

## **EXPLODING AND SPRINGING GUARANTIES**

**By John C. Murray**  
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### **Exploding Guaranties**

The form of guaranty attached hereto as “**Exhibit A**” is often referred to as an “exploding guaranty.” An individual or entity that is a direct or beneficial owner and/or holder of an equity interest in the borrower usually executes this form of guaranty. The lender in connection with a loan modification or deed-in-escrow transaction or as part of a joint or prepackaged borrower bankruptcy or consensual reorganization may require an exploding guaranty.

In these types of transactions -- which are designed to avoid or delay foreclosure by the lender -- the borrower is entitled to a “second chance” to perform under the loan documents, as same may have been modified by the parties. As part of such workout arrangements the borrower may be required to deposit a deed into escrow, which is to be delivered immediately to the lender if the workout does not succeed and the loan again goes into default.

Under the exploding guaranty, the entire debt (or some agreed-upon portion thereof) is guaranteed and the guaranty is valid, effective and binding as of the date the transaction is closed and the guaranty is executed. The guarantor guarantees payment in full of the loan upon the occurrence of certain future events, such as: the filing of a bankruptcy petition by or against the borrower; the assertion of lender-liability claims against the lender; the institution of litigation by the borrower seeking injunctive relief or otherwise seeking to prevent the lender from exercising its remedies under the workout document or underlying loan documents; the contesting of a subsequent foreclosure or enforcement proceeding filed by the lender; or the violation of certain covenants in the loan documents. The guaranty terminates upon the occurrence of certain specified events, such as payment in full of the loan, the successful completion of a foreclosure sale, or delivery of the property to the lender via a deed in lieu of foreclosure or pursuant to an escrow agreement.

### **Springing Guaranties**

Under a similar concept known as a “springing guaranty,” the guarantor executes a guaranty at the closing of the loan workout. However, the guarantor’s obligations under the guaranty become effective only upon the happening of certain specified events in the future, similar to those that would cause the lender to enforce the guarantor’s obligations under an exploding guaranty. Sometimes the springing guaranty is structured to provide that, even after it becomes

**EXHIBIT "A"**

**GUARANTY AGREEMENT**

THIS GUARANTY AGREEMENT ("this Guaranty"), dated as of the \_\_\_\_ day of \_\_\_\_, \_\_\_\_, is made by \_\_\_\_\_, an individual ("Guarantor"), in favor of \_\_\_\_\_, a \_\_\_\_\_ ("Lender") in connection with that certain [**Amendment to Loan Documents, Security Agreement and Agreement Concerning Mortgage Loan**] of even date herewith (as amended, restated, supplemented or otherwise modified and in effect from time to time, the "Agreement") between \_\_\_\_\_, a \_\_\_\_\_ ("Borrower") and Lender.

**RECITALS**

A. Pursuant to the Agreement, Lender has agreed to make certain financial accommodations for the benefit of Borrower.

B. Guarantor [**is a direct or beneficial owner and holder of equity interests in Borrower and**] otherwise derives material financial and other considerations and benefits from Borrower. Accordingly, Guarantor will derive substantial financial and other benefits from the extension of credit to Borrower for which the Agreement provides.

C. Lender is willing to make the financial accommodations set forth in the Agreement upon the condition, among other things, that Guarantor execute and deliver to Lender this Guaranty.

In consideration of the foregoing facts and in order to induce Lender to enter into the Agreement and to make the financial accommodations contemplated thereunder, Guarantor hereby agrees as follows:

1. Definitions. For all purposes of this Guaranty, unless otherwise defined herein or unless the context otherwise requires, all terms used herein which are defined in the Agreement shall have the respective meanings given them in the Agreement.

When used in this Guaranty, all words in any gender, whether male, female or neuter, shall extend to include all genders that may be applicable in any particular context.

2. Guaranty.

2.1 Guarantor hereby unconditionally and irrevocably guarantees to Lender and all of the successors, endorsees, transferees and assigns of Lender, the prompt and complete payment when due (whether at the stated maturity, by acceleration or otherwise) of the Obligations, including, without limitation, the aggregate unpaid principal amount of, and accrued interest on, the Note and all other obligations and liabilities of Borrower now existing or hereafter incurred arising out of or in connection with the Agreement (all such indebtedness, obligations and liabilities being hereinafter called the "Guaranteed Obligations"), and Guarantor further agrees to pay any and all expenses which may be paid or incurred in collecting from Guarantor any or all of the Guaranteed Obligations and/or in enforcing any rights hereunder.

2.2 The obligations of Guarantor under this Guaranty shall be continuing, absolute and unconditional under any and all circumstances and shall be paid by Guarantor regardless of (a) the validity, regularity, legality or enforceability of any one or more of the Agreement, the Note, any of the Guaranteed Obligations or any collateral security or other guaranty therefor at any time or from time to time held by Lender; (b) any defense, offset or counterclaim which may at any time be available to or be asserted by Borrower or Guarantor (other than actual payment of a

Guaranteed Obligation); or (c) any other event or circumstance whatsoever which may constitute, or might be construed to constitute, an equitable or legal discharge of a surety or a guarantor, it being the purpose and intent of the Guarantor that this Guaranty and the Guarantor's obligations hereunder shall remain in full force and effect and be binding upon Guarantor and its successors until the Guaranteed Obligations and the obligations of Guarantor under this Guaranty shall have been satisfied by payment in full (subject to Section 2.5). Notwithstanding any other provision of this Guaranty to the contrary, by its acceptance of this Guaranty, Lender agrees not to institute an action or proceeding to enforce this Guaranty unless (i) a petition, case or proceeding under Title 11 of the United States Code, as amended from time to time, is filed by Borrower or Guarantor or against Borrower by Guarantor or any Affiliate of Borrower or (ii) Lender has made a demand upon Borrower for delivery of the deed and other transfer documents set forth in Section \_\_\_ of the Agreement and Borrower, Guarantor or any Affiliate shall interfere in any manner whatsoever with the delivery of such deed and other transfer documents to Lender in accordance with Section \_\_\_\_ of the **[Escrow Agreement]**, which interference shall, for purposes hereof, include, but shall not be limited to, the institution or filing of any action, case or proceeding before or by any court, administrative agency or arbitration panel by Borrower, Guarantor or any Affiliate seeking (x) to stay or enjoin, permanently or temporarily, the delivery of the deed and other transfer documents as identified in the **[Escrow Agreement]**, (y) to rescind, revoke, void, set aside or nullify, in whole or in part, any delivery of the deed or other transfer and other documents or (z) a declaratory judgment or other relief precluding, limiting or affecting Lender's rights under the Agreement, provided, however, nothing contained in part (ii) of this sentence shall entitle Lender to institute an action or proceeding pursuant to this Guaranty if Borrower shall file an action or proceeding against Lender for breach of the Agreement where the sole remedy sought by Borrower is money damages and where such action or proceeding is filed

after delivery of the deed and other transfer documents as identified in this \_\_\_\_\_ Agreement to, or upon the order of Lender, pursuant to Section \_\_\_\_ of the [**Escrow Agreement**] [**and such proceeding is instituted against Lender after the latest to occur of (1) the expiration of any federal or state redemption or reinstatement period and (2) the expiration of any federal or state fraudulent conveyance or preferential transfer set-aside or avoidance period**].

2.3 Guarantor hereby consents that, without the necessity of any reservation of rights against Guarantor and without notice to or assent by Guarantor, any demand for payment of any of the Guaranteed Obligations made by Lender may be rescinded by Lender and any of the Guaranteed Obligations continued, and/or the Guaranteed Obligations, or the liability of any party upon or for any part thereof, or any collateral security or guaranty therefor, may, from time to time, in whole or in part, be renewed, extended, amended, modified, accelerated, settled, compromised, subordinated, waived, surrendered or released by Lender, and/or the Agreement, the Note, any collateral security documents or other guaranties or documents in connection therewith may be amended, modified, supplemented or terminated, in whole or in part, as Lender may deem advisable from time to time, and/or any collateral security at any time securing the payment of the Guaranteed Obligations may be sold, exchanged, waived, surrendered or released, Guarantor remaining bound hereunder notwithstanding the occurrence of any of the foregoing. Lender shall not have any duty to protect, secure, perfect or insure any collateral security at any time securing the payment of the Guaranteed Obligations. This is a guaranty of payment and not merely of collection. Guarantor waives any requirement that Lender make any demand, commence suit or exercise any other right or remedy under the Agreement, Note or other document or instrument prior to enforcing its rights against Guarantor hereunder. Guarantor waives diligence, presentment, protest, demand for payment and/or notice of default or non-payment

to or upon any of Borrower (except as otherwise provided for in the Agreement) or Guarantor with respect to the Guaranteed Obligations. When making any demand hereunder against Guarantor, Lender may, but shall be under no obligation to make a similar demand on any other guarantor, and any failure by Lender to make any such demand or to collect any payments from any such other guarantor or any release of such other guarantor shall not relieve Guarantor of its obligations and liabilities hereunder, and shall not impair or affect the rights and remedies, express or implied, or as a matter of law, of Lender against Guarantor. For the purposes hereof "demand" shall include the commencement and continuance of any legal proceedings.

2.4 Guarantor waives any and all notice of the creation, renewal, extension, modification or accrual of any of the Guaranteed Obligations and notice of or proof of reliance by Lender upon this Guaranty or acceptance of this Guaranty. The Guaranteed Obligations, and any of them, shall conclusively be deemed to have been created, contracted or incurred in reliance upon this Guaranty, and all dealings between Borrower or Guarantor and Lender shall likewise be conclusively presumed to have been had or consummated in reliance upon this Guaranty. Guarantor acknowledges receipt of a copy of the Agreement and the form of the Note.

2.5 This Guaranty shall continue to be effective, or be reinstated, as the case may be, if at any time, payment, or any part thereof, of any of the Guaranteed Obligations is rescinded or must otherwise be restored, reinstated or returned by Lender in connection with the insolvency, bankruptcy or reorganization of any Borrowers, or otherwise, all as though such payment had not been made.

3. No Subrogation. Guarantor expressly and irrevocably waives any and all rights of subrogation, reimbursement, indemnity, exoneration, contribution and any

other claim which it may now or hereafter have against any Borrower or any other person directly or contingently liable for the Guaranteed Obligations guaranteed hereunder, or against or with respect to any of Borrower's property (including, without limitation, property collateralizing its obligations to Lender), arising from the existence or performance of this Guaranty.

4. Representations and Warranties. Guarantor hereby represents and warrants that (a) Guarantor is [a \_\_\_\_\_] **an individual whose principal residence [chief executive officer/principal place of business]** is situated in and who is a domiciliary of the State of \_\_\_\_\_; (b) Guarantor has full power, authority, legal capacity and legal right to execute, deliver and perform this Guaranty; (c) this Guaranty constitutes a legal, valid and binding obligation of Guarantor enforceable in accordance with its terms; (d) no consent of any person (including any trustee, guardian, conservator or similar officer for or holder of any obligations of Guarantor), and no consent, license, approval or authorization of, or registration or filing with, any governmental authority, bureau or agency is required in connection with the execution, delivery and performance of, and payment under, this Guaranty; (e) the execution, delivery, performance and payment of this Guaranty does not and will not contravene any applicable law, regulation, order or decree, or any provision of any indenture, mortgage, contract or other agreement to which Guarantor, or any person controlled by, controlling, or under common control with Guarantor, is a party or by which any of the same or any of their respective assets may be bound; (f) there is no action, suit, investigation or proceeding by or before any court, arbitrator, administrative agency or other governmental authority pending or threatened against or affecting Guarantor (A) which involves the Guaranteed Obligations or Guarantor's obligations under this Guaranty, or (B) which if adversely determined, could have a material adverse effect on the financial condition, business, prospects or operations of Guarantor; (g) all financial statements of Guarantor

heretofore or hereafter furnished to Lender are complete and correct and fairly present the financial condition of Guarantor and the results of his businesses and affairs for the respective periods covered thereby, and there are no known contingent liabilities or liabilities for taxes of Guarantor which are not reflected in said financial statements and since the date of the most recent financial statements of Guarantor furnished to Lender, there has been no material adverse change in the financial condition, business, prospects or operations of Guarantor; and (h) Guarantor is not in default under any indenture, mortgage, contract or other agreement to which it is a party or by which Guarantor or any of its assets may be bound.

