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**Secured Loan Facility Sample Term Sheet**

By

Steven G. Horowitz  
Cleary Gottlieb Steen & Hamilton LLP  
New York, New York



SECURED LOAN FACILITY  
SUMMARY OF TERMS

The summary of terms set forth below is not intended to set forth all of the terms and conditions of the proposed loan. This summary does not evidence or memorialize any agreement or legally binding commitment to make a loan. Unless and until a commitment letter between the Borrower and [LEAD LENDER] has been executed and delivered, neither [LEAD LENDER] nor the Borrower will be under any legal obligation with respect to a loan.

**Borrower**

A special-purpose, bankruptcy-remote entity established by and affiliated with [SPONSOR] (“Borrower”).

- *A borrowing entity may not yet be formed when the commitment is signed, e.g., in the case of an acquisition financing. In such case, the letter should refer to an entity that will subsequently be formed by the principal party undertaking the transaction.*
- *The Sponsor would be a creditworthy party that would undertake the obligation to form the Borrower and close the Loan, as well any liability to the Lender that might arise under the commitment, e.g., for Lender’s expenses of closing the Loan.*
- *In a large loan (particularly*

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*one destined for securitization) a lender will want to specify that a borrower be bankruptcy remote in addition to being a special-purpose entity, which will require (among other things) at least one independent director on such borrower's board.*

- *Issues relating to use of existing SPE's include diligence regarding existing liabilities and transfer tax in certain jurisdictions.*
- *If a borrower is a single member LLC as opposed to a partnership, rating agencies have special requirements for bankruptcy remoteness, such as having an independent, non-member manager.*

## **Lenders**

[LEAD LENDER] and such other lenders as may become parties to the Loan Agreement through assignment from time to time (the "Lenders").

- *This provision is for a loan that is to be syndicated rather than securitized.*
- *Borrower may want Lead Lender to (i) commit to minimum retained portion of loan and (ii) maximum number*

*of lenders participating in the loan.*

**Administrative and Collateral Agent**

To be determined. The Lenders shall be responsible for payment of the fees of the Administrative Agent and the Collateral Agent.

- *Borrowers generally do not dictate the identity of these agents.*
- *The Administrative Agent performs tasks analogous to a Servicer in a securitized facility.*
- *The Collateral Agent is typically a neutral financial institution, often a trust bank, that holds the Collateral on behalf of the lenders. The Lead Lender could serve as the Collateral Agent; however, having a neutral Collateral Agent is advantageous in that the non-lead lenders do not have to be concerned about the insolvency of the Lead Lender.*

**Syndication Agent**

[LEAD LENDER] or its assignee. [LEAD LENDER] shall not assign its role as Syndication Agent to any other party without the consent of Borrower, such consent not to be unreasonably withheld.

- *Initially, the Lead Lender and*

*the Syndication Agent are likely to be the same party, however this may change over time. A borrower and other lenders may wish to stipulate that, at all times, the Lead Lender will maintain a minimum portion of the loan amount.*

- *A syndicated loan typically bears a higher interest rate than a securitized loan. However, a syndicated loan generally is less complicated and more flexible, and the financial reporting and approval provisions of such a loan may be less onerous.*

## **Security**

The loan (the “Loan”) will be secured by first-priority mortgages and security interests in favor of the Collateral Agent for the benefit of the Lenders on the properties known as the [PROPERTY PORTFOLIO] (the “Assets”), as well as assignments of leases and rents and collateral assignments of contracts and other rights and intangible property.

- *A multi-asset arrangement usually requires that the collateral is a consistent property type. If such an agreement involves special collateral (e.g. hotels,*

*restaurants, gas stations) the agreement would require special provisions pertaining to this collateral.*

## **Recourse**

The Loan shall be recourse only to the Borrower, not to any of its partners or any other person, except for standard carve-outs for environmental matters, breach of SPE covenants, intentional misrepresentation, waste, misappropriation of funds, bankruptcy filings and fraud.

- *Recourse to an SPE gives the Lender nothing more than the Collateral for the Loan, so Lender will expect recourse to Sponsor for carve-outs.*
- *Note distinction between the Loan becoming entirely recourse to Sponsor vs. Sponsor having liability for actual damages attributable to carve-outs.*
- *Sponsor guaranty of Loan in event of Borrower bankruptcy raises non-consolidation issues, so is often capped at a small percentage of the Loan.*
- *Other agreements may incorporate non-recourse loan provisions, under which lenders can look only to the*

*collateral for collection purposes, subject to the above carve outs. For example, in a lockbox arrangement lenders would have a security interest in a variety of cash collateral, such as escrow and reserve accounts. The provision above, however, allows the Lender to collect against the Borrower that may, from time to time, have other assets in its accounts.*

**Loan Structure  
and Loan Amount**

The Loan shall consist of the following:

- (1) an initial advance at Closing in an amount (the “Initial Advance”) equal to [\_\_]% of the sum of (i) the all-in acquisition price of the Assets, including, without limitation, reasonable transaction costs, plus (ii) the Origination Fee, legal expenses relating to the Loan, hedging costs, certain scheduled and approved capital expenditures made prior to the closing and certain other related expenses; and
  - *Some lenders are unwilling to finance transaction and origination fees.*
  - *Many loans will limit the loan amount based on appraised*



