; the International Emergency Economic Powers Act, 50 U.S.C. Section 1701 et. seq.; sanctions and regulations promulgated pursuant thereto by the Office of Foreign Assets Control ("OFAC"), as well as laws related to the prevention and detection of money laundering in 18 U.S.C Sections 1956 and 1957.

Section 5.0 Permits, Notices. Contractor has obtained (or prior to commencing any Work, will obtain) all of the licenses, permits, approvals and inspections necessary (if any) to complete the Work and the cost of all such licenses, permits, approvals and inspections are included in the cost of the Work.

Section 6.0 Standard of Care. The Work to be performed by Contractor under this Contract shall, at a minimum, meet all professional and/or trade standards applicable to Contractor and/or the Work being performed by Contractor. Contractor shall perform all Work under this Contract in a manner that is consistent with the skill, competence and knowledge customarily exercised by similarly experienced and qualified Contractors performing similar Work in the locality where the Site is located.

Section 7.0 Labor, Tools and Equipment. Contractor shall supply all of the services, labor, tools, equipment, transportation and materials necessary to complete the Work in a timely and efficient manner.

Section 8.0 Site Conditions. Contractor shall maintain the Site in a clean, neat and orderly condition at all times; clean-up the Site at the end of each work day; and promptly remove all debris, trash or waste generated during performance of the Work upon completion of the Work. All such debris, trash or waste shall be transported and disposed of at a disposal or recycling facility that is specifically authorized by the applicable governmental authority to accept the type of debris, trash or waste being deposited. Contractor shall provide Owner with dump receipts or other evidence demonstrating the final disposition of all debris, trash or waste generated during performance of the Work. Any costs incurred by Owner in cleaning-up the Site (either on a daily basis or upon completion of the Work) will be billed to Contractor and shall, at Owner's election, be payable immediately upon Contractor's receipt of a statement therefore or the cost incurred by Owner may be deducted from any future payments due to Contractor.

Section 9.0 Insurance. Contractor shall carry and maintain at its own cost, with insurance companies that are rated "A" or better by A.M. Best's insurance rating service, all necessary liability insurance for damages caused or contributed to by Contractor and insuring Contractor against claims that arise from or that are otherwise related to the work performed, or materials provided, by Contractor. Minimum insurance coverages, which shall not be construed as a limit on Contractor's liability, are set forth below:

- (a) **Workers' Compensation** insurance to the full extent required by applicable state or federal laws;
- (b) **Employer's Liability** insurance of not less than \$1,000,000.00;
- (c) **Commercial General Liability ("CGL")** insurance, including Contractual Liability, Public Liability coverage and satisfying the provisions of subparagraphs (i) and (ii) below, of not less than \$1,000,000.00 each occurrence and \$2,000,000.00 in the aggregate.
 - i. The CGL policy shall also cover liability arising from premises-operations, independent contractors, products-completed operations (maintained for at least 2 years following final completion of the Work/Services provided under the Contract), personal injury and liability under an insured contract (including the tort liability of another assumed in a business contract).
 - ii. Contractor's insurance shall apply as primary insurance with respect to any other insurance or self-insurance programs carried by any indemnities. If any additional insured has other insurance that is applicable to the loss, such other insurance shall be on an excess or contingent basis.
- (d) **Comprehensive Auto Liability:** a combined single limit of not less than \$1,000,000 on all owned or leased vehicles used in connection with the Project (if any).

All of the aforesaid insurance (except the Worker's Compensation Insurance and Employer's Liability Insurance) shall be written in the name of Contractor and shall name Owner as an additional insured. All such policies shall be underwritten with deductibles and in a form that shall be subject to Owner's approval. The certificates of insurance shall contain a provision that the policies will not be canceled or the coverage materially changed without 30 days' prior written notice to the Owner.

CONTRACTOR MUST PROVIDE OWNER WITH CERTIFICATES OF INSURANCE PRIOR TO COMMENCING ANY WORK AND UPON ANY POLICY RENEWAL OCCURRING DURING THE TERM OF THE CONTRACT.

Section 10.0 Indemnification. Contractor hereby agrees to indemnify and hold Owner harmless from and against any and all claims, damages, losses and expenses (including, but not limited to reasonable attorneys fees) that arise out of Contractor's performance of the Work, to the extent that such claims result, directly or indirectly, in whole or in part, from the acts, errors or omissions of Contractor, Contractor's employees, Contractor's agents or a subcontractor

working for or under Contractor. The indemnification provisions of this Section 11.0 shall survive the expiration or earlier termination of this Contract.

Section 11.0 Warranty. For a period of one (1) year from the date of completion (being defined as the date that all punch-list items have been completed), Contractor warrants to Owner (a) that all materials and/or equipment furnished under the Contract will be of good quality and new unless specifically required or otherwise permitted by the Contract; (b) that the Work will be free from defects not inherent in the quality required or permitted, and (c) that the Work will conform with the requirements of the Contract. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. Contractor's warranty excludes any damage or defect caused by abuse; modifications not executed by the Contractor; improper or insufficient maintenance; improper operation; or normal wear and tear sustained under normal usage.

Section 12.0 Termination. Owner may terminate this Contract upon three (3) days written notice to Contractor (the third day after Contractor's receipt of the notice of termination shall be the "Date of Termination"). In the event of termination, Contractor shall be paid for all Work performed through the Date of Termination.

Section 13.0 Waiver of Jury Trial. The parties hereby mutually waive any rights which either may have to trial by jury in any action, proceeding or counterclaim brought by one party against the other on any matter whatsoever arising out of or in any way connected with this Contract, the relationship of the parties, the Work or the Site, for any liability, claim, injury, loss or damage to persons or property.

Section 14.0 Subcontractors. All subcontractors must be approved in advance by Owner. All subcontracts shall include a copy of these General Conditions as well as subcontractor's express, written representation that subcontractor has reviewed, and agrees to comply with, these General Conditions.

Section 15.0 Miscellaneous. (a) This Contract represents the entire agreement between the parties and supersedes any prior negotiations, representations or agreements, either written or oral; (b) This Contract may only be modified by means of a written instrument signed by both parties; (c) Any terms or conditions set forth herein that are determined to be void, illegal or unenforceable, shall be severed from this Contract and the remainder of the Contract shall remain in full force and effect; (d) This Contract is not assignable in whole or in part by Contractor without Owner's prior written consent; (e) This Contract shall be construed according to the laws of the state where the Site is located; (f) Time is of the essence in the performance of all obligations under this Contract; (g) Any time periods provided herein shall be measured in calendar days; (h) Any capitalized terms that are not defined herein shall have the same meaning as set forth in the Annual Services/Small Project Contract.

Agreed to by:

OWNER:
Nationwide Mutual Insurance Company

By: _____

CONTRACTOR:

By: _____

ACC's 2005 Annual Meeting
 October 17-19
 Washington, D.C.

907 – How to Effectively Manage Real Estate Risk

- Commercial Leasing*
- Real Estate Financing*
- Project Design & Construction*

* Checklists for each topic are provided at the end of these materials.

Materials Prepared By:
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 Senior Counsel
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 Columbus, Ohio 43215

COMMERCIAL LEASING

Key Risk Management Clauses In Commercial Leases:

- Insurance
- Indemnification
- Compliance w/Laws
- Environmental Issues
- Destruction & Condemnation
- Default & Remedies
- Holdover

Insurance

Landlord: LL will obtain “All Risk” property insurance to insure LL’s real property from any damage (casualty) and Commercial General Liability (CGL) insurance to protect LL from liability arising from any event occurring on the leased premises, elsewhere in the building or in common areas. LL also wants T to insure T’s personal property (and possibly TI paid for by T) and obtain CGL to protect T (and LL, as an additional insured) from any liability arising from events occurring on the leased premises.

Tenant: T only wants to insure T’s personal property (and possibly TI paid for by T) from any casualty and to be protected from liability arising out of any event that occurs on the leased premises. T does not want to insure LL’s property or protect LL from liability arising from events that occur anywhere other than on the leased premises. T wants LL to protect T from liabilities arising from events that occur anywhere other than on the leased premises.

Sample Insurance Provision:

Insurance.

- (a) Landlord agrees to carry and maintain the following insurance during the Term:
- Special form [*or “All Risk”*] property insurance on the Building and the Building Complex [*or similar terms defined in the lease*], and all Tenant Improvements paid for by Landlord for the full replacement cost;
 - Commercial general liability insurance against claims for property damage, personal injury and contractual liability, arising from events occurring in, on or about the Building or the Building Complex (excluding the Premises), with a combined single limit [*as opposed to per occurrence or in the aggregate*] of not less than Two Million Dollars (\$2,000,000); and
 - Worker’s compensation insurance, covering Landlord’s employees, in amounts required by law.

All such insurance shall be procured from an insurance company or companies rated "A" or better by A.M. Best's and authorized to do business in the State where the Premises are located. All such policies (except worker's compensation) shall name Tenant as an additional insured, and Landlord shall make a good faith effort to provide Tenant with thirty (30) days written notice (or otherwise, as soon as possible) prior to cancellation or material alteration of any such policy. To the extent permitted by applicable law, all insurance maintained by Landlord shall be primary to any insurance provided by Tenant (as to coverage required to be maintained by Landlord). If requested in writing, Landlord shall provide certificate(s) of such insurance to Tenant upon commencement of the Term and as soon as possible upon any renewals.

- (b) Tenant agrees to carry and maintain the following insurance, at its own cost during the Term:
- (i) Special form [*or "All Risk"*] property insurance on Tenant's property and the contents of the Premises, including Tenant Improvements paid for by Tenant, for the full replacement cost;
 - (ii) Commercial general liability insurance, including coverage for property damage, personal injury and contractual liability, arising from events occurring in, on or about the Premises, with a combined single limit of not less than Two Million Dollars (\$2,000,000);
 - (iii) Workers' compensation insurance, covering Tenant's employees, in amounts required by law.

All such insurance shall be procured from an insurance company or companies rated "A" or better by A.M. Best's and authorized to do business in the State where the Premises are located. All such policies (except worker's compensation) shall name Landlord as an additional insured, and Tenant shall make a good faith effort to provide Landlord with thirty (30) days written notice (or otherwise, as soon as possible) prior to cancellation or material alteration of any such policy. To the extent permitted by applicable law, all insurance maintained by Tenant shall be primary to any insurance provided by Landlord (as to coverage required to be maintained by Landlord). If requested in writing, Tenant shall provide certificate(s) of such insurance to Landlord upon commencement of the Term and as soon as possible upon any renewal.

- (c) Each party agrees to use its best efforts (but without being obligated to incur any additional expense) to include in each of the insurance policies required above, a waiver of the insurer's right of subrogation against the other party, or if such waiver should be unobtainable or unenforceable: (i) an express agreement that such policy shall not be invalidated if the insured waives the right of recovery against any party responsible for a casualty covered by the policy before casualty; or (ii) any other form of permission for the release of the other party. Notwithstanding the foregoing and to the extent permitted by said insurance policies, each party hereby releases the other party with respect to any claim (including a claim for negligence or indemnity) which it might otherwise have against the other party for loss, damage or destruction with respect to its property

(including the Building, the Building Complex, the Premises, and rental value or business interruption) occurring during the Term, or Renewal Term, if applicable, of this Lease, to the extent to which it is insured (or required to be insured) under this Lease.

Indemnification

Definition: A promise to reimburse another for a loss suffered because of a third party's act.

Sample Indemnification Provision:

Damage to Property, Injury to Person.

- (a) Tenant, for itself and its legal representatives, successors and assigns, as a material part of the consideration to be rendered to Landlord under this Lease, hereby indemnifies and agrees to defend and hold harmless Landlord, its members, and their agents, employees, affiliates, contractors, legal representatives, successors and assigns, from any and all claims of liability for any injury or damage to any person or property whatsoever occurring: (i) on or in the Premises; and (ii) in, on or about the Building, the Building Complex or any part thereof, but only to the extent such injury or damage is caused by, arises out of or results from the [*gross negligence? Be careful in asking for this, it works both ways!*] negligence of Tenant, any of Tenant's agents, contractors, employees, licensees or invitees or from any breach or default in the performance of any obligation on Tenant's part to be performed under the terms of this Lease. Such indemnities shall include by way of example, but not limitation, all costs, reasonable attorneys' fees, expenses and liabilities incurred in or about any such claim, action or proceeding.
- (b) Landlord, for itself and its legal representatives, successors and assigns, as a material part of the consideration to be rendered to Tenant under this Lease, hereby indemnifies and agrees to defend and hold harmless Tenant, its agents, employees, affiliates, contractors, and legal representatives, successors and assigns, from any and all claims of liability for any injury or damage to any person or property whatsoever occurring: (i) in, on or about the Building, the Building Complex or any part thereof (excluding the Premises); and (ii) on or in the Premises, but only to the extent such injury or damage is caused by the [*gross negligence?*] negligence of Landlord, its agents, contractors, employees, licensees or invitees or from any breach or default in the performance of any obligation on Landlord's part to be performed under the terms of this Lease. Such indemnities shall include by way of example, but not limitation, all costs, reasonable attorneys' fees, expenses and liabilities incurred in or about any such claim, action or proceeding.