5. No Changes in Guarantor. Guarantor covenants and agrees that from and after the date hereof and so long as any of the Guaranteed Obligations remain outstanding, Guarantor will not (a) **[except as expressly permitted under subsection (c)]**, enter into any transaction or make any gift or devise or otherwise transfer any portion of Guarantor's assets unless after giving effect to such transaction Guarantor's tangible net worth equals or exceeds that which existed prior to such transaction, gift, devise or other transfer; **[or]** (b) otherwise sell or otherwise dispose of all or any substantial part of Guarantor's assets; **[or (c) without limiting the generality of clause (b), sell, transfer or otherwise dispose of any stock of any of Borrower owned by him as of the date hereof, except for transfers of such stock to existing shareholders of the Borrower made consistent with past practices and of a value not greater during any year than the value of stock so transferred during any year before the date on which the Loan was made]**.

6. Additional Covenants of Guarantor. Guarantor covenants and agrees that from and after the date hereof and so long as any of the Guaranteed Obligations remain outstanding, it will: (1) promptly give written notice to Lender of (i) the occurrence of any Event of Default under

the Agreement of which it is or should be aware; (ii) the commencement or threat of any material litigation or proceedings affecting it; and (iii) any dispute between it and any governmental regulatory body or other party that might materially interfere with Guarantor's normal businesses and affairs; (2) (i) duly observe and conform to all requirements of any governmental authorities relating to the conduct of Guarantor's businesses and affairs or to Guarantor's properties or assets; (ii) keep in full force and effect all rights, franchises, licenses and permits which are necessary to the proper conduct of Guarantor's businesses and affairs; and (iii) obtain or cause to be obtained as promptly as possible any governmental, administrative or agency approval and make any filing or registration therewith which at the time shall be required with respect to the performance of Guarantor's obligations under this Guaranty or the operation of Guarantor's businesses and affairs; (3) on not less than two (2) Business Days' prior notice (which need not be in writing), permit Lender or Guarantor's authorized representative at any reasonable time or times following the occurrence and during the continuation of an Event of Default under the Agreement to inspect Guarantor's books and records; (4) keep proper books of record and account in which full, true and correct entries in accordance with generally accepted accounting principles will be made of all dealings or transactions in relation to Guarantor's businesses, affairs and other activities; and (5) furnish to Lender the following financial statements, all in reasonable detail, prepared in accordance with generally accepted accounting principles applied on a basis consistently maintained throughout the period involved and with prior periods certified as true, current complete by **[an independent certified public accounting firm of recognized national standing] [Guarantor] [Guarantor's chief financial officer]**, (a) as soon as available, but in any event not later than ten (10) days after Guarantor files his federal income tax return for each year, Guarantor's personal financial statements, in form acceptable to Lender; and (b) promptly furnish to Lender, such additional financial and other

information as Lender may from time to time reasonably request.

**[Guarantor acknowledges that it shall be an Event of Default under the Agreement if, after the death of the Guarantor, any one or more of the following occurs:**

- (A) on or before the thirtieth day thereafter the estate of the Guarantor, by its appropriate representative, has not expressly assumed and reaffirmed the terms and provisions of the guaranty executed by the Guarantor and any security instruments executed and delivered with respect to the Guaranty, by executing and delivering to Lender instruments in form and substance acceptable to Lender;**
- (B) on or before the thirtieth day thereafter the estate of the Guarantor, by its appropriate representative, has not provided to Lender evidence reasonably acceptable to Lender of the solvency of said estate;**
- (C) on or before the thirtieth day thereafter the estate of the Guarantor, by Guarantor's appropriate representative, has not executed in favor of and delivered to Lender an agreement in form and substance acceptable to Lender pursuant to which it agrees to establish reserves reasonably**

**sufficient to satisfy the estate's obligations under the Guaranty; or**

**(D) said estate at any time thereafter makes any payment or distribution the result of which would be to leave the estate without adequate reserves to satisfy its obligations under the Guaranty.]**

7. Notices. **[Make consistent with Loan Documents or Modification Documents].**

8. No Waiver; Cumulative Remedies. A waiver by Lender of any right or remedy hereunder on any one occasion shall not be construed as a bar to any right or remedy which Lender would otherwise have had on any future occasion. No failure to exercise nor any delay in exercising on the part of Lender any right, power or privilege hereunder, shall operate as a waiver thereof; nor shall any single or partial exercise of any right, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided are cumulative and may be exercised singly or concurrently, and are not exclusive of any rights and remedies provided by law.

9. Miscellaneous. None of the terms or provisions of this Guaranty may be amended, waived, altered, modified, or terminated except by an instrument in writing signed by the party against which enforcement of such amendment, waiver, alteration, modification or termination is sought. This Guaranty and all obligations of Guarantor hereunder shall be binding upon the successors and assigns of Guarantor, and shall, together with the rights and remedies of Lender hereunder, inure to the benefit of Lender and its successors and assigns. The invalidity, illegality or indemnity of any provision of this Guaranty shall not affect the validity, legality or enforceability of any other

provision of this Guaranty. THIS GUARANTY SHALL BE GOVERNED BY, AND BE CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF \_\_\_\_\_.

10. Waiver of Jury Trial. GUARANTOR HEREBY WAIVES GUARANTOR'S RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING BASED UPON, OR RELATED TO, THE SUBJECT MATTER OF THIS GUARANTY AND THE BUSINESS RELATIONSHIP THAT IS BEING ESTABLISHED. THIS WAIVER IS KNOWINGLY, INTENTIONALLY AND VOLUNTARILY MADE BY GUARANTOR AND EACH GUARANTOR ACKNOWLEDGES THAT NEITHER LENDER NOR ANY PERSON ACTING ON BEHALF OF LENDER HAS MADE ANY REPRESENTATIONS OF FACT TO INDUCE THIS WAIVER OF TRIAL BY JURY OR HAS TAKEN ANY ACTIONS WHICH IN ANY WAY MODIFY OR NULLIFY ITS EFFECT. GUARANTOR ACKNOWLEDGES THAT THIS WAIVER IS A MATERIAL INDUCEMENT TO ENTER INTO A BUSINESS RELATIONSHIP, THAT GUARANTOR HAS ALREADY RELIED ON THIS WAIVER IN ACCEPTING THIS GUARANTY AND THAT LENDER WILL CONTINUE TO RELY ON THIS WAIVER IN ITS RELATED FUTURE DEALINGS. GUARANTOR FURTHER ACKNOWLEDGES THAT GUARANTOR HAS BEEN REPRESENTED (OR HAS HAD THE OPPORTUNITY TO BE REPRESENTED) IN THE SIGNING OF THIS GUARANTY AND IN THE MAKING OF THIS WAIVER BY INDEPENDENT LEGAL COUNSEL.

IN WITNESS WHEREOF, the undersigned has caused this Guaranty to be duly executed and delivered as of the day and year first above written.

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

STATE OF \_\_\_\_\_ )  
 ) SS  
COUNTY OF \_\_\_\_\_ )

ACKNOWLEDGEMENT

I, \_\_\_\_\_, a Notary Public, in and for said County, in the State aforesaid, DO HEREBY CERTIFY, that \_\_\_\_\_, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as his own free and voluntary act and for the uses and purposes set forth therein.

GIVEN under my hand and Notarial seal this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Notary Public

My commission expires:

\_\_\_\_\_, 19\_\_

effective, it still may terminate upon the occurrence of certain subsequent events, such as payment in full of the outstanding loan balance. A form of springing guaranty is attached hereto as **Exhibit “B.”** The following is suggested language for a springing guaranty, from Howard J. Weg, David B. Shamano and Craig B. Cooper, *How to Bankruptcy-Proof a Workout Agreement*, at 27-29 (April 4, 1998 ABA Spring Meeting):

- i. “This Guaranty may be enforced against Guarantor only if and when (i) Borrower files a voluntary petition for relief under the Bankruptcy Code, (ii) an order for relief under the Bankruptcy Code is entered against Borrower or Borrower consents to an order for relief under the Bankruptcy Code, or (iii) Borrower or Guarantor initiates or causes Borrower to become subject to any other insolvency or reorganization proceeding, including the assignment for benefit of creditors or the appointment of a receiver.”
  
- ii. “It shall be a default under this Agreement if (i) any parent, subsidiary, affiliate or co-obligor of Borrower (collectively, “Affiliates”) files a voluntary petition for relief under the Bankruptcy Code, (ii) an order for relief under the Bankruptcy Code is entered against any Affiliate or any Affiliate consents to such order for relief, (iii) an Affiliate becomes subject to any other insolvency or reorganization proceeding, including the assignment for benefit of creditors or the appointment of a receiver, or (iv) an affiliate becomes insolvent, because either (x) its liabilities exceed its assets or (y) it is unable to pay its debts as they become due.”

### **Variations of Exploding and Springing Guaranties**

Other variations of these types of guaranties include the following: a “shrinking” guaranty (where the guarantor’s liability diminishes as certain specified events occur); a “creeping” guaranty (where the guarantor’s liability increases if certain specified events occur); and an indemnity and hold-harmless agreement which is executed by a third party who agrees to absolutely and unconditionally indemnify the lender (subject to a maximum dollar limit or “liquidated damages” amount) for all losses the lender may incur as the result of certain actions by the borrower that prevent, hinder, or delay the lender in connection with the attempted exercise of any of its remedies against the borrower as set forth in the relevant workout (or related) document. (A form of such an indemnity agreement is attached hereto as **Exhibit “C”**).

### **Enforceability in Bankruptcy Proceedings**

The validity and enforceability of springing and exploding guaranties may be attacked in a bankruptcy proceeding on a number of theories (which may or may not be successful). The

borrower, guarantor (or other creditors) may claim that the “springing” and “exploding” features of these types of guaranties are unenforceable *ipso facto* clauses under Sections 363(l), 365(e), and 541(c) of the Bankruptcy Code. *See, e.g., DiCello v. United States (In re Railway Reorganization Estate, Inc.)*, 133 B.R. 578, 582 (Bankr. D. Del. 1991) (Government’s “springing liens” on certain assets of debtor railroad were unenforceable *ipso facto* clauses).

All or some of these parties could also argue that such clauses are inequitable and therefore unenforceable under § 105 of the Bankruptcy Code (which grants the court the power to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title”). It could even be argued that the lender’s right to proceed against the guarantor under the guaranty for a monetary judgment constitutes an unreasonable and impermissible penalty under § 506(b) of the Bankruptcy Code (which provides that an oversecured creditor may recover postpetition interest in addition to “reasonable fees, costs, and charges” as part of its secured claim).

