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Peer to Peer 6

The sleeves off your vest? Think again: the Latest on Non-Recourse Carve-Outs in Loan Documents

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I. Background

a. Recourse vs. Non-Recourse Loans

i. Recourse Loans

1. In recourse loans, the responsible parties are fully liable for the debt.
2. Upon a default, lender may realize its security interest in the collateral and also seek judgment against the responsible parties' personal assets.
3. Generally, if the loan documents are silent, the loan is full recourse.
4. Recourse loans are common for construction financing.

ii. Non-Recourse Loans

1. In non-recourse loans, liability is limited to the collateral for the loan, subject to any non-recourse carve-outs.
2. Non-recourse loans are common for permanent financing.
3. Carve-outs to the non-recourse status of the loan are divided into full recourse carve-outs and limited recourse carve-outs.
 - a. Upon the occurrence of a full recourse carve-out event, the loan becomes a recourse loan.
 - b. Upon the occurrence of a limited recourse carve-out event, the loan generally remains non-recourse, but the responsible parties become fully liable for lender's losses arising out of the occurrence of such event.

iii. Responsible Parties

1. Borrower
2. Guarantor

b. Case law affecting non-recourse loans

i. Cherryland (Wells Fargo Bank N.A. v Cherryland Mall L.P., 295 Mich. App. 799, 8123 N. W. 2d 79 (2011))

1. Loan documents contained a single purpose entity covenant providing that borrower shall not "become insolvent or fail to pay its debts from assets as the same shall become due." Id. at 123.
2. Borrower's insolvency violated the single purpose entity requirements which, in turn, triggered full recourse liability for borrower and guarantor.
3. The court enforced the provisions of the loan documents, holding borrower and guarantor to be fully and personally liable for the full amount of the debt.
4. Cherryland was overruled by Michigan legislation as noted below, and such legislation was upheld by a later court decision, LZLC. V. 18718 Borzman, LLC, 777 F. 3d 816 (2015).

ii. Gratiot (Gratiot Avenue Holdings, LLC v. Chesterfield Development Company, LLC, 835 F.Supp.2d 384 (E.D.Mich.) (2012))

1. The facts were substantially similar to Cherryland – the insolvency of borrower triggered full recourse liability.
2. Despite arguments that the intention of both parties was that the loan be non-recourse, the court found that a covenant by borrower to "pay its debts" included the loan debt and enforced full recourse liability for borrower and guarantor.

iii. Responsive Legislation

1. Michigan: Nonrecourse Mortgage Loan Act (Mich. Comp. Laws § § 445.1591-1595 (2012))

- a. “A post closing solvency covenant shall not be used, directly or indirectly, as a nonrecourse carve-out or as the basis for any claim or action against a borrower or any guarantor or other surety on a nonrecourse loan.”
- b. The enabling language of the law states:
 - “The legislature recognizes that it is inherent in a nonrecourse loan that the lender takes the risk of a borrower’s insolvency, inability to pay or lack of adequate capital after the loan is made and the parties do not intend that borrower is personally liable for payment of a nonrecourse loan if borrower is insolvent, unable to pay, or lacks adequate capital after the loan is made. The legislature recognizes that the use of a post closing solvency covenant as a nonrecourse carve-out, or an interpretation of any provision in a loan document that results in a determination that a post closing solvency covenant is a nonrecourse carve-out, is inconsistent with this act and the nature of a nonrecourse loan; is an unfair and deceptive business practice and against public policy; and should not be enforced.”
- c. The legislation overruled *Cherryland and Gratiot* and was upheld by a later court decision, *LZLC. V. 18718 Borzman, LLC*, 777 F. 3d 816 (2015).

