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General Session 5

Financing Your Shopping Center in Today's Real Estate Capital Markets; from Term Sheet to Closing: Negotiating a Loan You will not Regret

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FINANCING YOUR SHOPPING CENTER IN TODAY'S REAL ESTATE CAPITAL MARKETS; FROM TERM SHEET TO CLOSING:
NEGOTIATING A LOAN YOU WILL NOT REGRET

I. STATE OF THE REAL ESTATE FINANCE MARKET IN 2018

A. *CMBS Loans –What is happening in the market?*

1. 2017 CMBS Issuance: $86.4B

2. 2018 Year-to-date CMBS Issuance: As of 3/31/18 - $19.4B (compared to 3/31/17 - $12.5B)

3. Effect of increased regulation on CMBS Market in 2018

a. Impact of Risk Retention Rules – a narrowing of the CMBS lenders in the market; 18 months ago there may have been approximately 50 CMBS lenders in the marketplace and at the end of the first quarter of 2018, there are approximately 25 or 30 CMBS lenders

b. Who is holding the risk retention piece?

4. Discussion of pricing, leverage and spreads in the CMBS market

B. *Insurance Company Loans and other Balance Sheet Loans*

1. 2017 Insurance Company Issuance (the top 30 Insurance companies): $72.2B (virtually no change from 2016 issuance)

2. 2018 Year-to-Date Insurance Company Issuance: Will be set forth at Program in October; statistics unavailable presently

3. Discussion of pricing, leverage, and asset types which are financed by Insurance Companies and other Balance Sheet Lenders in 2018

C. *Mezzanine Lending Market*

1. Very Active Market

2. Approximately 120 market participants (biggest lenders include Apollo, Blackstone, Bookfield, Goldman)

3. Lower capitalization rates on properties have shifted equity players to debt side. It is harder to invest into equity in today's market – whether through ownerships or preferred equity – there are a lot of players focusing on fewer deals

4. Attractive returns – Yields in excess of 9%

5. Will finance up to an 85% LTV

D. *Retail Loans*

1. Lenders are taking a more conservative and selective approach to retail loans

2. Delinquency rates are anticipated to rise for retail shopping center loans

3. Impact of Toys-R-Us, Nine West and Bon-Ton bankruptcies; higher vacancy rates; co-tenancy issues

4. E-commerce continues to take market share from traditional retail shopping malls

5. Originations of commercial retail mortgages fell by 5 percent in 2016, and another 15 percent in 2017

6. Grocery stores have also suffered recently. Top Markets LLC (Northeast supermarket chain) has filed for Chapter 11

7. Lots of negative perception in the marketplace on retail properties

II. FINANCIAL DEFINITIONS – ISSUES TO FOCUS ON WHEN ANALYZING DEBT YIELD AND DEBT SERVICE COVERAGE RATIO DEFINITIONS (AND THE COMPONENTS THEREOF) WITH RESPECT TO YOUR SHOPPING CENTER

A. *Importance of Financial Definitions in Loan Documents*. Debt Yield and Debt Service Ratio formulas are used to measure the performance at the shopping center relative to borrower's/shopping center owner's ability to pay its debt service under the mortgage loan. Please see Exhibit A attached hereto for the definitions of Debt Yield and Debt Service Coverage Ratio and the components thereof. These financial definitions are used to determine whether the following rights in favor of lender may be triggered to increase the credit support/collateral for the mortgage loan or alternatively, whether certain rights in favor of borrower may be granted or certain obligations of borrower waived:

1. A trigger for a cash trap period

2. A trigger for a manage kick-out right in favor of lender

3. Borrower's ability to obtain a loan extension

4. On a multiple property transaction, borrower's right to a release of an individual property

5. The waiver of certain reserves or escrows (i.e. taxes and insurance reserves, TI/LC reserves, capital expenditures reserve) or lender consent requirements (for example, a waiver of lender consent for leasing or borrower's use of restoration proceeds)

B. *Include Financial Definitions in Term Sheet*. Because of the importance of these definitions in the Loan Documents with respect to the operation of the shopping center and borrower's rights and obligations under the loan documents, it is recommended that these definitions be negotiated at the Term Sheet phase of the loan origination.

C. Issues for a Borrower to Consider When Negotiating in the Term Sheet and/or Loan Documents the Component Definitions of Debt Yield and Debt Service Coverage Ratio:

1. Operating Income

   a. "Look Back" vs. Annualized (what about percentage rent?)

   b. Determining when new rental income is "stable" enough to be counted

   c. Business Income Proceeds during restoration included?

   d. Non-Recurring vs. Recurring Income. How to define?

2. Operating Expenses

   a. Which expenses are "actual" and which are "imputed"?

   b. How do you treat "corporate/non-property" expenses of the borrower….where do you draw the line?

   c. What about property-level expenses passed through to Tenants?

3. Determining Adjustments (what flexibility do we have with the following):

   a. Mark to market (How to determine?)

   b. Tenants who have not taken possession of the premises pursuant to executed leases, when can you count that rent? Sooner than actual possession by such tenant under the applicable lease?

   c. Tenants "going dark" (What about subleases or Investment Grade Tenants?)

   d. Tenants in bankruptcy (Understanding how this plays out to properly negotiate)

   e. Tenants in default (How long? Non-Monetary Defaults?)

   f. Expiring leases (What do you need in a new lease to keep counting? When do you stop counting the expiring lease?)

   g. How to address free rent or rent concession periods (Can the relevant lease income be counted if (a) a reserve is posted or (b) the net effect of such concession is reflected in a normalized annual rent for such lease; provided such rent concession does not exceed [ ] months?)

4. Please see Exhibit B attached hereto for negotiated definitions of "Operating Expenses" and "Operating Income"

III. FUTURE DEVELOPMENT: ISSUES TO CONSIDER IN CONNECTION WITH PLANNED EXPANSIONS AND/OR CONSTRUCTION AT YOUR CENTER

A. *Scope of Future Plans*. At term sheet negotiation, it is prudent to discuss with your client/business contacts the long- and short-term plans for the shopping center so that the loan contains appropriate flexibility to deal with future alterations to the center. In addition to any finance professionals working on the loan, be sure to include the leasing, development and property management teams in your discussion so that appropriate feedback is obtained for input on strategic planning. Discuss whether any new construction or redevelopment is contemplated and if so, the anticipated timeline for implementation. Consider:

   1. Do you anticipate any new construction/new ground up development?

   2. Do you anticipate developing (or selling) any outparcels? Look beyond existing pads and consider whether future opportunities may be available and feasible.

   3. Do you have any vacant (or soon to be vacant) boxes that will require significant modifications or alterations in order to lease? Do you anticipate substantial alterations to right-size boxes for tenants that have too much space?

   4. Do existing tenants or third parties have rights to develop/reconstruct under the terms of existing leases? Review leases and property documents for options to purchase, rights of expansion, etc., so that you can alert Lender to existing development and purchase rights and these matters can be appropriately addressed in the loan documentation.

B. *Obtaining Lender Approval for Proposed Construction/Redevelopment*. Under most loans, future construction or significant alterations to the center are not permitted unless specific consent is obtained. Borrowers strive to minimize Lender involvement in future development and construction to avoid delays, increased costs and administrative burden in completing the project. Consent requirements can range from relatively simple to (more often) very detailed and cumbersome, especially for CMBS loans and single asset loans. To the extent construction or expansion is anticipated during the term of the loan (or which may need to commence during the term of the loan), discuss the proposed plans with Lender as part of the term sheet negotiation. The easiest and most convenient way to deal with future construction plans is to address it directly in the loan (including any specific requirements) and obtain Lender's advance approval

over the terms of such construction and redevelopment. If future construction/expansion is not addressed in the loan, Borrower will likely be subject to Lender's (or Servicer's) sole discretion as to whether it will be permitted, and may have little leverage in negotiating Borrower-favorable requirements post-signing.

1. Upfront Lender Consent to a Specific Plan. Provide Lender with as much information regarding your proposed plans as possible. Your Lender will be more likely to become comfortable with the planned construction and consent in advance if the project is clearly defined (scope, cost, schedule, etc.) and detailed plans are presented.

2. Upfront Lender Consent to a Conceptual Plan, with Lender Approval Rights over Later Deliveries. If specific plans are not available, share as much as you can regarding the proposed development at term sheet negotiation and discuss with Lender conceptual approval, subject to more specific approval as the project becomes more defined. If possible, add parameters to Lender consent standard (e.g., not to be unreasonably withheld). Build in to the loan a specific approval process for the details as they become more specific. Examples of deliveries that Lender will likely require in order to approve, include: (a) detailed plans and specifications, (b) an officer's certificate confirming no default and other facts requested by Lender, (c) copies of permits and variances, (d) delivery of any required security documents or funds (See Item III.F below), (e) proof of Borrower's and contractor's insurance, including builder's risk and (f) copies of any tenant or third party consents which may be required in connection with the proposed redevelopment.

3. Alterations Threshold. For minor or limited construction or redevelopment, Lender consent may not be required if it falls below a certain alterations threshold, which you can negotiate as part of the loan. Examples of factors for determining whether Lender consent is required include if a proposed alteration (i) could reasonably be expected to have a material adverse effect, (ii) exceeds a certain threshold, which can be a specified dollar amount (e.g., alterations in excess of $250,000) or a percentage of the loan amount, or in the case of a portfolio loan, the allocated loan amount for the specific property (e.g., 5% of the loan amount), and (iii) is structural in nature.

C. *Minimize Servicer Involvement*. Typically Borrowers want to obtain pre-approval to the proposed alterations and construction items in advance in order to minimize Servicer involvement.

D. *SPE Issues*. If your loan requires the Borrower to be a special purpose entity, certain SPE requirements must be considered in determining whether future construction could result in violations of the SPE covenants.

1. Limitation on Business Activities – SPE requirements often limit the permitted activities to ownership, operation management, leasing and maintenance. Is construction permitted?

2. Limitation on Incurring Indebtedness – to the extent operational indebtedness may be incurred as part of construction, the loan agreement will need to appropriately permit this (e.g., any such indebtedness must be unsecured, not evidenced by a note, on commercially reasonable terms, not due more than 30-90 days beyond the date incurred and cannot exceed a percentage of the allocated loan amount).

3. Prohibition on Contracts with Affiliates – this can be an issue if, for tax or other purposes, a subsidiary/affiliate construction or management entity is party to construction or development agreements.

E. *REMIC*. With respect to CMBS loans, the Real Estate Investment Conduit (REMIC) tax rules may limit Lender's ability to consent to future construction if it would result in violation of REMIC rules. Even if the loan explicitly sets forth the criteria upon which the parcel should be released, in order to satisfy the REMIC rules, the loan must continue to be principally secured by real estate. If this test is not met, Servicer's consent to the construction project may be unattainable.