A claim could also conceivably be made that the enforcement of such guaranties violates the automatic-stay provisions of § 362 of the Bankruptcy Code, and that a bankruptcy court should enjoin the enforcement of such a guaranty upon the filing of a bankruptcy petition by or against the borrower. *See, e.g., North Star Contracting Corp. v. McSpedan (In re North Star Contracting Corp.)*, 125 B.R. 368, 370-71 (S.D.N.Y. 1991) (finding that action against corporate debtor’s president violated automatic stay because situation presented “special circumstances” based on identity of interests of debtor and third-party non-debtor); *Fleet Business Credit, L.L.C. v. Wings Restaurants, Inc.*, 291 B.R. 550, 2003 U.S. Dist. LEXIS 5997, April 10, 2003, at \*8 (holding that “in ‘unusual situations,’ a narrow exception provides for the imposition of a stay under § 362(a)(1) against a nonbankrupt party when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor” (internal quotations and citation omitted)); *In re North Star Contracting Corp.*, *supra*, 125 B.R. at 371 (“courts have recognized that an identity of interest exists between a debtor and a third-party non-debtor when a right to indemnification exists. These courts reason that a special circumstance exists because a judgment against the non-debtor will affect directly the debtor’s assets”); *cf. Sentry Bank and Trust Co. v. Goulding Place Developers, Inc. (In re Goulding Place Developers, Inc.)*, 99 B.R.493, 497-98 (Bankr.N.D.Ga. 1989) (corporate debtor’s Chapter 11 filing did not constitute bad faith so as to entitle creditor to relief from automatic stay to recover under guaranty executed by an officer of the debtor, where underlying note was only in technical default upon individual borrower’s Chapter 11 filing and bankruptcy filing was necessary to preserve debtor’s equity in the property); *In re Metal Center, Inc.*, 31 B.R. 458, 463 (Bankr.D.Conn. 1993) (finding that collateral estoppel would not apply in a bankruptcy automatic stay issue, because a judgment in the suit against the third party would not be binding on the bankruptcy court); *Brancato v. Trust Co. of Georgia Bank of Savannah, N.A. (In re Pestrutto)*, 108 B.R. 850, 852 (Bankr.S.D.Ga. 1989) (foreclosure action against property in which

debtor had transferred all of its legal and/or equitable interests was not subject to automatic stay, absent showing that foreclosure would have effect upon debtor's property or estate); *National Westminster Bank NJ v. Lomker*, 277 N.J.Super. 491, 494, 649 A.2d 1328, 1330 (1994) (finding that automatic stay did not extend to creditor's suit against debtor's individual guarantors); *Willis v. Celotex Corp.*, 978 F.2d 146, 148-49 (4<sup>th</sup> Cir. 1991), *cert. denied*, 507 U.S. 1030 (1993) (holding that automatic stay did not apply to an irrevocable letter of credit issued by bank to debtor's surety and that surety could draw on letter of credit because it was not property of bankruptcy estate, without violating automatic stay).

Section 524(e) of the Bankruptcy Code provides that a bankruptcy discharge does not discharge the obligation of any non-debtor party. Courts have generally construed this statutory provision as prohibiting bankruptcy plans from modifying or releasing the obligations and liabilities of guarantors under third-party guaranties and prohibiting bankruptcy courts from preventing the enforcement of such guaranties. *See, e.g., Star Phoenix Mining Co. v. West One Bank*, 147 F.3d 1145, 1147 (9<sup>th</sup> Cir. 1998) ("under § 524(e), a bankruptcy court does not have the power to discharge the liabilities of a bankrupt's guarantor"); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 601 (10<sup>th</sup> Cir. 1991) (finding that "[n]either the confirmation of a plan nor the creditor's recovery (or partial satisfaction) thereunder bars litigation against third parties for the remainder of the discharged debt"); *In re Sandy Ridge Devel. Corp.*, 881 F.2d 1346, 1351 (5<sup>th</sup> Cir. 1989) (confirmation of plan would not release non-debtor guarantors); *Mellon Bank v. M.K. Siegel*, 96 B.R. 505, 506 (Bankr. E.D. Pa. 1989) (holding that the bankruptcy court lacked the power to discharge the obligations of non-debtor guarantors of the debtors' obligations to creditors); *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 594-95 (7<sup>th</sup> Cir. 1982) (holding that the bankruptcy court's discharge of the liability of a guarantor did not preclude a collateral action by the creditor to enforce the guaranty); *Peterson v. Peterson*, 118 B.R. 801, 803 (Bankr. D. New Mexico 1990) (affirming that the discharge of the debt did not affect the liability of any other entity for such debt); *Underhill v. Royal*, 769 F.2d 1426, 1431-32 (9<sup>th</sup> Cir. 1985) (holding that a bankruptcy court's discharge of the liability of co-debtors or guarantors is without effect and does not bar collateral actions against such co-debtors or guarantors by creditors of the debtor); *R.I.D.C. Indus. Devel. Fund v. Snyder*, 539 F.2d 487, 490 (5<sup>th</sup> Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977) (holding that a bankruptcy court has no power to affect the obligations of guarantors); *In re Prime Motor Inns, Inc.*, 130 B.R. 610, 613 (S.D. Fla. 1991), (permitting lender to proceed against third-party issuer of a letter of credit when borrower's bankruptcy triggered lender's right to cash letter of credit); *In re Spanish Cay, Ltd.*, 161 B.R. 715, 722 (Bankr. S.D. Fla. 1993) (upholding enforceability of agreement that required insiders to assign their claims against debtor to creditor, which assignment would be effective upon commencement of any bankruptcy or insolvency proceeding with respect to debtor); *In re Murall, Inc.*, 118 B.R. 400, 403 (Bankr. D.S.C. 1989) (denying injunction against enforcement of guaranty because of lack of evidence of irreparable injury or substantial harm to others, or any overriding public interest or threat to the likelihood of a successful reorganization); *In re Rubenstein*, 105 B.R. 198, 204 (Bankr.D.Conn. 1989) (refusing to enjoin action against debtor's mortgagee because debtor

would not be bound by a judgment in that matter); *Apollo Molded Products, Inc. v. Kleinman (In re Apollo Molded Products, Inc.)*, 83 B.R. 189, 194 (Bankr.D.Mass. 1988) (“[w]e . . . align ourselves with those courts who have refused to enjoin suit against the debtor’s guarantor, even for a very short period of time, absent extraordinary circumstances”); *Kalispell Feed & Grain Supply, Inc. v. Norwest Bank Kalispell, N.A. (In re Kalispell Feed & Grain Supply, Inc.)*, 55 B.R. 627, 629 (Bankr. D. Mont. 1985) (denying injunction against guarantors because debtor would not be bound by any judgment against guarantors and judgment would not prejudice sale of debtor’s assets); *St. Petersburg Hotel Assocs., Ltd. v. Royal Trust Bank of St. Petersburg (In re St. Petersburg Hotel Assocs.)*, 51 B.R. 18, 19 (Bankr. M.D. Fla. 1984) (dissolving injunction where debtor was able to obtain financing that did not require credit strength of guarantor, as previously alleged); *Mahaffey v. E-C-P of Ariz., Inc.*, 40 B.R. 469, 473-74 (Bankr. D. Colo. 1984) (injunction denied where evidence established that guarantor did not intend to contribute any of his assets to debtor’s reorganization and creditor was otherwise unprotected by any other available assets if it were ordered not to proceed against guarantor); *First Nationwide Bank v. Brookhaven Realty Associates*, 637 N.Y.S.2d 418, 421, 223 A.D.2d 618, 620 (N.Y. App. Div. 1996) (finding that bankruptcy default provision in nonrecourse mortgage, which permitted mortgagee to seek deficiency judgment against mortgagor and its individual partners if bankruptcy proceeding was not dismissed within 90 days, did not violate section of Bankruptcy Code preventing enforcement of *ipso facto* bankruptcy clauses); *Kopolow v. P.M. Holding Corp. (In re Modern Textile, Inc.)*, 900 F.2d 1184, 1191 (8<sup>th</sup> Cir. 1990) (“the liability of a guarantor for a debtor’s lease obligations is not altered by the Trustee’s rejection of the lease”); *In re Farm Fresh Supermarkets of Maryland, Inc.*, 2001 Bankr. LEXIS 51 at \*5 and \*7 (rejecting bankruptcy trustee’s argument that proceeds of letter of credit posted for benefit of landlord creditor should be returned to bankruptcy estate where creditor drew on the letter of credit post-petition; and finding that “a standby letter of credit . . . is a distinct type of financing document that is more akin to a guarantee than to the usual letter of credit” and that “it was more of a guarantee than a regular letter of credit which is typically issued in sales of goods”); *American Nat’l Bank and Trust Co. of Chicago v. Hamilton Ind. International, Inc.*, 583 F.Supp. 164, 169 (N.D. Ill. 1984) (“[t]he distinction between a standby letter of credit and a true guarantee is that the former is a direct obligation to pay upon ‘specified documents showing a default’ while the latter is a secondary obligation requiring ‘proof of the fact of default’” (citations omitted)); *Consolidated Aluminum Corp. v. Bank of Virginia*, 544 F.Supp. 386, 394, *aff’d* 704 F.2d 136 (4<sup>th</sup> Cir. 1983) (“[t]he standby letter of credit functions somewhat in the manner of a guaranty or a surety bond, and thus is utilized to guarantee the performance of a wide variety of obligations”); *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 626 (9<sup>th</sup> Cir. 1989) (rejecting debtor’s request to preliminarily and permanently enjoin creditor from pursuing state-court action against guarantor of debtor’s plan); *In re Zale Corp.*, 62 F.3d 746, 760 (5<sup>th</sup> Cir. 1996) (following *American Hardwoods, supra*, and stating that it “must overturn a § 105 injunction if it effectively discharges a nondebtor”).