*value and/or financial covenants relating to Loan-to-Value Ratio (“LTV”) tests and Debt Service Coverage Ratio (“DSCR”) tests which may reduce the loan amount below the otherwise agreed upon percentage of acquisition and transaction costs. In such cases, the Borrower may seek the right not to close the Loan if the proceeds would fall below an agreed minimum level of proceeds, in which event it would pay Lender’s expenses but not a commitment fee.*

- *While DSCR is not a going-in provision in this loan, it is an ongoing covenant. Accordingly, in this loan, if Borrower fails to maintain the stipulated DSCR, the Lenders are entitled to various remedies (e.g. payments to a Reserve Account, termination of the Property Manager, tighter financial controls) short of termination and acceleration.*

(2) Borrower may, from time to time during the initial term of the Loan, draw up to \$[\_\_\_\_\_] in the aggregate in respect of approved capital expenditures (the “Capital

Expenditure Line”), as described below.

- *Securitized loans do not easily accommodate advances after the date of securitization, so the subsequent advance may be handled outside the securitization trust.*

### **Operating Account**

Borrower shall be required to maintain one or more depository accounts with a local bank (the “Cash Deposit Account”) as well as a depository account with the Collateral Agent (the “Operating Account”). Borrower shall be required to deposit all revenues received by Borrower with respect to the Assets into the Cash Deposit Account and to cause all amounts in the Cash Deposit Account to be swept into the Operating Account or the Reserve Account (as defined under “Principal Reserve Account” below), as the case may be, on a monthly basis (daily during the continuance of an Event of Default or a Failed DSCR Period (as defined under “Principal Reserve Account” below)). The Collateral Agent shall have the right to exercise full control over the Cash Deposit Account and the Operating Account during the continuance of an Event of Default under the loan documents, including the right to apply all amounts then on deposit

therein toward the indebtedness, whether or not then due and payable.

- *In a loan destined for securitization more restrictive measures, such as a lockbox arrangement and escrow accounts, are common, as lenders seek tighter control over a borrower's cash management. For example, tenants would pay rent directly into the lockbox account in contrast to the arrangement here by which the Borrower makes such payments. Note, however, that, in this loan, the Borrower is only required to make such payments on a monthly basis, freeing up capital for other uses prior to such payment. Borrowers need to examine carefully the financial consequences of any operating account or lockbox arrangement.*
- *The more money that a lender requires to be placed in escrow, the less attractive a loan may become to a borrower; therefore, a borrower may want to retain the right to cancel a deal if escrow funds exceed a specified amount.*
- *Note that in the above terms,*

*the Borrower has access to operating cash only once a month, when funds are transferred to the Operating Account (which is not a pledged account). However, Lender does not control expenditures in the absence of a default.*

- *The terms of escrow provisions are often heavily negotiated. For example, lenders may want a borrower to provide all escrow funds up front, whereas a borrower may want to be able to accumulate such funds over time (particularly funds that will not be used for some time, such as deferred maintenance payments). Thus, the lockbox account agreement may provide for the funding of certain escrows out of moneys deposited therein.*

**Initial Term**

[36 months].

- *It is common for a floating-rate loan to have a shorter term.*

**Extension Term:**

Borrower shall have two options to extend the term of the Loan for a period of one year each (the “Extension Term”) by notice given 30 days prior to the expiration of the initial term of the Loan, provided that (a) no Event of

Default shall have occurred and be continuing, (b) the applicable Extension Fee shall be paid; and (c) Borrower shall have appropriately extended the term of the interest rate cap agreement described under “Hedging” below.

|                        |   |
|------------------------|---|
| <b>Origination Fee</b> | [1.00]% of the Initial Advance plus the Capital Expenditure Line, payable at closing.   |
| <b>Extension Fee</b>   | The Extension Fee for each Extension Term will be [____]% of the principal amount of the Loan outstanding at the commencement of each Extension Term.   |
| <b>Interest Rate</b>   | <p>1-month LIBOR plus [____] basis points. Interest to be calculated on an actual/360 basis, payable monthly.</p> <ul style="list-style-type: none"> <li>• <i>Interest rate provisions are usually heavily negotiated. Borrowers often want to lock in interest rates and/or spreads, especially after executing loan commitments, though doing so exposes the Borrower to breakage costs if the Loan does not close.</i></li> <li>• <i>Such costs are a greater concern in fixed-rate loans. Lenders are usually willing to</i></li> </ul> |

*provide this comfort, though almost always require borrowers to cover breakage costs in the event a loan does not close (lenders' costs arise in particular when interest rates drop between the time of the rate lock and the scheduled closing of the transaction). Lenders are concerned that borrowers will seek a loan elsewhere if interest rates change and no commitment has been made.*

- *Because of the exposure to breakage costs, borrowers will usually not rate lock until there is a high degree of certainty that the Loan will in fact proceed to closing.*
- *Breakage costs for floating rate loans are lower because the applicable interest-rate period is shorter, e.g., 30-60-90 day LIBOR.*

### **Prepayments**

Borrower shall have the right to prepay the Loan in whole or in part, without premium or penalty, on the last day of any interest period upon at least three business days' written notice. Prepayments made at any other time or without such notice shall be subject to payment of breakage costs (defined as the excess, if any, of

(i) the amount of interest that otherwise would have accrued on the principal amount so prepaid from the date of prepayment through the end of such interest accrual period at a rate of interest equal to one-month LIBOR measured on the immediately preceding interest determination date under the Loan Agreement, over (ii) the amount of interest that otherwise would have accrued on such principal amount for such period at a rate per annum equal to one-month LIBOR measured two business days prior to the date of prepayment) (“Breakage Costs”).