Compliance With Laws

Although both LL and T want each other to comply with all applicable laws for obvious reasons, it is even more important to designate who is responsible (at least under the lease) for compliance with certain laws such as the ADA or environmental laws that could impose significant liabilities on one or both parties. LLs will usually resist representing that the premises (or the entire project) are in compliance with "all applicable laws", but Ts should try very hard to get this representation.

A possible compromise is for the T to obtain an indemnification (without the representation of compliance) for any non-compliance for which LL agrees to accept responsibility. Keep in mind that a representation of compliance, the allocation of liability for compliance in a lease, or an indemnification for damages arising from noncompliance, does not mean that the other party (or both T and LL) are not *legally* liable for compliance.

Sample Compliance with Laws Provision:

Compliance with Laws.

- (a) Landlord's Compliance. Landlord represents and warrants that to the best of Landlord's knowledge, the Premises, Building Complex, Project Common Area(s) and tenant improvements installed by Landlord are, [Tenant clause: *and throughout the term of this Lease shall be maintained*], in substantial compliance with all "Applicable Laws"¹. In the event that Landlord is found to be in breach of this representation or warranty, Landlord shall, at Landlord's expense, promptly take all actions necessary to achieve compliance.
- (b) Tenant's Compliance.
- (i) Tenant shall not use the Premises in any manner that would: (1) unreasonably impair the ability of Landlord to obtain, at standard rates, any insurance policy required under the terms of any lease or mortgage to which this Lease is subordinate; (2) impair the appearance, character or reputation of the Building Complex; (3) cause the discharge of any materials into the Building HVAC, sewer or plumbing systems or into any other vents or drains that are not designed to receive such materials; (4) impair, interfere with or unreasonably disturb any of the Building services, operations, or other occupants of the Building Complex; (5) create waste in, on or around the Premises or the Building Complex.
- (ii) Tenant shall maintain compliance with all Applicable Laws, but only to the extent that such compliance is: (1) not directly related to the physical

¹ "Applicable Laws" shall mean all laws, statutes, ordinances, rules and regulations that are now in force or that may hereafter be enacted or promulgated by any public authority with jurisdiction over the Premises, Building Complex, Project Common Area or activities conducted thereon and shall specifically include, but shall not be limited to, those related to the protection of human health, safety and the environment (e.g., CERCLA, RCRA, OSHA), and those enacted or promulgated pursuant to the Americans with Disabilities Act ("ADA").

condition of the Premises, the Building or the Building Complex as constructed and improved by Landlord; and (2) is required due to Tenant's specific use of the Premises and with which only the occupant of the Premises can comply (e.g., employment laws, ADA, maximum occupancy, workplace smoking, illegal business operations, etc).

- (c) Indemnity. Landlord agrees to indemnify, defend and hold Tenant harmless from and against any claims, losses or causes of action arising out of Landlord's failure to comply with any Applicable Laws as required by subsection (a) above. Tenant agrees to indemnify, defend and hold Landlord harmless from and against any claims, losses or causes of action arising out of Tenant's failure to comply with any Applicable Laws as required by subsection (b) above. [*Comment: Always look for reciprocal indemnities. If one party is asking for indemnification, the other party should be willing to give an equal indemnity in return.*]
- (d) Patriot Act Compliance. Tenant represents to Landlord, and Landlord represents to Tenant, that the representing party is not (and such party is not engaged in this transaction on behalf of) a person or entity with which either party is prohibited from doing business pursuant to any law, regulation or executive order ("Anti-Terrorism Laws"²) pertaining to national security and; such party has not violated and, to the best of such party's knowledge it is not under investigation for, the violation of any Laws pertaining to money laundering, as those Laws are more particularly described below. [*Although you may be strictly liable for violating one or more of these laws if you do enter into a lease with a Prohibited Person, this provision may give you a cause of action against the other party and may allow you to terminate the lease.*]

Environmental Issues

Environmental provisions can be the longest, most unreasonable and most complex provisions in a commercial lease. Neither party wants anything to do with environmental liabilities and wants the other party to indemnify them from any potential environmental liability that could, under the most unlikely of circumstances, ever occur. The simple reality is that the LL should accept liability for any environmental conditions created by the LL and the T should accept liability for environmental conditions created by the T. That's the easy part.

What about pre-existing contamination? What about contamination migrating from off-site? What about contamination that is caused by a third party? Although neither LL nor T is likely to assume any of these liabilities in the lease, if the contamination interferes with T's use of the premises, T should insist on some kind of practical remedy (i.e., termination rights). A more serious problem arises when environmental conditions created by a LL, T or a third party, and

² "Anti-Terrorism Laws", as referenced above, shall specifically include, but shall not be limited to, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 (aka, the USA Patriot Act); Executive Order 13224; the Bank Secrecy Act, 31 U.S.C. Section 5311 et. seq.; the Trading with the Enemy Act, 50 U.S.C. App. Section 1 et. seq.; the International Emergency Economic Powers Act, 50 U.S.C. Section 1701 et. seq.; sanctions and regulations promulgated pursuant thereto by the Office of Foreign Assets Control ("OFAC"), as well as laws related to the prevention and detection of money laundering in 18 U.S.C Sections 1956 and 1957.

the responsible party is insolvent. Who pays for the clean-up? As a LL, are you going to lose your other tenants? As a T, what happens if you have to terminate your lease early? What about your TI investment? What recourse do you have under the lease? At law?

Mold is another issue. The liability for mold remediation (and possibly personal injury) usually centers upon the *cause* or *source* of the moisture that allowed the mold to grow in the first place. If the moisture can be attributed to a source that the LL had the obligation to maintain under the lease and the LL had notice of the moisture problem, and failed to respond promptly, the liability should fall on the LL. On the other hand, if the source of the moisture is under T's control (*i.e.*, a sink in the leased premises that regularly overflows) and the T fails to respond promptly or notify the LL of the need for repairs, the liability should fall on the T. In reality, any protections that a T seeks for mold can be extremely difficult to obtain. On the other hand, LL wants T to assume the obligation to provide LL with prompt notice of any moisture or water issues.

Sample Environmental Provisions:

Environmental Conditions.

(a) Defined Terms

Hazardous Substance(s) - all substances (whether naturally occurring or man-made) that upon release, exposure, ingestion or inhalation, are generally considered by the scientific community to be detrimental to human health or the environment, including, but not limited to, petroleum (and its by-products) and all substances regulated or classified as "hazardous" or "toxic" under any Environmental Law (as that term is defined below). Specifically excluded from this definition are those substances that are stored, used and discarded in unregulated quantities and that are routinely and customarily used by consumers, in commercial offices or in retail operations (*i.e.*, toner cartridges, consumer cleaning products, non-industrial batteries, etc.). **[Comment: Does this include mold? Why not identify mold specifically?]**

Environmental Law(s) - any federal, state, or local law, rule, regulation, order, regulatory guidance document or standard (including standards adopted by any nationally recognized professional organization that develops health and safety standards, including, but not limited to, ANSI, NIOSH and ASHRE) that pertains to the protection of human health or the environment, including, but not limited to, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. Sections 6901, *et seq.* **[The long, exhaustive list of every environmental law known to mankind is not necessary – the identification of CERCLA is necessary.]**

Environmental Claims - all liabilities, including, but not limited to claims, damages, causes of action, notices or orders originating from private parties or governmental entities that are related to Hazardous Substances or Environmental Laws, including the cost of assessment, response, compliance with, settling or defending same (including the reasonable and customary fees and expenses of attorneys, consultants, contractors and experts).

Environmental Condition - an Environmental Condition shall consist of: (a) a violation of any Environmental Law; and/or (b) any condition that creates a verifiable threat to human health, the environment, or that has an adverse effect on the value of the Premises and that can be attributed to the presence of Hazardous Substances on the Premises.

Premises - for the limited purposes of this Section, the term "Premises" shall include the leased space; the building in which the leased space is located (if the leased space is not the entire building); the building site; the land on which the building is located (both surface and subsurface), air, surface water and groundwater directly associated therewith.

(b) Representations and Warranties

Tenant represents and warrants to Landlord that Tenant, including Tenant's employees, agents and contractors, will not use, store, generate, treat, transport, release or dispose of any Hazardous Substance on or about the Premises in violation of any Environmental Law or cause or create an Environmental Condition on the Premises.

Landlord represents and warrants to Tenant that to the best of Landlord's knowledge: (a) no Hazardous Substances have been used, stored, generated, treated, transported (to or from), or released on or about the Premises, in violation of any Environmental Law; (b) the Premises are not subject to any pending or proposed Environmental Claims; and (c) Landlord, including Landlord's employees and agents, will not use, store, generate, treat, transport, release or dispose of any Hazardous Substance on or about the Premises in violation of any Environmental Law or cause or create an Environmental Condition on the Premises.

(c) Indemnification

The indemnification obligations of Tenant and Landlord set forth below shall survive the expiration or earlier termination of this Lease.

Tenant shall indemnify, defend and hold Landlord harmless against any Environmental Claims related to the Premises that are the direct or indirect result of Tenant's actions. Furthermore, Tenant shall remedy or compensate Landlord for any damages to Landlord's property (real or personal) resulting from any such action.

Landlord shall indemnify, defend and hold Tenant harmless from any Environmental Claims related to the Premises that are the direct or indirect result of Landlord's actions. Furthermore, Landlord shall remedy or compensate Tenant for any damages to Tenant's property (real or personal) resulting from any such action.

(d) Notice

Tenant shall provide Landlord with written notice within 24 hours of: (i) receipt of any communication from any third party concerning Hazardous Substances or an Environmental Condition that is in any way related to the Premises; or (ii) the occurrence of any event (including, but not limited to, a spill or release involving Hazardous Substances) that could reasonably be anticipated to result in the creation of an Environmental Condition on the Premises.

(e) Remedies

Upon Tenant's default under any of the representations or warranties set forth herein, Landlord, in addition to all rights and remedies provided at law or in equity, shall have all of the remedies for a default by Tenant that are set forth in this Lease.

Upon Landlord's default under any of the representations or warranties set forth herein, Tenant, in addition to all rights and remedies provided at law or in equity, shall have all of the remedies for a default by Landlord that are set forth in this Lease.

Destruction & Condemnation

If the building burns down, is destroyed in an earthquake or is taken by eminent domain, what are the continuing obligations of LL and T under the lease? Although this is an unlikely event, the consequences are severe and the relative rights and obligations of the parties should be contemplated in advance.

Sample Destruction & Condemnation Provision:

Damage or Destruction to Building.

- (a) In the event that the Premises or the Building Complex are damaged by fire or other casualty and the repairs necessary to restore the Premises or the Building Complex to substantially the same condition it was in before the casualty occurred can be completed within one hundred twenty (120) days after the occurrence of such casualty, Landlord [*to the extent that insurance proceeds are made available for this purpose,*] shall diligently proceed to repair the damage at Landlord's expense. Within thirty (30) days after such casualty Landlord shall provide Tenant with notice of the time required to complete such repairs ("Repair Notice"). Until such repairs are substantially completed, Tenant's Base Rent [*and Additional Rent*] shall be abated in an amount that justly and proportionately compensates Tenant for any disruption of Tenant's business operations. If Landlord estimates that it cannot make such repairs within one hundred twenty (120) days or if such repairs are not completed within one hundred twenty (120) days, Tenant shall have the option of terminating this Lease by providing written notice to Landlord within thirty (30) days after Tenant's receipt of Landlord's

Repair Notice or the date on which it becomes evident that such repairs will not be completed within one hundred twenty (120) days. Landlord shall not be obligated to repair any damage to Tenant's Property, including furniture, fixtures or equipment removable by Tenant under the provisions of this Lease or any improvements installed in the Premises by or on behalf of Tenant (with the exception of the original Tenant improvements installed by Landlord on behalf of Tenant, which [*to the extent that insurance proceeds are made available for this purpose,*] Landlord will repair at Landlord's expense).