2. Ohio: Ohio Rev. Code §§ 1319.07 to 1319.09 (2013)

- a. “A postclosing solvency covenant shall not be used, directly or indirectly, as a nonrecourse carve-out or as the basis for any claim or action against a borrower or any guarantor or other surety on a nonrecourse loan.” The definition of “postclosing solvency covenant” does not encompass borrower covenants not to file a voluntary bankruptcy or other voluntary insolvency proceeding, which have typically triggered full recourse provisions. The Legacy Trust Act’s provisions apply to all nonrecourse loan documents in existence on, or entered into on or after, the effective date, but do not interfere with the claims of secured or unsecured creditors that accrue prior to the effective date.”
- b. Section 5 of the legislation sets forth the legislature’s analysis of the appropriate allocation of risk in a nonrecourse loan:
 - “The General Assembly recognizes that it is inherent in a nonrecourse loan that the lender takes the risk of a borrower’s insolvency, inability to pay, or lack of adequate capital after the loan is made and that the parties do not intend that borrower is personally liable for payment of a nonrecourse loan if borrower is insolvent, unable to pay, or lacks adequate capital after the loan is made ... [T]he use of a postclosing solvency covenant as a nonrecourse carve-out, or an interpretation of any provision in a loan document that results in a determination that a postclosing solvency covenant is a nonrecourse carve-out, is inconsistent with this act and the nature of a nonrecourse loan, is an unfair and deceptive business practice and against public policy, and should not be enforced.”

II. Full-recourse provisions

a. Bankruptcy

i. Bankruptcy events nearly always trigger full recourse liability.

1. Voluntary bankruptcy filings

- a. Voluntary bankruptcy filings nearly always trigger full recourse liability.
- b. Borrowers should consider which parties are affected. Typically, the affected parties are limited to borrower and guarantor. Lenders may try

to include owners of borrower or other affiliates. Such additional inclusions should be carefully reviewed and considered.

2. Involuntary filings

- a. Borrowers may attempt to obtain limited recourse treatment for involuntary filings. At a minimum, borrowers should seek a cure period for involuntary filings – typically 90 days. Additionally, borrowers should attempt to exclude involuntary filings initiated by or on behalf of lender.
- b. If borrower colludes with an involuntary filing, full recourse would be triggered.
 - i. Borrowers should consider defining collusion, although lenders will push for a broad definition, such as any action by borrower or guarantor to directly or indirectly facilitate the filing.
 - ii. Borrowers should consider narrowly defining who constitutes a colluding party. Affiliates may be too broad and encompass a minority investor.
- ii. Full recourse liability may be triggered by a bankruptcy event of borrower or any guarantor. Occasionally, this may be expanded to other loan parties (such as borrower's member or manager).

b. Prohibited Transfers

- i. The occurrence of a prohibited transfer without lender's consent generally triggers full recourse liability.
- ii. Loan documents typically prohibit transfers of the collateral, as well as transfers of direct and indirect ownership of borrower.
- iii. Borrowers should carefully review the transfer provisions to insure that acts in the ordinary course of business do not trigger full recourse. Borrowers often proceed with these types of transfers without considering whether or not lender's consent is required.
 1. Routine easements
 2. Amendments to reciprocal easement agreements or similar documents
 3. Leases
 4. Minor condemnations
 5. Transfers of minority ownership interest
 6. Upstream transfers
 7. Affiliate transfers
 8. Estate planning transfers
 9. Changes in property management
 10. Disposition of personal property

c. Prohibited liens

- i. Typically, the creation of any lien (whether superior or subordinate) triggers full recourse liability.
- ii. Borrowers should attempt to limit liability for involuntary liens, such as:
 1. Tax liens
 2. Mechanic's liens
 3. Judgment liens
- iii. At a minimum, borrower should have the opportunity to cure and to contest involuntary liens before triggering full recourse liability.

- iv. Recourse liability should not be triggered if lender is holding funds to pay the imposition causing the lien, such as tax escrows.
- v. Borrowers should consider whether parent debt could trigger a prohibited lien.
- d. See Appendix A for a sample borrower comments to a full recourse carve-out provision.

