

Friday, November 5, 2021  
10:30 AM – 11:45 AM

**Workshop 22**

**Loan Workout Strategies for the Pandemic and Post-Pandemic Economies: Putting Humpty Back Together Again**

Presented to

**2021 U.S. Law Conference  
San Francisco Marriott Marquis  
San Francisco, CA  
November 3-5, 2021**

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**I. What Is a Loan Workout?**

Overview

A workout is when a lender and a borrower, in the event of a borrower's default event, choose to resolve the default without exercising full rights or remedies under the loan agreement. In many cases, workouts serve as alternative solutions to bankruptcy or foreclosure and are more beneficial to both borrower and lender.

Prior to negotiation of a workout, a typical scenario unfolds. The borrower defaults. This could be a missed payment or series of missed payments, a failure to acquire insurance or failure to comply with some other term of the agreement. Then, the lender will send notice to the borrower of the default and gather facts about why the default occurred. This is an informal process involving the lender asking for financial statements, leases, and a statement about what caused the default. Some situations are benign and quickly corrected, and the parties move on without any serious changes. Other situations involve the borrower displaying financial distress and will require a change in the loan agreement.<sup>1</sup> Alternatively, a borrower, recognizing its own inability to meet loan requirements, can voluntarily approach the lender and request a workout.

Before workout negotiations begin, lenders will usually require a pre-workout agreement.<sup>2</sup> This will detail the negotiation process for the workout and require the borrower to accept its defaults under the loan and waive any claims against the lender.<sup>3</sup> Compliance with the pre-workout agreement will be an express condition of completing a workout agreement, so a borrower's attention to detail is key.<sup>4</sup>

<sup>1</sup> What are The Stages of a Loan Workout? (<https://fnrpusa.com/blog/what-are-the-stages-of-a-loan-workout/>)

<sup>2</sup> Commercial Real Estate Loan Restructurings Amid COVID-19 (<https://www.natlawreview.com/article/10-key-considerations-commercial-real-estate-loan-restructurings-primer>)

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

There are three types of workouts: (1) forbearance agreements; (2) restructuring, amending or modification agreements; and (3) waiver.<sup>5</sup> Each of these has its own specific agreement provisions and could be subject to additional consideration for the lender.<sup>6</sup>

Forbearance agreements will allow the borrower to temporarily make a reduced loan payment, or no payment at all. As such, the exact forbearance of the loan payment, as well as the duration of the forbearance, must be specified in the workout agreement. Forbearance can also include a temporary modification of contractual covenants. The important feature of forbearance is that it provides the borrower temporary relief. It can provide the parties time to negotiate more permanent restructuring of the loan, or it can result in the agreement returning to its original terms. In both instances, the forbearance will eventually end and the payments or covenants forewent will be made by the borrower.

Amending agreements, or loan modifications, are agreements to permanently change the payment terms or other conditions of the loan. This option, done correctly, is helpful to a borrower facing a likely default and wanting to avoid any remedies exercised by its lender. Changes to agreement provisions, regarding loan interest rates, payment deadlines, and so forth, are fact-specific and serve to make compliance more achievable for the borrower. The lender can require payment of a fee or additional collateral in exchange for the loan modification.

Waiver is a complete foregoing of the lender's rights against the borrower when the borrower fails to comply with the loan agreement. It is a more likely option when the default is a one-time occurrence or it is non-monetary in nature, or otherwise the lender recognizes the default does not impede the loan relationship. The key difference between waiver and forbearance is that, in forbearance, the lender puts an expiration date on its inability to pursue remedies against the borrower, whereas in waiver, a lender completely foregoes its rights and remedies against the borrower for the specific default(s) waived.

Borrowers in need of a loan workout agreement should consider the following:

- Communicate early and often with the lender.<sup>7</sup> A borrower should begin the conversation as soon as it is aware of a default or an anticipated default.
- Identify the entire business problem, including all defaults, any anticipated defaults, changes in market demand, and any risks or other problems associated with the property.<sup>8</sup>
- Identify the lender's priorities and incentives.<sup>9</sup> Lenders usually understand that damaging a borrower's business through bankruptcy and litigation pose more of a risk than a loan workout, and usually do not want to seize the property and deal with managing it. Their main concern is to maximize their value for the loans they issue.
- Be thoroughly prepared, and propose a comprehensive plan.<sup>10</sup> Borrowers should have reviewed their loan agreement, keep accurate records of their insurance plans, title, UCC filings, and property appraisal, and prepare to update these as necessary. Their proposal to the lender should show they understand their default(s) and all potential defaults, and what has caused their loan compliance problems, so that solutions to all issues can be resolved and no further renegotiation will be needed.

### Strategies from the Lender's Perspective

A. **Evaluation.** In evaluating a default or Event of Default by a borrower or a request by a borrower for a workout of a loan, the lender will take a number of steps to ensure that it is in a position to recover at loan maturity and payoff as much of the loan principal and interest that the lender expected to receive when it initially made the loan. A lender will take many actions, including some or all of the following actions:

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<sup>5</sup> Guidance for Distressed Companies: Loan Workouts and Exchange Offers (<https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/guidance-for-distressed-companies-loan-workouts-and-exchange-offers>)

<sup>6</sup> What are The Stages of a Loan Workout? (<https://fnrpusa.com/blog/what-are-the-stages-of-a-loan-workout/>)

<sup>7</sup> Guidance for Distressed Companies: Loan Workouts and Exchange Offers (<https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/guidance-for-distressed-companies-loan-workouts-and-exchange-offers>)

<sup>8</sup> Commercial Real Estate Loan Restructurings Amid COVID-19 (<https://www.natlawreview.com/article/10-key-considerations-commercial-real-estate-loan-restructurings-primer>)

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

1. Review the borrower's business and financials and the reason for the default to determine whether the borrower has a reasonable chance to reposition the asset in a manner that will generate enough revenue to pay debt service. To protect the cashflow of the borrower from being diverted by borrower, the lender may trigger lockbox and cash management agreements.
2. Review the loan documents to determine if there are any errors or omissions or other openings for challenges by the borrower.
3. Evaluate the collateral securing the loan and determine whether the collateral is sufficient or if there are other guaranties or other collateral that can be added to the security interest.
4. Assess the risk to lender and its position if borrower files for bankruptcy.
5. Commence enforcement actions by sending notices of default.