- (b) If the Premises are substantially and materially damaged during the final year of the Term or the final year of any Renewal Term previously exercised by Tenant, Tenant shall have the right to terminate this Lease within thirty (30) days of the date of the casualty by sending written notice to Landlord. In any event, the total destruction of the Building shall automatically terminate this Lease.

Condemnation.

- (a) Total Condemnation. If the entire Premises should be taken for a public or quasi-public use under power of eminent domain, or transferred under threat thereof, this Lease shall terminate and Base Rent, Additional Rent and all other charges shall be apportioned as of the date of actual physical possession by the condemning authority.
- (b) Partial Condemnation. If any portion of the Premises, Building or Building Complex shall be permanently taken for a public or quasi-public use or purpose under the power of eminent domain, or voluntarily transferred under threat thereof, and such partial taking renders the remainder of the Premises, Building or Building Complex unsuitable for Tenant's business operations, Tenant may elect to either terminate this Lease as of the actual date of physical possession by the condemning authority, or to remain in possession of the remainder of the Premises, provided, however, that Tenant shall give Landlord written notice of its election within thirty (30) days after the date of Landlord's written notification to Tenant of the condemnation. In the event that Tenant elects to remain in possession, then Landlord shall reconstruct the remainder of the Premises, Building or Building Complex as appropriate, to a condition reasonably equivalent to the condition existing prior to such taking. Subject to an adjustment of Base Rent as set forth below, this Lease shall then continue full force and effect.
- (c) Abatement of Base Rent. If any portion of the Premises shall be taken for a public or quasi-public use or purpose and Tenant elects to remain in possession as provided above, the Base Rent shall be equitably adjusted as of the date of such taking and during any period of repair or reconstruction.
- (d) Condemnation of Common Area. If any portion of the common area in the Building Complex shall be taken for a public or quasi-public use under the power of eminent domain, or transferred under threat thereof, and such taking deprives Tenant of reasonable access to the Premises or sufficient parking, then Tenant

shall have the right to terminate this Lease by providing Landlord at least thirty (30) days written notice.

- (e) Damages Awarded. Except as otherwise provided herein, all damages awarded on account of any condemnation or taking, or transfer under threat thereof, under the power of eminent domain, of the Premises, the Building Complex, or any portion thereof, shall be the sole property of Landlord; provided, however, that Tenant shall be entitled to receive any award made for the taking of any of Tenant's Property under the power of eminent domain; for damages caused thereto; for relocation costs, and/or for interruption of Tenant's business.
- (f) Effect of Termination. In the event this Lease is terminated pursuant to any of the provisions of this section, the effective date of such termination shall be the date upon which Tenant vacates the Premises. All Rent, Additional Rent and other charges payable on the part of Tenant to Landlord hereunder shall be paid through the effective date of such termination. After such payment, and as of the effective date of such termination, the parties shall thereupon be released from all further liability hereunder, except that Landlord shall refund any security deposit made by Tenant and make an equitable refund to Tenant of any unearned or unused rental that was paid in advance.
- (g) Temporary Condemnation. If any part of the Premises, common area, or other portion of the Building, or any interests or rights of use therein are taken for a public or quasi-public use or purpose, or under or in connection with the threat thereof, for a limited period of time ("**Temporary Taking**"), the Base Rent for the part of the Premises not taken shall be abated in an amount that justly and proportionately compensates Tenant for any disruption of Tenant's business operations that occurs as a result of the Temporary taking. If the Temporary Taking is of such a nature that it prevents Tenant from operating its business in the Premises, and if the Temporary Taking exceeds a consecutive period of ninety (90) days, Tenant may terminate this Lease at any time within thirty (30) days after possession is taken by providing written notice thereof to Landlord.

Default & Remedies

If a really serious problem arises with the premises, from either a T's or a LL's perspective, what can you do about it? Is legal action your only recourse (which means a lot of wasted time and money) or do you have any practical remedies?

Sample Default & Remedies Provision:

Default.

- (a) Tenant Defaults. The following events (herein referred to as an "Event of Default") shall constitute a default by Tenant hereunder:
 - (1) Tenant shall fail to pay when due any installment of Rent, Additional Rent or any other amounts payable hereunder and such failure shall continue for

a period of ten (10) days after [*Tenant's receipt of written notice thereof from Landlord*] the date such payment was due;

- (2) This Lease of the Premises or any part thereof shall be taken upon execution or by other process of law directed against Tenant, or shall be taken upon or subject to any attachment at the instance of any creditor or claimant against Tenant, and said attachment shall not be discharged or disposed of within ninety (90) days after the levy thereof;
 - (3) Tenant shall file a petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency act of any state or foreign country, or shall voluntarily take advantage of any such law or act by answer or otherwise, or shall be dissolved or shall make a general assignment for the benefit of creditors;
 - (4) Involuntary proceedings under any such bankruptcy law or insolvency act or for the dissolution of Tenant shall be instituted against Tenant, or a receiver or trustee shall be appointed for all or substantially all of the property of Tenant, and such proceedings shall not be dismissed or such receivership or trusteeship vacated within ninety (90) days after such institution or appointment;
 - (5) Tenant shall fail to perform any of the other agreements, terms, covenants or conditions hereof on Tenant's part to be performed (other than the obligation to pay Rent or any other charges payable hereunder), and such nonperformance shall continue for a period of thirty (30) days after receipt of Tenant's receipt of written notice from Landlord; provided, however, that if Tenant cannot reasonably cure such nonperformance within thirty (30) days, Tenant shall not be in default if it commences to cure such default within said thirty (30) days and diligently pursues the same to completion;
 - (6) Tenant shall fail to obtain the release of any mechanic's lien or other type of lien attributable to an act or omission of Tenant, as required herein.
- (b) Landlord's Remedies. Upon the occurrence of an Event of Default, and in addition to any other remedies now or hereafter available to Landlord at law or in equity, Landlord shall have the right, at its election, then or at any time thereafter and while any such Event of Default shall continue, either:
- (1) To give Tenant written notice of Landlord's intention to terminate this Lease on the date specified therein, which date shall be no sooner than thirty (30) days after Tenant's receipt of such notice. On the date specified in such notice, Tenant's right to possession of the Premises shall cease and this Lease shall thereupon be terminated without prejudice to Landlord's rights as described below; or

- (2) Should Landlord elect to terminate this Lease and re-enter the Premises, Landlord shall exert a commercially reasonable, good faith effort to mitigate Landlord's damages and relet the Premises or any part thereof for such term (which may be greater or less than the period which would otherwise have constituted the balance of the Term of this Lease) and on such commercially reasonable conditions (which may include concessions of free rent *[not to exceed sixty (60) days]*, and commercially reasonable allowances for alteration and repair of the Premises) as Landlord, in its sole and absolute *[reasonable]* discretion, may determine, and Landlord may collect and receive the rents therefor.
- (3) In the event that Landlord elects to terminate this Lease and take possession of the Premises as permitted in this Section ____, Tenant shall pay to Landlord: (i) the Rent and other sums as herein provided, which would be payable hereunder if such termination or repossession had not occurred, less; (ii) the net proceeds, if any, of any reletting of the Premises after deducting all Landlord's expenses actually incurred in connection with such reletting, including all reasonable and customary repossession costs, brokerage commissions, court costs, attorneys' fees, repair costs and expenses of preparing the Premises for such reletting. If, in connection with any reletting, the new lease term extends beyond the Term, or the premises covered thereby include other premises not part of the Premises, a fair and equitable apportionment of the rent received from such reletting and the expenses incurred in connection therewith as provided aforesaid will be made in determining the net proceeds from such reletting. Tenant shall pay such rents and other sums to Landlord monthly on the days on which the Base Rent would have been payable hereunder if such termination or repossession had not occurred.
- (4) After an Event of Default by Tenant, Landlord may sue for or otherwise collect all rents, issues and profits payable under all subleases on the Premises, including those past due and unpaid.
- (5) After an Event of Default by Tenant, Landlord may, without terminating this Lease, enter upon the Premises without prejudice to any other remedies, and do whatever Tenant is obligated to do under the terms of this Lease. Tenant agrees to reimburse Landlord on demand for any reasonable expenses that Landlord may incur in effecting compliance with the Tenant's obligations under this Lease.
- (6) No failure by Landlord to insist upon the strict performance of any agreement, term, covenant or condition hereof or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent during the continuance of any such breach, shall constitute a waiver of such agreement, term, covenant or condition. No waiver of any breach shall affect or alter this Lease, but each and every agreement, term, covenant and condition hereof shall continue in full force and effect with respect to any other than existing or subsequent breach thereof.
- (7) Nothing contained in this Section __ shall limit or prejudice the right of Landlord to prove and obtain as liquidated damages in any bankruptcy, insolvency, receivership, reorganization or dissolution proceeding, an amount equal to the maximum allowed by any statute or rule of law governing such proceeding and in effect at the time when such damages are to be proved, whether or not such amount be greater, equal to or less than the amounts recoverable, either as damages or rent, referred to in any of the preceding provisions of this Section __.
- (8) Whenever any Base Rent, Additional Rent or any other sums due hereunder remain unpaid more than ten (10) days after the due date thereof, Tenant shall pay to Landlord an administrative charge equal to five percent (5%) of the amount due to compensate Landlord for the costs and expenses associated with handling a delinquent account.
- (9) In addition to all other rights and remedies, Landlord shall be entitled to receive from Tenant the unamortized portion of the value of any Tenant Improvements paid for by Landlord or Leasing Commissions paid by Landlord; it being understood and agreed that such payment was made on the condition and basis that Tenant fully perform all obligations and covenants under this Lease for the Term. The amortization rate to be used in this calculation shall be 8% per annum amortized over the Term of this Lease. The value of the Tenant Improvements shall be determined based on the actual cost of the completed Tenant Improvements.
- (c) Landlord's Default; Tenant's Remedies. In the event that Landlord fails to fulfill or perform any of Landlord's obligations as set forth in this Lease, Tenant may:
- (1) Provide Landlord with written notice of any such failure and the action required to correct such failure. In the event Landlord fails to commence such work and diligently pursue it to completion within ten (10) days after receipt of Tenant's notice, then Tenant shall have the right, but not the obligation, to perform such acts and expend on Landlord's account, such funds to perform such work as is reasonably required. The funds so expended shall be due and payable to Tenant by Landlord within thirty (30) days after receipt of Tenant's invoice for the costs incurred. The invoice shall include reasonable documentation of all costs incurred. In the event Landlord fails to pay any such invoice within thirty (30) days as provided herein, Tenant may deduct the amount due from the next installment or installments of Base Rent due to Landlord [*this set-off provision can be problematic for Landlords due to certain mortgage provisions*]; or,
- (2) Should any Landlord default render the Premises unsuitable for its Permitted Use, in whole or in part, for a period of three (3) or more consecutive days, Base Rent shall be equitably abated for the total number of days that the Premises are not suitable for the Permitted Use set forth in

this Lease [*once again, this set-off provision can be problematic for Landlords due to certain mortgage provisions*].

- (d) Each right and remedy provided for in this Lease shall be cumulative and in addition to every other right or remedy provided for in this Lease, now or hereafter existing at law or in equity or by statute or otherwise, including, but not limited to, suits for injunctive or declaratory relief. The exercise or commencement of the exercise by Landlord or Tenant of any one or more of the rights or remedies provided for in this Lease, shall not preclude the simultaneous or subsequent exercise by Landlord or Tenant or any other rights or remedies provided for herein. All costs incurred by Landlord or Tenant in connection with collecting any amounts or damages owing by Landlord or Tenant pursuant to the provisions of this Lease or to enforce any provision of this Lease, including by way of example, but not limitation, reasonable attorneys' fees and court costs (from the date any such matter is turned over to an attorney), shall also be recoverable by the prevailing party.

Holdover

Your current lease expires, but construction of your new premises is not completed. Can you holdover in your current space? What's it going to cost? What are the risks? If you don't negotiate a holdover provision in your lease at commencement, you are at the LL's mercy. From the LL's perspective, you want to be able to recover damages if a prospective tenant is lost when an existing tenant holds over or to be able to proceed with a legal eviction if a quality tenant is waiting to occupy the space.

Sample Holdover Provision:

Holding Over.