However, notwithstanding § 524(e) of the Bankruptcy Code and the aforementioned cases, other bankruptcy courts have granted permanent injunctions preventing secured creditors from proceeding against third-party guarantors, or have modified or waived the obligations contained in such guarantees (generally in cases involving extraordinary fact situations, such as mass-tort litigation bankruptcies or instances where the court has determined that the guarantor is an indispensable party to the successful rehabilitation of the bankrupt debtor). *See, e.g., Menard–Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 702 (4<sup>th</sup> Cir. 1989), *cert. denied*, 493 U.S. 959 (1989) (holding that § 524(e) did not limit the equitable power of the bankruptcy court to enjoin suits against other entities where the entire reorganization depended on whether the debtor was free from indirect claims against partners who would have indemnity or contribution claims against the debtor); *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93-94 (2<sup>nd</sup> Cir. 1988), *cert. denied*, 493 U.S. 959 (1989) (ruling that the bankruptcy court had jurisdiction to enjoin a lien holder from attempting to assert his lien against property in the hands of a purchaser who had acquired a title from the bankruptcy court free and clear of liens and encumbrances; the court cited § 105(a) of the Bankruptcy Code and stated that this section “has been construed liberally to enjoin suits that might impede the reorganization process” and noted that to permit actions against third parties in this case would “adversely affect the property of the estate and would interfere with reorganization”); *In re Boston Harbor Marina Co.*, 157 B.R. 726, 730 (Bankr.D.Mass. 1993) (“[t]he statutory prohibition against discharge of third parties may nevertheless not apply in certain circumstances. The discharge of mass tort claims is one such circumstance”); *In re Burstein-Applebee Co.*, 63 B.R. 1011, 1020-21 (Bankr. W.D. Mo. 1986) (permanently enjoining a debtor’s principals from pursuing a state-court action against members of the creditors’ committee, a non-debtor); *In re Master Mortgage Investment Fund, Inc.*, 168 B.R. 930, 935-36 (Bankr. W.D. Mo. 1994) (holding that, under appropriate circumstances, a bankruptcy court has the power to issue a permanent injunction or third-party release to protect non-debtors from creditor enforcement actions; the court noted that creditor approval is “the single most important factor” in determining whether a discharge of a non-debtor’s obligation is appropriate); *In re Specialty Equipment Companies, Inc.*, 3 F.3d 1043, 1047 (7<sup>th</sup> Cir. 1993) (“a per se rule disfavoring all releases in a reorganization plan would be . . . unwarranted, if not a misreading of the statute [§ 524(e)]”); *Chase Manhattan Bank v. Third Eighty-Ninth Assoc. (In re Third Eighty-Ninth Assocs.)*, 138 B.R. 144, 146-48 (S.D.N.Y. 1992) (enjoining action against guarantor because of indispensability of guarantor to debtor’s business and reorganization); *Lazarus Burman Assoc. v. Nat’l Westminster Bank USA (In re Lazarus Burman Assoc.)*, 161 B.R. 891, 899 (Bankr.E.D.N.Y. 1993) (based on finding that facts of the instant case satisfied the same criteria set for in *In re Third Eighty-Ninth, supra*, injunction would issue to prevent lender from pursuing actions against non-debtor principals); *Codfish Corp. v. Federal Deposit Ins. Corp. (In re Codfish Corp.)*, 97 B.R. 132, 136 (Bankr. D.P.R. 1988) (granting an injunction under § 105(a) based on determination that operation of debtor’s business depended on guarantor, who was one of approximately only 50 persons in the world with the technical expertise to run the business); *F.T.L., Inc. v. Crestar Bank (In re F.T.L., Inc.)*, 152 B.R. 61, 64 (Bankr. E.D. Va. 1993) (granting injunction because of necessity of active

involvement of guarantor/principal to ensure confirmable plan and determination that creditor was receiving adequate protection payments and would not be harmed by delay in enforcement of guaranty); *In re Gathering Restaurant, Inc.*, 79 B.R. 992, 1001-02 (Bankr. N.D. Ind. 1986) (granting injunction against guarantor because guarantor was only immediate source of emergency loans required to ensure debtor's continued existence as going-concern business); *Kasual Kreation, Inc. v. Heller Fin., Inc. (In re Kasual Kreation, Inc)*, 54 B.R. 915, 917 (Bankr. S.D. Fla. 1985) (granting injunction where guarantors were determined to be indispensable for continued operation of debtor's business during crucial holiday season and creditors would not be substantially harmed); *In re Ionosphere Clubs, Inc.*, 111 B.R. 423, 435 (Bankr.S.D.N.Y. 1990, *aff'd in part*, 124 B.R. 35 (S.D.N.Y. 1991) (enjoining an action against the debtor airline's codefendants, including the chairman of the board of directors, because a finding of liability as to the codefendants could extend to the airline and collateral estoppel could prevent it from litigating factual and legal issues critical to its defense in other proceedings); *In re Lomas Fin. Corp*, 117 B.R. 64, 66-67 (S.D.N.Y. 1990) (staying an action against a corporate debtor's officers because debtor's reorganization efforts would suffer irreparable harm); *Sudbury, Inc. v. H. Escott*, 140 B.R. 461, 463 (Bankr.N.D.Ohio 1992) (enjoining fraud action against officers and directors of corporate debtor because of collateral estoppel concerns); *In re American Film Technologies*, 175 B.R. 847, 853-54 (Bankr.D.Del. 1994) (invoking § 105 of Bankruptcy Code to stay prosecution of state law case against debtor's officers and directors, based on "unusual circumstances" of identity of subject matter, issues, and parties involved); *In re Monroe Well Service, Inc.*, 67 B.R. 746, 753-54 (Bankr.E.D.Pa. 1986) (injunction prohibiting creditor from taking action may be appropriate when non-debtor owns assets that will either be a source of funds for debtor or when presentation of non-debtor's credit standing will play significant role in debtor's attempt to organize); *In re Arrowmill Devel. Corp.*, 211 B.R. 497, 502 (Bankr.D.N.J. 1997) (where debtor-corporation's proposed Chapter 11 plan required non-debtor equity interest holder to make capital contributions that would directly affect estate assets and allocations among creditors, court could entertain release of equity interest holder's liability and thereby enter relief between non-debtors); *First Fed. Sav. & Loan Assoc. of Little Rock v. Pettit*, 12 B.R. 147, 149 (Bankr. E.D. Ark. 1981) (enjoining action against co-debtor who was close relative and that involved personal residence, and ruling that such an action, under these facts and circumstances, would unduly interfere with debtor's reorganization plan); *In re Seatco, Inc.*, 257 B.R. 469, 475 (Bankr. N.D. Tex. 2001) (ruling that a provision of a Chapter 11 plan providing for a temporary injunction against collection on a guaranty, while preserving the rights of the beneficiary of the guaranty and the liability of the guarantor, did not violate § 524(e)); *In re Zale Corp.*, *supra*. 62 F.3d at 762 (noting, in *dicta*, that circumstances may arise in a bankruptcy case warranting the issuance of a temporary injunction of third-party actions in connection with confirmation of the debtor's plan); *Celotex Corp. v. Edwards*, 514 U.S. 300, 310 (1995) (agreeing with bankruptcy court's finding that "allowing respondents -- and 227 other bonded judgment creditors -- to execute immediately on the bonds would have a direct and substantial adverse effect on Celotex's ability to undergo a successful reorganization"); *Gillman v. Continental Airlines, Inc. (In re Continental Airlines, Inc.)*, 177 B.R. 475, 479 (D. Del. 1993)

(“while the automatic stay ordinarily applies only to actions against the debtor itself, it is properly extended to actions against non-debtors where an identity of interest exists between the debtor and non-debtor defendant such that the debtor is the real party defendant and the litigation will directly affect the debtor and, more particularly, the debtor's assets or its ability to pursue a successful plan of reorganization under Chapter 11”); *The Litchfield Co. of South Carolina, L.P. v. The Anchor Bank (In re The Litchfield Co. of South Carolina, L.P.)*, 135 B.R. 797, 804 (W.D. N.C. 1992) (“The Fourth Circuit has recognized that when proceedings against non-bankrupt third parties ‘would reduce or diminish ‘the property of the debtor . . . to the detriment of the debtor's creditors as a whole’ then a court may properly stay these proceedings pursuant to § 362” (citing *Credit Alliance Corp v. Williams*, 851 F.2d 119 (4<sup>th</sup> Cir. 1998), quoting *A.H. Robins v. Piccinin*, 788 F.2d 994, (4<sup>th</sup> Cir.), cert. denied, 479 U.S. 876 (1966)).

*See generally* Howard C. Buschman III and Sean P. Madden, *The Power and Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors*, 47 Bus. Law. 913 (1992); Marshall E. Tracht, *Contractual Bankruptcy Waivers: Reconciling Theory, Practice, and Law*, 82 Cornell L. Rev. 301, 313-14 (1997); Howard J. Weg, *Restricting Access to Bankruptcy Relief: Limiting the Assumption or Rejection of Executory Contracts*, 1999 ICSC U.S Shopping Center Law Conference, Scottsdale Arizona, October 20-23, 1999, Tab 27, pp. 26-27; Deborah A. Crabbe, *Are Non-debtor Releases/Permanent Injunctions Authorized Under the Bankruptcy Code?* 23 ABI J. 34 (2003); Marshall A. Tract, *Insider Guaranties in Bankruptcy: A Framework for Analysis*, 54 U. Miami L. Rev. 497 (2000); Marvin Leon, *Exploding and Springing Guarantees of Real Estate Loans*, 18 Probate & Property 57, 60-61 (2004) (arguing that exploding and springing guarantees should be invalidated on public policy grounds).

### **Equitable Subordination and Control Issues**

The lender must also be careful to exercise some degree of caution and discretion in connection with the events in exploding and springing guarantees that trigger liability of the guarantor (with respect to both the substance and number of such events), so that it does not open itself up to a claim by the debtor or other creditors of overreaching, “control” of the borrower or its business, or lender liability. An especially onerous form of exploding or springing guaranty could conceivably give rise to a claim that the lender is indirectly controlling the borrower’s conduct or business operations to the detriment of other creditors.

Section 510(c) of the Bankruptcy Code permits the bankruptcy court to subordinate, on equitable grounds, all or part of a lender’s allowed claim or interest, to transfer any lien securing a subordinated claim to the bankruptcy estate, or to disallow the claim entirely, in the appropriate circumstances. Bankruptcy courts generally invoke the sanctions set forth in § 510(c) when the lender has engaged in overreaching or lender control, which occurs when the lender steps beyond the traditional role of a lender and participates in the debtor’s business or engages in other

egregious conduct that justifies the use of the court's equitable powers. In these situations, the court may decide to subordinate, recharacterize, or even disallow a transaction that would not constitute a preferential transfer (under § 547 of the Bankruptcy Code) or a fraudulent conveyance (under § 548 of the Bankruptcy Code). The principles of equitable subordination are not set out in the Bankruptcy Code, and are defined by case law. In general, the equitable-subordination doctrine is limited to reordering priorities and does not permit total subordination of a claim.

### **Applications to Conduit and CMBS Financing**

Springing and exploding guarantees (which have been around for several years with respect to conventional commercial mortgage-loan financing) are now being utilized in connection with bankruptcy-remote structures in conduit and commercial-mortgage-backed-securities financing. In connection with such financing, the guarantor's obligations under a springing guarantee (or liability under an exploding guaranty) could be triggered by a breach of the bankruptcy-remote entity's loan covenants that are designed to assure the continuance of the single-purpose, bankruptcy-remote features of the entity (e.g., covenants not to incur additional debt except for trade debt, engage in another business activity, or merge with another entity). An additional triggering event could be the breach of the bankruptcy-remote borrowing entity's covenant, in a workout document, not to contest an automatic-relief-from-bankruptcy-stay provision in the event that a bankruptcy petition is subsequently filed by or against the entity. Other triggering events (applicable in a subsequent bankruptcy proceeding) could include the entity's proposal of a plan of bankruptcy reorganization plan that is not acceptable to or approved by the lender, the entity's opposition to the lender's motion to limit (or terminate) the exclusive time period within which the entity may file a plan of reorganization, and the opposition of the entity to a motion by the lender for the use, or turnover, of rents or other cash collateral.

Most property-specific transactions that are rated by the rating agencies are nonrecourse, without personal liabilities or guaranties. However, occasionally a rated entity will guarantee all or some portion of the debt. For example, a rated company that is an equity participant in a limited-partnership borrower may agree to guarantee some portion of the borrower's obligations in order to facilitate financing for the borrower. In order for the rating agency to rely on the guaranty in connection with its rating of the transaction, it may require that the guarantor and the guaranty agreement comply with the rating agency's "guarantee criteria."