- *Fixed rate loans typically have yield maintenance or prepayment premiums and lockout periods.*
- *An interesting dynamic arises when a loan with a yield maintenance premium is being refinanced. A borrower may be required to borrow more funds than would be required to refinance with no yield maintenance premium, affecting the decision of whether or not to refinance.*
- *A fixed prepayment premium (versus a yield maintenance premium) will often be high at the beginning of the loan term*

*and decrease as the loan reaches maturity to discourage early prepayment by the Borrower.*

- *A borrower may seek a penalty-free prepayment period for a brief period (e.g., three to six months, prior to the maturity of the loan).*
- *Contrast prepayment and defeasance – costs and mechanics.*

### **Loan Assumption**

Borrower may make a one-time transfer of the Property to a new borrower satisfactory to Lender (at Lender's sole discretion) after the first anniversary of the Closing Date, and prior to the fifth anniversary of the Closing Date, upon concurrent payment of a mandatory prepayment of the loan in an amount equal to the Release Price applicable to the same, and (i) on the first subsequent Payment Date, all accrued and unpaid interest on the principal amount of the loan so prepaid, or (ii) if such prepayment does not occur on a Payment Date, and all applicable Breakage Costs.

- *Though a borrower may want to seek broader transfer rights and reduced costs for transfer, a one percent fee is fairly*



*common.*

- *The key issue for lenders with respect to loan assumability is that the “quality” of the new borrower be comparable to the original borrower. To ensure this, lenders may want to require that any replacement borrower satisfy certain objective standards, such as holding and/or managing a certain quantity of assets or demonstrating a certain level of experience and often net worth as well.*
- *Note that, while the provision above does not explicitly prohibit the Borrower from bringing in new partners or selling equity in itself in a manner which would cause a change of control of the Borrower (though see “Covenants” (ii) below), such restrictions have become increasingly common in current loan documentation.*
- *Debt assumption has become more common in periods when properties have traded more frequently, i.e., transfers before the debt lockout periods have expired.*

### **Allocated Loan**

The Allocated Loan Amount of

|                           |  |
|---------------------------|--|
| <b>Amount</b>             | each Asset will equal [75]% of the all-in acquisition price of such Asset plus any amount drawn from the Capital Expenditure Line for capital expenditures relating to such Asset.   |
| <b>Release Provisions</b> | (a) The Borrower shall not be permitted to sell or otherwise convey or encumber any Asset or interest therein unless the Loan is prepaid (together with any breakage costs), in an amount (the "Release Price") equal to the product of (i) [125]% times (ii) the Allocated Loan Amount of such Asset (or, with respect to vacant land that constitutes a separate tax parcel and that is given an Allocated Loan Amount by the Lenders, [100]% of such land's Allocated Loan Amount), <u>less</u> (A) the amount of any insurance or condemnation proceeds with respect to such Asset which are applied toward the prepayment of the Loan, and <u>less</u> (B) the portion of any voluntary prepayment which is allocable to such Asset (the allocation for purposes of this clause (B) to be <u>pro rata</u> among all of the Assets on the basis of the Release Prices of the Assets as in effect immediately prior to such prepayment). Notwithstanding the foregoing, the Release Price may be reduced to [115]% of the Property's Allocated Loan Amount, |

less the amounts described above, in the event that the DSCR, after taking into account the effect of the sale at Release Price at both [115]% and [125]%, will be at least [\_\_] and [\_\_] respectively. The proportionate accrued and unpaid interest on the prepaid amount shall be paid on the first Payment Date following the prepayment.

- *This provision is designed to protect the Lender from fluctuations in the value of the collateralized properties, by requiring the Borrower to pay off an inflated percentage of the Allocated Loan Amount with respect to a particular property before that property can be released. In this loan, as the amount owed is paid down, the release provision becomes more generous (i.e., the percentage of the Allocated Loan Amount that must be paid in order to release a property is reduced).*
- *The Release Price premium also prevents cherry-picking the Lender's collateral by means of selling better properties and leaving only the lesser assets as subject to the mortgage.*

- *Any excess payment made over the Allocated Loan Amount would go to reduce the principal on the other Allocated Loan Amounts on a pro rata basis.*
- *Release provisions are a key liquidity issue for borrowers, as such provisions dictate the amount of flexibility which borrowers have to sell off portions of the collateral. Typically, the longer the term of a loan, the more important the release provision becomes to borrowers.*

(b) Casualty and condemnation proceeds not applied to the restoration of the Assets will be applied to the prepayment of the Loan, subject to a maximum equal to the related Release Price.