III. Violation of Single Purpose Entity Covenants (Full Recourse or Limited Recourse)

- a. Borrower's violation of a covenant to maintain existence as a single purpose entity may trigger full recourse or limited recourse liability.
- b. Borrowers should seek characterization as a limited recourse carve-out. Alternatively, full recourse liability should only be triggered if the violation causes substantive consolidation.
- c. Borrowers often do not focus on the single purpose entity requirements and subsequently unknowingly violate the requirements while acting in the ordinary course of business.
- d. Borrower should take special care to negotiate any post-closing solvency covenants.
- e. See Appendix B for sample borrower comments to a single purpose entity carve-out provision.

IV. Limited recourse provisions (See Appendix C for a sample exculpation clause)

- a. Misappropriation
 - i. Limited recourse is triggered by the misappropriation or misapplication of insurance proceeds, condemnation awards, rent or other revenue.
 - ii. Borrowers should attempt to allow the following to be permitted:
 - 1. Application of security deposits
 - 2. The right to adjust and receive insurance proceeds under a certain threshold
 - 3. Distributions in the ordinary course
- b. Waste
 - i. Limited recourse is triggered by the waste of all or any part of the property or all or any part of other collateral.
 - ii. Borrowers should attempt to include the following:
 - 1. A specific definition of waste, such as "physical damage to the property from the willful misconduct of borrower or any affiliate of borrower or, after the occurrence and during the continuance of an event of default, the removal or disposal of any portion of the property in violation of the Loan Documents (other than in the ordinary course of business)"
 - 2. A limitation of the carve-out liability to the extent that gross revenues of the property, net of debt service and any other amounts payable under the loan documents are sufficient avoid the occurrence of such waste
- c. Compliance with Laws
 - i. Limited recourse is triggered by the failure to comply with laws, rules and regulations applicable to the property.
 - ii. Borrowers should attempt to include the following:
 - 1. The right to contest the law or the application thereof
 - 2. A notice and cure period
 - 3. A limitation of the carve-out liability to the extent that gross revenues of the property, net of debt service and any other amounts payable under the loan documents are sufficient to correct the violation
- d. Interference with Lender's remedies
 - i. Limited recourse is triggered by the borrower or any loan party taking any action that interferes with lender's ability to realize on its remedies under the loan documents.

- ii. Borrowers should attempt to include the right to raise good faith defenses .
- e. Environmental losses
 - i. Limited recourse is triggered by the violation of any representation, warranty, covenant or indemnification provision in the loan documents relating to environmental laws, hazardous substances.
 - ii. Borrowers should carefully negotiate the environmental provisions to allow for notice and cure periods.
- f. Criminal acts
 - i. Limited recourse is triggered by the commission of a criminal act by borrower or any loan party.
 - ii. Borrowers should attempt to limit this to criminal acts resulting in forfeiture, seizure or loss of any portion of the property or other collateral.
- g. Failure to maintain insurance
 - i. Limited recourse is triggered by the failure to obtain and maintain the fully paid for insurance policies required under the loan documents.
 - ii. Borrowers should attempt to include the following:
 - 1. Exception for amounts held by lender in escrow for the payment of premiums
 - 2. A limitation of the carve-out liability to the extent that gross revenues of the property, net of debt service and any other amounts payable under the loan documents are sufficient pay such premiums
 - 3. Termination of liability on and after the date lender takes control of the property
- h. Failure to pay taxes.
 - i. Limited recourse is triggered by the failure to pay real estate taxes and assessments.
 - ii. Borrowers should attempt to include the following:
 - 1. A right to contest taxes
 - 2. Exception for amounts held by lender in escrow for the payment of taxes
 - 3. A limitation of the carve-out liability to the extent that gross revenues of the property, net of debt service and any other amounts payable under the loan documents are sufficient pay taxes
 - 4. Termination of liability on and after the date lender takes control of the property
- i. Failure to provide financial reports
 - i. Limited recourse is triggered by the failure of borrower to comply with the financial reporting obligations as set forth in the loan documents.
 - ii. Borrowers should attempt to include the following:
 - 1. Notice and cure periods
 - 2. Approved forms of reports to avoid any technical defaults
- j. Fraud and Misrepresentations
 - i. Limited recourse is triggered by the fraud or material misrepresentation of borrower or any guarantor or any of their agents or representatives in connection with the loan.
 - ii. Borrowers should attempt to limit the parties to which this applies and to limit to intentional acts.