F. *Security/Reserves*. Lender may condition its approval to construction or redevelopment on receipt of additional security for the loan. This security can come in numerous forms, including:

1. Completion Guaranty –a requirement that a creditworthy parent or affiliate guaranty the completion of the improvements.

2. Letter of Credit – requirement that prior to commencing construction, the Borrower deliver a letter of credit from an approved bank as additional security for construction and completion. Typically Lender may draw on the letter of credit if construction milestones are not met or there is a default under the loan. Note, this can create a REMIC issue if a letter of credit (non-real estate collateral) replaces real estate collateral.

3. Cash Reserve – requirement that loan funds are held back from initial disbursement, or that Borrower deposit additional funds prior to construction, which funds will be held by Lender in order to ensure cash available to complete unfinished work.

4. Construction Bond – requirement that Borrower and/or contractor purchase a surety bond in order to ensure completion of project and/or that contractor pays subcontractors.

G. *Expansion Release*. Another possible strategy to deal with future expansion or construction plans is to provide for the permitted release of the parcel(s) or outparcels on which the expansion or construction is expected to take place (referred to herein as the "Release Parcel"), but setting up your property and loan to accommodate this may require advance planning. Things to consider:

1. Valuation of Release Parcel – If the Release Parcel is expected to be released as collateral from the loan, Lender may require that it either be excluded from the initial valuation (which may affect available principal), or that the Release Parcel be separately appraised either at the time of loan origination or prior to construction in order to establish a "release price" at the time of the anticipated future construction. If this is a possible strategy, ask Lender to have its appraiser consider this and assign separate value when evaluating the shopping center at the time of initial underwriting.

2. Separate Parcel – In order to release the Release Parcel, it will likely need to be a separate tax parcel and in compliance with all subdivision requirements. Depending on the jurisdiction, the subdivision process can take weeks or months to accomplish.

3. Ownership of Release Parcel – Recall that the Borrower under the loan, if required to be an SPE, will only be permitted to own, manage and operate the parcel subject to the Loan. The post-signing release of the Release Parcel from the mortgage could result in an SPE violation unless the Release Parcel is conveyed to a new entity. Allowing a Borrower affiliate, which is not subject to the loan, to own property adjacent to the collateral (and an integral part of the collateral) may cause Lender to have concern with conflicts of interest among owners, including the potential that the new development will draw tenants away from the remaining collateral. Lender will likely want controls and restrictions over the Release Parcel to prevent these kinds of issues.

4. Relationship between Release Parcel and Remaining Shopping Center – Lender likely will not permit the release of a Release Parcel unless it has sufficient assurance that it will not result in any operational issues with the remaining collateral. For example, will the exclusion of the Release Parcel or development thereon result in issues under tenant leases (cam calculation, restricted areas, etc.)? Have any necessary tenant or third party consents been obtained? Lender may insist upon the recordation of cross-easement agreement to govern access, maintenance, easements and other operational issues to govern the co-existence of the parcels as separate properties.

5. Financial Tests - Lender may condition the future release of the Release Parcel on whether the remaining collateral (post-release) will satisfy certain financial metrics (e.g, is the debt yield prior to the release greater than the debt yield immediately following the release or a minimum debt yield established in the loan agreement?).

H. *Interference with Existing Shopping Center Operation and/or Existing Tenants' Business*. Above all else, Lender will want to ensure that its income-producing collateral is protected at all times during the term of the loan. To the extent Lender permits future construction or expansion, Lender will likely restrict the future development such that it does not violate existing leases or recorded agreements and that it will not have an adverse effect on the operation of the center.

I. *Post-Completion Deliveries.* Upon completion of any future expansion or construction, Lender will likely insist upon several required deliveries to release construction-related security. Examples of post-completion deliveries include lien-waivers, updated title policies, certificates of occupancy, certificates of completion from contractors and architects, as-built plans, updated survey, evidence of zoning compliance, evidence that the new construction is covered by insurance, estoppel certificates from new tenants, and officer's certificates confirming compliance with the loan documents. Review these carefully as part of the loan negotiation to avoid unnecessary expense when construction is complete.

IV. RECOURSE CARVE-OUT GUARANTORS

A. *Caps on Guarantees – How Common.* The most common form of guaranty in commercial mortgage loans is a guaranty of recourse obligations. These protect the lender from the so called "bad boy acts" (such as fraud, waste, and criminal acts) which are exceptions to otherwise nonrecourse loans. These exceptions are categorized into full recourse exceptions and losses-only exceptions. In the event of a breach of a full recourse exception, the lender would be able to recover the full amount of the debt with all expenses. In the case of a breach of a losses-only exception, the lender would only be able to recover the actual, out-of-pocket losses sustained by the lender as a result of the breach. Given this, it is uncommon for a lender to agree on a cap on the extent of liability to the guarantor because a lender would then otherwise bear the risk of loss caused by the bad acts of the borrower or guarantors in excess of the cap. With that being said, in the case of multiple guarantors, a lender may agree to cap the liability of a particular guarantor, provided the remaining guarantors are not subject to a cap. However, this is a rare structure, as caps are seldom used.

B. *Net Worth and Liquidity Requirements*. To ensure the protection of the lender, guarantors will often be required to maintain on-going net worth and liquidity covenants. This is often based on the lender's underwriting and review and analysis of personal financial statements, however a rule of thumb is that the net worth should be no less than the total amount of the loan and the liquidity should be at least ten percent of the total amount of the loan. A few other factors could also be considered if the guarantors are seeking to reduce the covenants. For instance, if the guarantors have been sponsors on other loans with the particular lender and the loans are performing as agreed, then the guarantors may have a case for a reduction. Under certain circumstances, it would not be uncommon for a lender to reduce the net worth to fifty percent of the total loan and reduce the liquidity to a figure significantly lower than the guarantors have shown as of closing. The language to be included in the loan documents is fairly straightforward and not subject to intense negotiation (other than as to the monetary amounts), but the guarantors should feel comfortable with their personal financials that they will be able to comply with the net worth and liquidity covenants throughout the term of the loan without issue.

C. Provisions a Borrower Should Seek to Negotiate

1. As borrower's counsel, the primary objective in negotiating the guaranty of recourse obligations and environmental indemnity is to limit the guaranteed obligations and deliverables of the guarantors. First, counsel should seek to limit the representations and warranties made by the guarantors. There should be minimal overlap with the representations and warranties made by the borrower, since a breach would be recoverable against the borrower and the lender already has a means of recovery. In addition, any property related representations should be limited to the actual knowledge of the guarantor without inspection. This holds especially true in the case of an acquisition.

2. Second, the guarantor's obligation to deliver financial statements should be pared back as much as possible. This is not necessarily because the required deliverables will be overly burdensome, but more so to avoid the risk of any administrative default for failure to deliver. With respect to delivery of financial statements, guarantors should insist that the lender accept a personal certification, without the need for audited financial statements. Depending on the size of the loan, a guarantor may be able to negotiate that such deliverables shall only be required during the continuance of an event of default. If a lender is unwilling to agree, then counsel should ensure that the guarantors are not required to deliver financial statements more than once annually, and upon lender's reasonable demand only during the continuance of an event of default.

3. Lastly, a guarantor should seek to reduce the amount of any penalty for failure to timely deliver financial reports. As discussed in further detail below, the borrower and guarantors should seek to reduce the monetary penalty, while also requiring enhanced notices before the penalty would be triggered.

D. *Individual Guarantees*. Guarantees from individuals, rather than entities, arise more frequently on smaller loans (loans under $20M). In the event that individuals guaranty the loan, a lender will be more likely to waive certain covenants and conditions. For instance, some lenders do not require on-going net worth and liquidity covenants for individuals and would not require audited financial statements. It is industry practice that, in selecting a guarantor, a lender is likely to require any individual with control of the borrowing entity to guaranty the loan because a lender would carry a risk if an individual had the ability to impact the performance of the loan and was not included as a guarantor. In the event a certain individual were to pose a credit risk (such a history of prior loan foreclosures), then a lender may request that the individual's control be limited or interest in the borrower be eliminated completely. One way to negotiate this as borrower's counsel would be to add a negative covenant to the loan agreement that at no time shall such individual be granted a greater voting interest in the borrower than as held at closing and prohibit the individual from being selected as a manager of the entity.

E. *Replacement Guarantors upon Guarantor Default or Death of Individual Guarantor*. Most lenders will permit replacement guarantor language to be included in the loan documents permitting the replacement of a guarantor following the death or incompetency of an individual. The guarantor should be required to meet all of the underwriting requirements of the original guarantor, including the satisfaction of the net worth and liquidity provisions. A sample replacement guarantor provision can be found attached hereto as Exhibit C. A borrower would not typically be permitted to replace a guarantor during an event of default. In general, the lender would be hesitant to permit such a replacement because the guarantor is typically the sponsor of the deal that they have been working with since origination and intended to work with through the maturity of the loan.

F. *When is a Guarantor Released*? Typically the 'guaranteed obligations' of the guarantor in a guaranty of recourse obligations are tied by definition or reference to the recourse obligations of the borrower in the loan documents, and as such the guarantors will be released from the guaranty of recourse obligations at such time that the debt has been satisfied and released. There are a few items to note in this regard. The first is that a standard guaranty is a guaranty of payment and not of collection, so an action against the guarantor is separate and apart from an action against the borrower and the lender has the option to pursue both simultaneously. Second, a guarantor will typically also be a signor, along with the borrower, to an environmental indemnity and an environmental indemnity, unless negotiated, will survive indefinitely notwithstanding termination, satisfaction, foreclosure or assignment of the mortgage. A borrower should negotiate for what is referred to as a sunset provision to include in the environmental indemnity. This is a standard request that most lenders will accept, provided the borrower comply with several conditions including the delivery of an updated Phase I report. A copy of this standard provision is attached hereto as Exhibit D and releases the indemnitors on the third anniversary following compliance of the conditions.

G. *Discussion of Requirement of New Guarantor in Connection with Permitted Equity Transfers or JV Change of Control Event*. Typically, a permitted equity transfer would not result in a new guarantor being appointed because the loan is unlikely to permit a transfer that changes the control of the borrower or reduces a sponsor's equity interest beneath a given amount. If such transfer is permitted by the loan documents, then the entity or individual assuming such equity

would typically be subject to the replacement guarantor conditions addressed above. In the event of a preferred equity or joint venture structure, the lender should perform substantial due diligence on the entity with springing control of the borrower prior to funding the deal. Such springing control features should also be made expressly subject and subordinate to the transfer provisions of the loan documents. Following a changeover event, the appointment of a replacement guarantor should be subject to the same replacement guarantor provisions discussed above.