### **Approval of Leases**

Any new lease or modification to an existing lease must be approved by Lenders holding at least [66-2/3]% of the aggregate principal amount of the Loan (the “Required Lenders”) if (i) such lease contains a purchase option, right of first offer, right of first refusal or similar right, (ii) covers in excess of [25]% of the aggregate rentable square footage of the building to which the lease pertains, or (iii)

would account for over [25]% of the gross rental revenue of the building to which the lease pertains. Any such lease or modification submitted for the approval of the Required Lenders, together with a summary of the economic terms of such lease and any termination options contained in such lease, will be deemed approved if the Required Lenders shall not have notified Borrower in writing of their disapproval within ten Business Days after such submission.

- *The time period for lenders review can be critical to lease negotiations. Borrowers often seek wide discretion on leasing so that they can negotiate deals without the delays associated with seeking lenders' approval. Lenders usually want control over major leases, so pre-agreed guidelines can be useful in identifying for borrowers the parameters within which they can conduct negotiations without seeking lenders' approval.*
- *Borrowers often wish to stipulate that they may submit a term sheet for approval in advance. If approval is granted, lenders are bound so long as the final lease does not*

*materially differ from the approved term sheet.*

**Capital  
Expenditure  
Line**

Up to a total of \$[\_\_\_\_\_] over the initial term of the Loan (the “Capital Expenditure Line”), Borrower may draw funds for reimbursement or direct payment of up to [75]% of amounts indicated on invoices for capital expenditures incurred by Borrower on the Assets on any Payment Date on at least three business days’ prior notice and in minimum amounts of \$[\_\_\_\_\_]. Funds will be disbursed only in accordance with approved capital expenditure budgets prepared by Borrower which itemize by amount and by building proposed capital expenditures within three categories: (1) tenant improvements, inducements and concessions, (2) leasing commissions and (3) other capital expenditures (with summary descriptions). Disbursements are subject, *inter alia*, to the absence of an Event of Default under the Loan Documents and the Administrative Agent’s receipt of evidence of completion for the work for which the advances are being made, invoices and lien waivers or other releases that would customarily be obtained with respect to the work in question. Amounts borrowed and

repaid under the Loan Agreement may not be reborrowed.<sup>1</sup>

Borrower may submit for Lender's approval, which shall not be unreasonably withheld, an updated budget that re-allocates the Capital Expenditure Line among the three categories.

- *The choice between reimbursement and direct payment of amounts due is an important working capital issue for borrowers. If funds will be paid directly this frees up capital for use by such borrowers and reduces the cost of capital.*
- *Under the applicable REMIC rules it is not possible to include a Capital Expenditure Line in a securitization agreement. In a loan destined for securitization, therefore, one typically would not see this provision, although it may be feasible to amend the agreement later and split the Capital Expenditure provision into a separate note, which would not be securitized.*

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<sup>1</sup> This is not a revolving credit line. The Capital Expenditure Line, therefore, covers the full anticipated costs over the life of the loan.

- *The approval which borrowers are sometimes required to obtain before capital expenditures are made can often become burdensome. Accordingly, borrowers often want to agree to some predefined parameters of capital expenditures within which approval is not needed.*

**Principal Reserve Account**

If, beginning with the calendar quarter (the “DSC Test Period”) ended [DATE], the Borrower’s DSCR (as defined under “DSCR” below) is less than [1.15] for two consecutive DSC Test Periods, the Borrower will be required to deposit into a reserve account (the “Reserve Account”) all net cash flow after payment of certain categories of operating expenses and required capital expenditures, which will be listed in a schedule to the Loan Agreement, plus the portion of operating income that would otherwise have been applied toward asset management fees. Funds in the Reserve Account will remain in the Reserve Account for the duration of the Loan unless applied to the prepayment of the principal of the Loan (which may be done at Borrower’s option). Each period during which Borrower is required to deposit amounts into the Reserve Account is referred to herein as a “Failed



DSCR Period”.

- *Failure to maintain adequate DSCR constitutes a “soft default” under this loan, entitling Lenders to limited remedies such as the cash trap described above, but not to loan acceleration.*
- *In a longer-term loan, a borrower will want to specify that the funds in the Reserve Account will be released upon borrower’s meeting subsequent DSCR goals.*

Notwithstanding any of the above provisions and provided that no Event of Default has occurred, Borrower shall be permitted to use funds in the Reserve Account to make distributions to its partners on account of taxes (calculated at the highest marginal federal, state and city rates payable by a [New York City] resident).

**DSCR**

“DSCR” shall be defined as the ratio of Net Operating Income to Imputed Interest Expense of the Borrower. Net Operating Income (“NOI”) is defined as operating revenue less operating expenses (excluding asset management and disposition fees, partners’ taxes, capital expenditures, interest expense, replacement reserves and certain other items). “Imputed Interest Expense” for any DSC Test Period is defined as the interest payable during such DSC Test Period after deducting interest rate cap payments received by Borrower for such period.