APPENDIX A

Sample Borrower Comments to Full Recourse Provision

Notwithstanding anything to the contrary in this Agreement, the Note or any of the Loan Documents, (A) Lender shall not be deemed to have waived any right which Lender may have under Section 506(a), 506(b), 1111(b) or any other provisions of the Bankruptcy Code to file a claim for the full amount of the Debt or to require that all collateral shall continue to secure all of the Debt owing to Lender in accordance with the Loan Documents, and (B) the Debt shall be fully recourse to Borrower in the event that: (i) ~~an Affiliate, officer, director, or representative which Controls, directly or indirectly, any Person acting at the direction or request of~~ Borrower or ~~any SPE Component Entity~~Guarantor files, or joins in the filing of, an involuntary petition against Borrower or any SPE Component Entity under the Bankruptcy Code or any other Creditors Rights Laws, ~~or solicits or causes to be solicited petitioning creditors for any involuntary petition against Borrower or any SPE Component Entity from any Person;~~ (ii) Borrower or any SPE Component Entity files an answer consenting to or otherwise acquiescing in or joining in any involuntary petition filed against it, by any other Person under the Bankruptcy Code or any other Creditors Rights Laws, or solicits or causes to be solicited petitioning creditors for any involuntary petition from any Person; (iii) ~~any Affiliate, officer, director, or representative which Controls Borrower or any SPE Component Entity~~Person acting at the direction or request of Borrower or Guarantor consents to or acquiesces in or joins in an application for the appointment of a custodian, receiver, trustee, or examiner for Borrower, any SPE Component Entity or any portion of the Property (other than an application initiated by Lender); (iv) Borrower or any SPE Component Entity makes an assignment for the benefit of creditors ~~or admits in any legal proceeding its insolvency or inability to pay its debts as they become due, except to extent to prevent a claim of perjury or as required by court order;~~ (v) Borrower, any SPE Component Entity or Guarantor contests or opposes any motion made by Lender to obtain relief from the automatic stay or seeks to reinstate the automatic stay in the event of any federal or state bankruptcy or insolvency proceeding involving the Guarantor or its Affiliates; (vi) ~~or (vii) or (viii) if any voluntary Sale or Pledge occurs that is not a Permitted Transfer or a Permitted Equity Transfer (other than a Minor Transfer Violation); or (viii) the breach of any representation, warranty or covenant contained in Article 5 hereof that results in the substantive consolidation of the assets of Borrower with the assets of another Person.~~

"Minor Transfer Violation" shall mean (i) the transfer of any direct or indirect ownership interest in Borrower that is not a Permitted Equity Transfer but does not result in a change in Control of Borrower ~~or (ii) the entering into of standard utility easements in the ordinary course of business so long any such easements do not have a material adverse effect on the use, operation or value of the Property, do not impede any rights of Lender under the Loan Documents, and do not in any way affect the priority or security of Lender's lien and security interest in the Property.~~

APPENDIX B

Sample Borrower Comments to Single Purpose Entity Provision

Borrower has not and will not:

- a) engage in any business or activity other than the ownership, operation ~~and~~, maintenance **and financing** of the Property, and activities incidental thereto;
- b) acquire or own any assets other than (A) the Property, and (B) such ~~incidental~~ Personal Property **and other assets** as may be necessary for the ownership, leasing, maintenance and operation of the Property;
- c) merge into or consolidate with any Person, or dissolve, terminate, liquidate in whole or in part, transfer or otherwise dispose of all or substantially all of its assets or change its legal structure;
- d) fail to observe all organizational formalities, or fail to preserve its existence as an entity duly organized, validly existing and in good standing (if applicable) under the Applicable Law of the jurisdiction of its organization or formation, or amend, modify, terminate or fail to comply with the provisions of its organizational documents **with respect to the matters set forth in this Section 5.1 or otherwise in any material respect;**
- e) own any subsidiary, or make any investment in, any Person;
- f) commingle its assets with the assets of any other Person; **provided, however, that Borrower may deposit amounts that have been remitted to Borrower's operating account ("Borrower Account", and such funds, "Borrower's Funds") into a centralized cash management account of an Affiliate of Borrower, as and when received, provided that all amounts deposited into such centralized account are clearly segregated, for accounting purposes, from the revenues and expenses of all other Persons and sufficient amounts from Borrower's Funds are remitted to the Borrower Account for payment of all Property expenses;**
- g) incur any Indebtedness, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than (A) the Debt, (B) trade and operational indebtedness incurred in the ordinary course of business with trade creditors, provided such indebtedness is (1) unsecured, (2) not evidenced by a note, (3) on commercially reasonable terms and conditions, and (4) due not more than sixty (60) days past the date incurred and paid on or prior to such date, and/or (C) Permitted Equipment Leases; provided however, the aggregate amount of the indebtedness described in ~~(B) and (C) shall~~ **B) shall** not exceed at any time two percent (2%) of the outstanding principal amount of the Debt. No Indebtedness other than the Debt may be secured (subordinate or pari passu) by the Property;
- h) fail to maintain **(or cause any Manager to maintain)** all of its books, records, financial statements and bank accounts separate from those of its affiliates and any constituent party. Borrower's assets have not and will not be listed as assets on the financial statement of any other Person; provided, however, that Borrower's assets may be included in a consolidated financial statement of its affiliates, provided that (i) appropriate notation shall be made on such consolidated financial statements to indicate the separateness of Borrower and such affiliates and to indicate that Borrower's assets and credit are not available to satisfy the debts and other obligations of such affiliates or any other Person and (ii) such assets shall be listed on Borrower's own separate balance sheet. Borrower has maintained and will maintain **(or will cause any Manager to maintain)** its books, records, resolutions and agreements as official records;
- i) enter into any contract or agreement with any ~~general partner, member, shareholder, principal or affiliate~~ **Affiliate**, except upon terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arm's-length basis with unaffiliated third parties;
- j) maintain its assets in such a manner that it will be costly or difficult to segregate, ascertain or identify its individual assets from those of any other Person;

k) assume or guaranty the debts of any other Person, hold itself out to be responsible for the debts of any other Person, or otherwise pledge its assets for the benefit of any other Person or hold out its credit as being available to satisfy the obligations of any other Person;

l) make any loans or advances to any Person;

m) fail to file its own tax returns unless prohibited by Applicable Law from doing so (except that Borrower may file or may include its filing as part of a consolidated federal tax return, to the extent required and/or permitted by Applicable Law, provided that there shall be an appropriate notation indicating the separate existence of Borrower and its assets and liabilities);

n) fail either to hold itself out to the public as a legal entity separate and distinct from any other Person and not as a division or part of any other Person or to conduct its business solely in its own name or **fail to correct any known misunderstanding regarding its separate identity;**

o) fail to maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations (to the extent there exists sufficient cash flow from the Property to do so after the payment of all operating expenses and Debt Service and provided, this clause (xv) shall not require any equity owner to make additional capital contributions to Borrower);

p) without the unanimous written consent of all of its partners or members, as applicable, and the consent of each Independent Director (regardless of whether such Independent Director is engaged at the Borrower or SPE Component Entity level), (a) file or consent to the filing of any petition, either voluntary or involuntary, to take advantage of any Creditors Rights Laws (other than with respect to any filing by Lender or its Affiliate), (b) seek or consent to the appointment of a receiver, liquidator or any similar official, ~~(c) take any action that might cause such entity to become insolvent, or (d (other than with respect to any appointment initiated by Lender or its Affiliate), or (c)~~ make an assignment for the benefit of creditors (other than Lender or its Affiliate);