V. TRANSFERS AND PLEDGES AND THE DUE-ON-SALE/ENCUMBRANCE RESTRICTION IN THE LOAN DOCUMENTS

A. *Discussion of Sponsorship*

1. Sponsorship is critical to the underwriting of a mortgage loan. There are 2 components of sponsorship: (a) subscribed equity and (b) control. Lenders typically require the named Sponsor to own at least a 51% equity interest in the borrower (so they have “skin in the game”) and control the borrower and the property for the term of the loan. The subscribed equity is important to the lender in the event that there are problems at the property in the future. The named Sponsor will make protective advances or capital contributions to the borrower in order to protect its equity investment. The control requirement is additionally important as the Sponsor shall have significant experience in the ownership and operation of shopping centers.

2. A lender will focus on the following factors with respect to the named Sponsor or Controlling Party when doing pre-closing diligence on such entity or individual:

   a. What is the Sponsor’s track record in the commercial mortgage loan space? Have they been good borrowers that timely repay their loans? Do they have a history which includes any defaulted loans, loan work-outs or foreclosures? Bankruptcies?

   b. Reputation/experience generally as a shopping center owner in the submarket where the mortgaged property is located.

      - For how long?

      - How many shopping centers?

   c. Does the Sponsor have substantial financial strength?

   d. Is there any outstanding litigation involving the Sponsor?

   e. Does an affiliate of the Sponsor act as property manager?

   f. Does the Sponsor have a JV partner? If yes, what type of major decision rights does such JV partner have?

B. *Permitted Equity Transfers*

1. Maintenance of sponsorship is important to the loan underwriting. The named Sponsor must continue to (a) control and (b) own 51% in the borrower post equity transfer. Any transfer which would cause either clause (a) or (b) to fail to be true will require lender consent.

2. In addition to the requirement that the Sponsor continue to control and own 51% in the borrower, the following conditions must be satisfied:

   a. Searches for any entity owning in excess of 25% (domestic entity) or 10% (foreign entity) as a result of such transfer.

   b. Borrower is able to remake the representations for OFAC, Patriot Act and ERISA.

c. A Qualified Manager continues to manage the mortgaged property.

d. A new non-consolidation opinion is delivered in the event an entity owns 49% or more in the borrower as a result of such transfer that did not own 49% or more prior to such transfer.

e. Lender receives prior written notice of such transfer.

f. Continued compliance by borrower of the SPE covenants.

3. Transfers to a Qualified Equityholder (who will control and own 51% or more in the borrower) may be permitted without lender consent. Many lenders (both portfolio and CMBS) will agree to an objective test in the loan documents so a Qualified Equityholder shall be permitted to be the replacement Sponsor under the loan documents provided the conditions set forth above in Section 2 are met. The objective test will need to address:

a. Total assets and net worth of transferee. Below is an example of a definition that will need to be satisfied in connection with a transfer to a Qualified Equityholder. Typically a lender will want the Qualified Equityholder to have total assets and net worth at least equal to that of the named Sponsor at closing.

"**Ownership Net Worth Criteria**" shall mean, with respect to any Person, that such Person has (i) total assets of at least **[One Billion Dollars ($1,000,000,000)]** and (ii) net worth of at least **[Five Hundred Million Dollars ($500,000,000)]** as calculated in accordance with generally accepted accounting principles (or other principles acceptable to Lender); provided that if such Person is a publicly traded entity which has common stock listed on the New York Stock Exchange or another nationally recognized exchange, then such Person's net worth shall be determined based on the lesser of its (x) then current market capitalization based solely on its common stock (i.e., exclusive of any preferred stock outstanding) and (y) shareholder's equity value.

b. Experience of such transferee. Below is an example of a definition that will need to be satisfied in connection with a transfer to a Qualified Equityholder. Typically a lender will want the Qualified Equityholder to have at least equal experience as the named Sponsor at closing.

"**Ownership Experience Criteria**" shall mean, with respect to any Person, that such Person (i) has at least ten (10) years' experience owning and/or operating properties comparable to the Property in major metropolitan areas, (ii) is regularly engaged in the business of owning and/or operating properties comparable to the Property in major metropolitan areas and (iii) owns and/or operates, together with such Person's Affiliates, as of the applicable date of determination, at least **[twelve (12)]** super regional malls (of at least **[500,000]** square feet each) containing comparable retail space totaling at least **[10,000,000]** square feet in the aggregate.

c. No felony; no OFAC/Patriot Act violations; no default/litigation for balance sheet loans (a "Customer In Good Standing"); no bankruptcies.

d. New searches for such transferee

e. If the loan is a CMBS loan, will a rating agency confirmation required?

f. How about a fee?

C. *Moody's 2018 view on Sponsorship and Transfers*.[1]

D. *Pledges*

1. Is the pledge actually made in connection with mezzanine debt?

   a. If the repayment of the loan for which the pledge is given as security is specifically tied to the cash flow of the property, then the debt must be underwritten as subordinate debt. Such subordinate debt must be taken into consideration in a lender's underwriting and shall be included in the calculation of debt service coverage ratio, debt yield and loan-to-value ratio.

   b. There is a stress on cash flow and the mezzanine debt and pledge will affect calculation of loan proceeds.

   c. There will be sponsorship considerations also as there may be a change of control of the borrower in connection with the foreclosure of such pledge. The holder of such pledge will have to be underwritten as a replacement sponsor.

2. The following pledges are typically permitted in the loan documents (without lender consent) because they are structured to not put a stress on cashflow at the property and therefore not considered mezzanine debt:

   a. Permitted Economic Pledges – See <u>Exhibit E</u> hereto for sample provision

   b. Permitted Non-Controlling Pledges – See <u>Exhibit F</u> hereto for sample provision

   c. Permitted Parent Level Pledges – See <u>Exhibit G</u> hereto for sample provision

   Please note that the conditions set forth in Section B(2) above would also need to be satisfied with respect to the permitted pledges described above.

E. *Violations Trigger Event of Default and Recourse In Loan Documents*. If there is a violation of the restrictive covenants on transfers and/or pledges in the loan documents, then such breach shall result in an "Event of Default" and recourse under the Loan Documents.

1. Events of Default

   a. Notice and cure?

   b. How to carve-out "foot faults" or administrative breaches?

2. Recourse

   a. Losses?

   b. Full Recourse?

   c. Bifurcated Treatment of Breach

      i. <u>Losses</u>: (1) involuntary transfer by borrower of an interest in property, (2) involuntary transfer of a non-Controlling interest in borrower, and (3) attachment of non-monetary or involuntary monetary lien.

      ii. <u>Full Recourse</u>: (1) any voluntary transfer by borrower of an interest in the property, (2) any transfer of a Controlling interest in borrower, (3) any voluntary transfer of a non-Controlling interest in borrower, or (4) any voluntary monetary lien.

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[1] Please see Section entitled "Property and equity transfer restrictions are weakening" in <u>Moody's CMBS US: Key Pillars of Loan Structural Quality Are Eroding, Especially In Single-Borrower Deals</u>, January 5, 2018.

F. Loan Assumptions

1. Are they Permitted?

   a. CMBS Loans - yes

   b. Balance Sheet Loans – maybe no

2. It permitted, Lender Consent

   a. Sole discretion

   b. Not to be unreasonably withheld

3. Qualified Transferees – the objective test again

4. For Securitized Loans

   a. Rating Agency Confirmations – required unless there is a Qualified Transferee

   b. Typically prohibit any post-closing transfer to a Tenancy-In-Common, a Delaware Statutory Trust or a “Crowdfunded Person.” See Exhibit H for a definition of “Crowdfunded Person.”

   c. Special Servicers may be involved

5. Assumption Fee

6. If loan has strong sponsorship at closing which may have resulted in caps on recourse or waiver of certain reserves, such benefits may not apply to the transferee in a loan assumption.

VI. LEASING

A. *Impact of Increasing Retail Bankruptcies on Shopping Center Financing.*

1. Co-Tenancy Issues. As stores close, vacancies (i.e., dark) stores can trigger reduced rent or termination rights in other leases. The decreased income (either from terminated leases or those on reduced or percentage rent) will adversely affect Borrower’s ability to satisfy financial covenants and meet debt yield tests, and store closures will trigger additional notice requirements to Lender.

2. Exclusive of Bankrupt Tenant’s Rental Income from Definition of Net Operating Income (“NOI”). The loan agreement will contain a very detailed definition of net operating income/gross income from operations. However, certain components of income will be excluded, including rental income attributable to tenants in bankruptcy.

3. Trigger of Cash Trap. If the loan contemplates a springing cash trap, the trigger event is frequently tied to a debt yield test (e.g., if the debt yield falls below a certain percentage for 2 consecutive calendar quarters). Debt Yield is the ratio of net income (gross income from operations less operating expenses) to loan balance. Given that the debt yield will be affected by a decrease in NOI, tenant bankruptcies will increase the risk that a cash sweep will occur.

4. How to Plan for and What to Negotiate in the Loan Documents

   a. Consider Financial Condition of Existing Tenants Upfront. If the shopping center has tenants that are on credit watch lists or are reasonably likely to go bankrupt or dark, negotiate debt yield and loan to value ratios that are achievable without the presence of the problematic tenant.

b. Definition of NOI. Carefully negotiate the types of income that can be included in gross income for purposes of calculating the debt yield. Examples:

iii. Bankrupt Tenants. While bankrupt tenants will likely be excluded, be sure that once that lease has been affirmed or assumed as part of the bankruptcy, the NOI is again included.

iv. Tenants in Default. The NOI definition may attempt to exclude those tenants in monetary default. Add a time period so that income is only excluded if it is aged for 60 or more days.

v. Non-Renewing Tenants. The NOI definition may exclude tenants that have expressed an intention to not renew or to terminate their leases. Limit the exclusion to tenants that have provided written notice and that the excluded period commences at the time the tenant actually terminates (or as short of a period as possible prior to termination), instead of immediately upon receipt of notice.

vi. Dark Tenants. Lender's NOI definition will exclude dark tenants, even if they are still paying rent. Require that the rent be counted if the dark space is sublet under market terms and satisfies any co-tenancy conditions.

c. Increase Flexibility on Use. It is not uncommon for the loan agreement to contain a covenant that the Property will only be used for uses customary in retail shopping centers. In light of uncertainty in retail markets, negotiate expanded definitions to permit more flexibility on future use (e.g., warehouse use in light of expansion of e-commerce and more entertainment and educational uses).

B. *Lender Consent with Respect to Leasing Activity– How to Minimize*.

1. Definition of Major Lease v. Non-Major Lease. The definition of Major Lease will vary depending on loan and property/portfolio size A lease may fall within the "Major Lease" category if the lease is above a certain square footage or does not contain certain specified loan terms (rent, term, triple net requirement, etc.), contains a purchase option or right of first refusal or is a lease with an affiliate of Borrower. The definition may be expanded to include all leases upon an event of default. Negotiate an exclusion for temporary tenants (regardless of rent amount or square footage).