Tenant shall vacate the Premises upon the expiration or earlier termination of this Lease [, *except as the parties may otherwise agree in writing*]. If Tenant does not vacate the Premises upon the expiration or earlier termination of this Lease and holds over with [*or without*] Landlord's consent, Tenant shall become a tenant from month-to-month, subject to all of the terms of this Lease as may reasonably be applicable to such month-to-month tenancy, except that Tenant shall pay monthly Base Rent (plus all other charges), in an amount that is equal to one hundred ten percent (110%) of the Base Rent plus all other charges for the first six (6) months and, thereafter, one hundred twenty five percent (125%) of the Base Rent (plus all other charges) as provided herein (the "Holdover Rent") [*This is a Tenant friendly clause. Most LLs will want T to pay 200% or more as well as reserving all other remedies available to get possession of the premises if necessary.*]. Such tenancy shall continue until terminated by Landlord or Tenant by providing the other party with at least thirty (30) days written notice prior to the last day of the calendar month intended as the date of termination of such month-to-month tenancy. Such Holdover Rent shall be Landlord's sole and exclusive remedy in the event of a holdover by Tenant [*LL will want to avoid this limitation of remedies, but this is critical to the T. T could be held liable for consequential damages arising from LLs loss of a major tenant due to the holdover.*].

REAL ESTATE FINANCING

What are the relative risks of a Lender and Borrower in a typical, commercial loan transaction and how can those risks be controlled?

Key Risk Management Clauses in Commercial Mortgage Loans:

- Defaults & Remedies
- Insurance
- Escrow Accounts
- Maintenance; Environmental
- Non-Recourse Provisions & Carve-Outs

Lender Risks v. Borrower Risks

Lender Risks

- Financial loss if Borrower stops making payments for any reason.
- Financial loss if the collateral is damaged, condemned, or otherwise loses value.
- Liability from accidents occurring on the property.
- Liability arising from environmental contamination.
- Lender liability arising from interfering with a Borrower's business.

Lender's Key Objectives

Maintenance of the Collateral – Lender's primary security in the event of a loan default is the property and, if applicable, the tenants that are producing the income from the property. Lender wants to make sure that Borrower has the funds available to perform routine maintenance. This is usually accomplished with an escrow accounts controlled by Lender.

Get Payments on Time – It goes without saying that Lender wants the loan payments made on time, but Lender also wants Borrower to make insurance and tax payments on time as well. Again, this is usually accomplished with an escrow account controlled by the Lender.

Keep the Collateral Adequately Insured –Lender wants to ensure that Borrower keeps the collateral adequately insured at all times. Lender also wants to have control the insurance proceeds in the event of a casualty.

Borrower Risks

- Default, resulting in imposition of Lender's remedies.
- Loss of a key tenant.
- Potential personal liability.

Borrower's Key Objectives

Get Notice of Defaults & Opportunity to Cure – Default remedies in commercial loan documents can be severe and range from default interest rates to foreclosure. Borrowers should insist on written notice and a reasonable opportunity to cure any default before the Lender can invoke a remedy. Keep in mind that most Lenders will not provide a notice or an opportunity to cure monetary defaults (*i.e.*, late payments).

Non-Recourse Loan w/No Carve-Outs – Most commercial mortgage loans are “non-recourse”, meaning there is no personal liability for members, managers or shareholders; only the borrowing entity is liable under the loan documents. However, most loan documents also contain “carve-outs”, which are carve-outs from the non-recourse provision. For the carve-outs, individuals and guarantors can be held personally liable. For that reason, it is in the Borrower's best interest to limit the carve-outs as much as possible.

Flexibility in Leasing – Most loan documents contain a provision that requires the Lender's consent to major tenant leases (which lenders define differently). This requirement can add significant time and complexity to the lease negotiation process and can cost the Borrower a key tenant if a Lender is too restrictive in its lease requirements or does not review a proposed lease and provide a response to the Borrower in a timely manner.

Timely Responses from Lender – This applies to every matter that requires the Lender's review, consent or approval (*i.e.*, leases, SNDAs, etc.). Borrowers should try to get a reasonable time limit on the response time from the Lender.

Key Risk Management Clauses in Commercial Mortgage Loans:Defaults & Remedies

Sample Promissory Note Provision:

Default.

If Borrower defaults in the payment of principal, interest and/or any other obligations arising under this Note or any of the other Loan Documents, or if Borrower defaults in the performance of any of the other terms, covenants or conditions contained in this Note or in any of the other Loan Documents, then, at the option of Lender, the entire outstanding principal balance of this Note (together with all accrued unpaid interest) and all other obligations arising under this Note or any of the other Loan Documents, may be accelerated by Lender and become immediately due and payable, regardless of the Maturity Date. All amounts then due shall bear interest after maturity (whether by acceleration or otherwise) at the lesser of either: (i) the highest rate of interest then allowed by applicable laws; or (ii) the then applicable interest rate of this Note plus five hundred (500) basis points.

During the existence of any default, Lender may apply any funds received, including but not limited to insurance proceeds or condemnation awards, to any amount then due and owing

under this Note or any of the other Loan Documents, as Lender may determine in Lender's sole and absolute discretion. Neither this right nor the exercise of this right, shall serve to cure the default or preclude Lender from exercising its option to accelerate the entire Loan.

With respect to any Non-Monetary Default (as hereinafter defined), Lender's right to accelerate the maturity of the Loan shall be conditioned upon Lender giving Borrower written notice of such Non-Monetary Default and a thirty (30) day period, after the date of such notice, within which to cure such Non-Monetary Default, unless such Non-Monetary Default cannot reasonably be cured within said thirty (30) day time period, in which event Borrower shall have an extended period of time to complete the cure, provided that Borrower has commenced to cure the default within said thirty (30) day period and Borrower is, in Lender's sole judgment, not diminishing or impairing the value of the Property and is diligently pursuing a cure to completion. Any notice required hereunder shall be given as provided in the Mortgage. Lender shall have no obligation to give Borrower notice of, or any period to cure, any Monetary Default (as hereinafter defined) or any Incurable Default (as hereinafter defined) prior to exercising Lender's right to accelerate the maturity of the Loan and to exercise all other rights and remedies available to Lender at law or in equity. “Monetary Default” shall mean any default that can be cured by the payment of money, including but not limited to, the payment of principal and interest due under this Note and the payment of taxes, assessments and insurance premiums when due (as provided in the Mortgage). “Non-Monetary Default” shall mean any default that is not a Monetary Default or an Incurable Default. “Incurable Default” shall mean: (i) any voluntary or involuntary sale, assignment, mortgaging or transfer of the Property or interest therein in violation of the covenants of the Mortgage; or (ii) if Borrower, or any person or entity comprising Borrower, should make an assignment for the benefit of creditors, become insolvent, or file (or have filed against it) a petition in bankruptcy (including but not limited to, a petition seeking a rearrangement or reorganization).

During any period of default and regardless of any cure period applicable to such default, the Mortgage or any of the other Loan Documents in which either: (i) Borrower is permitted to take an action without Lender's consent; or (ii) Lender's consent is to be exercised reasonably, Lender's consent shall be required and shall be granted or withheld in Lender's sole and absolute discretion.

Sample Mortgage Provision:

Time is of the Essence; Monetary and Non-Monetary Defaults.

It is understood by Borrower that time is of the essence in connection with all obligations of Borrower herein, in the Note, the Assignment and any of the other Loan Documents.

Lender, at its sole option, may declare the Loan evidenced by the Note, as well as all other monies secured hereby, including, without limitation, all Prepayment Premiums (to the extent permitted by the laws of the State of [insert State] and late payment charges, to be forthwith due and payable, in the event:

- (i) Borrower defaults in the payment of any monthly installment of the Note, whether of principal or interest, or both, or in the payment of any other sums of money

referred to herein or in the Note, promptly and fully when the same shall be due, without notice or demand from Lender to Borrower in regard to such Monetary Default (as hereinafter defined);

- (ii) Borrower breaches or defaults on any one of the terms, covenants, conditions and agreements of the Note, this Mortgage, the Assignment or any other Loan Documents evidencing or securing the Note or the Loan; or in the event that each and every one of said terms, covenants, conditions and agreements is not otherwise either duly, promptly and fully discharged or performed, and any such Non-Monetary Default (as hereinafter defined) remains uncured for a period of thirty (30) days after Written Notice thereof has been delivered from Lender to Borrower; unless such Non-Monetary Default cannot be cured within said thirty (30) day period, in which event Borrower shall have an extended period of time to complete cure, provided that action to cure such Non-Monetary Default is promptly commenced within said thirty (30) day period, and Borrower is, in Lender's sole judgment, not diminishing or impairing the value of the Property, and is diligently pursuing a cure to completion.
- (iii) Any default occurs in the performance of any covenant or obligation of Borrower or any other party under any indemnity or guaranty delivered to Lender in connection with the Loan and such default continues beyond the expiration of applicable notice and cure periods.

Upon the occurrence of any one of the above events, and at the option of Lender, the principal of and the interest accrued on the Loan (as evidenced by the Note) and all other sums secured by this Mortgage shall immediately become due and payable as if all of said sums of money were originally stipulated to be paid on such day. In addition, Lender may avail itself of all rights and remedies provided by law and may foreclose or prosecute a suit at law or in equity as if all monies secured hereby had matured prior to its institution, anything in this Mortgage or in the Note to the contrary notwithstanding. Lender shall have no obligation to give Borrower notice of, or any period to cure, any Monetary Default or any Incurable Default (as hereinafter defined) prior to exercising its rights, powers, privileges and remedies to accelerate the maturity of the Loan secured hereby.

As used herein, the term "Monetary Default" shall mean any default which can be cured by the payment of money such as, but not limited to, the payment of principal and interest due under the Note, taxes, assessments and insurance premiums when due as provided in this Mortgage. As used herein, the term "Non-Monetary Default" shall mean any default that is not a Monetary Default or an Incurable Default. As used herein, the term "Incurable Default" shall mean either: (i) any voluntary or involuntary sale, assignment, mortgaging, encumbering or transfer in violation of the covenants contained herein; or (ii) if Borrower, or any person or entity comprising Borrower or any guarantor or indemnitor of the Loan, should make an assignment for the benefit of creditors, become insolvent, or file a petition in bankruptcy (including but not limited to, a petition seeking a rearrangement or reorganization) which is not dismissed within thirty (30) days after the filing of same.

Lender may institute an action to foreclose this Mortgage as to the amount so declared due and payable, and thereupon, the Property shall be sold according to law to satisfy and pay the

same, together with all costs, expenses and allowances thereof, including, without limitation, Reasonable Attorneys' Fees. The Property may be sold in one parcel, several parcels or groups of parcels, and Lender shall be entitled to bid at the sale, and, if Lender is the highest bidder for the Property or any part or parts thereof, Lender shall be entitled to purchase the same. The failure or omission on the part of Lender to exercise the option for acceleration of maturity of the Note and foreclosure of this Mortgage following any default as aforesaid or to exercise any other option or remedy granted hereunder to Lender when entitled to do so in any one or more instances, or the acceptance by Lender of partial payment of the Loan secured hereby, whether before or subsequent to Borrower's default hereunder, shall not constitute a waiver of any such default or the right to exercise any such option or remedy, but such option or remedy shall remain continuously in force. Acceleration of the maturity of the Note, once claimed hereunder by Lender, at the option of Lender, may be rescinded by written acknowledgment to that effect by Lender, but the tender and acceptance of partial payments alone shall not in any way either affect or rescind such acceleration of maturity, nor act as a waiver, accord and satisfaction, modification, novation or similar defense.

Insurance

Sample Mortgage provision:

Hazard Insurance.