q) fail to allocate shared expenses (including, without limitation, shared office space) ~~or fail to use separate stationery, invoices and checks;~~

r) fail ~~to remain solvent,~~ to pay its own liabilities ~~(including, without limitation, salaries of its own employees)~~ from its own funds ~~or fail to maintain a sufficient number of employees in light of its contemplated business operations (in each case, (~~ to the extent there exists sufficient cash flow from the Property to do so); or

s) acquire obligations or securities of its partners, members, shareholders or other affiliates, as applicable, or identify its partners, members or shareholders or other Affiliates, as applicable, as a division or part of it; ~~or~~

t) ~~(xx) violate or cause to be violated the assumptions made with respect to Borrower and its principals in the Non-Consolidation Opinion or in any New Non-Consolidation Opinion.~~

APPENDIX C

Sample Exculpation Clause

Exculpation. Subject to the qualifications below, Lender shall not enforce the liability and obligation of Borrower to perform and observe the obligations contained in the Loan Documents by any action or proceeding wherein a money judgment shall be sought against Borrower, except that Lender may bring a foreclosure action, an action for specific performance or any other appropriate action or proceeding to enable Lender to enforce and realize upon its interest and rights under the Loan Documents, or in the Property, the Rents or any other collateral given to Lender pursuant to the Loan Documents; provided, however, that, except as specifically provided herein, any judgment in any such action or proceeding shall be enforceable against Borrower only to the extent of Borrower's interest in the Property, in the Rents and in any other collateral given to Lender, and Lender shall not sue for, seek or demand any deficiency judgment against Borrower in any such action or proceeding under or by reason of or under or in connection with any Loan Document. The provisions of this Section shall not, however, (i) constitute a waiver, release or impairment of any obligation evidenced or secured by any Loan Document; (ii) impair the right of Lender to name Borrower as a party defendant in any action or suit for foreclosure and sale under the Security Instrument; (iii) affect the validity or enforceability of any of the Loan Documents or any guaranty made in connection with the Loan or any of the rights and remedies of Lender thereunder; (iv) impair the right of Lender to obtain the appointment of a receiver; (v) impair the enforcement of the Assignment of Leases and Rents; (vi) constitute a prohibition against Lender to commence any other appropriate action or proceeding in order for Lender to fully realize the security granted by the Security Instrument or to exercise its remedies against the Property; or (vii) constitute a waiver of the right of Lender to enforce the liability and obligation of Borrower, by money judgment or otherwise, to the extent of any loss, damage, cost, expense, liability, claim or other obligation incurred by Lender (including attorneys' fees and costs reasonably incurred) arising out of or in connection with the following (all such liability and obligation of Borrower for any or all of the following being referred to herein as "**Borrower's Recourse Liabilities**"):

(a) fraud, willful misconduct, intentional misrepresentation or intentional failure to disclose a material fact by or on behalf of Borrower, Guarantor, any Affiliate of Borrower or Guarantor, or any of their respective agents or representatives in connection with the Loan, including by reason of any claim under the Racketeer Influenced and Corrupt Organizations Act (RICO);

(b) the forfeiture by Borrower of the Property, or any portion thereof, because of the conduct or purported conduct of criminal activity by Borrower or Guarantor or any of their respective agents or representatives in connection therewith;

(c) physical waste of the Property or any portion thereof (to the extent cash flow available to Borrower from operations of the Property is sufficient to prevent such waste), or after an Event of Default the removal or disposal of any portion of the Property;