**EXHIBIT "B"****GUARANTY**

1. The Guaranty. FOR VALUE RECEIVED and in consideration of advances made or to be made, or credit given or to be given, or other financial accommodation from time to time afforded or to be afforded to \_\_\_\_\_, a limited partnership organized and operated under the laws of the state of \_\_\_\_\_ (the "Beneficiary") or to \_\_\_\_\_ NATIONAL RANK AND TRUST COMPANY OF \_\_\_\_\_ ("Trustee"), not personally but as Trustee under Trust Agreement dated \_\_\_\_\_, 199\_\_ and known as Trust No. \_\_\_\_\_ (herein, Beneficiary and Trustee, individually and collectively, jointly and severally, together with the successors and assigns of each of them, are sometimes called "Debtor"), by \_\_\_\_\_, its successor or successors, immediate or remote, by merger, consolidation, sale of a major portion of its assets or otherwise (all of which are hereunder called "Lender"), and in consideration of Lender entering into the Settlement Agreement (defined hereinafter), the undersigned, \_\_\_\_\_ and \_\_\_\_\_ (individually, a "Guarantor," and collectively, "Guarantors"), jointly and severally hereby unconditionally guaranty (subject to the limitations set forth in Section 2 hereof) the full and prompt payment and performance when due (whether by acceleration or otherwise) to Lender of the Obligations (defined below). For all purposes of this Guaranty ("Guaranty"), the term "Obligations" shall mean and

include all obligations and indebtedness (including, without limitation, all principal, Basic Interest, Additional Interest, costs, fees and expenses) of Debtor to Lender of any kind whatsoever, howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent, now or hereafter existing, or due or to become due, under or with respect to any or all of the following:

- a. An Amended and Restated Mortgage Note dated as of \_\_\_\_\_ 199\_\_, given by Debtor to Lender in the principal amount of \$\_\_\_\_\_ (the "Note");
- b. That certain Amended and Restated First Mortgage and Security Agreement (the "Mortgage") executed by Debtor, dated as of the date of the Note and recorded in the Office of the Recorder of Deeds of \_\_\_\_\_ County, \_\_\_\_\_ and covering certain property in \_\_\_\_\_ County, \_\_\_\_\_, more particularly described in the Mortgage (the "Mortgaged Premises");
- c. That certain Security Agreement (Improvements Escrow, Consultant's Escrow, Cash Flow Escrow and Tax Escrow) executed by Debtor and dated of even date herewith;
- d. All of the other Restated Loan and Mortgage Documents (as such term is defined in the Mortgage); and

- e. The indemnity set forth in Section \_\_\_\_ of that certain Agreement dated as of \_\_\_\_\_, 199\_\_ among Beneficiary, the Guarantors, \_\_\_\_\_, \_\_\_\_\_ Management Co., Inc., and \_\_\_\_\_ (the "Settlement Agreement");

and any and all modifications, extensions or renewals of or substitutions for, any thereof or collateral given in connection with any thereof, heretofore or hereafter; and the term "Obligations" shall include all such obligations and indebtedness unconditionally, and notwithstanding any right or power of Debtor or anyone else to assert any claim or defense as to the invalidity or unenforceability of any of such obligations or indebtedness, and no such claim or defense shall affect or impair the obligations of Guarantors hereunder. Upon the occurrence of any Event of Default under any of the Restated Loan and Mortgage Documents, or upon any default or breach under the Settlement Agreement, Guarantors will, on demand by Lender or the holder of the Note, pay and perform all of the Obligations. Guarantors further agree to pay on demand all expenses, legal or otherwise (including court costs and attorneys' fees), paid or incurred by Lender in endeavoring to collect the Obligations, or any part thereof, and in enforcing this Guaranty.

2. Limitation on Guaranty. Notwithstanding anything to the contrary contained herein, Lenders' right of recovery and judgment against Guarantors is limited to: (a) \$ \_\_\_\_\_, plus all costs and expenses (including, without limitation, reasonable attorneys' fees) paid or incurred

by Lender in endeavoring to collect on this Guaranty, or any part thereof, and in enforcing this Guaranty and Guarantors' obligations hereunder, plus (b) interest at the Default Rate provided in the Note, on such amounts as are described in clause (a) above at any time due and owing.

3. Covenant Not to Sue. Notwithstanding anything herein to the contrary, Lender covenants and agrees with Guarantors that Lender will not sue Guarantors, or assert any claims against Guarantors in respect of their obligations under this Guaranty, unless and until either (A) both a Conveyance Event (as defined in the Settlement Agreement) and a Challenge (defined hereinafter) have occurred or (B) a Claim (defined hereinafter) is raised which involves or includes the assertion that the transfer of the Mortgaged Premises (or any portion thereof) pursuant to the Escrow Agreement (as defined in the Settlement Agreement) and the Conveyance Documents (as defined in the Settlement Agreement) is or would be unenforceable under applicable law. For purposes of this Section, a "Challenge" shall mean (A) (i) the filing, institution or commencement of a voluntary bankruptcy proceeding by Beneficiary, or (ii) the filing, institution or commencement of an involuntary bankruptcy proceeding or any other action or proceeding against Beneficiary which involuntary proceeding or other such action or proceeding is not dismissed with prejudice within thirty (30) days of its commencement or (B) the filing, institution, commencement or assertion of any suit, cause of action, arbitration proceeding, claim, counterclaim, defense, or action of any kind other than a Permitted Challenge (defined hereafter) (each a "Claim") by any one or more of Beneficiary, Trustee, any Guarantor or any relative or affiliate of or entity controlling,

controlled by or under common control with any of the foregoing (an "Affiliated Challenging Party") or by any other person or entity other than an Affiliated Challenging Party (an "Unaffiliated Challenging Party") of, concerning, related to or in any way connected with or arising from the Loan and Mortgage Documents (as defined in the Settlement Agreement) or the Restated Loan and Mortgage Documents or the Settlement Agreement, including (without limitation) a Claim (i) which is based, in whole or in part, on the claim, assertion, allegation or premise that a Conveyance Event (as defined in the Settlement Agreement) has not occurred or that Lender (or its designee) is not or was not entitled to obtain title to or ownership of the Mortgaged Premises (regardless of whether by conveyance as provided in the Escrow Agreement, by foreclosure or otherwise), (ii) which in any way challenges or contests, or seeks to impede, delay, bar, stay, enjoin, interfere with, rescind or invalidate, Lender (or its designees) obtaining title to or ownership of the Mortgaged Premises (regardless of whether by conveyance as provided in the Escrow Agreement, by foreclosure or otherwise), or (iii) which is based, in whole or in part, on the claim, assertion, allegation or premise that Lender has acted improperly or in bad faith or in breach of any of its obligations under any of the Restated Loan and Mortgage Documents, under the Settlement Agreement or otherwise. For purposes of this Section, a "Permitted Challenge" shall mean any Challenge (a) consisting of a lawsuit commenced by an Affiliated Challenging Party, in a court which has competent jurisdiction over the parties and the subject matter or of a claim. defense or counterclaim asserted in any action brought by Lender, its successors or assigns, (b) where one of the claims or the only claim raised or asserted by the Challenging Party is that no Conveyance Event has occurred, (c) in which the court

enters a final and nonappealable order or judgment finding that no Conveyance Event has in fact occurred, and (d) involves an assertion that the remedies set forth in Sections \_\_\_\_, \_\_\_\_ and \_\_\_\_ of the Settlement Agreement pertaining to the transfer of the Mortgaged Premises (or any portion thereof) pursuant to the Conveyance Documents are not enforceable remedies as a matter of law.

4. Reliance. It is expressly understood and acknowledged that Lender has entered into the Settlement Agreement in reliance upon the agreement contained therein of Guarantors to enter into this Guaranty, and that Lender has made financial accommodations in reliance upon the execution and delivery of this Guaranty and the validity thereof, and Guarantors have consented to this Guaranty as an inducement to Lender to enter into the Settlement Agreement.

5. Representations and Warranties. Each Guarantor represents and warrants to Lender as follows:

- a. Any and all balance sheets, net worth statements and other financial statements or data concerning Guarantors which have heretofore been given to Lender by or on behalf of such Guarantor fairly and accurately present, to the best knowledge, information and belief of the Guarantors, the financial condition of Guarantors as of the respective dates thereof, and, since the respective dates thereof, there has been no material adverse change in the financial condition of Guarantors.

- b. The execution, delivery and performance of this Guaranty by Guarantors and the performance of all covenants, agreements and obligations hereunder do not and will not contravene or conflict with (i) the limited partnership agreement of Beneficiary, (ii) any law, order, rule, regulation, writ, injunction, or decree now in effect of any government, governmental instrumentality or court having jurisdiction over Guarantors, or (iii) any contractual restriction binding on or affecting Guarantors or their respective property or assets.
- c. This Guaranty constitutes the legal, valid and binding obligation of Guarantors and is enforceable against Guarantors in accordance with its terms.
- d. Except as previously disclosed in writing or under oath by Guarantors to Lender, there is no action, proceeding or investigation pending or, to the knowledge of such Guarantor, threatened or affecting Guarantors which may adversely affect Guarantors' ability to fulfill Guarantors' obligations under this Guaranty.
- e. Guarantors have disclosed all events, conditions and facts known to Guarantors which could have any material adverse effect on the financial condition of Guarantors. No representation or warranty of Guarantors contained herein, nor any schedule, certificate or other document

furnished by Guarantors to Lender in connection with this Guaranty or the Restated Loan and Mortgage Documents or the Settlement Agreement, contains any material misstatement of fact or omits to state a material fact or any fact necessary to make the statements contained therein not misleading.

f. Except as previously disclosed to Lender in writing or under oath, there are no facts or circumstances of any kind or nature whatsoever of which such Guarantor is aware which such Guarantor believes would in any way impair or prevent Guarantors from performing their obligations under this Guaranty in any material respect.

6. Covenants. Each Guarantor agrees and covenants as follows:

a. Guarantors agree that this Guaranty shall continue to be effective or be reinstated, as the case may be, if at any time payment or performance of any of the Obligations, or any part thereof, is avoided, rescinded or waived, or must otherwise be restored, disgorged, reimbursed or repaid by Lender upon the bankruptcy, insolvency or reorganization of Debtor or otherwise and shall continue in full force and effect as long as there exists a possibility that any payment or performance of any of the Obligations may be avoided,

rescinded, waived, restored, disgorged, reimbursed or repaid. without limiting the generality of the foregoing, Guarantors agree that to the extent Debtor makes a payment or payments to Lender, which payment or payments or any part thereof are at any time subsequently invalidated, declared to be fraudulent or preferential, set aside or required, for any of the foregoing reasons or for any other reason, to be repaid or paid over to a custodian, trustee, receiver, or any other party under any bankruptcy code or act, state or federal law, common law or equitable cause, then to the extent of such payment or repayment, the Obligations or any part thereof intended to be satisfied shall be revived and continued in full force and effect as if said payment or repayment had not been made and Guarantors shall be primarily liable for such Obligations.