2. Upfront Approval Pursuant to Term Sheet. If leases or letters of intent are in process at the time the term sheet is being negotiated, request advance approval from Lender for these pending deals.

3. Issues to Consider with Servicer to Streamline Process

a. Incorporate Deemed Approval. This may ultimately require Borrower to deliver the request and a second notice, but can ensure the Borrower that Lender or Servicer will review and respond timely (or be deemed to have approved).

b. Establish Lender Contact Person and Clear Line of Communication. Obtain a name and email address for the individual to whom consent request submittals can be directed (a relationship manager). Follow up post-securitization for clear direction on the notice address for going-forward consent requests.

C. *OTHER LEASING COVENANTS*.

a. Covenants to Observe Terms of and Enforce Leases. Limit Borrower obligations to "commercially reasonable" standard and to avoid actions that would have a "material adverse effect" to allow Borrower flexibility to use appropriate business judgment.

b. Delivery Covenants. Loans will often require delivery of leases, amendments and notices related to termination or "going dark." Where possible, attempt to tie the delivery requirement to monthly or quarterly financial reporting to minimize administrative follow up. Establish a threshold under which termination fees can be retained by Borrower (versus deposited into a leasing reserve or applied to the loan).

D. SNDA'S

1. Term Sheet Negotiation/SNDAs as Condition Precedent to Loan Closing.

a. Requirement. Lender's initial position may be to require SNDAs from all tenants. Consider negotiating that SNDAs are required only for certain tenants, such as those with (i) recorded memos of lease, (ii) rights of first refusal or options to purchase, (iii) leases that require landlord to deliver an SNDA in connection with a new financing, and/or (iv) leases that do not provide they are automatically subordinate to loans. Also require Lender to agree to use (or start from) any SNDAs attached to existing tenants' leases and/or national tenants' preferred form SNDAs.

b. Timing. Obtaining SNDAs can be time consuming and if required before loan closing, can result in significant timing delays. Negotiate a "commercially reasonable" efforts standard to obtain pre-closing, and a post-closing obligation to again, use "commercially reasonable" efforts to continue to track and deliver SNDAs for a certain period (30-90 days) post-closing.

c. Practical Considerations. (1) Negotiate a neutral (non-obnoxious) SNDA form with Lender in advance of sending to tenants to streamline the SNDA process; (2) Ask Lender to sign off on Lender name and notice addresses in advance of initially sending the SNDA request to tenant in order to avoid duplication later; (3) If you do not have excellent tenant contacts and relationships, consider hiring outside counsel or a consultant to assist in SNDA preparation, tracking, negotiation and retrieval; and (4) Establish a contact with Lender and Lender's counsel to be designated to handle SNDA negotiations.

2. Lender SNDA Obligations for New Leases. Include in the loan agreement an obligation for Lender to deliver an SNDA upon Landlord's or Tenant's request post-closing. Consider incorporating the following concepts into your loan: (a) require Lender to be obligated to deliver an SNDA if requested by national tenants, tenants under major leases and tenants executing ground leases, and to use commercially reasonable efforts to deliver SNDAs for any other tenants, (b) use national tenants' form SNDAs and/or pre-negotiate a form SNDA for other tenants; (c) require a specific turnaround time from Lender on SNDA requests; and (d) limit the fee/outside attorneys' costs that may be charged to Borrower to process them. Consider requiring no fee or a nominal fee if the SNDA is substantially on the pre-negotiated form and a uniform processing fee and cap on attorneys' fee for other forms (e.g., $500 Lender processing fee and actual counsel costs not to exceed $1,500).

E. ESTOPPELS

1. Term Sheet Negotiation/Estoppel as Condition Precedent to Loan Closing.

a. Requirement. Negotiate the required estoppel threshold as part of the term sheet. Frequently, estoppels from Major Tenants are required and a certain percentage of remaining tenants. The thresholds vary depending on the size of the property/portfolio. For portfolio loans, consider requiring that the thresholds be met on a portfolio basis (as opposed to per individual property) in order to more easily meet the estoppel requirement. Require Lender to agree to accept (i) estoppel forms attached to existing tenant's leases, (ii) estoppels that meet the minimum requirements of the respective leases, and (iii) national tenants' form estoppels.

b. Timing. Receipt of estoppels are often a closing condition in the term sheet, but as closing approaches, Lenders may agree to accept some estoppels post-closing.

c. Practical Considerations. (1) Negotiate a user-friendly estoppel form with Lender for tenants that do not require a tenant-specific standard form – avoid requirements to attach the entire lease; (2) Confirm all certification parties in advance of sending the estoppel requests (including Lender or servicer name and reference to CMBS trustee; Borrower name (and/or new entity name if property will be transferred to a new SPE prior to closing); (3) Do some advance reconnaissance with property management and leasing teams to get ahead of known issues to maximize likelihood that estoppels will come back clean (e.g., fix minor repairs and roof leaks); (4) Allow at least 30-60 days to obtain estoppels and do not agree that they become stale if dated outside of some window before closing (or risk having to obtain estoppels a second time if closing is delayed); and (5) If you do not have excellent tenant contacts and relationships, consider hiring outside counsel or a consultant to assist in estoppel preparation, tracking, negotiation and retrieval.

2. Estoppel Covenants. Loan will require an ongoing covenant of Borrower to deliver estoppels upon Lender's request. Limit Borrower's obligation in connection with these requests to "commercially reasonable efforts" and negotiate a sufficient amount of time after receipt of Lender's request to prepare and retrieve estoppels back (e.g., 30 days). It is not unusual to see a Borrower obligation to deliver an estoppel covering various lease items (e.g., rental payment dates, tenants in default, security deposits, etc.). Attempt to limit obligation to Major Tenants.

VII. CASH MANAGEMENT

A. Springing, Soft or In-Place Hard

1. One of the most crucial items to be negotiated in the term sheet stage is the type of cash management that will apply to the loan. There are three types of cash management to choose from. Springing cash management is a system in which a borrower is free to collect the rents and use their existing operating account, without cashflow being subject to the lender's control until the occurrence of a triggering event. In the retail context, a triggering event would often be caused by an underperforming loan (DSCR or debt yield falling below a given amount) or a major tenant terminating its lease, vacating its premises or filing for bankruptcy. Once a triggering event occurs, the tenants would be instructed to deposit rent into a deposit account, and then funds would be transferred to a cash management account to be applied in accordance with the cash management waterfall provisions. A soft cash management system would mean that the tenants would be instructed to deposit rent into a deposit or lockbox account and if no triggering event has occurred the funds would be released to the borrower. Upon a triggering event, the funds would be transferred on a periodic basis, usually daily, to a cash management account. Finally, a hard cash management system would eliminate any triggering events and funds would be deposited into the deposit account and then transferred to the cash management account throughout the term of the loan.

2. The most preferential cash management system to a borrower is springing cash management. In the case of a refinance, this allows the borrower to continue to conduct its business in the way it had prior to closing. This grants the borrower access to the rents and the ability to control cashflow. Another significant advantage is that the borrower will not be charged a monthly servicing charge by the deposit bank which is a great savings over the course of a loan.

3. Soft cash management would give assurance to a lender that in the event of a default or triggering event, the tenants would not require further direction with respect to the rent deposits and the lender would simply control the applications of funds during the trigger period. Soft cash management is burdensome on the borrower because there is a delay before the borrower has access to the rents (if negotiated properly the delay would

typically be one business day). Unlike springing cash management, the borrower would be responsible for the payment of monthly fees to the deposit bank.

4. Lastly, the least favorable form of cash management to a borrower is hard (in-place) cash management. From a lender's perspective, this would typically be reserved for high-risk properties (such as properties with significant vacancies at closing) or sponsors that pose a credit risk. In some instances, a borrower may not even have access to funds following the cash management waterfall and the funds would simply constitute additional collateral. This is highly restrictive and expensive as fees may be owed to both the deposit bank and the cash management bank.

B. Who is the DACA Bank?

1. The selection of the deposit bank, or DACA bank, can be a critical decision for a borrower. Smaller, regional bank lenders may require that the borrower open an account with the lender, which is not normally negotiable. Larger lenders will have a preferred deposit bank. The majority use Wells Fargo because the account set-up process is not overly time-consuming and they have significant experience in the industry. A springing account can be ready in the matter of a few days, and a soft or hard account can take a week to ten days. A copy of the submission form used to initiate the Wells Fargo process is attached hereto as Exhibit I. The greatest benefit is that the Wells Fargo form of Deposit Account Control Agreement is customary to the industry so there is little need for negotiation.

2. In some instances, a borrower may want to use a different deposit bank. The two primary concerns is that the borrower already has an established relationship at another bank, or there is a local branch near the property in the event a borrower requires a physical lockbox. There are several banks, both national and regional, that offer this product, but it is imperative to obtain the bank's form of deposit account control agreement as early in the closing process as possible so it may be properly vetted by the lender. One common point of contention in the form is the indemnification provisions. Very often a lender will not agree to indemnify a deposit bank, even for losses caused by the lender. If a borrower feels strongly regarding the use of a particular deposit bank, then it may need to agree to either indemnify the bank for lender caused losses or negotiate with the bank for the removal of the indemnification clause.

C. *Budgets and Lender Approval*. The financial reporting provisions of a loan will require that the borrower submit a budget, at least annually, for the lender's review and approval. The budget should detail month-to-month operating expenses (tax, insurance, management fees, etc.) as well as budgeted capital expenditures (parking lot paving, painting of façade, etc.). The budget should be as detailed as possible, because during the continuance of a cash management period, approved operating expenses and capital expenses will be disbursed from the cash management bank. Items not included on the budget will not be funded, and depending on the waterfall structure, the borrower may not have access to excess cashflow. The borrower and lender should agree on a form of budget prior to closing, and a borrower would benefit from adding such form as an exhibit to the loan documents to reduce the likelihood of the lender requesting additional information in the future.

D. Are Operating Expenses in the Cash Management Waterfall?

1. During the continuance of a trigger period (in the case of a springing or soft cash management structure, or generally, in the case of a hard cash management structure) any funds in the deposit account shall be disbursed through the cash management bank in a given order of priority known as the cash management waterfall. This can normally be found in the loan agreement or the cash management agreement and sets forth the exact order in which funds will be paid. A typical cash management waterfall would consist of the following payments:

(i) payment of ground rents;

(ii) deposit to the tax reserve account;

(iii) deposit to the insurance reserve account;

(iv) payment to the deposit bank for fees related to the deposit bank;

(v) payment of debt service to the lender;

(vi) deposit of any other required reserves (TI/LC, capital expenditures, etc.);

(vii) payment to borrower for approved operating expenses;

(viii) payment to borrower for approved capital expenditures; and

(ix) remaining amounts paid into an excess cashflow account.