B. **Selection of Approach.** Lender's evaluation of the various facts involved will feed their decision regarding whether it is prudent to use a temporary fix in the form of a forbearance agreement or whether it should proceed with a long term solution in the form of a restructuring or a workout. Lender may also choose to foreclose or obtain the collateral in a deed-in-lieu transaction.<sup>11</sup>

1. A forbearance agreement is an agreement pursuant to which, for a limited time, a lender refrains from taking an action that it otherwise legally has the right to take. A forbearance agreement is helpful to lenders because it can correct deficiencies in the loan documents, preserve defaults, provide the lender with a full release of any claims and full waiver of any defense to loan documents. A forbearance agreement might include terms such as (a) a different payment plan for principal and interest payments such as an interest rate adjustment or capitalization or discounted payoff, (b) accrual and waiver of default interest, (c) fees to the lender such as a forbearance fee and an administrative fee, (d) new or expanded payment guaranties, and (e) additional collateral to secure the loan.
2. A longer term restructuring of a loan will be based on an operating plan which permits the borrower a reasonable chance of achieving positive business results. More favorable terms for the borrower makes it more possible that the borrower will be able to repay the loan and therefore avoid a foreclosure or other adverse judgment. A restructuring will typically be documented with amendments to the existing loan documents or, sometimes, a new set of loan documents.
3. Bankruptcy is typically avoided by lenders because of the high legal and accounting costs, the damage to the value of the borrower caused by the filing, and the delay that the bankruptcy process causes in the lender receiving payment. There are reasons however, that a lender might wish to force the workout into bankruptcy court. These are discussed in Section \_\_\_ below.

### Strategies from the Borrower's Perspective

A. **Evaluation.** When the borrower is in default in a loan, it should consider its goals with respect to the collateral and borrower's intention continue to operate, own, and sell. The borrower will take one or more of any of the following actions:

1. Determine whether it can "right the ship" by addressing the adverse impacts that created the situation that is making it difficult or impossible for the borrower to pay its debt service under the loan. Examples of changes that may be required include finding replacement tenants or manager, changes to market conditions (such as those caused by the pandemic), etc. This is a continuous evaluation as the borrower negotiates the terms of any forbearance agreement or loan modification agreements.

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<sup>11</sup> These materials do not cover foreclosure or deed-in-lieu transactions because our focus is loan workouts which provide the opportunity for the loan to remain in place.

2. An evaluation of the costs and liabilities associated with each potential workout solution, including additional fees that the lender may require as part of the workout.

B. **Selection of Approach.** When a borrower is in default in a loan, it will consider its goals with respect to the collateral and its intention continue to operate, own, and sell the collateral. The borrower will take one or more of any of the following actions:

1. Pursue the negotiation of a forbearance agreement.
2. Pursue a loan modification.
3. Pursue a deed-in-lieu arrangement or not oppose lender's foreclosure action.

## II. How Has COVID-19 Impacted CRE and Retail?

### The Short-term and Long-term

COVID-19's short-term impact on commercial real estate, simply put, was devastating. Property owners collected less than 50% of rent due to of shutdown orders on restaurants and nonessential shopping. It is estimated that property values decreased by nearly 20%, and rent values by 5-10%.<sup>12</sup>

The pandemic affected the commercial real estate market differently, depending on the specific asset class, and this will likely impact recovery as well. In April 2020, immediately after pandemic shutdowns began, year over year changes to returns on REIT property indices ranged from increases of over 30% in data centers and cell towers to decreases of nearly 50% or higher in retail and hotels.

Specifically in retail, sales dropped nearly 90% in clothing stores and 45% in department stores. In the fiscal year following the outbreak, retail malls lost approximately 50% of revenue. Rents went down by 4% to 5%, and revenues from movie theaters and other non-retail sources of income were virtually wiped out. Several clothing and department stores, like J.C. Penney and Brooks Brothers, began or accelerated bankruptcy proceedings as they could no longer pay rent.

During the pandemic, it has been a common strategy for retail property owners, including mall owners, to defer a portion of rent payments for six to twelve months. As a more extreme example, an owner group purchased one of the larger retail chains renting in its malls. This turned out to be an accretive investment and has led to further acquisitions.

By May 2021, most malls were experiencing an upward trend. The year over year percentage decrease in mall traffic was 24% in March, but was down to 18.7% in April of this year. Retail recovery has varied by style of the property, with stand-alone retail buildings and open air shopping centers showing more traffic than closed malls.

For the long-term, the hotel industry is likely to bounce back, while brick-and-mortar retail will likely never return to pre-pandemic levels.<sup>13</sup> One estimate predicts that a third of America's 1,100 malls will be demolished.<sup>14</sup> Small, specialty retailers will continue to struggle, but retail commercial property that will succeed post-pandemic are more likely to be big-box "everything" stores, like Target, Costco, Walmart, and Home Depot. Due to the strength of ecommerce, data centers, storage facilities, and distribution centers have become investments of choice in commercial real estate. The market for office space is less clear. Industries, firms, and workers may vary in whether they prefer to operate from home or in the camaraderie of the office, and those that do return to the office may need additional space to accommodate better social distancing.<sup>15</sup> The end result may vary by industry and job type.

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<sup>12</sup> However, these decreases fare better than the decreases of the 2008 financial crisis. *Is investors' love affair with commercial property ending?* The Economist.

<sup>13</sup> 26 No. 5 Prac. Real Est. Law. 26.

<sup>14</sup> *Is investors' love affair with commercial property ending?* The Economist.

<sup>15</sup> *Id.*

## The Future of Retail

One lesson from the pandemic is that there will likely be less demand for commercial real estate, although there will still be demand, including in retail. This is partly because of low interest rates, giving investors confidence to make more purchases. Big investment firms in particular are willing to build their portfolios. However, overall investors are being more careful in light of shifting demand.