Borrower shall, throughout the term of this Mortgage, continuously keep the Improvements, the Fixtures and Personal Property, now or hereafter existing, erected, installed and located in or upon the Real Property, insured with extended coverage insurance against loss or damage resulting from fire, windstorm, flood, sinkhole, earthquake and such other hazards, casualties, contingencies and perils including, without limitation, other risks insured against by persons operating like properties in the locality of the Property, or otherwise deemed necessary or advisable by Lender, on such forms and with such deductibles as may be required by Lender, covering the Property in the amount of the full replacement cost thereof, less excavating and foundation costs, and covering all loss or abatement of rental or other income, without a provision for co-insurance, in an amount equal to the scheduled rental income of the Property for at least twelve (12) months, or if applicable, business interruption insurance in an amount sufficient to pay debt service on the Note, operating expenses, taxes and insurance on the Property for a period of twelve (12) months, and covering loss by flood (if the Property lies in a Special Flood Hazard Area as designated on the Department of Housing and Urban Development's Maps, or other flood prone designation) in an amount equal to the outstanding principal balance of the Loan secured hereby or such other amount as approved by Lender, and earthquake insurance with a deductible amount of no more than ten percent (10%) of the policy amount, if the Property is located within one-half (1/2) mile of an Alquist-Priolo Special Earthquake Study Zone or if, in the judgment of Lender's inspecting architect, the Property lies in an area of anticipated significant seismic activity. All such insurance shall be carried with a company or companies licensed to do business in the state where the property is located, which is acceptable to Lender, which company or companies shall have a rating at the time this Mortgage is executed equivalent to at least A:X as shown in the most recent Best's Key Rating Guide. The original policy or policies and renewals thereof (or, at the sole option of Lender, duplicate originals or certified copies

thereof), together with receipts evidencing payment of the premium therefor, shall be deposited with, held by and are hereby assigned to, Lender as additional security for the Loan secured hereby. Each such policy of insurance shall contain a noncontributing loss payable clause in favor of and in a form acceptable to Lender, and shall provide for not less than thirty (30) days prior Written Notice to Lender of any intent to modify, non-renew, cancel or terminate the policy or policies, or the expiration of such policies of insurance. If the insurance required under this section or any portion thereof is maintained pursuant to a blanket policy, Borrower shall furnish to Lender a certified copy of such policy, together with an original Evidence of Insurance Certificate (Accord Form 27) for hazard insurance indicating that Lender is an insured under such policy in regard to the Property and showing the amount of coverage apportioned to the Property, which coverage shall be in an amount sufficient to satisfy the requirements hereof. Not less than fifteen (15) days prior to the expiration dates of each policy required of Borrower hereunder, Borrower will deliver to Lender a renewal policy or policies marked "premium paid" or accompanied by other evidence of payment and renewal satisfactory to Lender. In the event of foreclosure of this Mortgage or other transfer of title to the Property in extinguishment of the Loan secured hereby, all right, title and interest of Borrower, in and to any insurance policies then in force including any rights to unearned premiums, and in and to insurance proceeds then payable, shall pass to the purchaser or grantee.

In the event of loss by reason of hazards, casualties, contingencies and perils for which insurance has been required by Lender hereunder, Borrower shall give immediate notice thereof to Lender. Lender is hereby irrevocably appointed attorney-in-fact coupled with an interest, for Lender to, at its option, make proof of loss and/or to file a claim thereunder. Each insurance company concerned is hereby notified, authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and Lender jointly, and Borrower hereby authorizes Lender to adjust and compromise any losses for which insurance proceeds are payable under any of the aforesaid insurance policies and, after deducting the costs of collection, to apply the proceeds of such insurance, at its option either: (a) to the restoration or repair of the insured Improvements, and the Fixtures and Personal Property, provided that, in the opinion and sole discretion of Lender, such restoration or repair is reasonably practical and, provided further, that, in the opinion and sole discretion of Lender, either: (i) the insurance proceeds so collected are sufficient to cover the cost of such restoration or repair of the damage or destruction with respect to which such proceeds were paid; or (ii) the insurance proceeds so collected are not sufficient alone to cover the cost of such restoration or repair, but are sufficient therefor when taken together with funds provided and made available by Borrower from other sources; in which event Lender shall make such insurance proceeds available to Borrower for the purpose of effecting such restoration or repair; but Lender shall not be obligated to see to the proper application of such insurance proceeds nor shall the amount of funds so released or used be deemed to be payment of or on account of the Loan secured hereby, or (b) to the reduction of the Loan secured hereby, notwithstanding the fact that the amount owing thereon may not then be due and payable or that said Loan is otherwise adequately secured, in which event such proceeds shall be applied at par against the Loan secured hereby and the monthly payment due on account of such Loan shall be reduced accordingly. None of such actions taken by Lender shall be deemed to be or result in a waiver or impairment of any equity, lien or right of Lender under and by virtue of this Mortgage, nor will the application of such insurance proceeds to the reduction of the Loan serve to cure any default in the payment thereof. In

the event of foreclosure of this Mortgage or other transfer of title to the Property in extinguishment of the Loan secured hereby, all right, title and interest of Borrower in and to any insurance policies then in force including any rights to unearned premiums and in and to insurance proceeds then payable, shall pass to the purchaser or grantee.

In case of Borrower's failure to keep the Property properly insured as required herein, Lender, its successors or assigns, may (but shall not be required to) acquire such insurance as required herein at Borrower's sole expense.

Notwithstanding anything set forth in this section to the contrary, in the event of loss or damage to the Property by fire or other casualty for which insurance has been required by Lender and provided by Borrower, and the amount of such loss or damage does not exceed fifty percent (50%) of the unpaid principal balance of the Note, Lender hereby agrees to allow the proceeds of insurance to be used for the restoration of the Property and to release such insurance proceeds to Borrower as such restoration progresses, provided:

(a) Borrower is not in default under any of the terms, covenants and conditions of this Mortgage, the Note or any of the other Loan Documents;

(b) The Improvements, after such restoration, shall be at least eighty percent (80%) leased pursuant to leases approved in writing by Lender;

(c) The plans and specifications for the restoration of the Property are approved in writing by Lender in advance;

(d) At all times during such restoration, Borrower has deposited with Lender funds which, when added to the insurance proceeds received by Lender, are sufficient to complete the restoration of the Property in accordance with the approved plans and specifications, and all applicable building codes, zoning ordinances, regulations and Accessibility Laws, and further, that the funds retained by Lender are sufficient to complete the restoration of the Property as certified to Lender by Lender's inspecting architect/engineer;

(e) Borrower provides suitable completion, payment and performance bonds, builders' all risk insurance, and all necessary licenses and permits for such restoration in form and amount acceptable to Lender;

(f) The insurer under such policies of fire or other casualty insurance does not assert any defense to payment under such policies against Borrower, any tenant, or third party of Borrower with regard to of the Property;

(g) Lender shall have the option, upon the completion of such restoration of the Property, to apply any surplus insurance proceeds remaining after the completion of such restoration, at par, to the reduction of the outstanding principal balance of the Note; notwithstanding the fact that the amount owing thereon may not then be due and payable or that said Loan is otherwise adequately secured;

(h) The funds held by Lender shall be disbursed no more often than once per month and in not more than five (5) increments of not less than Fifty Thousand and 00/100 Dollars (\$50,000.00) each, except the final disbursement of such funds which may be in an amount less than Fifty Thousand and 00/100 Dollars (\$50,000.00);

(i) Lender's obligation to make any such disbursement shall be conditioned upon Lender's receipt of written certification from Lender's inspecting architect/engineer (whose fees shall be reimbursed to Lender by Borrower) that all construction and work for which such disbursement is requested has been completed in accordance with the approved plans and specifications and in accordance with all applicable building codes, zoning ordinances and all other local, state or federal laws, codes, ordinances, statutes, rules and regulations, and, further, that Borrower has deposited with Lender sufficient funds to complete such restoration in accordance with subparagraph ___(d) above; and

(j) Lender shall be entitled to require and to impose such other conditions to the release of such funds as would be customarily or reasonably be required and imposed by local construction lenders for a project of similar nature and cost.

Liability Insurance.

Borrower shall, throughout the term of this Mortgage, continuously carry and maintain such commercial general liability insurance as may from time to time be required by Lender, taking into consideration the type of property being insured and the corresponding liability exposure, on forms, with deductibles, in amounts and with such company or companies licensed to do business in the state where the Property is located and as may be acceptable to Lender. All such commercial general liability insurance shall be carried with a company or companies which have a rating at the time this Mortgage is executed equivalent to at least A:X as shown in the most recent Best's Key Rating Guide. The original policy or policies and all renewals thereof (or, at the sole option of Lender, duplicate originals or certified copies thereof), together with a Certificate of Insurance (Accord Form 25S) and receipts evidencing payment of the premium therefor, shall be deposited with, held by and are hereby assigned to, Lender as additional security for the Loan secured hereby. Such policy or policies of insurance shall name Lender as an additional insured and shall provide for not less than thirty (30) days prior Written Notice to Lender of any intent to modify, cancel, non-renew, or terminate the policy or policies or the expiration of such policy or policies of insurance. Not less than fifteen (15) days prior to the expiration dates of each policy or policies required of Borrower hereunder, Borrower will deliver to Lender a renewal policy or policies marked "premium paid" or accompanied by other evidence of payment and renewal satisfactory to Lender. In the event of foreclosure of this Mortgage or other transfer of title to the Property in extinguishment of the Loan secured hereby, all right, title and interest of Borrower, in and to any insurance policies then in force including any rights to unearned premiums, and in and to insurance proceeds then payable, shall pass to the purchaser or grantee.

In case of Borrower's failure to keep the Property properly insured as required herein, Lender, its successors or assigns, may (but shall not be required to) acquire such insurance as required herein at Borrower's sole expense.

Escrow Accounts

Sample Mortgage Provision:

Funds Held By Lender For Taxes, Assessments, Insurance Premiums, And Other Charges.

In order to more fully protect the security of this Mortgage, Borrower shall deposit with Lender, together with and in addition to each monthly payment due on account of the Loan evidenced by the Note, an amount equal to one-twelfth (1/12) of the annual total of such taxes, assessments, insurance premiums and other charges (all as estimated by Lender in its sole discretion) so that, at least thirty (30) days prior to the due date thereof, Lender shall be able to pay in full all such taxes, assessments, insurance premiums and other charges as the same shall become due. Lender may hold the sums so deposited without paying interest, commingle same with its general funds and/or apply the same to the payment of said taxes, assessments, insurance premiums or other charges as they become due and payable. If at any time the funds so held by Lender are insufficient to pay such taxes, assessments, insurance premiums or other charges as they become due and payable, Borrower shall immediately, upon notice and demand by Lender, deposit with Lender the amount of such deficiency. The failure on the part of Borrower to do so shall entitle Lender, at Lender's sole option, to make such payments in accordance with the rights and pursuant to the conditions elsewhere provided in this Mortgage. Whenever any default exists under this Mortgage, Lender may, at Lender's sole option, but without an obligation so to do, apply any funds so held by Lender pursuant to this section toward the payment of the Loan secured hereby, notwithstanding the fact that the amount owing thereon may not then be due and payable or that the Loan may otherwise be adequately secured, in such order and manner of application as Lender may elect.

Maintenance; Environmental

Sample Mortgage Provision:

Preservation and Maintenance of Property; Accessibility; Hazardous Waste.

(a) Borrower shall keep all Improvements now existing or hereafter erected on the Real Property in good order and repair, and shall not do or permit any waste, impairment or deterioration, nor alter, remove or demolish any of the Improvements, Fixtures or Personal Property attached or appertaining thereto, without the prior written consent of Lender. Borrower shall not initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance or other public or private restrictions limiting or defining the uses that may be made of the Property or any part thereof, nor perform or permit any other act whereby the Property shall become less valuable, be used for purposes contrary to applicable law, or be used in any manner that will increase the premium for, or result in a termination or cancellation of, the insurance policies that are required by the Loan

Documents. In furtherance of, and not by way of limitation upon, the foregoing covenant, Borrower shall effect such repairs as Lender may reasonably require, and from time to time make all needful and proper replacements so that the Improvements, Appurtenances, Fixtures and Personal Property will, at all times, be in good condition, fit, and proper for the respective purposes for which they were originally erected or installed. In connection with the making of such repairs, Borrower shall use contractors who are properly licensed, who carry workers' compensation insurance and appropriate liability insurance, who generally have a good reputation for completing their work in a neat, prompt and workmanlike manner, and use only new or re-manufactured goods of a quality as good or better than that originally used on the Property. As provided herein, Borrower shall insure that no liens are filed against the Property that relate in any way to repair or maintenance work performed on the Property.

(b) Borrower shall, at all times throughout the term of this Mortgage, keep the Property and groundwater of the Property free of Hazardous Materials (as defined below) and free of any liens associated with the presence or release of Hazardous Materials. Borrower shall not, and shall not knowingly permit its tenants or any third party requiring the consent of Borrower to enter the Property, to use, generate, manufacture, treat, store, release, threaten release, transport on or over, emit or dispose of Hazardous Materials in, on, over, under or about the Property, which for purposes of this section shall include the groundwater of the Property, in any manner that would constitute a violation of any federal, regional, state or local law, code, ordinance, statute, rule, regulation, decision or order currently in existence or hereinafter enacted (hereinafter collectively referred to as "Hazardous Waste Laws"). Borrower shall give Lender prompt Written Notice (as hereinafter defined) of any claim by any person, entity, or governmental agency that a release or disposal of Hazardous Materials has occurred on or about the Property in excess of any quantity permitted by the Hazardous Waste Laws, whether caused by Borrower, a tenant or any third party. Borrower, at Borrower's sole cost, shall retain qualified engineers or environmental consultants to promptly and thoroughly investigate any release or suspected release of Hazardous Materials on or about the Property. To the extent such actions are required by any applicable Hazardous Waste Laws, Borrower shall promptly remove or remediate (as appropriate) any Hazardous Materials found on or about the Property regardless of whether or not Borrower was responsible for the existence of the Hazardous Materials. Borrower shall not incorporate any underground storage tanks into the Property without the prior written consent of Lender, and shall insure that all tanks currently on the Property are maintained in compliance with all applicable Hazardous Waste Laws and underground storage tank regulations.