2. The cash management bank will apply the funds to the cash management waterfall on a monthly basis, typically on the payment date to ensure debt service is paid. As discussed above, an in-place cash management scheme is overly burdensome on the borrower and provides the lender with the comfort of knowing exactly how any funds from the property are applied. The order of the cash management waterfall is not usually negotiated, but a borrower would benefit from moving the approved operating expenses up in the order of payment. This would ensure that third-party expenses are paid early, and in doing so, this ensures that the property will be able to continue to function.

E. *If a Cash Sweep is in Place – Will Lender Permit Borrower Access to Excess Cashflow Subaccount?*

1. The use of excess cashflow following the application of funds to the cash management waterfall is another highly negotiated point between the borrower and lender. In the case of springing or soft cash management, the funds would be deposited into the cash management account only during the occurrence of a triggering event, which is often caused by a critical concern of the property or the sponsor. During such triggering event, funds are generally held by the lender as additional collateral for the debt. These funds can either be held by the lender until the triggering period has ceased, or through the maturity of the loan.

2. The specific triggering event is also a condition to the use of excess cashflow. If the triggering event is caused by an event of default, then the lender will likely require that it is the lender's right to use the funds in its sole and absolute discretion, including paying down the loan. One important negotiation point for the borrower is to confirm that excess cashflows are delivered to the borrower with the borrower's argument being that the lender has already collected for debt service and reserve deposits, so there is not a significant risk at this point. In the event that excess cashflows are held by the lender, the borrower may negotiate that such funds are promptly returned to the borrower once the triggering event has ceased and that the lender's discretion is not applicable to such determination.

VIII. FINANCIAL REPORTING REQUIREMENTS

A. *Gap Versus Tax Reporting*. Typical loan documents will require that the borrower keep accurate books, records and accounts reflecting the financial affairs of the borrower and all items of income and expense in accordance with GAAP. That being said, the majority of lenders are indifferent to the use of GAAP versus tax based accounting. A borrower should seek to have the lender preapprove the form of each document prior to closing and add language to the loan documents such that the reports to be delivered to lender on an ongoing basis shall be in such form as previously delivered to lender prior to closing. With respect to the GAAP covenant, a simple revision to the loan documents adding that the reports will be in such form as selected by borrower and generally used in the industry for property of this nature and reasonably approved by lender should suffice.

B. *Frequency of Delivery of Financial Reports: Financial Statements, Balance Sheets, Operating Statements, Rent Rolls, Etc.*

1. The frequency of delivery of financial reports will depend on the type of loan (securitized or balance sheet) and the size of the loan. For securitized loans, a borrower can expect to be required to deliver monthly reports until the loan has securitized, and quarterly thereafter. As with most facets of the loan documents, a balance sheet lender should be more lenient on these requirements.

2. The loan agreement will likely require that financial statements, including balance sheets and a profit and loss statement be delivered on an annual basis. The more detailed reports, such as operating statements, month over month balance sheets, capital expense reports and aged receivable reports will be required quarterly, and in some cases, monthly.

3. A rent roll will also be required with both the quarterly and annual reports. Like with all of the reports the form should be pre-approved and added to as a schedule in the loan documents to avoid any issues in servicing. The rent roll should, at a minimum, identify the leased premises, name all of the tenants, list the monthly rent and other charges payable under the lease, provide the term of the lease and include any other material provisions of the lease. Some lenders may require that the rent roll specifically include items such as which tenants occupy greater than a given percentage of the rentable space at the property, list the percentage of total space subject to rollover in the next calendar year, or provide detailed information on any prospective tenants.

C. *Guarantor Reporting – What is Required*. As addressed above, entities guarantying a loan, and often times, individuals as well, will be required to maintain on-going net worth and liquidity covenants. In order to evidence compliance with such covenants, a guarantor will typically be required to provide a certification with supporting financial statements, tax returns, REA schedules, etc. Depending on the size of the loan, a borrower may be able to limit such requests to during the continuance of an event of default or upon the reasonable request of lender.

D. *Audited Statements*. The extent to which the financial reports of the borrower and property must be audited varies greatly by the size of the loan. For loans over $20M, it is typical that borrowers would be required to provide financial statements audited by a 'big four' accounting firm along with an unqualified opinion of such firm. The level below this would be statements audited by an independent certified public accountant reasonably acceptable to lender. The final threshold would be statements prepared and reviewed by an independent certified public account reasonably acceptable to lender. In the event an independent certified public accountant is required, the borrower should seek to have the firm pre-approved by lender and specifically referenced in the loan documents to avoid disputes during the term of the loan.

E. *Regulation AB and Securitized Loans*. Regulation AB, or Reg. AB, was amended by the SEC in 2011 to enhance the disclosure and reporting requirements for asset backed securities, including commercial mortgage-backed securities. Reg. AB reporting requirements will not apply to the majority of borrowers and only impacts a borrower who holds a greater than 10% interest in the total pool of securitized loans. The lender will be required to comply with standardized asset-level disclosures, and in doing so will require a plethora of information from the borrower. It would therefore not be uncommon for the loan agreement to include a covenant that in the securitization process, borrower shall provide to lender such documentation, financial statements and reports in form and substance as required for lender to comply with Regulation AB. Fortunately, the majority of these issues will be addressed prior to the securitization of the loan and would not have a significant impact to the on-going financial reporting requirements of the loan documents.

F. *Penalties for Non-Compliance*. A standard loan agreement will include some sort of financial penalty to the borrower for failure to timely deliver financial reporting. This varies greatly from lender to lender, but anywhere between $1,000 to $10,000 would be considered industry standard. Borrower should note that the terms are very negotiable, both in the amount of the penalty and the triggers for such penalty. For instance, a borrower should negotiate a requirement for multiple notices, with the final notice to include a capitalized subject line with language akin to the following: 'FAILURE TO COMPLY WITH THIS NOTICE SHALL RESULT IN A PENALTY IN THE AMOUNT OF $___'. In addition, the penalty should be limited to the borrower's failure to deliver, and not the adequacy of the reports, provided that the borrower make a good faith effort to address any lender concerns in the case the reports are questioned. If the borrower is greatly concerned with the amount of the penalty or the ability to perform (such as

because a third-party manager manages the property so delivery of certain reports are the responsibility of an unaffiliated entity) then the borrower should negotiate the penalty out completely and offer to the lender a nonrecourse exception for any actual losses the lender may incur for failure to deliver the reports.

IX. INSURANCE

A. *Recent Updates*. While there have been few innovations or updates in required insurance since the passage of the Terrorism Risk Insurance Reauthorization Act of 2015, one development is that virtually all lenders engage a third-party insurance consultant to evaluate a property's insurance program and ensure compliance with the loan documents. These consultants will work directly with the borrower's insurance broker leaving little for the lender to be concerned with. While adding some costs to the overall closing expenses, the use of a consultant does provide much needed efficiency in the closing process. Once the process has concluded, the consultant will generally provide a chart summarizing the various coverages maintained by the borrower, the insurers and their applicable ratings, policy expirations, limits and deductibles and annual premium.

B. *Anchored Retail – Will the Lender accept the Anchor's Insurance*. In order for a lender to accept the property insurance coverage of an anchor tenant, both the lease and the coverage will need to be thoroughly reviewed by the insurance consultant. Even if the coverage is sufficient the borrower will be required to deliver certificates of insurance regularly and the lender will need to be named as an additional insured and/or mortgagee/loss payee on the tenant's policy. The loan documents will also include springing insurance provisions such that in the event the tenant fails to maintain the required insurance, the borrower must immediately procure the coverage, failure to do so constituting an event of default. The lender should also preserve the right to purchase the insurance in the event the borrower fails to do so, as well as holdback sufficient funds for such procurement. Below is a sample insurance covenant with respect the anchor tenant's coverage:

> Notwithstanding anything to the contrary contained in this Section X.X, Borrower shall be deemed to be in compliance with the covenants set forth in this Section X.X as long as the following conditions remain satisfied, as determined by Lender in Lender's sole discretion: (i) no Event of Default exists; (ii) no "Event of Default" (as defined in the Anchor Tenant Lease) exists under the Anchor Tenant Lease; (iii) the insurance coverages maintain by Anchor Tenant for the Anchor Tenant Premises (the "Anchor Tenant Insurance"), as approved by Lender on or before the date hereof, remains in full force and effect, without any change or modification, unless approved by Lender in writing; and (iv) the Anchor Tenant Insurance complies with the terms and conditions of Section X of the Anchor Tenant Lease, as approved by Lender on or before the date hereof. If at any time any of the foregoing conditions is not satisfied, then Borrower shall immediately comply with the terms and conditions of this Section X.X by procuring and maintaining the insurance required hereby.

C. *Self-Insurance.* Self-insurance is fairly rare in the commercial mortgage industry and should be limited to sponsors with substantial portfolios and liquidity well in excess of the loan amount. There would also be a multitude of conditions in order for the lender to approve a self-insurance program. First, the sponsor should be included as a guarantor and covenant to maintain ample liquidity to cover the costs of repair following a casualty. Second, a lender should hold back a portion of the funds in a reserve to be applied to rebuild in the event of a casualty. Alternatively, and more favorable to the borrower, this reserve could also be structured as a debt service reserve so that loan payments will be made while the property is repaired. Finally, a lender should consider requiring reinsurance which would only apply to costs in excess of a predetermined amount. As addressed above, it would hue of both parties to engage a third party insurance consultant to determine if this option would be feasible. In the retail context it is also important to note that the borrower would still need to be in compliance with the lease of each tenant, which may require that the landlord maintain standard property insurance.

D. Legal Non-Conforming Properties - Issues to Consider

1. Most lenders will now rely on a zoning report from a third-party consultant (as opposed to a zoning letter) to determine if the mortgaged collateral is in conformance with local zoning requirements. If a property has been previously built to code and is no longer in compliance due to changes to the zoning codes, it is classified as a legal nonconforming property. These can be further classified into legal nonconforming uses and legal nonconforming characteristics. Legal nonconforming characteristics would include parking deficiencies setback violations, height violations, etc. The first item to consider in this instance is the right to rebuild the property following a casualty. Many municipalities will permit a full right to rebuild in the event of a casualty provided the nonconforming characteristic is not expanded in the rebuild and that the rebuild can be completed within a stated time frame. The second item is the availability of law or ordinance coverage if the property cannot be rebuilt by right. This coverage would cover the increased cost to build in conformance with the code and the loss of value when the undamaged portion of the building must be razed to conform.

2. If the use is legal nonconforming, i.e. a tenant's use is grandfathered in because it predates the existing zoning code or the tenant has received a special use permit, a lender will again look to the right to rebuild provisions of the zoning code. If the use is not permitted following the repair and restoration of the property, then the lender will need to address the issue in the loan documents. This can be accomplished by adding a losses-only nonrecourse exception to the loan documents for the loss of an existing use following a casualty or condemnation. This option should be reserve for smaller tenants who do not account for a material portion of the overall rents.