- *An amortizing loan would typically include amortization payments in the denominator in calculating DSCR.*
- *Note that cash expenditures that are excluded from the definition of NOI (e.g., capital expenditures) can have a significant impact on the calculation of DSCR.*
- *The definition of NOI is often negotiated. For example, some agreements include asset management, disposition fees and capital expenditure lines in NOI.*
- *Because capital expenditures are excluded from NOI in this agreement, cash available to service the debt is actually less than the calculated NOI.*

|                          |   |
|--------------------------|---|
| <b>Cash Flow Release</b> | Provided no Event of Default has occurred and provided that the preceding sections do not require otherwise, the Borrower shall be entitled to receive on each interest payment date any remaining net cash flow after payment of operating and capital expenditures and any required amounts due to the Lenders.   |
| <b>Hedging</b>           | Borrower will be required to purchase an interest rate cap in a notional amount equal to the Loan balance, having a term coterminous with that of the Loan and a strike price not exceeding one-month LIBOR (measured two days prior to the closing of the Loan) plus [225] basis points for the first year, [275] basis points for the second year, [325] basis points for the third year and an amount to be reasonably agreed upon by the Lenders for each extension term. |
| <b>Assignability</b>     | Each Lender has the right to assign or participate the loan. The total number of Lenders may not exceed [EIGHT]. Borrower shall reasonably cooperate in order to effectuate each assignment and participation, <u>provided</u> that Borrower shall be reimbursed for reasonable out-of-pocket third-party expenses incurred in connection therewith.  |

- *Because of provisions relating to Required Lenders (see “Approval of Leases” section of this Term Sheet), a borrower typically seeks to limit the number of potential lenders either by directly fixing the maximum number of lenders as in this agreement or by requiring that any lender hold a minimum percentage of the debt.*
- *A borrower with a relationship with a specific lender may want such Lender to maintain some level of investment in and/or control over the loan.*

### **Mezzanine Debt**

[EQUITY OWNER OF BORROWER] may pledge its partnership or membership interests in Borrower as collateral to secure its indebtedness to an institutional lender, provided (i) each of Borrower and such lender agrees to notify the Administrative Agent promptly of any acceleration of such debt and (ii) such debt is non-recourse to the general partner of Borrower.

- *This is a loose provision pertaining to mezzanine debt. Lenders often seek to limit the amount of mezzanine debt (e.g., by an overall LTV or DSCR) and insert a provision*

*pursuant to which the lenders must approve the mezzanine lenders and the terms of the mezzanine loan.*

- *Lenders also often require (i) standstill agreements to limit the ability of any mezzanine lender to exercise remedy provisions while any mortgages in connection with the loan are outstanding and (ii) that the mezzanine loan be either coterminous with or for a longer term than such mortgages so as to prevent the pay out of the mezzanine loan prior to such mortgages.*
- *Inter-creditor agreements are commonly used to document the relationship between the mortgage and mezzanine lenders. The Borrower is not a party to such an agreement.*
- *It is quite unusual for a subordinate loan default to trigger a default under a senior loan. By contrast, it is typical for a senior loan default to trigger a default under the subordinate loan, since the subordinate lender at that stage needs to take action against the borrower in order to protect its position from extinguishment due to remedial*

*enforcement by the senior lender.*

**Transaction Costs**

Borrower shall pay all reasonable costs and expenses incurred by the Lenders and the Agents in connection with the Loan, including all legal fees, due diligence and travel expenses, recording costs, appraisals, engineering and environmental reports and other related costs. The Lenders and/or the Lenders' consultants shall review any existing engineering and environmental reports delivered by Borrower to the Lenders. Based on such review, the Lenders shall determine, in their sole discretion, whether new reports are required.

**Representations and Warranties**

The Loan Documents will contain such representations and warranties by Borrower as are customarily found in documentation for secured loans of this type, including, without limitation, representations and warranties relating to: corporate, partnership and/or limited liability company authority; and standard environmental, title, zoning, permitting and similar representations and warranties. In addition, the Loan Documents will contain indemnities from the Borrower, which are satisfactory to

Lender.

- *From a credit perspective, an indemnity from a single-purpose borrower that owns only the Assets may be of little practical value to lenders. If this is a serious concern, lenders should consider customized indemnities from a creditworthy affiliate or parent of such borrower.*
- *Borrowers may wish to qualify representations by knowledge, though lenders typically take the view that representations are a risk allocation device for their benefit, and thus knowledge qualifiers are inappropriate.*

### **Covenants**

The Loan Documents will contain such covenants by Borrower as are customarily found in documentation for secured loans of this type, including, without limitation, covenants:

- (i) to pay principal and interest on the Loan;
- (ii) not to sell or encumber the Assets directly (through the transfer of the Assets) or indirectly (through the transfer of ownership interests in the Borrower),

nor to cause or suffer a change of control of the Borrower, except as permitted by the Loan Documents;

- *A foreclosure on the equity pledged as collateral to any mezzanine lender will usually constitute a change of control under the senior loan. Accordingly, a mezzanine lender will want to be pre-approved by the senior lender as a potential controlling party of the mortgage borrower. Even if granted, however, lenders will want such approvals to be reconfirmed by the senior lender at the time of any equity foreclosure to address possible changes in the condition and creditworthiness of the mezzanine lender.*
- (iii) to maintain the condition of the Property;
- (iv) to provide the Lenders with certain specified financial and other reports;
- *In order to avoid future reporting complications, the parties may want to specify what software programs should be used to record and disseminate information. In*



*addition, a borrower should carefully examine the scope and frequency of the proposed reports, and, in connection therewith, should also obtain the Lender's prior approval of its accountant.*

- *Some lenders impose financial penalties for non-compliance with reporting requirements, since this is often more useful than threats of default.*

(v) restricting construction and expansion;

(vi) restricting transactions with affiliates;