Borrower hereby agrees to indemnify Lender and hold Lender harmless from and against any and all losses, liabilities, damages, injuries, costs, expenses, fines, fees and claims of any and every kind whatsoever paid, incurred or suffered by, or asserted against, Lender for, with respect to, or as a direct or indirect result of, the presence in, on, over, under or about, or the escape, seepage, leakage, spillage, discharge, emission or release from, the Property of any Hazardous Materials (including, without limitation, any losses, liabilities, damages, injuries, costs, expenses or claims asserted or arising under any Hazardous Waste Laws), regardless of the source of origination and whether or not caused by, or within the control of, Borrower.

Liability under this Paragraph 3(b) and similar provisions in this Mortgage and the other Loan Documents concerning Hazardous Materials shall survive repayment of the Note and satisfaction of this Mortgage; provided, however, Borrower shall have no liability under this Paragraph 3(b) regarding Hazardous Materials if either (i) the Property becomes contaminated subsequent to Lender's acquisition of the Property by foreclosure, acceptance by Lender of a deed in lieu thereof, or subsequent to any transfer of ownership of the Property which was approved or authorized by Lender in writing, pursuant to this Mortgage, provided that such transferee assumes in writing all of the obligations of Borrower with respect to Hazardous Materials pursuant to the Loan Documents, or (ii) at such time Borrower provides Lender with an environmental assessment report acceptable to Lender, in Lender's sole discretion, showing the Property to be free of Hazardous Materials and not in violation of any Hazardous Waste Laws. The burden of proof under this Paragraph 3(b) with regard to establishing the date upon which any Hazardous Materials was released in, on, over, under or about the Property shall be upon Borrower.

Hazardous Materials shall include, but not be limited to, substances defined as "hazardous substances," "hazardous materials," or "toxic substances" in The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by The Superfund Amendments and Reauthorization Act of 1986, The Hazardous Materials Transportation Act, The Resource Conservation and Recovery Act of 1976, as amended by The Used Oils Recycling Act of 1980, The Solid Waste Disposal Act amendment of 1984, The Toxic Substances Control Act, The Clean Air Act, The Clean Water Act, or in any other Hazardous Waste Laws and shall include oil, petroleum and all of its constituents and by-products.

(c) Borrower shall at all times throughout the term of this Mortgage, maintain the Property in full compliance with all federal, state, county, regional or local laws, codes, ordinances, rules, regulations, decisions and orders currently in existence or hereafter enacted or rendered, governing accessibility for the disabled, including but not limited to: The Architectural Barriers Act of 1968; The Rehabilitation Act of 1973; The Fair Housing Act of 1988; The Americans with Disabilities Act; and The (insert State) Elimination of Architectural Barriers Act (hereinafter collectively referred to as the "Accessibility Laws").

Borrower hereby agrees to indemnify and hold Lender harmless from and against any and all losses, liabilities, damages, injuries, costs, expenses and claims of any and every kind whatsoever paid, incurred, suffered by, or asserted against Lender for, with respect to, or as a direct or indirect result of, the non-compliance of Borrower or the Property, with the Accessibility Laws, regardless of whether or not such noncompliance is caused by, or within the control of, Borrower.

Liability under this section and similar provisions of this Mortgage and the other Loan Documents concerning Accessibility Laws shall survive repayment of the Note and satisfaction of this Mortgage; provided, however, Borrower shall not be liable under this section for compliance with any Accessibility Laws if such Accessibility Laws first become effective, or such violations result from alterations or improvements to the Property that are performed subsequent to Lender's acquisition of the Property by foreclosure or acceptance of a deed in lieu of foreclosure or subsequent to any transfer that was approved or authorized

by Lender, provided that such transferee assumes in writing all obligations pertaining to the Accessibility Laws pursuant to this Mortgage and the other Loan Documents.

(d) Lender and/or its agents, shall at all reasonable times have the right and shall be permitted, but shall not be required, to enter upon and inspect the Property to insure compliance with the foregoing covenants, and any and all other terms, covenants, conditions and agreements set forth in this Mortgage.

Non-Recourse Provisions & Carve-Outs

Sample Promissory Note Exculpation provision (an almost identical provision should also be included in the Mortgage):

Exculpation.

The liability of Borrower with respect to the payment of principal and interest under this Note shall be "non-recourse" and Lender's source of satisfaction of Borrower's obligations under this Note and the other Loan Documents shall be limited to the Property and Lender's receipt of the rents, issues and profits from the Property and any other collateral pledged as security, now or hereafter held by Lender. Lender shall not seek to procure payment out of any other assets of Borrower or any person or entity comprising Borrower, or to seek judgment (except as hereinafter provided) for any funds that are or may be payable under this Note or any of the other Loan Documents, as well as any claim or judgment (except as hereafter provided) for any deficiency remaining after foreclosure of the Mortgage. Nothing herein contained shall be deemed to be a release or impairment of the Loan evidenced by this Note or the security intended by the other Loan Documents, or be deemed to preclude Lender from exercising its rights to foreclose the Mortgage or to enforce any of its other rights or remedies under the Loan Documents [, **including but not limited to the guaranty from _____ to Lender, executed as of the date of this Note (the "Guaranty")**].

It is expressly understood and agreed that the limitation on liability described above shall in no way affect or apply to the continued personal liability of Borrower and Borrower's general partners for all sums due to:

(1) fraud or material misrepresentation made in or in connection with the Loan application, this Note or any of the other Loan Documents;

(2) failure to pay taxes, assessments and any other governmental impositions prior to delinquency, or to pay for labor, materials or any other charges that could result in liens on any portion of the Property;

(3) the misapplication of (i) proceeds of insurance covering any portion of the Property; or (ii) proceeds of the sale, condemnation or transfer in lieu of condemnation of any portion of the Property; or (iii) rentals received by or on behalf of Borrower subsequent to the date on which Lender makes written demand therefor pursuant to the terms, conditions or remedies set forth in any of the Loan Documents;

(4) causing or permitting waste to occur in, on or about the Property, and failing to maintain the Property, except for ordinary wear and tear;

(5) failure to return to Lender all unearned advance rentals and security deposits that have been paid by tenants of the Property to the extent that such fees have not been refunded to or forfeited by such tenants;

(6) failure to return to Lender any and all sums paid to Borrower by any tenant of the Property which sums permit the tenant to terminate its lease or otherwise abandon or vacate its leased premises;

(7) loss by fire or any other casualty to the extent not compensated by insurance proceeds collected by or remitted to Lender;

(8) failure to return, or failure to reimburse Lender for, all Fixtures and Personal Property (as defined in the Mortgage) owned by Borrower and taken from the Property by or on behalf of Borrower out of the ordinary course of business, and not replaced by items with values equal to or greater than the values of the Fixtures and Personal Property so removed;

(9) all court costs and Reasonable Attorneys' Fees (as hereinafter defined) actually incurred by Lender for which Borrower is liable pursuant to the terms of this Note or the terms of any of the other Loan Documents;

(10) all costs and expenses, including returning the Property to its prior condition, including but not limited to the proper removal, transportation and disposal of Hazardous Materials (as defined in the Mortgage): (i) found on the Property in excess of legal limits; or where removal or remediation is otherwise required by any governmental entity; to which exposure is limited or regulated by any governmental authority; or that could pose a hazard to the health or safety of the occupants of the Property or the general public and regardless of the source of origination (including sources off the Property that have migrated onto the Property or into its groundwater); and (ii) violations or breaches by Borrower of any indemnity or other agreement of Borrower to hold Lender harmless from and against any and all losses, liabilities, damages, injuries, costs and expenses of any kind arising as a result of the presence and/or removal of Hazardous Materials and from the violation of Hazardous Waste Laws (as defined in the Mortgage). Borrower shall not be liable under this section if the Property becomes contaminated subsequent to Lender's acquisition of the Property by foreclosure or acceptance of a deed in lieu of foreclosure, or subsequent to any transfer of ownership of the Property that was approved by Lender pursuant to the Mortgage. Liability under this subparagraph (10) shall extend beyond repayment of the Loan and compliance with the terms of the Note and Mortgage unless, at such time, Borrower provides Lender with an environmental assessment report that is acceptable to Lender, in Lender's sole and absolute discretion, reasonably demonstrating that the Property is free of Hazardous Materials and is not subject to any violation of Hazardous Waste Laws. The burden of proof under this subparagraph with regard to establishing the date upon which any such Hazardous Materials were placed or appeared in, on or under the Property, shall be upon Borrower.

(11) any and all costs and expenses: (i) incurred in order to cause the Property to comply with any applicable Accessibility Laws (as defined in the Mortgage) and (ii)

associated with violations or breaches by Borrower of any indemnity or other agreements by Borrower to hold Lender harmless from and against any and all losses, liabilities, damages, injuries, costs or expenses of any kind arising as a result of non-compliance with any applicable Accessibility Laws. Borrower shall not be liable under this section for compliance with any applicable Accessibility Laws that first become effective, or for any violation of any applicable Accessibility Laws resulting from alterations or improvements to the Property, that are performed subsequent to Lender's acquisition of the Property by foreclosure or acceptance of a deed-in-lieu of foreclosure or subsequent to any transfer of ownership of the Property that was approved by Lender pursuant to the Mortgage; and

(12) failure to remit to Lender any amounts under any letter of credit (or any renewals and/or replacements thereof) supplied by Borrower to Lender in connection with the Loan, this Note or any of the other the Loan Documents in the event that the institution issuing such letter of credit becomes insolvent, files or has filed against it any bankruptcy or similar proceeding or is closed (either temporarily or permanently), is placed in receivership, conservatorship or liquidation by the Federal Deposit Insurance Corporation, Resolution Trust Corporation or any other governmental or quasi-governmental entity, or otherwise fails or refuses to honor such letter of credit.

[ADD THE FOLLOWING IN STATES WHERE APPLICABLE]

(13) failure to timely pay any amounts payable for all state documentary stamp taxes and intangible personal property taxes (if any) that may be levied or assessed against the Loan, this Note, or any of the other Loan Documents, together with all accrued interest, penalties or changes.

The obligations of Borrower in subparagraphs (1) through (12) [or (13)] above, except as specifically provided in subparagraphs (10) and (11), shall survive the repayment of the Loan evidenced by this Note and satisfaction of the Mortgage.

Notwithstanding anything to the contrary contained in this Note or in the other Loan Documents, until the Guaranty referenced above is released by Lender, the exculpation and non-recourse provisions of this section shall not be effective and Borrower shall be personally, fully and completely liable for the repayment of the Loan as evidenced by this Note and performance under the Loan Documents.

Full Recourse

Notwithstanding any provisions in this Note to the contrary, including without limitation the provisions set forth in the section above captioned "Exculpation", Borrower and the general partners of Borrower (if any) shall be personally liable, jointly and severally, for the entire indebtedness evidenced by this Note (including all principal, interest and other charges) in the event that Borrower: (i) violates the covenant governing the placing of subordinate financing on the Property as set forth in Paragraph ___ of the Mortgage, or (ii) violates the covenant restricting transfers of interests in the Property or transfers of ownership interests in Borrower as set forth in Paragraph ___ of the Mortgage.

Design & Construction

What are the risks facing an Owner in a construction project?

- Inadequate, incomplete or poorly drafted design documents.
- Delays (controllable and uncontrollable).
- Personal injury accidents at the site.
- Property damage at the site or to materials in transit or in storage.
- Builder becomes insolvent and cannot complete the project.
- Builder fails to pay subcontractors or material suppliers.
- Change orders increasing costs.
- Poor workmanship (Standard of Care).

Key Risk Management Provisions in Design & Construction Contracts

Note: Sample clauses follow in the attached contract.

Design Documents – Owners should pay as much attention to the contracts with their design professional as they do to the construction contract. American Institute of Architect (AIA) contracts are very good for this purpose. Know what remedies you have available to you if the design documents are inadequate, incomplete or poorly drafted. Are the design professional's obligations clear in the contract for design services or are there a lot of "assumptions"? Is the "scope of work" clear? Sometimes it is helpful to focus more on what is *not* included in the scope of work then what is included. What is the applicable "standard of care" under the contract?