X. "KNOW YOUR BORROWER"

A. *Increased Regulations on Banks Create Bigger Burdens on Shopping Center Owners*

B. *Preparation of Detailed Organizational Chart for Borrower*

C. *Searches – Bankruptcy, Litigation, Judgement, AML*

D. *OFAC/PATRIOT ACT – How deep in the equity should the Lender go?*

XI. INERNAL HOUSEKEEPING AND DILIGENCE FOR THE SHOPPING CENTER OWNER IN CONNECTION WITH LOAN CLOSING

A. *Advance Preparation and Internal Due Diligence Prior to Term Sheet*. Understanding your properties (or your client's properties) and doing advance preparation and internal diligence prior to the term sheet negotiation can streamline the closing process and help avoid surprises at the eleventh hour. Suggested advance preparation includes:

1. Addresses. Evaluate your properties (buildings and tenant premises) to establish a comprehensive list of property addresses, which will be necessary for insurance purposes, zoning diligence and surveys.

2. Site Plan Analysis. Compare site plans, rent rolls, tax bills and county GIS maps to confirm owned versus unowned portions of centers, ground leased parcels and any obvious ownership peculiarities.

3. Gather Information and Populate a Data Site.

a. Gather financial data, rent rolls, receivables reports, budgets, insurance information, prior title policies, surveys, environmental reports, and zoning reports and establish a user-friendly data site.

b. Discuss properties to be financed with property management and development teams to understand known issues and attempt to resolve (e.g., clean up outstanding liens, determine status of pending condemnation actions, address property condition issues, and file corrective deeds to clean up entity names). Poll internal departments to uncover potential issues.

c. Create comprehensive inventory/spreadsheet of lease agreements, tenant contact information and significant terms to streamline preparation of estoppels and tenant direction letters.

d. Review prior environmental reports for potential issues and address such issues directly with Lender early in process (e.g., soil vapor).

e. Determine whether any properties are condominiums, ground leased or have special public improvement or TIF financing arrangements. Pull and organize all applicable documentation related to these arrangements and alert Lender to such matters as soon as possible as they may require special due diligence and/or treatment in the loan documentation.

f. Gather certificates of occupancy for each tenant space and if not immediately available, request from tenants.

4. Rights of First Refusal and Purchase Options. Review leases and recorded documents to create a list of ROFRs and options. Determine whether pending financing (or property transfers related thereto) will be affected. Address purchase options as needed in the loan documents (e.g., loan will need to allow for a release of those parcels on the terms contained in the operative option instrument).

B. *Order Third Party Reports*. As soon as Lender has been identified, confirm approved title, survey, environmental, zoning and appraisal vendors. Coordinate with Lender to determine who (as between Borrower and Lender) is ordering what. Order commitments, surveys and zoning reports and perform cursory review upon receipt to identify problem areas.

C. *Entity Housekeeping*.

1. Form Entities and Amended/Restated Operating Agreements As Needed. If Independent Directors are required, engage vendor and request resumes for Lender review and approval.

2. Review of SPE Representations and Covenants in Light of Business Operations.

a. Determine whether Recycled Entities can be used or if new entities should be formed. Consider entity's date of establishment and history and be sure to consider transfer tax implications in the analysis.

b. Carefully review SPE representations and covenants. Recycled Entities may not be able to make certain representations going back to the time of their formation (e.g., a Recycled Entity that is currently a borrower under a loan that is being refinanced cannot make a representation that it has never incurred indebtedness. The representations will need to be revised to carve-out refinancing. If a merger or consolidation is in the entity's history, it may not qualify as an SPE).

c. Previously Owned Properties. If a Recycled Entity previously owned outparcels or adjacent land (that has since been sold), Borrower may not be able to rep that the entity has not engaged in any business or activity other than the ownership, operation, etc. of the property subject to the loan. In addition, Lender may require the Borrower's environmental indemnity to cover previously owned property.

D. *Review of Property Level and Borrower Representation and Warranties for Compliance*. Keep in mind that the representations in a loan agreement are more detailed and more comprehensive than at typical purchase and sale agreement. It may take longer to confirm facts and poll departments to determine if any carve outs to the standard representations are necessary (and if so, it may take some time to get the lender comfortable with the specific uncovered issues). Leave plenty of time to do appropriate diligence in connection with the final representations and warranties prior to loan closing and establish a system to reconfirm if closing is delayed.

E. *ERISA Analysis. If Owner owns "Plan Assets" or is a "Governmental Plan" or "Employee Benefit Plan," get ERISA counsel involved*.

F. *Existing Loan and Payoff*.

1. Is the shopping center subject to existing financing? If so, contact the existing lender or servicer to obtain a payoff letter and confirm prepayment procedures and notice requirements. Provide payoff notice within required timeframes.

2. Determine whether any existing mortgages will be assumed (to achieve mortgage tax savings) and if so, coordinate among Lender's counsel, existing Lender's counsel and Borrower's counsel to achieve this within required timeframe.

3. Is defeasance required in connection with loan payoff? If so, it is recommended to engage a defeasance consultant (such as Chatham or Defease with Ease) to advise regarding the process and coordinate the closing. Timing coordination can be tricky, so it is prudent to start the defeasance process at least 30 (preferably 60) days in advance of the loan closing.

G. *Account Maintenance and Treasury Matters*.

1. Operating, Lockbox and Cash Management Accounts. Determine identity of operating, lockbox and cash management accounts, and Lender approval thereof. Request form DACAs from each bank and provide to Lender's counsel. Begin KYC searches early. Establish new accounts as soon as possible.

2. Discuss cash management logistics with accounting and treasury and identify operational roadblocks. Do standard leases and/or Major Leases and operational realities jive with cash management requirements?

3. If Floating Rate Loan, Start Process to Obtain Cap or Swap. Consider retaining Chatham or another consultant to assist with this process.

H. Securitization Cooperation

1. What do I have to do Post Closing? Among other things, Borrowers can expect to do the following on a post-closing basis in connection with securitization:

   a. Provide updated financial and other information regarding the Borrower and property

   b. Provided updated opinions

   c. Reconfirm representations and warranties on one or more occasions

   d. Execute one or more amendments to the loan agreement to establish interest rate, reallocate the loan among components and clean up any issues securitization counsel discovered in the loan agreement

   e. Generally comply with Lender requests, as requested, in order to ensure compliance with the requirements of Regulation AB

f. You may also be asked to review and confirm all or certain portions of the preliminary offering circular and final offering circular

2. Indemnifications. Lender will require broad indemnification from Borrower with respect to disclosures provided to rating agencies and as set forth in the preliminary offering documents.

EXHIBIT A

1. “**Debt Service Coverage Ratio**” shall mean as of the last day of the calendar month immediately preceding the applicable date of determination, the quotient obtained by dividing (1) the Adjusted Net Cash Flow by (2) the aggregate actual Debt Service (excluding Reserve Funds) projected over the twelve (12) month period subsequent to the date of calculation[**INSERT IF LOAN HAS I/O PERIOD**: provided, that, the foregoing shall be calculated by Lender (A) assuming that the Loan had been in place for the entirety of said period and (B) disregarding any “interest only” period under the Loan and assuming that constant principal and interest payments were due for the entirety of said period based the Interest Rate and a [__] ([__]) year amortization schedule]. Lender’s calculation of the Debt Service Coverage Ratio shall be conclusive and binding on Borrower absent manifest error. **[If Mezzanine Loan: Revise to include debt service on Mezzanine Loan]**

2. “**Debt Yield**” shall mean, as of the last day of the calendar month immediately preceding the applicable date of determination, the quotient (expressed as a percentage) obtained by dividing (1) Adjusted Net Cash Flow as of such date by (2) the outstanding principal amount of the Loan as of such date. Lender’s calculation of the Debt Yield shall be conclusive and binding on Borrower absent manifest error. **[If Mezzanine Loan: Revise to include outstanding principal balance of Mezzanine Loan]**

[**INSERT IF OFFICE/RETAIL COLLATERAL AND DSCR OR DY IS APPLICABLE:** “**Adjusted Net Cash Flow**” shall mean the Underwritten NOI less (a) normalized tenant improvement and leasing commission expenditures equal to $[__________] per square foot per annum, and (b) normalized capital improvements equal to $[___________] per square foot per annum. Lender’s calculation of Adjusted Net Cash Flow shall be conclusive and binding on Borrower absent manifest error.

[**INSERT IF MULTI-FAMILY COLLATERAL AND DSCR OR DY IS APPLICABLE:** “**Adjusted Net Cash Flow**” shall mean the Underwritten NOI less (a) normalized tenant improvement and leasing commission expenditures equal to $[__________] per square foot per annum, and (b) normalized capital improvements equal to $[___________] per unit per annum. Lender’s calculation of Adjusted Net Cash Flow shall be conclusive and binding on Borrower absent manifest error.]

“**Debt Service**” shall mean, with respect to any particular period of time, scheduled [**Insert if Amortizing Loan:** principal and] interest payments under the Note.

“**Underwritten NOI**” shall mean Underwritten Operating Income less Underwritten Operating Expenses. Lender’s calculation of Underwritten NOI (including determination of items that do, and do not, qualify as Operating Income or Operating Expenses) shall be calculated by Lender in good faith based upon Lender’s determination of Rating Agency criteria and shall be final absent manifest error.

“**Underwritten Operating Expenses**” shall mean projected annualized Operating Expenses based on a trailing twelve (12) month period adjusted upwards (but not downwards) by anticipated increases in Operating Expenses as reasonably determined by Lender. Lender’s calculation of Underwritten Operating Expenses shall be conclusive and binding on Borrower absent manifest error.

“**Underwritten Operating Income**” shall mean projected annualized Operating Income based on the most recent rent roll and such other information as is required to be delivered by Borrower pursuant to Section [ ] hereof, as reasonably adjusted by Lender to take into account, a vacancy factor equal to the greater of (a) an imputed vacancy rate of [______]%, (b) market vacancies for the market in which the Property is located, and (c) the actual vacancy rate at the Property. Lender’s calculation of Underwritten Operating Income shall be conclusive and binding on Borrower absent manifest error. [**Insert if any DSCR or DY test is being used on deal.]**

“**Operating Expenses**” shall mean all expenses, computed in accordance with GAAP or other sound and prudent accounting principles approved by Lender (without duplication) of whatever kind and from

whatever source, relating to the ownership, operation, repair, maintenance and management of the Property that are incurred on a regular monthly or other periodic basis, including, without limitation (and without duplication), Taxes, Insurance Premiums, management fees (whether or not actually paid) equal to the greater of the actual management fees and **[four percent (4%)]** of annual Operating Income, costs attributable to the ordinary operation, repair and maintenance of the systems for heating, ventilation and air conditioning, advertising expenses, license fees, utilities, payroll and related taxes, computer processing charges, operating equipment or other lease payments as approved by Lender, ground lease payments, bond assessments and other similar costs, in each instance, actually paid for by Borrower. Operating Expenses shall not include (i) Debt Service, (ii) capital expenditures, tenant improvement costs, leasing commissions, or other expenses which are paid from the Reserve Funds or other escrows required by the Loan Documents (other than escrows with respect to Taxes and/or Insurance Premiums), (iii) any payment or expense for which Borrower was or is to be reimbursed from proceeds of the Loan or insurance or by any third party, (iv) federal, state or local income taxes, (v) any non-cash charges such as depreciation and amortization, and (vi) any item of expense otherwise includable in Operating Expenses which is paid directly by any Tenant except real estate taxes paid directly to any taxing authority by any tenant. Lender's calculation of Operating Expenses shall be conclusive and binding on Borrower absent manifest error.