The second lesson is that retail will need to adapt its shopping experience to meet consumers' wants and needs. Fifty-eight percent of consumers expect mall shopping to be less popular after the pandemic, and the amount of consumers who expect to return to malls once a week will be half of the pre-pandemic level.<sup>16</sup>

Retail property owners should encourage their tenants to adapt to the trends discussed below, or be looking for new retail tenants that already incorporate these tactics.

For one example, there will be an increased need to accommodate for public health concerns. This includes contactless services, such as automated checkout and curbside pickup. Some retailers have begun allowing customers to ring up their own purchased items using an app.

A major shift is melding customers' online shopping with in-person shopping experiences. Curbside pickup is one service that provides an omnichannel experience that more seamlessly blends customers' online and physical shopping experiences. Customers will be shopping for products online and arriving at the store knowing exactly what they want. This elevates a sales associate's role to someone who provides excellent customer service, including using the brand's digital tools to solve the customer's problems.<sup>17</sup>

Other retail adaptations utilize technology and maximize on customers' expectations for convenience. Hashtags and other ways of incorporating social media can enhance the customer experience. Brands that offer same-day delivery are more likely to bring in customers. More digital brands are expanding their physical stores, though they are cautious to focus only on locations that will succeed. Shopping experiences can be enhanced by augmented reality, such as placing a piece of furniture into one's home, or by using artificial intelligence to help the customers search for the good they are looking for.

Adapting retail property is not entirely on the tenant shops, however. Property owners as well should get creative in how they can reutilize their space, given the decrease in demand, both inside and outside their retail structures. Outside the building, drive-in theaters, farmers markets, workout classes and other community programming have been innovative uses of space.<sup>18</sup> Inside, owners have shifted from fuller customer experiences, like casinos and aquariums, to customer-absent uses like data centers.<sup>19</sup>

### **III. COVID Impact on Commercial Chapter 11 Cases**

Year-on-year commercial chapter 11 filings increased 29% in 2020. The 7,128 filings in 2020 were the most since 2012, which saw 7,789 filings, according to data prepared by Epiq for the American Bankruptcy Institute.

However, after a significant spike in the number of commercial chapter 11 filings in the second and third quarters of 2020, the pace of new chapter 11 filings slowed significantly toward the end of the year.

The S&P 500 fell by more than a third from the beginning of February to the end of March 2020. In Q2 2020, US GDP fell by a record 31.4% and large numbers of businesses were forced to seek bankruptcy protection.

Stimulus measures were implemented to blunt the impact of the pandemic. The CARES Act, signed into US law at the end of March 2020, provided more than US\$2 trillion of financial support for businesses and consumers, with US\$454 billion made available to the Federal Reserve to provide loans and loan guarantees to businesses.

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<sup>16</sup> *The future of the mall*. Deloitte.

<sup>17</sup> *Id.*

<sup>18</sup> Can the shopping mall survive COVID-19? (<https://www.cushmanwakefield.com/en/insights/the-edge/can-the-shopping-mall-survive-covid-19>)

<sup>19</sup> *Id.*

During this period, banks and other capital providers were often willing to modify loans, relax covenants or forbear from enforcing remedies, and provide additional capital to allow borrowers to survive the pandemic. Many large businesses were able to raise funds through additional leveraged loans and high yield debt in the capital markets.

The stimulus and availability of capital provided almost immediate benefit. The S&P 500 jumped almost 13% in April and ended the year with a total return of almost 18%. The U.S. GDP increased by 33.4% in Q3, erasing the losses from Q2, and grew by an additional 4% in Q4. The major stock markets posted all-time highs in early 2021.

It's unclear if this will continue as capital and debt markets may dry up. U.S. leveraged loan default rates increased steadily throughout 2020 to reach 4.5% in December, up from 1.7% at the end of 2019, according to ratings agency Fitch.

Chapter 11 filings were also limited by creditors' reluctance to enforce remedies and accept losses when asset values were so uncertain due to the pandemic. This was particularly the case in sectors such as commercial real estate, travel, leisure and aviation, where businesses often have no obvious alternative operators should lenders opt to foreclose and take control of troubled companies' assets. As markets stabilize and the post-pandemic future becomes more clear, lenders will have a better sense of collateral value, which will likely result in more restructurings, both in and out of court.

According to the Debtwire Restructuring Database, chapter 11 proceedings in 2020 were fairly evenly divided between "freefall" cases (entering chapter 11 without a restructuring deal in place with creditors) and pre-negotiated or pre-packaged bankruptcy cases (with such a deal in place, potentially already voted on for pre-packs).<sup>20</sup> In comparison, in 2019 there were three times as many freefall cases as pre-negotiated/packaged. This suggests that debtors filing for Chapter 11 in 2020 were more concerned that filing a freefall case could result in liquidation.

Year over year, total commercial filings decreased 10 percent in April 2021, as the 2,078 filings were down from the 2,303 commercial filings registered in April 2020. Total commercial chapter 11 filings experienced the largest decline, as the 287 filings dropped 49 percent in April 2021 from the 567 commercial chapter 11 filings in April 2020. On a monthly basis, April 2021's total commercial filings represented a 9 percent decrease from the March 2021 commercial filing total of 2,293, and commercial chapter 11 filings decreased 26 percent from the 386 filings in March 2021.

"Massive stabilization efforts by the government, continued low interest rates and leniency by many lenders have helped lay the foundation for an economic recovery, but growing debt loads and financial uncertainty remain for many families and businesses amid the COVID-19 pandemic," said American Bankruptcy Institute Executive Director Amy Quackenboss.<sup>21</sup>

Epiq recently released its May 2021 bankruptcy filing statistics from its AACER bankruptcy information services business. The new filings for May dropped to 34,734 across all chapters. This is a 15% drop from the April 2021 new filings count of 40,913 (this includes individuals and commercial filings). Non-commercial consumer filings across all chapters totaled 32,958, down 15% from 38,830 in April. Commercial filings across all chapters were also down in May with a total of 1,776 new filings, down 15% from 2,083 in April.

There were 182,629 total new bankruptcy filings across all chapters for the first five months of 2021, down 29% from 255,697 in the same period in 2020. Commercial Chapter 11 filings were down 14% over April with 246 new filings in May.