Insurance; Bonding – Owner wants the Contractor and any subcontractors to carry adequate property casualty insurance and liability insurance. If any design work is being done as part of the project, the Owner will want the design professional to carry Errors & Omissions ("E&O") or Professional Liability insurance. Either the Contractor or Owner will also need to obtain builder's risk insurance. Payment & performance bonds increase the cost of a project (the cost is usually passed through to the Owner by the Contractor), however, if the project is large, complex, critical or is to be performed over an extended period of time, you have to weigh the cost of the bond against the cost that would be incurred if the Contractor were to suddenly become insolvent and was unable to finish the project.

Default; Remedies – The Owner wants the right to declare a default and terminate the contract as soon as possible if a major problem arises so a new contractor can be brought in to finish the job without undue delay. Of course the Contractor will want written notice and a reasonable opportunity to cure any default that could lead to a termination of the contract. The parties also need to address what the Contractor is entitled to recover in the event of contract termination and this usually depends on whether the termination was or was not for cause.

Payment Procedures; Schedule – It must be clear from the contract when the Contractor is entitled to payment and for what amount. Is the project simple enough where a monthly invoice will do, or is a request for payment (requiring review and approval by the design

professional and/or owner) more appropriate? How will disputes over the amount requested be addressed? Will there be any retainage? Conditional or unconditional (as appropriate) lien waivers should be obtained before any payment is made.

Alternative Dispute Resolution – ADR may or may not be desirable, depending on your perspective. On one hand, ADR may be desirable for disputes where the monetary value of the dispute is too low to justify litigation. On the other hand, the relatively low cost of mediation may encourage one or both parties to mediate every single dispute that arises. You are not bound by the AAA rules and procedures and can customize an ADR provision that fits your needs and the complexity/size of the project.

Delays – How will you handle the inevitable delays? What is an acceptable delay? Will there be an extension of time and an adjustment of the contract sum for uncontrollable delays or just an extension of time with no adjustment of the contract sum? What documentation will be required for a delay claim? When must a delay claim be presented?

Completion Trigger – Is “Substantial Completion” or “Completion” adequately defined? Who makes the determination? When do warranties begin to run?

[Sample Construction Contract Follows]

PART I - ANNUAL SERVICES/SMALL PROJECT CONTRACT

(This Part I is to be used in conjunction with Part II, which consists of the General Conditions to the Contract)

Section 1.0 Basic Terms.

- (a) **“Owner” and Notice Address:** [Redacted]
Attn: [Redacted]
Phone: [Redacted]
Fax: [Redacted]
e-mail: [Redacted]
- (b) **“Contractor” and Notice Address:** [Redacted]
Attn: [Redacted]
Phone: [Redacted]
Fax: [Redacted]
e-mail: [Redacted]
- (c) **“Effective Date”** This Contract shall be effective as of [this is usually the date the contract was executed].
- (d) **“Expiration Date”** This Contract shall terminate on [this may be the Completion Date or it may be a later date if the Contractor is to perform on other projects].
- (e) **“Site” and Location:** As identified in the Proposal or RFP. (See, Section 2.0 below)
- (f) **“Contract Price”** As identified in the Proposal or RFP. (See, Section 2.0 below)

Section 2.0 Contract Documents. The following documents constitute the “Contract Documents”:

- (a) This Part I - Annual Services/Small Project Contract;
- (b) The general conditions to the Annual Services/Small Project Contract (“Part II - General Conditions”);
- (c) The specifications, plans or request for proposal (“RFP”) (as issued by the Owner, if any);
- (d) The contractor/services provider requirements provided by Owner (“Contractor Requirements”); and
- (e) The proposal for the Work that is to be supplied by Contractor to the Owner (“Proposal”).

Collectively, the above referenced documents comprise the “Contract”. To the extent that this Annual Services/Small Project Contract and any other Contract Documents (including any attached exhibits) are in direct conflict, this Contract for Annual Services/Small Project shall be controlling.

Section 3.0 The Work. The “Work” consists of the services and/or materials to be provided by Contractor as more particularly described in the Proposal.

Section 4.0 Term. This is a contract for the provision of services and/or materials that may be provided continuously over the term of this Annual Services/Small Project Contract or intermittently on distinct projects. The beginning and ending dates shall be determined as follows: (a) Work on specific projects shall commence on the “Commencement Date” and be completed on or before the “Completion Date”, as those terms are defined in a separate Proposal that shall be provided to Owner by Contractor; and (b) The provision of ongoing services shall commence on the Effective Date and end on the Expiration Date of this Annual Services/Small Project Contract, as set forth above. All Work performed by the Contractor between from the Effective Date through the Expiration Date is to be governed by the terms and conditions of this Contract.

Section 5.0 Billing: Payment. Owner shall make payment to Contractor as set forth in Section 2.0 of the General Conditions, unless other provisions are specifically set forth in the Proposal.

Section 6.0 Insurance. Contractor shall carry and maintain at Contractor’s cost, the insurance coverages set forth in Section 10.0 of the General Conditions, unless other provisions are specifically set forth below. [insert any special insurance provisions here, including any payment or performance bond requirements, E&O coverage, etc.]

PART II - GENERAL CONDITIONS

Section 7.0 Underground Obstructions; Utilities. If any excavation is to be conducted as part of the Work or if the Work could otherwise reasonably be expected to impact existing utilities serving the Site (underground or aboveground), Contractor shall identify and accurately locate all utilities serving the Site and Contractor assumes all liability for any damages, including but not limited to personal injury, arising from Contractor's failure to properly identify and protect such utilities.

Section 8.0 Confidentiality: Contractor shall ensure that any information disclosed to or obtained by Contractor in connection with its Work under this Contract shall not be disclosed to others, in whole or in part, without the prior written consent of Owner, and shall be used solely for the purpose for which such information was provided and for no other purpose whatsoever.

Section 9.0 Notices. Notices to the respective parties shall be sent to the addresses set forth in Section 1.0 above and shall be deemed to have been received: (a) on the actual date of receipt if sent by overnight courier or registered/certified mail return receipt requested; or, (b) on the date that the receiving party provides the sending party written confirmation of receipt of the notice if sent by facsimile. Notice by any other means shall not be deemed to be effective notice.

Section 10.0 Execution in Counterparts. This Contract may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which shall constitute one Contract. To facilitate execution of this Contract, the parties may execute and exchange counterparts of the signature page to this Contract by facsimile. Until such time as both parties are in receipt of a fully executed and complete Contract, neither party shall have any rights or obligations towards the other party.

Section 11.0 Site Access; Scheduling. Contractor is hereby granted a limited right-of-entry to the Site for the sole purpose of completing the Work. Access to the building, scheduling the Work and building security issues shall be coordinated prior to commencing any Work on the Site with the Owner contact. Contractor shall be responsible for obtaining the name and contact information of Owner's contact person from Owner prior to commencing work. Any keys, access cards and/or pass codes issued to Contractor for access to complete the Work pursuant to this Agreement must be returned to Owner immediately upon completion of the Work or the earlier termination of this Agreement. Owner reserves the right to (a) withhold final payment from Contractor until such time as all such keys, access cards and/or pass codes have been returned; or (b) if thirty (30) days have passed since the completion of the Work or earlier termination of this Agreement, Owner may deduct the actual cost of changing the locks or access codes from the amount owing to Contractor.

IN WITNESS WHEREOF, the Owner and Contractor have executed this Contract as of the dates indicated below.

<p>OWNER:</p> <p>_____</p> <p>By: _____ *</p> <p>Print Name: _____</p> <p>Its: _____</p> <p>Date: _____</p>	<p>CONTRACTOR:</p> <p>[contractor's correct legal name]</p> <p>_____</p> <p>By: _____ *</p> <p>Print Name: _____</p> <p>Its: _____</p> <p>Date: _____</p>
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ATTACHMENTS:

- Part II - General Conditions to the Annual Services/Small Project Contract
- A - Specifications, plans or the RFP (as issued by the Owner, if any)
- B - Contractor's Proposal
- C - Nationwide Contractor/Service Provider Requirements

*NOTE: Owner and Contractor must also sign the General Conditions attached to this Contract.

Section 1.0 Contract Documents. These GENERAL CONDITIONS ("General Conditions"), by and between Nationwide Mutual Insurance Company ("Owner") and Contractor (as identified below), are an integral part of the "Contract Documents", which consist of: (a) The Annual Services/Small Project Contract; (b) these General Conditions; (c) Nationwide Contractor Requirements; and (d) the Proposal. The Contract Documents shall collectively comprise the "Contract". These General Conditions supersede and replace any general conditions provided by Contractor that may be included in, or attached to, Contractor's Proposal.

Section 2.0 Contract Price; Payment. The Contract Price for the Work, as set forth in the Proposal, shall be all inclusive and shall specifically include, but shall not be limited to: (a) all applicable taxes; (b) the cost of all licenses, permits, approvals and inspections necessary to complete the Work; (c) any dumpster, dump fees, hauling or disposal fees incurred by the Contractor; and (d) the cost of meeting all of the requirements set forth in the Contract. Payment of any undisputed amounts shall be made to Contractor (a) within thirty (30) days after Owner's receipt of a complete invoice that complies with the terms of the Proposal; or (b) otherwise pursuant to the payment schedule set forth in the Proposal.

Section 3.0 Compliance with Laws; Hazardous Conditions; Safety Issues. The Work shall be completed in compliance with all applicable federal, state and local laws, rules and regulations, including, but not limited to, all laws related to the protection of human health and safety and protection of the environment (including all applicable OSHA and EPA regulations). **THE CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR DEVELOPING, MAINTAINING AND ENFORCING COMPLIANCE WITH ALL WORKER/WORKPLACE SAFETY PROGRAMS AND PROCEDURES REQUIRED BY LAW OR OTHERWISE NECESSARY TO COMPLETE THE WORK IN A SAFE MANNER.** Contractor shall be solely liable for any claims, fines, fees, penalties or other liabilities arising from Contractor's failure to perform the work in a safe manner; comply with all such laws, rules or regulations; or to effectively develop, maintain and enforce an adequate worker/workplace safety program. Contractor shall: (a) take all necessary and appropriate actions to protect Contractor, Contractor's employees, agents, vendors, subcontractors; Owner, Owner's property and Owner's employees, agents, vendors; and all third parties that lawfully have access to the Premises or to public areas adjacent to the Premises, from exposure to any unsafe conditions that may be associated with the work performed by Contractor; (b) provide Owner with immediate notice of any notices, citations, property damage or personal injuries occurring on (or adjacent to) the Premises or that are in any way associated with the Work; and (c) promptly notify Owner upon discovering any Hazardous Substances³ or conditions at the Premises that were not previously disclosed to Contractor by Owner.

Section 4.0 Representations and Warranties. Contractor hereby represents and warrants to Owner that: (a) Contractor is familiar with the laws, rules, and regulations applicable to the Work; (b) Contractor has thoroughly reviewed the Contract Documents and has obtained in writing, from Owner, clarification of any terms or conditions contained therein that Contractor found to be in conflict, in error, inconsistent or unclear; (c) Contractor has inspected the premises where the Work will be performed (the "Site") and found existing site conditions to be consistent with the Work described and the Contract Documents; (d) Contractor is sufficiently experienced with the Work to be performed and shall supply a sufficient number of qualified personnel (certified and licensed as required by any applicable law, rule or regulation) necessary to complete the Work as provided herein; and (e) Contractor is not, and Contractor is not engaged in this transaction on behalf of, a person or entity with which Owner is prohibited from doing business pursuant to any law, regulation or executive order pertaining to national security ("National Security Laws")⁴ and Contractor has not violated and, to the best of Contractor's knowledge Contractor is not under investigation for, the violation of any Laws pertaining to money laundering, as those Laws are more particularly described in the footnote below.

³ As used herein, the term "Hazardous Substances" shall have the same meaning as set forth in §101(14) of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") as amended and shall also include: (a) "Pollutants" and "Contaminants" as defined by the CERCLA; (b) substances defined as "Toxic" by the Toxic Substances Control Act ("TSCA") and, (c) petroleum, petroleum by-products and its constituents.

⁴ "National Security Laws", as referenced above, shall specifically include, but shall not be limited to, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 (aka, the USA Patriot Act); Executive Order 13224; the Bank Secrecy Act, 31 U.S.C. Section 5311 et. seq.; the Trading with the Enemy Act, 50 U.S.C. App. Section 1 et seq.; the International Emergency Economic Powers Act, 50 U.S.C. Section 1701 et. seq.; sanctions and regulations promulgated pursuant thereto by the Office of Foreign Assets Control ("OFAC"), as well as laws related to the prevention and detection of money laundering in 18 U.S.C Sections 1956 and 1957.