(d) misappropriation or conversion by or on behalf of Borrower (including failure to turn over to Lender on demand following an Event of Default), of any gross revenues, including (i) Rents and Lease Termination Payments (ii) any Proceeds paid by reason of any Insured Casualty or any Award received in connection with a Condemnation or other sums or payments attributable to the Property not applied in accordance with the provisions of the Loan Documents (except to the extent that Borrower did not have the legal right, because of a bankruptcy, receivership or similar judicial proceeding, to direct disbursement of such sums or payments); (iii) all Rents of the Property received or collected by or on behalf of the Borrower after and during the continuance of an Event of Default and not applied to payment of Principal and interest due under the Note, and to the payment of actual and reasonable operating expenses of the Property, as they become due or payable (except to the extent that such application of such funds is prevented by bankruptcy, receivership, or similar judicial proceeding in which Borrower is legally prevented from directing the disbursement of such sums); and (iv) any security deposits, advance deposits or any other deposits collected with respect to the Property which are not delivered to Lender in accordance with the provisions of the Loan Documents;

(e) the failure to pay Taxes (to the extent cash flow available to Borrower from operations of the Property is sufficient to pay such Taxes), provided Borrower shall not be liable to the extent funds to pay such amounts are available in the Tax and Insurance Subaccount and Lender failed to pay same in accordance with and subject to the terms and conditions set forth in Section ___ hereof;

(f) the failure to obtain and maintain the Policies in accordance with this Agreement (to the extent cash flow available to Borrower from operations of the Property is sufficient to obtain and maintain the Policies), provided Borrower shall not be liable to the extent such failure is a result of non-payment of Insurance Premiums, and funds to pay such Insurance Premiums are available in the Tax and Insurance Subaccount and Lender failed to pay same in accordance with and subject to the terms and conditions set forth in Section hereof;

(g) failure to pay charges for labor or materials or other charges contracted for by Borrower that can create Liens on any portion of the Property (to the extent cash flow available to Borrower from operations of the Property is sufficient to pay such charges);

(h) the breach of any representation, warranty, covenant or indemnification in any Loan Document concerning Environmental Laws or Hazardous Substances, including Section hereof and Section hereof, and clauses (viii) through (xi) of Section hereof; or

(i) any cost or expense incurred by Lender in connection with the enforcement of its rights and remedies hereunder or any other Loan Document.

Notwithstanding anything to the contrary in this Agreement or any of the Loan Documents, (A) Lender shall not be deemed to have waived any right which Lender may have under Section 506(a), 506(b), 1111(b) or any other provisions of the Bankruptcy Code to file a claim for the full amount of the Debt or to require that all collateral shall continue to secure all of the Debt in accordance with the Loan Documents, and (B) Lender's agreement not to pursue personal liability of Borrower as set forth above SHALL BECOME NULL AND VOID and shall be of no further force and effect, and the Debt shall be fully recourse to Borrower in the event that one or more of the following occurs (each, a "**Springing Recourse Event**"):

(i) an Event of Default described in Section hereof shall have occurred;

(ii) a breach of the representation set forth in Section hereof or a breach of the covenants set forth in Section hereof;

(iii) the occurrence of any condition or event described in either Section hereof or Section hereof and, with respect to such condition or event described in Section hereof, either Borrower, SPE Party, Guarantor or any Person owning an interest (directly or indirectly) in Borrower or Guarantor consents to, aids, solicits, supports, or otherwise cooperates or colludes to cause such condition or event or fails to contest such condition or event; and/or

(iv) if Guarantor, SPE Party, Borrower or any Affiliate of any of the foregoing, in connection with any enforcement action or exercise or assertion of any right or remedy by or on behalf of Lender under or in connection with the Note, the Security Instrument or any other Loan Document, seeks a defense, judicial intervention or injunctive or other equitable relief of any kind or asserts in a pleading filed in connection with a judicial proceeding any defense against Lender or any right in connection with any security for the Loan, which the court in any such action or proceeding determines that Borrower requested such judicial intervention or injunctive or other equitable relief in bad faith.