"The continued decline in chapter 11 filings is anticipated given ample available market liquidity coupled with federal stimulus intervention," said Deirdre O'Connor, senior managing director of corporate restructuring at Epiq.<sup>22</sup>

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<sup>20</sup> <https://www.jdsupra.com/legalnews/chapter-11-cases-soared-in-2020-with-1752237/>

<sup>21</sup> <https://www.abladvisor.com/news/30998/april-total-commercial-chapter-11-filings-fall-49-y-y>

<sup>22</sup> <https://www.globenewswire.com/en/news-release/2021/06/08/2243812/10374/en/May-2021-Bankruptcy-Filings-Drop-Again.html#:~:text=The%20new%20filings%20for%20May,15%25%20from%2038%2C830%20in%20April.&text=Commercial%20Chapter%2011%20filings%20were,246%20new%20filings%20in%20May>

Total commercial Chapter 11 filings in May 2021 decreased 66 percent from the previous year, according to data provided by Epiq, the American Bankruptcy Institute said. Commercial Chapter 11 filings totaled 246 in May, down from the 725 commercial Chapter 11 filings in May 2020.

Total commercial filings decreased 31 percent in May, as the 1,787 filings were down from the 2,599 total commercial filings registered in May 2020. The 34,760 total bankruptcy filings in May were down 13 percent from the 39,993 total filings in May 2020. Total consumer filings decreased 12 percent in May, as the 32,973 filings fell from the 37,394 consumer filings registered in May 2020.<sup>23</sup>

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<sup>23</sup> <https://www.abladvisor.com/news/31238/commercial-chapter-11-filings-decreased-66-in-may-y-y>

## EXHIBIT A: Sample Forebearance Agreement

### FORBEARANCE AGREEMENT<sup>24</sup>

This Forbearance Agreement ("**Agreement**"), dated as of [DATE], is made by and among [NAME OF BORROWER] (the "**Borrower**"), and certain of its subsidiaries (collectively, the "**Guarantors**"), certain lenders (the "**Required Lenders**") and [NAME OF ADMINISTRATIVE AGENT] (the "**Agent**").

#### RECITALS

WHEREAS, Borrower, Agent, [and] Lenders, [and Guarantors] [OTHER PARTIES] are parties to a certain Loan Agreement dated as of [DATE] (as amended, amended and restated, supplemented, or otherwise modified from time to time in accordance with its provisions, the "**Loan Agreement**") pursuant to which Lenders made a loan to Borrower in the original principal amount of \$[AMOUNT] (the "**Loan**"). Capitalized terms used herein without definition shall have the meanings ascribed thereto in the Loan Agreement;

WHEREAS, the outstanding principal balance owed by Borrower to Lenders under the Loan is \$[AMOUNT];

WHEREAS, as security for all of the indebtedness and obligations due to Lenders under the Loan Agreement (collectively, the "**Obligations**"), Borrower executed and delivered to Agent a certain Security Agreement dated as of [DATE] (the "**Security Agreement**"), granting to Lenders a security interest in the collateral, as defined in the Security Agreement (the "**Collateral**");

WHEREAS, as a condition precedent to the making of the Loan by Lenders, Guarantors executed and delivered to Agent a certain Guaranty dated [DATE] (the "**Guaranty**"), unconditionally guarantying payment to Lenders of the Obligations owing by Borrower to Lenders under the Loan Agreement;

WHEREAS, Borrower is in default under the Loan Agreement;

WHEREAS, Borrower and Guarantors have requested Agent and Lenders to forbear from exercising their rights and remedies under the Loan Agreement and Security Agreement; [and]

WHEREAS, Agent and Lenders are willing to forbear from exercising such rights and remedies for a limited period of time, provided that Borrower and Guarantors comply with the terms and conditions of this Agreement[./; and]

[WHEREAS, Lenders have directed Agent to enter into this Agreement on their behalf to set forth the terms and conditions of such forbearance.]

NOW, THEREFORE, in consideration of the mutual covenants, terms, and conditions set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Borrower Acknowledgments. Borrower and Guarantors acknowledge and agree that:

1.1 Recitals. The above recitals are true and correct.

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<sup>24</sup> This is a standard form of forbearance agreement to be used when a borrower defaults under a loan agreement and the parties are negotiating an out-of-court restructuring. This Standard Document has integrated notes with important explanations and drafting and negotiating tips. *Forbearance Agreement, Practical Law Standard Document 1-524-1560*, by Practical Law Bankruptcy & Restructuring and Practical Law Finance. Westlaw © 2021 Thomson Reuters. No claim to original U.S. Government Works.



1.2 Defaults. The following Events of Default have occurred and are continuing under the Loan Agreement:

[LIST OF DEFAULTS] (the “**Existing Defaults**”).

1.3 Loan Documents. The Loan Agreement, Guaranty, Security Agreement, and all other agreements, instruments, and other documents executed in connection with or relating to the Obligations or the Collateral (the “**Loan Documents**”) are legal, valid, binding, and enforceable against Borrower and Guarantors in accordance with their terms. The terms of the Loan Documents remain unchanged[, except as modified pursuant to Section 6].

1.4 Obligations. The Obligations are not subject to any setoff, deduction, claim, counterclaim, or defenses of any kind or character whatsoever.

1.5 Collateral. Lenders have valid, enforceable, and perfected security interests in and liens on the Collateral, as to which there are no setoffs, deductions, claims, counterclaims, or defenses of any kind or character whatsoever.

1.6 [No Lending Obligation]. As a result of the Existing Defaults, Agent and Lenders have no obligation to make loans or otherwise extend credit to Borrower under the Loan Documents, except as expressly contemplated under this Agreement.]

1.7 Right to Accelerate Obligations. As a result of the Existing Defaults, Required Lenders have [the right to accelerate the maturity and demand immediate payment of the Obligations/accelerated the Obligations and they are now due and payable].

1.8 Default Notice. To the extent required by the Loan Agreement [or the Guaranty], Borrower and Guarantors have received timely and proper notice of the Existing Defaults and the opportunity to cure (if any), in accordance with Section [NOTICES] of the Loan Agreement[, Section [NOTICES] of Guaranty,] or applicable law, and hereby waive any rights to receive further notice thereof. All applicable cure periods relating to the Existing Defaults have lapsed.