- *If a borrower can show that related-party transactions are equivalent to transactions with third parties, or are otherwise consistent with the lenders' initial underwriting of the Loan, then such transactions should be permitted. In some cases, lenders may view an affiliated asset manager as a positive factor in loan underwriting.*

(vii) to comply with laws (including all environmental laws); and

(ix) relating to the collateral

|                                  |   |
|----------------------------------|---|
|                                  | securing the Loan, and various other matters.   |
| <b>Additional Financing</b>      | <p>Borrower will not be permitted to incur additional financing, whether secured by the Assets, or secured by any of the Borrower's interests in the Assets or otherwise.</p> <ul style="list-style-type: none"><li>• <i>Note the interaction between this provision and those dealing with funding for Capital Expenditures. To the extent the Loan does not include funding for such items, the Borrower will need to contribute equity, whether derived from the mortgaged properties' surplus or external to the assets being financed.</i></li></ul> |
| <b>Modifications and Waivers</b> | <p>None of the terms in the Loan Documents may be changed, amended, waived, discharged or terminated unless such action is approved by the Required Lenders; <u>provided, however</u>, that certain items, including the following, will require the unanimous consent of all Lenders:</p> <ul style="list-style-type: none"><li>(i) Extension of the scheduled maturity;</li><li>(ii) Reduction of the rate or extension of the time of payment of interest or fees;</li></ul>   |

- (iii) Reduction of the principal amount or increase in the Maximum Loan Amount;
  - (iv) Amendment or modification of the definition of an Event of Default (to the extent relating to monetary defaults);
  - (v) Amendment or modification of the definition of Required Lenders;
  - (vi) Consent to the assignment or transfer by Borrower of any of its rights or obligations under the Loan Documents.
- *The main purpose of this provision is to require unanimity of lenders in connection with the workout and restructuring of a troubled loan. Of course, such a feature creates an opportunity for a holdout lender to obstruct the otherwise sound restructuring of a financially distressed asset.*
  - *Subordinate lenders will also want to limit the scope of senior loan modifications that can be made without their*

*consent.*

**Events of Default**

The Loan Documents will provide for customary events of default, including non-payment, breach of covenants, representations or warranties and insolvency.

- *A borrower may want to negotiate notice, grace periods and cure provisions.*

**Credit Underwriting**

The origination of the Loan by the Lenders will be contingent upon and subject to Lenders' complete satisfaction, in their sole discretion, with the creditworthiness of the Loan and the Borrower.

Lenders will perform a credit underwriting of the Loan, which will be in accordance with the standards of prudent institutional investors, and which will include (among other things) environmental reviews, engineering reports, site inspections, title reports (and or updates), NOI audits and a full legal documentation review. The results of the credit underwriting must be to Lenders' satisfaction, in their sole and absolute discretion.

- *Lenders' underwriting of NOI may differ substantially from that of borrowers, and such*

*differences may have a significant impact not only on the initial funding of the loan, but also on certain covenants' applicability during the life of such loan (e.g., those relating to the removal of any property manager and a borrower's ability to undertake major capital improvements).*

- *Underwritten NOI will also have an impact the scope of required escrow and reserve accounts.*
- *Lender's discretion is sometimes broadened by having provisions for increased interest rate if market conditions at the time of closing have changed since the time of loan commitment.*

### **Closing Conditions**

The Lenders' obligation to disburse the Loan is conditioned on its timely receipt and approval of all documents, procedures and matters relating to the Loan as well as its approval of the parties issuing the documents or performing the procedures, and such approval shall be given or withheld at the Lenders' sole discretion. Unless otherwise specifically noted, the costs of providing all such documents, reports, policies and information

will be borne by the Borrower and paid for at or prior to the Closing. The matters required by the Lenders as conditions to closing (“Closing Conditions”) shall include but not necessarily be limited to the completion and delivery of the following:

(1) An appraisal of the Assets by [\_\_\_\_\_] (“Appraiser”), showing that the LTV ratio will be no greater than [\_\_]%.

Notwithstanding the foregoing, if the appraisal shows the value of the Assets to be less than \$[\_\_\_\_\_] , the Loan Amount shall be reduced to an amount equal to [\_\_]% of the appraisal amount;

- *A borrower may suggest that a reduction of the Loan Amount below a specified amount should entitle it to cancel the loan and receive a refund of the related commitment fee.*
- *Loan sizing is of particular importance in the context of refinancing, so that a borrower does not have to fund equity to repay the debt being refinanced.*

(2) A “Phase I environmental inspection report” of each property forming a part of the Assets prepared by an environmental

consultant approved by the Syndication Agent in its sole discretion;

(3) In the event that the environmental inspection report (as described in paragraph (2) above) states that there exists any hazardous material on or beneath or stored at any Property, which material may become a hazard to public health or violate any law or regulation requiring removal, containment or treatment, then the Borrower will deliver an engineer's report, describing the feasibility, and estimating the cost, of such remediation, with such cost to be reserved for.