"**Operating Income**" shall mean all revenue derived from the ownership and operation of the Property from whatever source, including, without limitation, rental income reflected in a current rent roll for all Tenants paying unabated rent and in actual physical occupancy of their respective space demised pursuant to Leases which are in full force and effect (whether denominated as basic rent, additional rent, escalation payments, electrical payments or otherwise), common area maintenance, real estate tax recoveries, utility recoveries, other miscellaneous expense recoveries, other required pass-throughs, business interruption, rent loss or other similar insurance proceeds and other miscellaneous income. Operating Income shall not include (i) insurance proceeds (other than proceeds of rent loss, business interruption or other similar insurance allocable to the applicable period), (ii) condemnation proceeds (other than condemnation proceeds arising from a temporary taking or the use and occupancy of all or part of the applicable Property allocable to the applicable period), (iii) proceeds of any financing, (iv) proceeds of any sale, exchange or transfer of the Property or any part thereof or interest therein, (v) capital contributions or loans to Borrower or an Affiliate of Borrower, (vi) any item of income otherwise includable in Operating Income but paid directly by any Tenant to a Person other than Borrower, (vii) any other extraordinary, non-recurring revenues, (viii) payments paid by or on behalf of any Tenant under a Lease which is the subject of any proceeding or action relating to its bankruptcy, reorganization or other arrangement pursuant to the Bankruptcy Code or any similar federal or state law or which has been adjudicated a bankrupt or insolvent unless such Lease has been affirmed by the trustee in such proceeding or action pursuant to a final, non-appealable order of a court of competent jurisdiction, (ix) payments paid by or on behalf of any Tenant under a Lease the demised premises of which are not occupied either by such Tenant or by a sublessee thereof, (x) payments paid by or on behalf of any Tenant under a Lease in whole or partial consideration for the termination of any Lease, (xi) payments paid by or on behalf of any Tenant under a Lease which is in default under such Lease (including, without limitation, due to delinquency in the payment of rent for more than thirty (30) days), (xii) payments paid by or on behalf of any Tenant under a Lease which has failed to extend or renew such Lease in accordance with an option in its Lease for which the notice period has expired, (xiii) payments paid by or on behalf of any Tenant under a Lease which has less than one hundred eighty (180) days remaining under its Lease term and has not extended or renewed their Lease by written notice to Borrower, (xiv) [payments paid by or on behalf of any Tenant under a Lease which has more than six (6) months of free rent remaining (unless the full amount of such excluded free rent has been reserved with Lender, in which case such free rent shall be included in the determination of Operating Income)], (xv) sales tax rebates from any Governmental Authority, (xvi) payments from any Tenant in default under its Lease beyond any applicable notice and cure periods, (xvii) payments from any Tenant that has expressed its intention (directly, constructively or otherwise) to not renew or to terminate, cancel and/or reject its applicable Lease, (xviii) sales, use and occupancy taxes on receipts required to be accounted for by Borrower to any Governmental Authority, (xix) refunds and uncollectible accounts, (xx) interest income from any source other than the Reserve Funds required pursuant to this Agreement or the other Loan Documents,
(xxi) unforfeited security deposits, utility and other similar deposits, (xxii) any other income from Tenants not paying rent, and (xxiii) any disbursements to Borrower from the Reserve Funds. Lender's calculation of Operating Income shall be conclusive and binding on Borrower absent manifest error.

[REPLACE THE FOREGOING IF MULTI-FAMILY COLLATERAL WITH THE FOLLOWING:
"**Operating Income**" shall mean all revenue derived from the ownership and operation of the Property

from whatever source, including, without limitation, rental income reflected in a current rent roll for all Tenants paying unabated rent and in actual physical occupancy of their respective space demised pursuant to Leases which are in full force and effect (whether denominated as basic rent, additional rent, escalation payments, electrical payments or otherwise), common area maintenance, laundry income, real estate tax recoveries, utility recoveries, other miscellaneous expense recoveries, other required pass-throughs, business interruption, rent loss or other similar insurance proceeds and other miscellaneous income. Operating Income shall not include (i) insurance proceeds (other than proceeds of rent loss, business interruption or other similar insurance allocable to the applicable period), (ii) condemnation proceeds (other than condemnation proceeds arising from a temporary taking or the use and occupancy of all or part of the applicable Property allocable to the applicable period), (iii) proceeds of any financing, (iv) proceeds of any sale, exchange or transfer of the Property or any part thereof or interest therein, (v) capital contributions or loans to Borrower or an Affiliate of Borrower, (vi) any item of income otherwise includable in Operating Income but paid directly by any Tenant to a Person other than Borrower, (vii) any other extraordinary, non-recurring revenues, (viii) payments paid by or on behalf of any Tenant under a Lease which is the subject of any proceeding or action relating to its bankruptcy, reorganization or other arrangement pursuant to the Bankruptcy Code or any similar federal or state law or which has been adjudicated a bankrupt or insolvent unless such Lease has been affirmed by the trustee in such proceeding or action pursuant to a final, non-appealable order of a court of competent jurisdiction, (ix) payments paid by or on behalf of any Tenant under a Lease the demised premises of which are not occupied either by such Tenant or by a sublessee thereof, (x) payments paid by or on behalf of any Tenant under a Lease in whole or partial consideration for the termination of any Lease, (xi) payments paid by or on behalf of any Tenant under a Lease which is in default under such Lease (including, without limitation, due to delinquency in the payment of rent for more than thirty (30) days), (xii) [Intentionally omitted], (xiii) [Intentionally omitted], (xiv) [Intentionally omitted], (xv) sales tax rebates from any Governmental Authority, (xvi) payments from any Tenant in default under its Lease beyond any applicable notice and cure periods, (xvii) [Intentionally omitted], (xviii) sales, use and occupancy taxes on receipts required to be accounted for by Borrower to any Governmental Authority, (xix) refunds and uncollectible accounts, (xx) interest income from any source other than the Reserve Funds required pursuant to this Agreement or the other Loan Documents, (xxi) unforfeited security deposits, utility and other similar deposits, (xxii) any other income from Tenants not paying rent, and (xxiii) any disbursements to Borrower from the Reserve Funds. Lender’s calculation of Operating Income shall be conclusive and binding on Borrower absent manifest error.]

EXHIBIT B

"**Operating Expenses**" shall mean all expenses, computed in accordance with ~~GAAP or other sound and prudent accounting principles approved by Lender (without duplication)~~an Approved Accounting Method of whatever kind and from whatever source, relating to the ownership, operation, repair, maintenance and management of the Property that are incurred on a regular monthly or other periodic basis, including, without limitation (and without duplication), Taxes, Insurance Premiums, management fees (whether or not actually paid) equal to the greater of the actual management fees and ~~[~~four percent (4%)~~]~~ of annual Operating Income, costs attributable to the ordinary operation, repair and maintenance of the systems for heating, ventilation and air conditioning, advertising expenses, license fees, utilities, payroll and related taxes, computer processing charges, operating equipment or other lease payments as approved by Lender, ground lease payments, bond assessments and other similar costs, in each instance, actually paid for by Borrower. Operating Expenses shall not include (i) Debt Service, (ii) capital expenditures, tenant improvement costs, leasing commissions, or other expenses which are paid from the Reserve Funds or other escrows required by the Loan Documents, (iii) any payment or expense for which Borrower was or is to be reimbursed from proceeds of the Loan or insurance or by any third party, (iv) federal, state or local income taxes, (v) any non-cash charges such as depreciation and amortization, ~~and~~ (vi) non-recurring or extraordinary expenses, and (vii) any item of expense otherwise includable in Operating Expenses which is paid directly by any Tenant except real estate taxes paid directly to any taxing authority by any tenant. Lender's calculation of Operating Expenses shall be ~~conclusive and binding on Borrower absent manifest error. **[NOTE TO COUNSEL – IF HOTEL COLLATERAL, REPLACE THE FOREGOING WITH DEFINITION FROM "HOTEL RIDER INSERT".]**~~determined by Lender in its reasonable judgement.

"**Operating Income**" shall mean all revenue derived from the ownership and operation of the Property from whatever source, including, without limitation, rental income reflected in a current rent roll for all Tenants paying ~~unabated~~ rent ~~and~~(taking into account, solely with respect to any lease with an Investment Grade Tenant, future rent increases or escalations, if any, during the term of the applicable lease, which such rent increase(s) or escalation(s) shall be applied on an average or "straight-line" basis (i.e. taking the average of all rent payable throughout the term of such Lease)) and (other than as expressly set forth in the exclusions below) in actual physical occupancy of their respective space demised pursuant to Leases which are in full force and effect (whether denominated as basic rent, additional rent, escalation payments, electrical payments or otherwise), common area maintenance, real estate tax recoveries, utility recoveries, other miscellaneous expense recoveries, other required pass-throughs, business interruption, rent loss or other similar insurance proceeds and other miscellaneous income. Operating Income shall not include (i) insurance proceeds (other than proceeds of rent loss, business interruption or other similar insurance allocable to the applicable period), (ii) condemnation proceeds (other than condemnation proceeds arising from a temporary taking or the use and occupancy of all or part of the applicable Property allocable to the applicable period), (iii) proceeds of any financing, (iv) proceeds of any sale, exchange or transfer of the Property or any part thereof or interest therein, (v) capital contributions or loans to Borrower or an Affiliate of Borrower, (vi) any item of income otherwise includable in Operating Income but paid directly by any Tenant to a Person other than Borrower, (vii) any other extraordinary, non-recurring revenues, (viii) payments paid by or on behalf of any Tenant under a Lease which is the subject of any proceeding or action relating to its bankruptcy, reorganization or other arrangement pursuant to the Bankruptcy Code or any similar federal or state law or which has been adjudicated a bankrupt or insolvent unless such Lease has been affirmed by the trustee in such proceeding or action pursuant to a final, non-appealable order of a court of competent jurisdiction, (ix) payments paid by or on behalf of any Tenant under a Lease the demised premises of which are not occupied either by such Tenant or by a sublessee thereof under the applicable Lease with respect to such demised premises, unless such Tenant is an Investment Grade Tenant, (x) payments paid by or on behalf of any Tenant under a Lease in whole or partial consideration for the termination of any Lease, (xi) payments paid by or on behalf of any Tenant under a Lease which is in default under such Lease (including, without limitation, due to delinquency in the payment of rent for more than thirty (30) days), (xii) payments paid by or on behalf of any Tenant under a Lease which has failed to extend or renew such Lease in accordance with an option in its Lease for which the notice period has expired, (xiii) payments paid by or on behalf of any Tenant under a Lease which has less than ~~one hundred eighty~~ninety (~~180~~90) days remaining under its Lease term and has not extended or renewed their Lease by written notice to Borrower and is not engaged with Borrower in good faith negotiations to extend or renew the applicable Lease (pursuant to evidence satisfactory to Lender), (xiv) [payments paid by or on