1.9 Default Interest Rate. By reason of the Existing Defaults, Required Lenders have the right, as of [DATE], to impose the default rate of interest under Section [INTEREST] of the Loan Agreement. Effective [DATE], the interest rate under the Loan is [INTEREST RATE].

1.10 No Waiver of Defaults. Neither this Agreement, nor any actions taken in accordance with this Agreement or the Loan Documents[, including Agent’s and Lenders’ continued making of loans to Borrower,] shall be construed as a waiver of or consent to the Existing Defaults or any other existing or future defaults under the Loan Documents, as to which Agent’s and Lenders’ rights shall remain reserved.

1.11 Preservation of Rights and Remedies. Upon expiration of the Forbearance Period (as defined in Section 2.1), all of Agent’s and Lenders’ rights and remedies under the Loan Documents and at law and in equity shall be available without restriction or modification, as if the forbearance had not occurred.

1.12 Lender Conduct. Lenders have fully and timely performed all of their obligations and duties in compliance with the Loan Documents and applicable law, and have acted reasonably, in good faith, and appropriately under the circumstances.

1.13 Purpose of Forbearance. The purpose of this Agreement is to provide Borrower with a period of time to [DESCRIPTION OF OBJECTIVES OF THE FORBEARANCE].

1.14 Request to Forbear. Borrower and Guarantors have requested Agent’s and Lenders’ forbearance as provided herein, which shall inure to their direct and substantial benefit.

## 2. Lender Forbearance.

2.1 Forbearance Period. Subject to compliance by Borrower and Guarantors with the terms and conditions of this Agreement, Agent and Lenders hereby agree to forbear from exercising their rights and remedies against Borrower and Guarantors under the Loan Documents with respect to the Existing Defaults during the period

(the “**Forbearance Period**”) commencing on the Effective Date (as defined in Section 3) and ending on the earlier to occur of (i) [DATE] and (ii) the date that any Forbearance Default (as defined in Section 12) occurs. Lenders’ forbearance, as provided herein, shall immediately and automatically cease without notice or further action on the earlier to occur of (i) or (ii) (the “**Termination Date**”). On and from the Termination Date, Required Lenders may, in their sole discretion, exercise any and all remedies available to them under the Loan Documents by reason of the occurrence of any Events of Default thereunder or the continuation of any Existing Default.

2.2 Extension of Forbearance Period. In the sole discretion of Required Lenders and without obligation, after the Termination Date, they may renew or extend the Forbearance Period, or grant additional forbearance periods. [In addition, upon the occurrence of [DESCRIPTION OF EVENT], the Forbearance Period will be automatically extended until [DATE].]

2.3 Scope of Forbearance. During the Forbearance Period, Agent and Lenders will not (i) accelerate the maturity of the Obligations or initiate proceedings to collect the Obligations; [(ii) discontinue lending under the terms described in Section 4;] (iii) initiate or join in filing any involuntary bankruptcy petition with respect to Borrower under the Bankruptcy Code, or otherwise file or participate in any insolvency, reorganization, moratorium, receivership, or other similar proceedings against Borrower under the laws of the US; (iv) repossess or dispose of any of the Collateral, through judicial proceedings or otherwise; or (v) initiate proceedings to enforce the Guaranty.

3. Conditions Precedent. This Agreement shall not become effective unless and until the date (the “Effective Date”) that each of the following conditions shall have been satisfied in Agent’s sole discretion, unless waived in writing by Agent:

3.1 Delivery of Certain Documents. Borrower and Guarantors shall deliver or cause to be delivered the following documents, each in substance and form acceptable to Agent:

- (a) a copy of this Agreement, duly executed by Borrower and each Guarantor;
- (b) a certificate dated the date hereof, signed by the Secretary of Borrower and Guarantors, containing certified copies of (i) Borrower’s and Guarantors’ [articles/certificate] of incorporation and bylaws, as the case may be; (ii) resolutions duly adopted by the board of directors of Borrower and Guarantors, as applicable, authorizing the execution and delivery of this Agreement and all documents required to be delivered in connection herewith, and all transactions contemplated herein; (iii) a statement containing the true and correct names, titles, and signatures of Borrower and Guarantors authorized to sign such documents and authorize such transactions;
- (c) a cash flow forecast through [DATE] that includes a detailed cash flow, collateral, [and] loan balance[, and borrowing base] analysis.
- (d) a detailed, weekly cash budget setting forth Borrower’s projected weekly expenses through [DATE] (the “**Budget**”), an initial version of which is attached hereto as Exhibit A. The Budget will be periodically updated, as required by Section 8.9(b);
- (e) a report describing Borrower’s plan for [DESCRIPTION OF BORROWER’S OBJECTIVES] (the “**Restructuring Plan**”), attached hereto as Exhibit B;
- (f) such additional documents, including, without limitation [LIST OF INSTRUMENTS, AGREEMENTS, AND DOCUMENTS], duly executed by the appropriate parties, that are required to perfect and evidence Lenders’ liens and priority in the Collateral and in any additional collateral granted by Borrower to secure all obligations of Borrower to Lenders hereunder and under the Loan Agreement;
- (g) additional guaranties, duly executed by [NAME OF ADDITIONAL GUARANTORS], guaranteeing Borrower’s payment of the Obligations;
- (h) current certified financial statements from Borrower and each Guarantor;
- (i) [subordination agreements in favor of Lenders, duly executed by [NAME OF OTHER LENDERS], pursuant to which [NAME OF OTHER LENDERS] agree[s] to subordinate [its/their] obligations and liens to the Obligations and liens of Lenders;]

(j) A stipulation for entry of a judgment of foreclosure and sale of real property Collateral and replevin of personal property Collateral (the "Foreclosure Stipulation").

(k) such other documents as Agent may request with respect to any matter relevant to this Agreement or the transactions contemplated hereby.

3.2 Forbearance Fee. As partial consideration for Agent's and Lenders' agreement to forbear as set forth herein, Borrower shall have paid to Agent a forbearance fee in the amount of \$[AMOUNT].