(4) A written report by a qualified engineer employed by Lenders at Borrower's expense, on the condition and operation of the structure and systems of the buildings and other improvements on each Property (pursuant to the terms set forth in Exhibit B hereto), which will (x) describe the feasibility, and estimate the cost, of remediation (with such cost to be reserved for), and (y) provide an estimate of capital expenditures at such property expected over the life of the Loan (with such estimate to be utilized to determine, subject to the Syndication Agent's written

approval, the required ongoing capital expense budget for the Assets);

(5) Title insurance policies, including appropriate endorsements insuring each Mortgage as a first priority lien upon the applicable Property, and copies of all title exceptions;

- *A borrower may want to specify that there are certain endorsements for which it does not want to pay due to cost (e.g., zoning endorsements).*

(6) Evidence of compliance with zoning and other laws;

- *Borrowers typically resist any requirement to deliver zoning opinions, though this is more common in certain jurisdictions (e.g., Massachusetts and the District of Columbia) and with construction loans.*

(7) A final certified survey of each Property;

(8) Legal opinions by Borrower's counsel (i) attesting to, among other matters, Borrower's due organization, valid existence, due authorization, execution and delivery of the Loan Documents,



and their valid, binding and enforceable nature, and (ii) certifying (A) that the execution, delivery and performance by Borrower of the same does not conflict with or result in a breach of any other documents, laws, or liens, (B) that there is no judgment or litigation affecting the validity or enforceability of the Loan Documents or Borrower's ability to perform its obligations thereunder, and (C) that the Loan Documents create valid security interests in each Property;

- *In order to issue such opinions, a borrower's counsel must be qualified in the relevant jurisdictions (which will depend on where such borrower is organized and what law governs the Loan Documents). If a borrower's primary counsel is not appropriately qualified (which is typical in multi-state portfolio loans), local counsel will have to be obtained, resulting in greater costs to such borrower and, potentially, the negotiation of the opinion requirements.*
- *To help defray some of the cost and/or time delays associated with having to use additional counsel (as well as the lawyer*

*frustration associated therewith), a borrower may want to use inside counsel or to turn to model forms of legal opinions which bar associations in a number of jurisdictions (including New York) have developed.*

- *The “no conflict” opinion language with respect to the breach of “any other documents” provided above is rather broad. Accordingly, such opinions are often limited to an agreed list of material documents.*
- *Non-consolidation opinions are typically required in loans above a threshold amount, e.g., in the range of \$20-30 mm.*

(9) Certified rent rolls and historical operating statements for the Assets;

(10) All material leases and franchise agreements and any other agreements material to the Assets, as determined by the Syndication Agent in its sole discretion;

- *The Syndication Agent and its advisors will carefully review Borrower’s rent rolls, operating statements, leases, franchise agreements and any*

*other material agreements in order to evaluate the risk of the Loan, and as an important part of their general due diligence.*

(11) Review and approval of the Property Manager and the Property Management Agreement;

- *The Property Management Agreement may permit the Lender to terminate any property manager if, pursuant to a mutually agreed upon measure (e.g., NOI), the performance of any Property declines below a specified level.*

(12) Tenant estoppel letters and subordination, non-disturbance and/or attornment agreements (“SNDA’s”) from certain tenants to be selected by the Syndication Agent at its sole discretion;

- *It is often difficult for borrowers to obtain tenant estoppel letters from all tenants. For this reason, a borrower should seek to obtain some flexibility relating to this requirement, such as a qualification that such borrower will use its “best efforts” to obtain the same, and/or a commitment to obtain such letters from a portion of*

*the tenants.*

- *SNDA forms prepared by lenders' counsel are often objectionable to tenants (particularly national tenants with strong bargaining power). Accordingly, if lease provisions do not oblige tenants to sign a particular form, such SNDA's may be hard to obtain. However, commercial leases often provide that tenants are automatically subordinate to any future mortgagee or that tenants will be subordinated to mortgage lenders so long as they receive notice and a customary non-disturbance agreement. It is important during the due diligence process for the lenders to examine all lease language relating to subordination as well as to determine whether a given mortgaged property is located in an "automatic" or "pick and choose" state for foreclosure purposes (i.e., whether the lender has the choice (as is the case in New York) to foreclose against a borrower (the fee simple owner) without also foreclosing against desirable tenants).*

(13) Evidence of public liability, business interruption and casualty insurance coverages on with respect to each Property (along with flood insurance should any Property be located in a flood hazard zone and earthquake insurance should any Property be located in an earthquake zone) on terms and issued by companies rated at least [\_\_\_] by a nationally recognized rating agency, which companies are satisfactory to the Syndication Agent. Insurance must be in an amount sufficient (i) to cover all Breakage Costs plus all principal under the loan, (ii) to avoid coinsurance, and (iii) to cover the full replacement cost of the improvements now existing or hereafter erected upon each Property; and

- *Many insurance companies are rated by rating agencies (e.g., Best's and Standard & Poor). Insurance obtained from a highly rated insurer is often more expensive than insurance provided by a lower-rated insurer. For this reason, a borrower should examine the rating of its existing insurer to determine if it will need to incur additional costs to obtain a policy from a higher rated insurer.*

- *For prominent buildings in locations that are perceived as being vulnerable to possible terrorist attacks, terrorism insurance has become a material transaction cost in mortgage loans.*
- *The length of business interruption coverage is another aspect of insurance coverage that has received greater attention in recent years.*

(14) Credit reports of Borrower, the partners and principals of the Borrower and of the Property Manager.