- b. Lender may, from time to time, in its sole discretion and without notice to or consent by Guarantors, take any or all of the following actions, all without in any way diminishing, impairing, releasing or affecting the liability or obligations of Guarantors under or with respect to this Guaranty (and each Guarantor hereby irrevocably consents to Lender doing any or all of the following): (i) retain or obtain a security interest in any property to secure any of the Obligations or any obligation hereunder

(provided that nothing in this clause (i) shall otherwise obligate Guarantors to grant any security interest to Lender in any property of Guarantors), (ii) retain or obtain the primary or secondary obligation of any obligor or obligors, in addition to Guarantors, with respect to any of the Obligations, (iii) extend or renew for one or more periods (whether or not longer than the original period), or alter or exchange, any of the Obligations, or release or compromise any obligation of Guarantors hereunder or any obligation of any nature of any other obligor with respect to any of the Obligations, or otherwise amend or modify any or all of the Restated Loan and Mortgage Documents or the Settlement Agreement, (iv) waive, modify, subordinate, compromise or release its security interest in, or surrender, release or permit any substitution or exchange for, all or any part of any property securing any of the Obligations or any obligation hereunder, or extend or renew for one or more periods (whether or not longer than the original period) or waive, release, subordinate, compromise, modify, alter or exchange any obligations of any nature of any obligor with respect to any such property, (v) subject to Section 3 hereof, resort to Guarantors for payment of any of the Obligations, whether or not Lender shall have resorted to or exhausted any other remedy or any other security or collateral or any obligation hereunder or shall have proceeded against

Beneficiary or any other obligor primarily or secondarily obligated with respect to any of the Obligations, and (vi) grant participations to one or more banks or other financial institutions in and to all or any part of the Note, the Mortgage and the other Restated Loan and Mortgage Documents and the indebtedness evidenced thereby, this Guaranty, or other security documents now or hereafter in existence with respect to the Obligations.

- c. No act of commission or omission of any kind or at any time, upon the part of Lender in respect to any matter whatsoever, shall in any way affect or impair this Guaranty.
- d. So long as any of the Restated Loan and Mortgage Documents or the Settlement Agreement shall be in effect or any of the obligations shall be owed by Debtor, each Guarantor covenants that:
  - (1) Such Guarantor will deliver to Lender from time to time, but in no event less than one time per year, on or before April 14 of each year (or within 10 days after any permitted extension of the filing date for such taxes), a financial statement certified as accurate by such Guarantor and copies of such Guarantor's federal and state tax returns and such other information regarding

the financial position or business of Guarantors as Lender may reasonably request;

- (2) Guarantors will promptly give notice in writing to Lender of all litigation, arbitration proceedings and regulatory proceedings affecting Guarantors or any of them or any of their properties, which reasonably could be expected materially and adversely to affect the financial condition or business of Guarantors in their respective individual capacities or any of them or the ability of Guarantors or any of them to perform the obligations under this Guaranty or which in any manner draws into question the validity of the Restated Loan and Mortgage Documents, the Settlement Agreement or the Obligations; and
  - (3) Guarantors agree to provide from time to time such other information concerning Guarantors as Lender may reasonably request.
- e. Any amounts received by Lender from whatever source on account of the Obligations may be applied by it toward the payment of such of the Obligations, and in such order, portion and priority of application, as Lender

may from time to time elect in its sole and absolute discretion.

- f. Any indebtedness of Debtor now or hereafter held by or owing to either of the Guarantors is hereby subordinated to the indebtedness of Debtor to Lender under to either Guarantor on account of any subordinated debt (other than payments made on the Working Capital Loan as permitted by the Deposits Security Agreement) shall be collected and received by such Guarantor in trust for Lender and shall be paid over to Lender on account of the Indebtedness (as defined in the Note) without impairing or releasing the obligations of Guarantors hereunder.
  
- g. The liability of Guarantors hereunder, and the remedies for the enforcement of such liability, shall in no way be diminished or affected by (i) the release or discharge of Debtor in any creditors', receivership, bankruptcy, reorganization, insolvency or other proceeding, (ii) the rejection or disaffirmance of any document or instrument evidencing, securing, or executed in connection with the Obligations in any such proceeding, (iii) the impairment, limitation or modification of the Obligations or of the estate of Debtor in bankruptcy, or of any remedy for the enforcement of Debtor's liability under any document or instrument evidencing, securing, or executed in connection with the

Obligations, resulting from the operation of any present or future provision of title 11 of the United States Code or any other statute or law of any kind or from the decision or order of any court, (iv) any disability or defense of Debtor, or (v) the cessation of the liability of Debtor for any cause whatsoever.

- h. The creation or existence from time to time of Obligations in excess of the amount to which the right of recovery under this Guaranty is limited is hereby authorized and permitted, without notice to Guarantors, and shall in no way affect or impair the rights of Lender and the obligations of Guarantors under this Guaranty.
- i. Lender shall have no obligation of any kind whatsoever to obtain, perfect or retain a valid lien upon or security interest in any collateral of any kind whatsoever to secure any of the Obligations, or to protect or insure any property which may at any time be the subject of any such lien or security interest, and any failure of Lender to obtain, perfect or retain any such lien or security interest, or to protect or insure any such property, shall in no way impair, diminish, release or affect the obligations of Guarantors hereunder.
- j. It is further expressly understood by and between Lender and Guarantors that

Guarantors' personal guaranty referred to herein shall not in any way modify or relieve Guarantors of or from any other liability or obligations that Guarantors or any of them may have to Lender relative to any and all documents executed by Guarantors or any of them, including the Restated Loan and Mortgage Documents and the Settlement Agreement, and that any and all said liability shall survive the execution of this Guaranty, and shall remain in full force and effect subsequent to this Guaranty.

- k. In order to hold Guarantors liable hereunder (subject to Section 3 hereof), there shall be no obligation on the part of Lender, at any time, to resort for payment to Debtor or other persons or corporations, their properties or estates, or resort to any collateral, security, property, liens or other rights or remedies whatsoever, it being understood that this is a guaranty of payment and performance and not of collection.
- 1. In the event this Guaranty is executed by more than one person or entity, it is agreed that each shall be bound by all of the provisions hereof, jointly and severally, and, subject to the limitations set forth in Section 2 and Section 3, each shall be obligated for the full payment of the Obligations to Lender, regardless of the existence of any such other guaranty. If more than one Debtor is named herein, this Guaranty

shall extend fully to the indebtedness of each such Debtor to Lender.

- m. If acceleration of the time for payment of any amount that is guaranteed hereunder is stayed or demand for payment of any such amount is precluded upon the insolvency, bankruptcy or reorganization of Debtor (determined without regard to whether a court might act favorably on a request for relief from any such stay or other preclusion), all such amounts otherwise subject to acceleration under the terms of the Restated Loan and Mortgage Documents shall nonetheless be payable by Guarantors hereunder forthwith on demand by Lender.
  - n. Such Guarantor shall, within five (5) business days after receipt thereof, deliver to Lender copies of any notices of default served on such Guarantor in his individual capacity pursuant to the terms of any other agreement to which either Guarantor is a party where such agreement involves goods, services or obligations with respect to which the fair market value or stated price or value exceeds \$10,000.00.
7. Waivers. Each Guarantor hereby expressly waives:
- a. notice of the acceptance by Lender of this Guaranty,

- b. notice of the existence or creation or non-payment of all of any of the Obligations,
  - c. presentment, demand, notice of dishonor, protest, notice of protest, default, nonpayment, and all other notices whatsoever,
  - d. all diligence in collection or protection of or realization upon the Obligations or any thereof, any obligation hereunder, or any security for or guaranty of any of the foregoing,
  - e. any right of subrogation against Debtor, except as provided in Section 23,
  - f. its right to enforce any remedies Lender now has, or later may have, against Debtor, except as provided in Section 24,
  - g. any right to participate in any security now or hereafter held by Lender, except as provided in Section 23, and
  - h. all suretyship defenses and suretyship rights of every nature otherwise available.
8. Effect of Delay or Action. No delay on the part of Lender in the exercise of any right or remedy shall operate as a waiver thereof, and no single or partial exercise by Lender of any right or remedy shall preclude other or further

exercise thereof or the exercise of any other right or remedy, nor shall any modification or waiver of any of the provisions of this Guaranty be binding upon Lender except as expressly set forth in a writing duly signed and delivered on behalf of Lender. No action of Lender permitted hereunder shall in any way affect or impair the rights of Lender or the obligations of Guarantors under this Guaranty.

9. Successors and Assigns: Participations. All of the representations, warranties, undertakings, agreements and covenants herein contained and the obligations hereunder shall be binding upon Guarantors and their respective heirs, executors and legal and personal representatives, and upon their respective successors and assigns; and to the extent that Debtor or any Guarantor is either a partnership or a corporation, all references herein to Debtor and to such Guarantor, respectively, shall be deemed to include any and all successors, whether immediate or remote, to such partnership or corporation. Lender may, without any notice whatsoever to anyone, sell, assign or transfer all of the Restated Loan and Mortgage Documents or the obligations, or any part thereof, and in that event each and every immediate and successive assignee, transferee, or holder of all or any part of the Restated Loan and Mortgage Documents or the obligations shall have the right to enforce this Guaranty, by suit or otherwise, for the benefit of such assignee, transferee or holder, as fully as if such assignee, transferee or holder were herein by name specifically given such rights, powers and benefits; but Lender shall have an unimpaired right, prior and superior to that of any said assignee, transferee or holder, to enforce this Guaranty for the benefit of Lender, as to so much of the Restated Loan and Mortgage

Documents or the Obligations as it has not sold, assigned or transferred.

10. Continuing and Unconditional Guaranty. This Guaranty shall in all respects be a continuing, absolute, irrevocable and unconditional guaranty, and shall remain in full force and effect (notwithstanding, without limitation, the death, withdrawal, bankruptcy, dissolution or termination of the existence of Debtor or of any Guarantor) until all of the following have occurred: (i) Guarantors have no further monetary obligation of any kind under or with respect to this Guaranty, (ii) all of Guarantors' obligations hereunder (including, without limitation, costs of collection hereunder) have been paid and satisfied in full, (iii) Lender has no further obligation to make any advance or extend any credit under any agreement to which this Guaranty would apply, and (iv) all indebtedness and other amounts owed by Beneficiary or Trustee under the Restated Loan and Mortgage Documents or the Settlement Agreement have been paid in full. No notice of discontinuance given by the Guarantors shall affect or impair any of the agreements or obligations of Guarantors hereunder, and all of the agreements and obligations of Guarantors under this Guaranty shall, notwithstanding any notice of discontinuance, remain fully in effect until the conditions set out in the preceding sentence have been satisfied.

11. No Exculpation. No exculpatory, "non-recourse" or other language or provision contained in the Settlement Agreement, the Note or in any other document or instrument shall in any way prevent or limit Lender from proceeding to enforce this Guaranty against Guarantors personally. It is further expressly understood by and between

Lender and Guarantors that Guarantors' personal guaranty referred to herein shall not in any way modify or relieve Guarantors of or from any other liability or obligations that Guarantors or any of them may have to Lender relative to any and all documents executed by Guarantors or any of them, including the Restated Loan and Mortgage Documents or the Settlement Agreement, and that any and all said liability shall survive the execution of this Guaranty, and shall remain in full force and effect subsequent to this Guaranty.

12. Mortgage on Real Property. Each Guarantor authorizes Lender, at its sole option, without notice or demand and without affecting the liability of Guarantors hereunder, to release and reconvey (with or without the receipt of any consideration) any lien against any or all of the security, and to foreclose the Mortgage by judicial sale, or to accept a conveyance of the Mortgaged Premises, all without affecting the liability of Guarantors hereunder. Each Guarantor expressly waives any defense to the recovery by Lender from such Guarantor of any deficiency, including without limitation any defense arising as a result of any election of remedies by Lender which limits or destroys Guarantors' right to proceed against Debtor. Each Guarantor waives all suretyship defenses it would otherwise have. Each Guarantor waives any right to receive notice of any judicial sale or foreclosure or conveyance of any real property, and the failure of Guarantors to receive such notice shall not impair or affect Guarantors' liability hereunder.