3.3 Professional Fees and Other Expenses. As partial consideration for Agent's and Lenders' agreement to forbear as set forth herein, Borrower shall have paid all of Agent's reasonable costs and expenses (including attorneys' fees) incurred in connection with the preparation and negotiation of this Agreement.

3.4 Retention of Turnaround Professionals. Borrower shall have engaged and continued to engage, at its own expense, the services of a turnaround consultant reasonably satisfactory to Agent, on terms and conditions satisfactory to Agent.]

4. Continued Financing During Forbearance Period. Notwithstanding the Existing Defaults, subject to the satisfaction of all conditions specified in Section 3, during the Forbearance Period, Agent and Lenders, [in their sole discretion] shall continue to honor requests by Borrower for loans as provided in the Loan Agreement [(as amended herein)]; provided that Borrower shall use the proceeds of such loans solely in accordance with the Budget. [Agent's and Lenders' obligation to make loans to Borrower shall automatically terminate, without notice to or action by any party, on the Termination Date or upon the expiration of any extension of the Forbearance Period, as provided in Section 2.2.]]

5. Payments During Forbearance Period. During the Forbearance Period, Borrower shall make the following payments in lieu of any payments required under the Loan Documents:

[Interest: \$[AMOUNT]]

[Principal: \$[AMOUNT]]

[Late Fees: A late fee of [AMOUNT]% shall be assessed on the amount of any overdue principal or interest.]

6. Amendments to the Loan Documents. Upon the satisfaction of the conditions precedent set forth in Section 3, the Loan Documents are hereby amended as follows:

[LIST OF AMENDMENTS]

7. Representations and Warranties. Borrower and each Guarantor represent and warrant as to itself that all representations and warranties relating to it contained in the Loan Documents are true and correct as of the Effective Date, except to the extent that such representations and warranties expressly relate to an earlier date, in which case such representations and warranties shall have been true and correct in all material respects as of such earlier date. Borrower and Guarantors further represent and warrant to Agent as follows:

7.1 Authorization. The execution, delivery, and performance of this Agreement are within its corporate power and have been duly authorized by all necessary corporate action.

7.2 Enforceability. This Agreement constitutes a valid and legally binding Agreement enforceable against Borrower and Guarantors in accordance with its terms, subject to the effects of bankruptcy, insolvency, fraudulent conveyance, and similar laws affecting creditors' rights generally and to general principles of equity.

7.3 No Violation. The execution, delivery, and performance of this Agreement do not and will not (i) violate any law, regulation, or court order to which Borrower or Guarantors are subject; (ii) conflict with Borrower or Guarantors' organizational documents; or (iii) result in the creation or imposition of any lien, security interest, or encumbrance on any property of Borrower, Guarantors, or any of their subsidiaries, whether now owned or hereafter acquired, other than liens in favor of Lenders.

7.4 No Litigation. No action, suit, litigation, investigation, or proceeding of or before any arbitrator or Governmental Authority is pending or, to the knowledge of Borrower or Guarantors, threatened by or against or affecting Borrower or Guarantors or against any of their property or assets with respect to any of the Loan Documents or any of the transactions contemplated hereby or thereby.

7.5 Financial Condition. The financial statements, dated [DATE OF FINANCIAL STATEMENTS PROVIDED IN Section 3.1(h)], as delivered by Borrower and Guarantors pursuant to Section 3.1(h), are complete and correct and, present fairly in accordance with GAAP the financial condition of Borrower, Guarantors, and their consolidated subsidiaries at such date and the consolidated [and consolidating] results of their operations and changes in financial position for the fiscal period then ended.

7.6 No Change. Except as previously disclosed to Agent, since [DATE OF FINANCIAL STATEMENTS PROVIDED IN Section 3.1(h)], there has been no material adverse change in the business, operations, assets, or financial or other condition of the Borrower, Guarantors, and their subsidiaries taken as a whole.

7.7 Accuracy of Information. All information provided by Borrower and Guarantors, or any of their respective agents, is true, correct, and complete in all material respects, as of the date provided and does not contain any untrue statements of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading.

7.8 Advice of Counsel. Borrower and Guarantors have freely and voluntarily entered into this Agreement with the advice of legal counsel of their choosing, or have knowingly waived the right to do so.

8. Covenants. In addition, in order to induce Agent and Lenders to forbear from the exercise of their rights and remedies as set forth above, Borrower and Guarantors hereby covenant and agree that at all times during the Forbearance Period, unless Agent otherwise consents in writing, as follows:

8.1 Compliance with Budget. Borrower shall only make expenditures that are in accordance with the Budget. Each line item in the Budget is subject to a maximum amount for each particular week, as specified in the Budget. [Borrower may shift on a weekly basis between line items in an amount not to exceed [10%/[OTHER PERCENTAGE]] of any such line item.] [[In addition,] Borrower may carry over expenditures for each line item for a particular week to the amount specified for such line item for the following week, if such expense is not incurred during the week specified in the Budget.] Borrower may not modify the Budget without Agent's written consent.

8.2 Compliance with Loan Documents. Borrower and Guarantors shall continue to perform and observe all covenants, terms, and conditions, and other obligations contained in all of the Loan Documents [(as expressly modified herein)] and this Agreement, except with respect to the Existing Defaults.

8.3 Financial Covenants. In addition to the financial covenants set forth in the Loan Documents, Borrower shall comply with the following additional financial covenants:

[LIST OF ADDITIONAL FINANCIAL COVENANTS]

8.4 Restructuring Consultant. Borrower shall continue to engage, at its own expense, the services of a turnaround consultant reasonably satisfactory to Agent, on terms and conditions satisfactory to Agent.]

8.5 Bank Accounts. Borrower shall deposit all cash, cash equivalents, checks, notes, drafts, instruments, refunds, deposits, and proceeds of Collateral in bank accounts that it shall maintain with Agent, except as expressly provided in Section 8.6 with respect to the proceeds from the sale of assets outside the ordinary course of business.]

8.6 Sale of Assets. Borrower shall not sell, convey, transfer, assign, lease, abandon, or otherwise dispose of any of its assets, tangible or intangible (including but not limited to sale, assignment, discount, or other disposition of accounts, contract rights, chattel paper, or general intangibles with or without recourse), without Agent's prior written consent. If Agent grants its written consent, Borrower shall cause buyer or other transferee to pay all proceeds of such disposition directly to Agent for application to the Obligations.