Section 5.0 Permits; Notices. Contractor has obtained (or prior to commencing any Work, will obtain) all of the licenses, permits, approvals and inspections necessary (if any) to complete the Work and the cost of all such licenses, permits, approvals and inspections are included in the cost of the Work.

Section 6.0 Standard of Care. The Work to be performed by Contractor under this Contract shall, at a minimum, meet all professional and/or trade standards applicable to Contractor and/or the Work being performed by Contractor. Contractor shall perform all Work under this Contract in a manner that is consistent with the skill, competence and knowledge customarily exercised by similarly experienced and qualified Contractors performing similar Work in the locality where the Site is located.

Section 7.0 Labor, Tools and Equipment Contractor shall supply all of the services, labor, tools, equipment, transportation and materials necessary to complete the Work in a timely and efficient manner.

Section 8.0 Site Conditions. Contractor shall maintain the Site in a clean, neat and orderly condition at all times; clean-up the Site at the end of each work day; and promptly remove all debris, trash or waste generated during performance of the Work upon completion of the Work. All such debris, trash or waste shall be transported and disposed of at a disposal or recycling facility that is specifically authorized by the applicable governmental authority to accept the type of debris, trash or waste being deposited. Contractor shall provide Owner with dump receipts or other evidence demonstrating the final disposition of all debris, trash or waste generated during performance of the Work. Any costs incurred by Owner in cleaning-up the Site (either on a daily basis or upon completion of the Work) will be billed to Contractor and shall, at Owner's election, be payable immediately upon Contractor's receipt of a statement therefore or the cost incurred by Owner may be deducted from any future payments due to Contractor.

Section 9.0 Insurance. Contractor shall carry and maintain at its own cost, with insurance companies that are rated "A" or better by A.M. Best's insurance rating service, all necessary liability insurance for damages caused or contributed to by Contractor and insuring Contractor against claims that arise from or that are otherwise related to the work performed, or materials provided, by Contractor. Minimum insurance coverages, which shall not be construed as a limit on Contractor's liability, are set forth below:

- (a) **Workers' Compensation** insurance to the full extent required by applicable state or federal laws;
- (b) **Employer's Liability** insurance of not less than \$1,000,000.00;
- (c) **Commercial General Liability** ("CGL") insurance, including Contractual Liability, Public Liability coverage and satisfying the provisions of subparagraphs (i) and (ii) below, of not less than \$2,000,000.00 each occurrence and \$2,000,000.00 in the aggregate.
 - i. The CGL policy shall also cover liability arising from premises-operations, independent contractors, products-completed operations (maintained for at least 2 years following final completion of the Work/Services provided under the Contract), personal injury and liability under an insured contract (including the tort liability of another assumed in a business contract).
 - ii. Contractor's insurance shall apply as primary insurance with respect to any other insurance or self-insurance programs carried by any indemnitees. If any additional insured has other insurance that is applicable to the loss, such other insurance shall be on an excess or contingent basis.
- (d) **Comprehensive Auto Liability:** a combined single limit of not less than \$2,000,000 on all owned or leased vehicles used in connection with the Project (if any).

All of the aforesaid insurance (except the Worker's Compensation Insurance and Employer's Liability Insurance) shall be written in the name of Contractor and shall name Owner as an additional insured. All such policies shall be underwritten with deductibles and in a form that shall be subject to Owner's approval. The certificates of insurance shall contain a provision that the policies will not be canceled or the coverage materially changed without 30 days' prior written notice to the Owner.

CONTRACTOR MUST PROVIDE OWNER WITH CERTIFICATES OF INSURANCE PRIOR TO COMMENCING ANY WORK AND UPON ANY POLICY RENEWAL OCCURRING DURING THE TERM OF THE CONTRACT.

Section 10.0 Indemnification. Contractor hereby agrees to indemnify and hold Owner harmless from and against any and all claims, damages, losses and expenses (including, but not limited to reasonable attorneys fees) that arise out of Contractor's performance of the Work, to the extent that such claims result, directly or indirectly, in whole or in part, from the acts, errors or omissions of Contractor, Contractor's employees, Contractor's agents or a subcontractor working for or under Contractor. The indemnification provisions of this Section 10.0 shall survive the expiration or earlier termination of this Contract.

Section 11.0 Warranty. For a period of one (1) year from the date of completion (being defined as the date that all punch-list items have been completed), Contractor warrants to Owner (a) that all materials and/or equipment furnished under the Contract will be of good quality and new unless specifically required or otherwise permitted by the Contract; (b) that the Work will be free from defects not inherent in the quality required or permitted, and (c) that the Work will conform with the requirements of the Contract. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. Contractor's warranty excludes any damage or defect caused by abuse; modifications not executed by the Contractor; improper or insufficient maintenance; improper operation; or normal wear and tear sustained under normal usage.

Section 12.0 Termination. Owner may terminate this Contract upon three (3) days written notice to Contractor (the third day after Contractor's receipt of the notice of termination shall be the "Date of Termination"). In the event of termination, Contractor shall be paid for all Work performed through the Date of Termination.

Section 13.0 Waiver of Jury Trial. The parties hereby mutually waive any rights which either may have to trial by jury in any action, proceeding or counterclaim brought by one party against the other on any matter whatsoever arising out of or in any way connected with this Contract, the relationship of the parties, the Work or the Site, for any liability, claim, injury, loss or damage to persons or property.

Section 14.0 Subcontractors. All subcontractors must be approved in advance by Owner. All subcontracts shall include a copy of these General Conditions as well as subcontractor's express, written representation that subcontractor has reviewed, and agrees to comply with, these General Conditions.

Section 15.0 Miscellaneous. (a) This Contract represents the entire agreement between the parties and supersedes any prior negotiations, representations or agreements, either written or oral; (b) This Contract may only be modified by means of a written instrument signed by both parties; (c) Any terms or conditions set forth herein that are determined to be void, illegal or unenforceable, shall be severed from this Contract and the remainder of the Contract shall remain in full force and effect; (d) This Contract is not assignable in whole or in part by Contractor without Owner's prior written consent; (e) This Contract shall be construed according to the laws of the state where the Site is located; (f) Time is of the essence in the performance of all obligations under this Contract; (g) Any time periods provided herein shall be measured in calendar days; (h) Any capitalized terms that are not defined herein shall have the same meaning as set forth in the Annual Services/Small Project Contract.

Agreed to by:

OWNER:

By: _____

CONTRACTOR:

By: _____

CHECKLISTS

Commercial Leases

Key Risk Management Provisions Checklist

Commercial General Liability (CGL)

Limits
Deductibles
Extent of Coverage
Additional Insured (Who pays deductible?)
Contractual Liability
Primary Coverage
Waiver of Subrogation

Property Insurance

Limits
Deductibles
Extent of Coverage
Additional Insured (Who pays deductible?)
Contractual Liability
Primary Coverage
Waiver of Subrogation

Indemnification

Landlord (LL)
Tenant (T)
Negligence
Extent of Indemnification (Who? What? Where?)

Compliance w/ Laws

Does LL represent compliance at commencement?
Does LL represent that compliance will be maintained throughout the term?
Compliance w/ "All laws now in effect and as adopted or amended in the future?"
 Environmental (Mold?)
 ADA
What are T's remedies for LL's failure to comply?
Does T represent that compliance will be maintained throughout the term?
 Environmental (Mold?)
 ADA
What are T's remedies for LL's failure to comply?
Patriot Act compliance.

Environmental

Does LL represent compliance at commencement?
Does LL represent that compliance will be maintained throughout the term?
Compliance w/ "All laws now in effect and as adopted or amended in the future?"
How is mold addressed?
What are T's remedies for LL's failure to comply?
Does T represent that compliance will be maintained throughout the term?
What are T's remedies for LL's failure to comply?
Do other T's use hazardous substances?
Does T use hazardous substances in the ordinary course of business?

Indemnification

LL

T

Does LL indemnify T for "third party" releases (other T's or off-site)?

What is the clean-up standard (how clean is clean)?

Who controls the clean-up?

Destruction; Condemnation

LL's obligation to rebuild.

Time frame for reconstruction.

Rent Abatement for T?

Base Rent

Other Costs

Termination Rights

Are repair/rebuild obligations tied to receipt of insurance proceeds?

Does LL's lender control insurance proceeds?

Does T have any rights to condemnation proceeds?

Default; Remedies

Notice Requirements

Opportunity to Cure

T's Self-Help Remedies

Rent Set-Off Rights

Termination Rights

Do T's remedies conflict with LL's mortgage?

Monetary v. Non-Monetary Defaults

T's obligations following termination.

LL's obligations following termination.

Holdover

What are T's cost in event of holdover?

LL's Remedies

Consequential Damages

Exception for ongoing, good-faith negotiations?

Real Estate Financing

Key Risk Management Provisions Checklist

(Note; Mortgage)

Defaults; Remedies

Notice Requirements

Opportunity to Cure

Monetary v. Non-Monetary Defaults

Lender's Remedies

Acceleration

Foreclosure

Default Interest

Appt. of Receiver

Default Interest

Prepayment Premium

Commercial General Liability (CGL) Insurance

Limits

Deductibles

Extent of Coverage

Additional Insured

Contractual Liability

Underwriter Requirements/Qualifications

Property Insurance

Limits

Deductibles

Extent of Coverage

Flood

Earthquake

Terrorism

Environmental

Additional Insured

Contractual Liability

Underwriter Requirements/Qualifications

Control of Insurance Proceeds

Escrow Accounts

Taxes; Assessments.

Insurance

Tenant Improvements

Maintenance

Interest on Escrow Funds

T's right to withdraw funds.

Maintenance; Environmental

Environmental Indemnifications

Survival of Indemnity

Release of Indemnity

Non-Recourse Provisions; Carve-Outs

- Non-Recourse Provision
- Is there a guaranty?
 - What are guarantor's obligations/liabilities?
 - Are there provisions for the release of the guaranty?
- What are the non-recourse "carve-outs"?
 - Who is liable?
 - Survival of carve-outs.

Project Design & Construction

Key Risk Management Provisions Checklist

Design Professional ("DP") Contract

- Scope of Work
 - Design Only
 - Review Pay Requests
 - Contract Administration
 - Physical Inspections
 - Resolve Contractor/Owner Disputes
- Professional Liability or E&O Insurance
- Payment Procedures; Schedule
 - Lump sum/Hourly/Percentage of Construction Cost
 - Schedule of Values
 - Reimbursable Costs (multiplier?)
 - When is payment due (contract phases)?
- Defaults; Remedies
 - Owner's Remedies
 - What is DP entitled to recover after termination?
 - What are Owner's/DP's obligations after termination?
 - Who owns (and has the right to future use of) the design documents?

Contract for Construction

Defaults; Remedies

- Notice Requirements
- Opportunity to Cure
- Owner's Remedies
 - Termination
 - Withhold Payment
- What is Contractor entitled to recover after termination?
- What are Owner's obligations after termination?
- Surety Notice Requirements

Commercial General Liability (CGL) Insurance

- Limits
- Deductibles
- Extent of Coverage
- Additional Insured
- Contractual Liability
- Primary Coverage
- Underwriter Requirements

Property Insurance

- Limits
- Deductibles
- Extent of Coverage
- Additional Insured
- Primary Coverage
- Builder's Risk (who provides?)
- Materials in Transit
- Materials Stored Off-Site

Payment/Performance Bond Requirements

Indemnification

- Owner
- Contractor
- DP
- Negligence
- Extent of Indemnification (Who? What? Where?)

Change Order Requirements

- Any changes in work permitted w/o a written change order?
- Who has authority to sign a CO?

Delays

- Are "uncontrollable" or force majeure delays defined?
- What are the documentation requirements for a delay?
- Extension in contract time; cost increase; or both?

Payment Procedures; Schedule

- Contractor submittal requirements for pay requests.
 - Information/detail required.
 - Contractor's reps & warranties for pay request (payment of subs).
- Payment Schedule
 - Is final payment due upon "Substantial Completion" or "Completion"?
- Who reviews pay requests?
- Approval period for pay requests.
- How are disputes over pay requests handled?
- Withholding/Retainage
- Lien Waivers

Completion Trigger

- Is "Substantial Completion" and/or "Completion" adequately defined?
- Who makes the determination?
- Inspections
- Punchlist Provisions
- When do warranties begin to run?