13. Guaranty of Payment. In order to hold Guarantors liable hereunder (subject to Section 3 hereof), there shall be no obligation on the part of Lender, at any time, to resort for payment to Debtor, or other persons or corporations,

their properties or estates, or resort to any collateral, security, property, liens or other rights or remedies whatsoever. The obligations of Guarantors hereunder are independent of the obligations of Debtor, notwithstanding any right or power of the Debtor or any other person or entity to assert any claim or defense as to the invalidity or unenforceability of the Obligations or of any provision of the Settlement Agreement, the Restated Loan and Mortgage Documents or the Conveyance Documents, and no such claim or defense shall impair the obligations of the undersigned hereunder. A separate action may be brought and prosecuted against Guarantors, and any requirement that Lender institute suit, or exercise or exhaust its remedies or rights against Debtor or against any other person, guarantor, or mortgage, or other collateral guaranty securing all or any part of the Obligations, prior to enforcing any rights it has under this Guaranty, or otherwise, is hereby expressly waived, and Guarantors hereby further waive the benefit of any statute of limitations affecting their liability hereunder or the enforcement hereof. Guarantors agree that their liability hereunder is primary, absolute and unconditional without regard to the liability of any other party, it being understood that (subject to Section 3 hereof) this Guaranty is a guaranty of payment and performance and not of collection.

14. Time of Essence. Time is of the essence of this Guaranty.

15. No Modification Without Writing. This Guaranty may not be modified, amended, revised, revoked, terminated, changed or varied in any way whatsoever except by the express terms of a writing signed by the party or parties sought to be bound thereby.

16. Rights Cumulative. The rights and remedies of Lender hereunder are cumulative and in addition to any and all other rights and remedies specified herein or in the Restated Loan and Mortgage Documents or in the Settlement Agreement or available at law or in equity.

17. Knowledge and Information. Guarantors, and each of them, are fully aware of the financial condition of Debtor (and the partners thereof) and of the Mortgaged Premises, and are executing and delivering this Guaranty based solely upon their own independent investigation of all matters pertinent hereto and are not relying in any manner upon any representation or statement of Lender with respect thereto. Guarantors are in a position to obtain, and hereby assume full responsibility for obtaining, any additional information concerning the financial condition of Debtor (and the partners thereof) and of the Mortgaged Premises as Guarantors may deem material to their obligations hereunder, and Guarantors are not relying upon, nor expecting, Lender to furnish them any information concerning the financial condition of Debtor (or the partners thereof) or the Mortgaged Premises. Guarantors shall have no right to require Lender to obtain or disclose any information with respect to the Obligations, the financial condition or character of Debtor (or the partners thereof) or the Mortgaged Premises, or Debtor's (or the partners' thereof) ability to pay the obligations or any other person, or any other matter, fact or occurrence whatsoever.

18. GOVERNING LAW. THIS GUARANTY SHALL BE CONSTRUED ACCORDING TO THE LAWS OF THE STATE OF \_\_\_\_\_, IN WHICH

STATE IT SHALL BE PERFORMED BY GUARANTORS. GUARANTORS AND LENDER HEREBY AGREE THAT ALL ACTIONS TO ENFORCE THE TERMS AND PROVISIONS OF THIS GUARANTY SHALL BE BROUGHT AND MAINTAINED ONLY WITHIN THE STATE OF \_\_\_\_\_ AND GUARANTORS AND LENDER HEREBY CONSENT TO THE EXCLUSIVE JURISDICTION OF ANY COURT WITHIN THE STATE OF \_\_\_\_\_, WAIVE PERSONAL SERVICE OF ALL PROCESS AND HEREBY CONSENT THAT SUCH SERVICE MAY BE MADE BY REGISTERED OR CERTIFIED MAIL, DIRECTED TO GUARANTORS OR TRAVELERS (AS THE CASE MAY BE), AT THE RESPECTIVE ADDRESSES HEREINAFTER SET FORTH. GUARANTORS, JOINTLY AND SEVERALLY, HEREBY EXPRESSLY WAIVE, AND LENDER HEREBY EXPRESSLY WAIVES, ANY AND ALL RIGHTS WHICH THEY OR IT MAY HAVE TO MAKE ANY OBJECTIONS BASED ON (A) JURISDICTION, TO ANY SUIT BROUGHT TO ENFORCE THIS GUARANTY IN THE STATE OF \_\_\_\_\_, OR (B) VENUE, TO ANY SUIT BROUGHT TO ENFORCE THIS GUARANTY IN \_\_\_\_\_ COUNTY, \_\_\_\_\_, IN EACH CASE IN ACCORDANCE WITH THE ABOVE PROVISIONS.

19. Notices. Any notice, demand or other communication to be given hereunder shall be effectively given if made in writing, and delivered either personally or by United States certified or registered mail, postage prepaid, return receipt requested (which shall be deemed received upon the earlier of receipt or three (3) days after the deposit thereof with

the United States Postal Service) to Lender or Guarantors (and their respective counsel) at their respective addresses set forth below or to such other addresses as Lender or Guarantors may direct in a notice complying with this Section:

Lender:

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

Attn: \_\_\_\_\_

With a copy to: \_\_\_\_\_

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

Guarantors: \_\_\_\_\_

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

and

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

With a copy to: \_\_\_\_\_

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

20. Severability. If any provision of this Guaranty or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Guaranty shall be valid and enforceable to the fullest extent permitted by law.

21. WAIVER OF JURY TRIAL. EACH GUARANTOR WAIVES ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING IN CONNECTION WITH THIS GUARANTY OR THE OTHER RESTATED LOAN AND MORTGAGE DOCUMENTS OR THE SETTLEMENT AGREEMENT OR ANY DOCUMENT REFERENCED THEREIN OR EXECUTED AND DELIVERED IN CONNECTION THEREWITH.

22. Capitalized Terms. Any term capitalized but not specifically defined herein, which is capitalized and defined in the Note, shall have the same meaning for purposes of this Guaranty as it has for purposes of the Note.

23. Subrogation. Notwithstanding anything to the contrary in this Guaranty, the waivers contained in sections 7(e), (f) and (g) shall apply only until all of the Obligations and the Guaranty have been satisfied in full.

SIGNED AND DELIVERED by the undersigned Guarantors, as of the \_\_\_\_\_ day of \_\_\_\_\_, 199\_\_.

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

Name: \_\_\_\_\_,  
Individually as Guarantor

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

Name: \_\_\_\_\_,  
Individually as Guarantor

Accepted this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_

By: \_\_\_\_\_ (“Lender”)

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

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

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

STATE OF \_\_\_\_\_ )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

Before me, a Notary Public in and for said County and State, personally appeared

\_\_\_\_\_, and  
acknowledged the execution of the foregoing "Guaranty" as his voluntary act and deed.

WITNESS my hand and Notarial Seal this \_\_\_\_\_ day  
of \_\_\_\_\_ 19

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
(Printed Signature)

My Commission Expires: \_\_\_\_\_

My County of Residence: \_\_\_\_\_

STATE OF \_\_\_\_\_ )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

Before me, a Notary Public in and for said County and State, personally appeared

\_\_\_\_\_, and  
acknowledged the execution of the foregoing "Guaranty" as his voluntary act and deed.

WITNESS my hand and Notarial Seal this \_\_\_\_\_ day  
of \_\_\_\_\_ 19

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
(Printed Signature)

My Commission Expires: \_\_\_\_\_

My County of Residence: \_\_\_\_\_

**EXHIBIT "C"**

**INDEMNIFICATION AGREEMENT**

THIS INDEMNIFICATION AGREEMENT dated as of the \_\_\_\_ day of \_\_\_\_\_, 199\_\_ given by \_\_\_\_\_ and \_\_\_\_\_ (hereinafter collectively referred to as the "Indemnitors, and individually as an Indemnitor") to \_\_\_\_\_, a \_\_\_\_\_ corporation having an office at \_\_\_\_\_, \_\_\_\_\_ (hereinafter referred to as "Lender").

**PRELIMINARY STATEMENT**

A. Unless otherwise defined in this Agreement, each capitalized term appearing in this Agreement shall have the meaning given to such term in Exhibit A, which is attached hereto and incorporated herein by reference.

B. Lender has made a loan (the "Loan") in the aggregate original principal amount of \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_) to Borrower, which Loan is (i) evidenced by the Note and (ii) secured by, among other things, (a) the Mortgage covering the fee estate of Borrower in the Property, (b) the Assignment of Leases and Rents; and (c) the UCC-1 Financing Statements.

C. At the request of Borrower and all of its partners, Lender has agreed to enter into the Modification and

Extension Agreement, pursuant to which the Note, the Mortgage, the Assignment of Rents, the Assignment of Leases and the Cash Management Agreement will be modified and amended in certain respects, provided that, among other things, the Indemnitors enter into this Agreement. The Note, the Mortgage, the Assignment of Leases and Rents, the Pre-workout Agreement and all other documents and instruments executed and/or delivered in connection with the Loan, as the same may be modified, are hereinafter collectively referred to as the "Loan Documents").

D. Execution and delivery of this Agreement is a condition precedent to the effectiveness of the Modification and Extension Agreement.

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in order to induce Lender to enter into the Modification and Extension Agreement, the Indemnitors hereby covenant and agree with Lender as follows:

1. The Indemnitors absolutely and unconditionally agree to indemnify and to hold Lender harmless from and against any and all losses, claims, liabilities, damages, costs and expenses (including, without limitation, reasonable counsel fees) of any nature whatsoever, contingent or otherwise, foreseen or unforeseen, which Lender may or shall incur as a direct or indirect result of Borrower, any general partner of Borrower, any Indemnitor, any other person, party or entity (other than Lender) acting on behalf of or at the instigation of Borrower, any general partner of Borrower or any Indemnitor, or any other person, party or entity taking any step or action (including, without limitation, the filing by or against Borrower, or any

general partner of Borrower, of a petition under any bankruptcy or insolvency law, which has the effect of materially interfering with, preventing, hindering or delaying the conveyance of the Property (whether by foreclosure or deed in lieu thereof) to Lender (or its nominee, assignee or designee) in accordance with the Loan Documents and any of the documents referred to therein or related thereto.

2. In the event that one of the events described in Paragraph 1 of this Agreement shall occur, the Indemnitors (a) acknowledge that the damage to be suffered by Lender shall be difficult or impossible to ascertain and (b) absolutely and unconditionally agree to pay to Lender upon demand the sum of \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_) as full liquidated damages for, and in satisfaction of, the Indemnitors' obligations hereunder as Lender's sole and exclusive remedy hereunder. The Indemnitors acknowledge and agree that the payment of the aforesaid \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_) is a fair and reasonable remedy for Lender if any of the events set forth in Paragraph 1 of this Indemnification Agreement shall occur, as any such event will result in Lender incurring damages which cannot now be determined with any degree of certainty.

3. The Indemnitors hereby consent that from time to time, before or after any default by Borrower, with or without further notice to or assent from the Indemnitors, any security at any time held by or available to Lender for any obligation of Borrower, or any security at any time held by or available to Lender for any obligation of any other person or party secondarily or otherwise liable for all or any portion of the Debt may be exchanged, surrendered or released and any obligation of Borrower, or of any such other person or party,

may be changed, altered, renewed, extended, continued, surrendered, compromised, waived or released in whole or in part, or any default with respect thereto waived, and Lender may fail to set off and may release, in whole or in part, any balance of any deposit account or credit on its books in favor of Borrower, or of any such other person or party, and may extend further credit in any manner whatsoever to Borrower, and generally deal with Borrower or any such security or other person or party as Lender may see fit; and the Indemnitors shall remain bound under this Indemnification Agreement notwithstanding any such exchange, surrender, release, change, alteration, renewal, extension, continuance, compromise, waiver, inaction, extension of further credit or other dealing.