8.7 Perfection of Lenders' Liens. Borrower and Guarantors shall execute and deliver to Agent such documents and take such actions as Agent deems necessary or advisable to perfect or protect the Lenders' security interests, mortgages, or liens granted by Borrower or Guarantors to Lenders.

8.8 Weekly Financial Reports. In addition to any weekly reporting required under the Loan Documents, on or before [TIME] on [DAY] of each calendar week, Borrower shall deliver to Agent the following weekly financial reports as of the close of business for the immediately preceding calendar week, all in form, content, and detail satisfactory to Agent:

(a) [a Borrowing Base Certificate, in the form attached hereto as Exhibit C, including a sworn statement duly executed by an officer of Borrower that Borrower is in compliance with the terms and conditions of this Agreement and the Loan Documents, and is current on its wages, benefits, taxes, and insurance payments;]

(b) [an accounts receivable aging report;]

(c) [a cash receipts and expenditures report;]

(d) [an accounts payable report; and]

(e) [an inventory report.]

8.9 Monthly Reports. In addition to any monthly reports required under the Loan Documents, within [30/[OTHER NUMBER]] days after the end of each calendar month, Borrower shall deliver to Agent the following reports as of the end of such month, all in form, content, and detail satisfactory to Agent:

(a) a balance sheet and statements of income and cash flows from the beginning of the fiscal year through the end of such month, certified by Borrower's chief financial officer;

(b) an updated Budget through [DATE];

(c) an updated rolling 13-week cash flow forecast;

(d) a litigation report summarizing the status of all litigation and disputes involving Borrower;  
[and]

(e) a restructuring plan report, summarizing the progress made towards the execution of the Restructuring Plan[./; and]

(f) [an employee report, specifying by employee accrued and unpaid wages and employee benefits.]

8.10 Other Financial Information. Borrower and Guarantors each shall promptly provide to Agent such other financial information as Agent may reasonably request.

8.11 Obligations to Third Parties. Borrower shall (i) continue to pay, discharge, or otherwise satisfy at or before maturity or before they become delinquent, as the case may be, all of its liabilities and obligations arising in the ordinary course of business during the Forbearance Period as contemplated by the Budget, and (ii) without duplication of (i), not default on any of its obligations to any third party.

8.12 Notice of Adverse Claims. If Borrower or Guarantors shall become aware that any person or entity is asserting any lien, encumbrance, security interest, or adverse claim (including any writ, garnishment, judgment, warrant of attachment, execution, or similar process or any claim of control) against any of them or any of their property (each, an "**Adverse Claim**"), they shall promptly notify Agent in writing thereof, and provide to Agent all documentation and other information it may request regarding such Adverse Claim.

8.13 Further Assurances. Promptly upon the request of Agent, Borrower and Guarantors shall take any and all actions of any kind or nature whatsoever, and execute and deliver additional documents, that relate to this Agreement and the transactions contemplated herein.

9. Reaffirmation of Guaranty. Each Guarantor hereby ratifies and reaffirms (i) the validity, legality, and enforceability of the Guaranty; (ii) that its reaffirmation of the Guaranty is a material inducement to Agent [and Required Lenders] to enter into this Agreement; and (iii) that its obligations under the Guaranty shall remain in full force and effect until all the Obligations have been paid in full.

10. Release of Claims and Waiver of Defenses. In further consideration of Agent's [and Required Lenders'] execution of this Agreement, Borrower and Guarantors, on behalf of themselves and their successors, assigns, parents, subsidiaries, affiliates, officers, directors, employees, agents, and attorneys hereby forever, fully, unconditionally and irrevocably waive and release Lenders and their successors, assigns, parents, subsidiaries, affiliates, officers, directors, employees, attorneys, and agents (collectively, the "**Releasees**") from any and all claims, liabilities, obligations, debts, causes of action (whether at law or in equity or otherwise), defenses, counterclaims, setoffs, of any kind, whether known or unknown, whether liquidated or unliquidated, matured or unmatured, fixed or contingent, directly or indirectly arising out of, connected with, resulting from, or related to any act or omission by any Lender or any other Releasee with respect to the Loan Documents and any Collateral, other than any Lender's or any Releasee's willful acts or omissions, on or before the date of this Agreement (collectively, the "**Claims**"). Borrower and Guarantors further agree that Borrower shall not commence, institute, or prosecute any lawsuit, action, or other proceeding, whether judicial, administrative, or otherwise, to collect or enforce any Claim.

11. Indemnification. Borrower and Guarantors hereby expressly acknowledge, agree, and reaffirm their indemnification obligations to Lenders and the other Indemnified Parties set forth in Section [INDEMNIFICATION SECTION] of the Loan Agreement. Borrower and Guarantors further acknowledge, agree, and reaffirm that all such indemnification obligations set forth in Section [INDEMNIFICATION SECTION] of the Loan Agreement shall survive the expiration of the Forbearance Period and the termination of this Agreement, the Loan Agreement, the other Loan Documents, and the payment in full of the Obligations. Notwithstanding the foregoing, such indemnity shall not be available to the extent that such claims, damages, losses, liabilities, or related expenses result solely from a Lender's or other Indemnified Party's gross negligence or willful misconduct.

12. Events of Default. The occurrence of one or more of the following shall constitute a "**Forbearance Default**" under this Agreement:

12.1 The occurrence of the Termination Date.

12.2 Borrower or Guarantors shall fail to abide by or observe any term, condition, covenant, or other provision contained in this Agreement or any document related to or executed in connection with this Agreement.

12.3 A default or event of default shall occur under any Loan Document or any document related to or executed in connection with this Agreement or any of the Loan Documents (other than the Existing Defaults).

12.4 Any Guarantor ceases to exist or revokes or terminates its liability under the Guaranty, or challenges the validity or enforceability of the Guaranty, or denies any further liability or obligation thereunder.