- *While uncommon, there are occasions on which borrowers or their affiliates or manager have troublesome records, which complicate the underwriting of a loan by an institutional lender.*

**Loan  
Documentation**

In addition to the Closing Conditions, the closing of the Loan is conditioned upon finalization, execution and delivery of the Loan Documents.

**Pro Forma Balance  
Sheet**

Upon consummation of the transactions contemplated by this Commitment, the balance sheet (the "Balance Sheet") of Borrower

will not substantively differ from the Pro Forma Balance Sheet of Borrower.

- *These provisions protect the Lenders from significant adverse changes in the Borrower's financial condition between Term Sheet and Closing.*

In addition, upon consummation of such transactions, the following items on the Balance Sheet shall be within the ranges set forth below:

[Specific balance sheet requirements to be set forth here.]

#### **Attorney's Fees**

In the event of any litigation, arbitration or other dispute resolution proceedings between the parties hereto arising out of or relating to the transactions contemplated hereby, the party prevailing in such litigation, arbitration or proceeding shall be entitled to recover from the other party the reasonable attorney's fees and disbursements incurred by such prevailing party in connection with such litigation, arbitration or proceeding.

#### **No Joint Venture**

Nothing contained herein (i) shall constitute Lenders or any of their affiliates as members of any partnership, joint venture,

association or other separate entity with Borrower, its affiliates or any other entities, (ii) shall be construed to impose any liability as such on any of the Lenders or any of their affiliates, or (iii) shall constitute a general or limited agency or be deemed to confer on either party hereto any express, implied or apparent authority to incur any obligation or liability on behalf of the other. Each Lender is acting as principal with respect to the Loan, and no Lender nor any of its affiliates shall have any obligation to permit any other party to participate in the origination of the Loan.

**Entire Agreement**

This Commitment contains all of the agreements and understandings of the parties hereto relating to the transactions described herein and the respective obligations of each Lender and Borrower in connection therewith. All prior negotiations, proposals, agreements and understandings relating to the subject matter of this Commitment are hereby null and void.

**Indemnification**

The Borrower shall indemnify, pay and hold harmless each Lender, its successors and assigns and affiliates and each of their respective officers, directors, agents employees, partners,



members, shareholders and affiliates (collectively, the “Indemnitees”) from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, claims, costs, expenses and disbursements of any kind or nature whatsoever (including the reasonable fees and disbursements of counsel for such Indemnitees in connection with any investigative, administrative or judicial proceeding commenced or threatened, whether or not any such Indemnitees shall be designated a party thereto), which may be imposed upon, incurred by, or asserted against such Indemnitee in any manner relating to or arising out of any of the transactions contemplated by this Commitment (collectively, the “Indemnified Liabilities”); provided, however, that the Borrower shall not have any obligation to an Indemnitee hereunder to the extent that such Indemnified Liabilities arise from the gross negligence, illegal acts, fraud or willful misconduct of such Indemnitee, its agents, contractors or employees.

- *In the event that the Loan Documents include an environmental indemnity provision, such provision is likely to be heavily negotiated.*

*Borrowers dislike environmental indemnities because, unlike the other items described above, the events which trigger such indemnities are often beyond their control. In addition, an environmental guarantor, such as a parent or affiliate, may be sought in conjunction with such indemnification. This can create a conflict with the organizational documents of the investment group, particularly in the context of an investment fund, where the organizational documents often forbid such indemnification. Environmental insurance is becoming a more common alternative to the environmental indemnity provision.*

- *In contrast to the environmental indemnity discussed above, it is not common for Lenders to seek a guarantee of general indemnity from the mortgage borrower's creditworthy affiliates.*

### **Governing Law**

This Commitment shall be governed by, and construed in accordance with, the laws of the State of [STATE], [without reference to the conflicts of laws

principles of such state].

- *Though the bracketed language is commonly found in documents of this type, such language is not necessary in New York, since New York choice of law principles generally do not require a court to consider whether the law of some other jurisdiction should govern the transaction.*
- *In multistate loans, the choice of law clause is often amplified, e.g. New York law generally applies to the loan documentation, except that with respect to real property security instruments (principally the mortgage and assignment of leases and rents), the local law of the jurisdiction in which each Property is located applies to the creation, perfection and enforcement of liens relating thereto.*

**Closing Date**

Lender will use all reasonable efforts to facilitate a timely closing (the “Closing”) by [DATE], subject to Borrower’s delivery of information satisfactory to the Lenders for origination of the Loan and satisfaction of all of the terms and conditions of this

Commitment.

- *Borrowers may want a pre-agreed extension of the Closing Date in order to allow them to satisfy all Closing Conditions. Lenders typically prefer to retain discretion to evaluate requests for extension in light of then-current circumstances.*

**Venue and  
Submission to  
Jurisdiction**

To the fullest extent permitted by applicable law, any legal suit, action or proceeding with respect to any of the transactions contemplated by this Commitment shall be instituted in any federal or state court in [CITY], [STATE]. The Borrower shall waive any objection that it may have to the laying of venue of any such suit, action or proceeding in any such court. The Borrower shall submit to the jurisdiction of any such court in any suit, action or proceeding.

**Committee  
Approval**

Any Commitment issued by [LEAD LENDER] for the Loan is subject to, among other things, the approval of [LEAD LENDERS]'s Loan Committee.