4. This is an agreement to pay liquidated damages and not an agreement of collection and the Indemnitors further waive any right to require that any action be brought against Borrower or any other person or party or to require that resort be had to any security or to any balance of any deposit account or credit on the books of Lender in favor of Borrower or any other entity, person or party.

5. Each reference herein to Lender shall be deemed to include its successors and assigns, in whose favor the provisions of this Indemnification Agreement shall also inure. This Indemnification Agreement shall be binding upon, and shall inure to the benefit of, Lender and the Indemnitors and the respective heirs, executors, administrators, legal representatives, successors and assigns of Lender and the Indemnitors, provided, however, that the Indemnitors shall in no event or under any circumstances have the right, without obtaining the prior written consent of Lender, to assign or transfer the Indemnitors' obligations and liabilities under this Indemnification

Agreement, in whole or in part, to any other person, party or entity.

The term "Indemnitors" as used herein shall mean the "Indemnitors and each of them" and each undertaking herein contained shall be their joint and several undertaking, provided, however, that in the next succeeding paragraph hereof the term "Indemnitors" shall mean the "Indemnitors or any of them".

1. No delay on the part of Lender in exercising any right or remedy under this Indemnification Agreement or failure to exercise the same shall operate as a waiver in whole or in part of any such right or remedy. No notice to or demand on the Indemnitors shall be deemed to be a waiver of the obligation of the Indemnitors or of the right of Lender to take further action without notice or demand as provided in this Indemnification Agreement.

2. This Indemnification Agreement may only be modified, amended, changed or terminated by an agreement in writing signed by Lender and all of the Indemnitors. No waiver of any term, covenant or provision of this Indemnification Agreement shall be effective unless given in writing by Lender and if so given by Lender shall only be effective in the specific instance in which given.

3. The Indemnitors acknowledge that this Indemnification Agreement and the Indemnitors' obligations under this Indemnification Agreement are and shall at all times continue to be absolute and unconditional in all respects. This Indemnification Agreement sets forth the entire agreement and understanding of Lender and the Indemnitors, and the Indemnitors absolutely, unconditionally and irrevocably waive any and all right to assert any setoff, counterclaim or crossclaim

of any nature whatsoever with respect to this Indemnification Agreement or the obligations of the Indemnitors under this Indemnification Agreement or the obligations of any other person or party (including, without limitation, Borrower) relating to this Indemnification Agreement or the obligations of the Indemnitors hereunder, in any action or proceeding brought by Lender to enforce the obligations of the Indemnitors under this Indemnification Agreement. The Indemnitors acknowledge and Lender, by its acceptance hereof, acknowledges that no oral or other agreements, understandings, representations or warranties exist with respect to this Indemnification Agreement or with respect to the obligations of the Indemnitors under this Indemnification Agreement except as specifically set forth in this Indemnification Agreement or otherwise in writing by Lender and the Indemnitors.

4. Notwithstanding any payments made by the Indemnitors pursuant to the provisions of this Indemnification Agreement, the Indemnitors shall not seek to enforce or collect upon any rights which the Indemnitors now have or may acquire against Borrower either by way of subrogation, indemnity, reimbursement or contribution for any amount paid under this Indemnification Agreement. In the event either a petition is filed under the Bankruptcy Code or under any other applicable Federal or state bankruptcy law or other similar law in regard to Borrower or an action or proceeding is commenced for the benefit of the creditors of Borrower, this Indemnification Agreement shall at all times thereafter remain effective (or if previously terminated as a result of Indemnitors having fulfilled their obligations hereunder in full or as a result of Lender having released the Indemnitors from their obligations and liabilities hereunder, shall without further act or instrument be reinstated and shall thereafter remain in full force and effect), all in regard to any payments or other transfers of assets to Lender received

from or on behalf of Borrower which are or may be held voidable on the grounds of preference, fraudulent conveyance or otherwise, whether or not the Debt has been paid in full with the same force and effect as if such payments or other transfer of assets had not been made, and if applicable, as if such previous termination had not occurred. Nothing contained in this paragraph shall be construed to increase the maximum liability of the Indemnitors hereunder to an aggregate amount in excess of \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_), it being expressly understood that if the Indemnitors shall have paid all amounts due and owing hereunder, this Indemnity shall not be reinstated except in accordance with the provisions of paragraph 11 hereof.

5. If at any time any payment, or portion thereof, made by, or for the account of, the Indemnitors on account of the obligations under this Indemnification Agreement, is set aside by any court or trustee having jurisdiction as a voidable preference, fraudulent conveyance or otherwise as being subject to avoidance or recovery under the provisions of the Bankruptcy Code or under any other applicable Federal or state bankruptcy law or similar law, the Indemnitors hereby agree that this Indemnification Agreement (i) shall continue and remain in full force and effect, or (ii) if previously terminated as a result of the Indemnitors having fulfilled their obligations hereunder in full or as a result of Lender having released the Indemnitors from their obligations and liabilities hereunder, shall without further act or instrument be reinstated and shall thereafter remain in full force and effect, in either case with the same force and effect as though such payment or portion thereof had not been made, and if applicable, as if such previous termination had not occurred.

6. Any notice, request or demand given or made under this Indemnification Agreement shall be in writing and shall be hand delivered or sent by Federal Express or other reputable overnight national courier service, and shall be deemed given when received at the following addresses whether hand delivered or sent by Federal Express or other reputable overnight national courier service:

If to Lender: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

With a copy to:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

If to the Indemnitors:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

With a copy to:

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

Each party to this Indemnification Agreement may designate a change of address by notice given to the other party fifteen (15) days prior to the date such change of address is to become effective.

7. This Indemnification Agreement is, and shall be deemed to be, a contract entered into under and pursuant to the laws of the State of \_\_\_\_\_ and shall be in all respects governed, construed, applied and enforced in accordance with the laws of the State of \_\_\_\_\_. No defense given or allowed by the laws of any other state or country shall be interposed in any action or proceeding hereon unless such defense is also given or allowed by the laws of the State of \_\_\_\_\_.

8. The Indemnitors agree to submit to personal jurisdiction in the State of \_\_\_\_\_ in any action or proceeding arising out of this Indemnification Agreement and, in furtherance of such agreement, the Indemnitors hereby agree and consent that without limiting other methods of obtaining jurisdiction, personal jurisdiction over the Indemnitors in any such action or proceeding may be obtained within or without the jurisdiction of any court located in \_\_\_\_\_ and that any process or notice of motion or other application to any such court in connection with any such action or proceeding may be served upon the Indemnitors, by registered or certified mail to or by personal service at the last known address of the Indemnitors, whether such address be within or without the jurisdiction of any such court.

9. No exculpatory provisions contained in the Note, the Mortgage or in any other document or instrument executed and delivered in connection therewith or otherwise with respect to the Debt shall in any event or under any circumstances be deemed or construed to modify, qualify, or affect in any manner whatsoever the personal recourse obligations and liabilities of the Indemnitors under this Indemnification Agreement.

10. This Indemnification Agreement may be executed in one or more counterparts by some or all of the parties hereto, each of which counterparts shall be an original and all of which together shall constitute a single Indemnification Agreement. The failure of any party listed below to execute this Indemnification Agreement, or any counterpart hereof, shall not relieve the other signatories from their obligations hereunder.

11. Except as set forth in paragraphs 10 and 11 of this Indemnification Agreement, the obligations and liabilities of the Indemnitors under this Indemnification Agreement shall terminate on the earlier to occur of (i) the date that the Debt has been repaid in full, or (ii) the date upon which the Property shall be transferred to Lender, its nominee or designee pursuant to the Transfer Documents held in escrow under the Escrow Agreement or pursuant to an uncontested judicial or non-judicial foreclosure action conducted in accordance with the Escrow Agreement.

IN WITNESS WHEREOF, the Indemnitors have duly executed this Indemnification Agreement the day and year first above set forth.

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



\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

ACKNOWLEDGEMENT

STATE OF \_\_\_\_\_ )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 199\_\_,  
before me appeared \_\_\_\_\_, to me  
personally known, who being by me duly sworn, did say that  
he executed the within Indemnity Agreement, and said  
\_\_\_\_\_ acknowledged said instrument to be  
his free act and deed.

Given under my hand and official seal, this \_\_\_\_ day  
of \_\_\_\_\_, 199\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

EXHIBIT A

DEFINITIONS

Assignment of Leases and Rents: The term "Assignment of Leases and Rents" shall mean a certain Assignment of Landlord's Interest in Leases and Conditional Assignment of Rents dated as of \_\_\_\_\_, 199\_\_, given by Borrower to Lender, and recorded at Book \_\_\_\_\_, Page \_\_\_\_\_ of the Office of the Recorder of Deeds for \_\_\_\_\_ County, \_\_\_\_\_.

Borrower: The term "Borrower" as used herein shall mean \_\_\_\_\_, L.P., a \_\_\_\_\_ limited partnership having its principal office at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.

Debt: The term "Debt" as used herein shall mean the obligations evidenced by the Loan Documents, as the same may be amended or modified in the future.

Deed: The term "Deed" as used herein shall mean a certain General Warranty Deed conveying the Property from Borrower to Lender, which Deed is to be held in escrow by First American Title Insurance Company pursuant to the terms and conditions of the Escrow Agreement.

Escrow Agreement: The term "Escrow Agreement" shall mean that certain Escrow Agreement dated as of \_\_\_\_\_, 199\_\_ to be entered into by and among Borrower, Lender and First American Title Insurance Company, as escrow agent.

Modification and Extension Agreement: The term "Modification and Extension Agreement" shall mean that certain Modification and Extension Agreement to be entered into by and among Borrower, all of the partners of Borrower and Lender and to be recorded in the Office of the Recorder of Deeds for \_\_\_\_\_ County, \_\_\_\_\_.

Mortgage: The term "Mortgage" as used herein shall mean a certain Mortgage and Security Agreement dated as of \_\_\_\_\_, 19\_\_ given by Borrower to Lender and recorded at Book \_\_\_\_\_, Page \_\_\_\_\_ of the Office of the Recorder of Deeds for \_\_\_\_\_ County, \_\_\_\_\_. The Mortgage grants Lender a first priority lien on the Property.

Note: The term "Note" as used in this Agreement shall mean a certain Note dated as of \_\_\_\_\_, 199\_\_ in the principal amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) made by Borrower for the benefit of Lender

Pre-Workout Agreement: The term "Pre-Workout Agreement" shall mean that certain Pre-Workout Agreement dated as of \_\_\_\_\_, 199\_\_ entered into by and between Borrower and Lender.

Property: The term "Property" as used herein shall mean the real property (and the improvements located thereon)

described at Exhibit B attached hereto and incorporated by reference herein.

UCC-1 Financing Statements: The term "UCC-1 Financing Statements" shall mean any and all UCC-1 Financing Statements or Fixture Filings filed by Lender against Borrower and all of Borrower's personal property, including any and all continuations, assignments or amendments filed with respect thereto.

EXHIBIT B

LEGAL DESCRIPTION OF PROPERTY