behalf of any Tenant under a Lease which has ~~more than six (6) months~~a period of free rent remaining~~]~~**~~[CONFIRM WITH CLOSER]~~**~~,~~ (provided, however, that to the extent rental income is not included pursuant to this clause (xiv), such rental income, without any duplication, shall be considered Operating Income for the purposes hereof (A) so long as Borrower has established with Lender and fully funded a reserve account with Lender to cover such rent concession or free rent period with respect to such Lease(s) or (B) to the extent a particular Tenant is either in a scheduled rent concession period at the time of determination or has a rent concession period scheduled in the future during the applicable projection or calculation period (which in either case is not to exceed six (6) consecutive months during the applicable projection or calculation period), such tenant's annualized rent may be adjusted by Lender in its reasonable discretion to reflect a normalized annualized amount taking into account the actual amount of rent due and payable during such period and the net effect of such rent abatement or rent concession occurring during the applicable projection or calculation period), (xv) sales tax rebates from any Governmental Authority, (xvi) payments from any Tenant in default under its Lease beyond any applicable notice and cure periods, (xvii) payments from any Tenant that has expressed its affirmative written intention ~~(directly, constructively or otherwise)~~ to not renew or to terminate, cancel and/or reject its applicable Lease~~,~~ (during the final three (3) months prior to the effective date of such expiration, termination and/or rejection of such Lease), (xviii) sales, use and occupancy taxes on receipts required to be accounted for by Borrower to any Governmental Authority, (xix) refunds and uncollectible accounts, (xx) interest income from any source other than the Reserve Funds required pursuant to this Agreement or the other Loan Documents, (xxi) unforfeited security deposits, utility and other similar deposits, (xxii) ~~any other income from Tenants not paying rent~~[intentionally omitted], and (xxiii) any disbursements to Borrower from the Reserve Funds. Lender's calculation of Operating Income shall be ~~conclusive and binding on Borrower absent manifest error.~~ **~~[NOTE TO COUNSEL – IF HOTEL COLLATERAL, REPLACE THE FOREGOING WITH DEFINITION FROM "HOTEL RIDER INSERT".]~~**determined by Lender in its reasonable judgement.

EXHIBIT C

STANDARD REPLACEMENT GUARANTOR PROVISION

Replacement Guarantor. To the extent that any Guarantor is a natural person, the death or incompetency of such Guarantor shall be an Event of Default hereunder unless such Guarantor is replaced in accordance with this Section XX. Borrower shall be permitted to substitute a replacement guarantor and no “Event of Default” shall be deemed to have occurred hereunder, provided that (a) no other Event of Default hereunder or under any of the other Loan Documents has occurred and is then continuing; (b) each of the following terms and conditions are satisfied (i) within thirty (30) days after the occurrence of such death or incompetency, Borrower delivers Lender written notice of its intent to substitute the guarantor, (ii) the replacement guarantor is a Satisfactory Replacement Guarantor (as defined below), (iii) within thirty (30) days after delivery of the written notice described in the preceding subclause (i), such Satisfactory Replacement Guarantor assumes the obligations of Guarantor hereunder and under the other Loan Documents in a manner satisfying the Prudent Lender Standard, (iv) concurrently with such assumption, each of Borrower and such Satisfactory Replacement Guarantor affirms each of their respective obligations under the Loan Documents in a manner satisfying the Prudent Lender Standard, and (v) prior to or concurrently with such assumption, as applicable, Lender receives such information, documentation and opinions as may be required by Lender in connection with such assumption and the foregoing in order to satisfy the Prudent Lender Standard (including, without limitation, opinions relating to REMIC); and (c) such substitution is permitted by then applicable REMIC Requirements. As used herein, the term “Satisfactory Replacement Guarantor” shall mean a replacement guarantor that (1) satisfies the Minimum Financial Criteria, (2) is acceptable to Lender and the Rating Agencies, (3) satisfies the Prudent Lender Standard, (4) Controls Borrower and any SPE Component Entity, and (5) is an Affiliate of Sponsor.

EXHIBIT D

STANDARD SUNSET CLAUSE TO ENVIRONMENTAL INDEMNITY

Notwithstanding the foregoing, in the event (i) the Loan is paid in full in the ordinary course, (ii) Indemnitor delivers to Indemnitee a current Phase I environmental site assessment with respect to the Property (and a follow up Phase II environmental assessment report if required by the Phase I) and such other information or investigations as Indemnitee may require in its sole and absolute discretion, which concludes that there is no evidence that the Property contains any hazardous substances and the Property is not subject to any significant risk of contamination from any off site hazardous substances in violation of the representations, warranties, and covenants set forth in this Agreement and the other Loan Documents, as determined by Indemnitee in its sole and absolute discretion, (iii) no Event of Default exists and is continuing under this Agreement or in any of the other Loan Documents, (iv) Indemnitee has not exercised any of its remedies under the Security Instrument to obtain an entry of a judgment of foreclosure, exercise any power of sale, or delivery of a deed in lieu of foreclosure of the Security Instrument, and (v) as of the date of determination, all of the representations and warranties contained under this Agreement and in any of the other Loan Documents regarding hazardous substances and Environmental Law are true and correct, as determined by Indemnitee, Indemnitor shall be released from its obligations set forth herein on the third (3rd) anniversary of the date on which items (i)-(v) above are satisfied.

EXHIBIT E

PERMITTED ECONOMIC PLEDGES

Permitted Economic Pledge shall mean a pledge by [Sponsor] of its right to receive distributions from Borrower provided that (1) such pledge is to secure a loan or line of credit secured by the substantial assets of such Person in addition to the direct and/or indirect economic interests held by such Person in Borrower, (2) the repayment of such loan or line of credit is not specifically tied solely to the cash flow of the Property, (3) such pledge is solely an economic pledge secured only by the pledgor's rights to receive economic distributions with respect to the pledged interests applicable, (4) such pledge does not include any rights of any such pledgor to participate in management or Control of Borrower, Sponsor or any Guarantor and (5) the pledgees under such pledges shall not have any right to succeed to the equity interest of the pledgor, or become a member, partner or shareholder of the Person that is the issuer of the applicable pledged interest pursuant to such pledge and such pledge when exercised will not result in a change of Control of Borrower, Sponsor or any Guarantor.

EXHIBIT F

PERMITTED NON-CONTROLLING PLEDGES

Permitted Non-Controlling Equity Pledge shall mean a pledge, hypothecation or creation of security interests in, or encumbrance of, indirect ownership interests in any direct or indirect member, partner or shareholder of Borrower (but not a direct ownership interest in Borrower) provided (i) such pledged interests do not represent a Controlling indirect interest in Borrower or any SPE Component Entity, (ii) the aggregate percentage of indirect interests in Borrower or any SPE Component Entity pledged pursuant to such Permitted Non-Controlling Equity Pledges, at any one time, shall not exceed a forty-nine percent (49%) indirect interest in Borrower, (iii) [intentionally omitted], (iv) the repayment of the obligation, loan or facility secured by such pledge is not specifically tied solely to the cash flow of the Property and (v) a Permitted Non-Controlling Equity Pledge may not be made in connection with a Permitted Parent Pledge (i.e., each Permitted Non-Controlling Equity Pledge must be made to secure a debt facility or other obligation separate and apart from any debt facility or other obligation secured by a Permitted Parent Pledge).

EXHIBIT G

PERMITTED PARENT LEVEL PLEDGES

Permitted Parent Pledge shall mean a pledge, hypothecation or creation of security interests in, or encumbrance of, direct or indirect ownership interests in any member, partner of shareholder of Borrower (but not a direct ownership interest in Borrower) held by **[Sponsor]**, in favor of one or more Permitted Pledge Banks (but in only one transaction); provided that (i) such pledge is to secure a loan or line of credit secured by all or substantially all of the assets of such Person, in addition to the indirect ownership interests held by such Person, as applicable, in any member, partner or shareholder of Borrower (but not a direct interest in Borrower); (ii) the repayment of such loan or line of credit is not specifically tied to the cash flow of the Property, and (iii) a Permitted Parent Pledge shall not be made in connection with a Permitted Non-Controlling Pledge (i.e., each Parent Level Pledge shall be made in connection with a debt facility or other obligation separate and apart from any debt facility or other obligation secured by a Permitted Non-Controlling Pledge).

Permitted Pledge Bank means a commercial bank or a financial institution with significant real estate experience involving properties similar to the property with a long term unsecured debt rating of no less than “A” by S&P and “A2” by Moody’s.

EXHIBIT H

"**Crowdfunded Person**" shall mean a Person capitalized primarily by monetary contributions (A) of less than $35,000 each from more than 35 investors who are individuals and (B) which are funded primarily (I) in reliance upon Regulation Crowdfunding promulgated by the Securities and Exchange Commission pursuant to the Securities Act of 1933, as amended and/or (II) through internet-mediated registries, platforms or similar portals, mail-order subscriptions, benefit events and/or other similar methods.

EXHIBIT I

DEPOSIT ACCOUNT CONTROL AGREEMENT SUBMISSION FORM

Estimated Closing Date	
Lender Name	
Borrower Name	
DACA Needed?	☐Yes ☐No
If Yes, what type?	☐Hard ☐Soft ☐Springing
CMA Needed?	☐Yes ☐No
If Yes, what type?	☐Hard ☐Springing
Master Servicer	☐Wells Fargo ☐Other (please name):
Property Type	☐Hotel ☐Office Space ☐Multi-family ☐Retail ☐Other (please state):
Number of Tenants	
PO Box needed?	☐Yes ☐No
Property Physical Address:	
Borrower Contact Information:	
Acceptance Fee	$1000 automatically debited on or around the 11 of the month after activation takes place for HARD or SOFT DACAs. $2500 paid via wire to WFB, at Borrower's closing on Springing transactions
Frequency of Wires from DACA account to Section 5a. account	