12.5 Borrower or any Guarantor:

(a) becomes insolvent;

(b) is generally not, or is unable to, or admits in writing its inability to, pay its debts as they become due;

(c) (i) commences any case, proceeding, or other action under any existing or future Requirement of Law relating to bankruptcy, insolvency, reorganization, or other relief of debtors, seeking (A) to have an order for relief entered with respect to it, or (B) to adjudicate it as bankrupt or insolvent, or (C) reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition, or other relief with respect to it or its debts, or (D) appointment of a receiver, trustee, custodian, conservator, or other similar official for it or for all or any substantial part of its assets, or (ii) makes a general assignment for the benefit of its creditors;

(d) has commenced against it in a court of competent jurisdiction any case, proceeding, or other action of a nature referred to in clause (c) above which (i) results in the entry of an order for relief or any such adjudication or appointment or (ii) remains undismissed, undischarged, unstayed, or unbonded for [NUMBER] days; or

(e) ceases to conduct business in the ordinary course.

12.6 A tax lien, warrant, or levy is imposed on Borrower or any Collateral.

12.7 Borrower, any Guarantor, or any of their respective creditors commences a case, proceeding, or other action against Lender relating to any of the Obligations, Collateral, Loan Documents, this Agreement, or any action or omission by Lenders or their agents in connection with any of the foregoing.

12.8 Any other creditor of Borrower or any Guarantor commences an action against Borrower or any Guarantor seeking to collect any debt, obligation, or liability.

12.9 Any representation or warranty of Borrower or any Guarantor made herein shall be false, misleading, or incorrect in any material respect when made.

12.10 Borrower or any Guarantor takes an action, or any event or condition occurs or exists, which Agent reasonably believes in good faith is inconsistent in any material respect with any provision of this Agreement, or impairs, or is likely to impair, the prospect of payment or performance by Borrower of its obligations under this Agreement or any of the Loan Documents.

13. Remedies. Immediately upon the occurrence of a Forbearance Default:

13.1 The Forbearance Period shall immediately and automatically cease without notice or further action without notice to, or action by, any party.

13.2 Agent and Lenders shall be entitled to exercise any or all of their rights and remedies under the Loan Documents, this Agreement, or any stipulations or other documents executed in connection with or related to this Agreement or any of the Loan Documents, or applicable law, including, without limitation, the appointment of a receiver.

13.3 [Agent's and Lenders' obligation to make loans or otherwise extend credit to Borrower shall immediately and automatically terminate, without notice to or action by any party.]

13.4 Borrower shall cooperate with Agent's repossession of all personal property Collateral, which Borrower shall immediately surrender to Agent upon Agent's request, at the time and place designated by Agent.

13.5 Agent and Lenders may, in their sole discretion, commence foreclosure actions with respect to the real property Collateral and replevin actions with respect to any of the other Collateral, and enforce the Foreclosure Stipulation.

13.6 Agent may set off or apply to the payment of any or all of the Obligations, any deposit balances, any or all of the Collateral or proceeds thereof, or other money now or hereafter owed Lenders by Borrower.

14. Bankruptcy.

14.1 Waiver of Right to File for Bankruptcy Protection. Borrower agrees that it will not institute, or cause or encourage others to institute against Borrower any proceedings under any state insolvency law or any federal bankruptcy law.

14.2 Waiver of Automatic Stay.

(a) **Waiver.** In the event Borrower is the subject of any voluntary [or involuntary] proceeding under the Bankruptcy Code, Borrower hereby unconditionally and irrevocably agrees that Agent and Lenders are immediately entitled, without notice, demand, or any other action, to relief from the automatic stay so as to allow Agent and Lenders to foreclose on their Collateral and enforce their other rights and remedies under the Loan

Documents, or at law and in equity under applicable state law. Borrower hereby consents to the immediate lifting, without notice, demand, or any other action, of any such automatic stay and agrees that it shall not, in any manner, contest or otherwise delay any motion filed by Agent or Lenders for relief from the automatic stay. Agent's or Lenders' enforcement of this stay waiver is subject to the approval of the bankruptcy court in which the case is then pending [and is effective only to the extent that it does not result in a breach of any fiduciary duty owed by Borrower's directors and officers to Borrower's creditors].

(b) **Acknowledgment by Borrower.** Borrower expressly acknowledges and agrees that (i) it is currently in default under the Loan Agreement with no ability to cure such defaults and no defense to any of its obligations under the Loan Agreement; (ii) because of its uncured defaults under the Loan Agreement, Agent and Lenders have the absolute and immediate right to pursue foreclosure and other remedies with respect to their Collateral; (iii) Agent and Lenders have specifically negotiated for this stay waiver as consideration for forbearing from the exercise of certain remedies, including forgoing foreclosure and [ANY OTHER CONSIDERATION GIVEN BY LENDERS]; (iv) it has been provided with and carefully reviewed [NAME OF APPRAISER]'s appraisal of the Collateral [DETAILS OF THE APPRAISAL REPORT, INCLUDING THE VALUATION DETERMINED AND THE AMOUNT OF THE DEBT], and based on its review of the appraisal and its own independent knowledge of the current and future use and the current value of the Collateral, Borrower agrees that there is no equity in the Collateral; (v) if it is unable to comply with, or otherwise defaults under, this Agreement, it will not have any realistic prospect of an effective reorganization of its business under Chapter 11 of the Bankruptcy Code, including the sale of its business, the sale of all or substantially all of its assets, the restructuring of its assets and liabilities, or a liquidation; (vi) any bankruptcy filing or other action it takes to stay, condition, or inhibit Agent and Lenders from exercising their remedies is taken in bad faith and (vii) the stay waiver contained in Section 14.2(a) is a material inducement to Agent's [and Required Lenders'] willingness to enter into this Agreement, without which Agent and Lenders would not have agreed to forbear from exercising their rights and remedies under the Loan Documents.

15. Miscellaneous.

15.1 Notices. Any notices with respect to this Agreement shall be given in the manner provided for in Section [NOTICES SECTION] of the Loan Agreement and Section [NOTICES SECTION] of the Guaranty.

15.2 Integration; Modification of Agreement. This Agreement and the Loan Documents embody the entire understanding between the parties hereto and supersedes all prior agreements and understandings (whether written or oral) relating to the subject matter hereof and thereof. The terms of this Agreement may not be waived, modified, altered, or amended except by agreement in writing signed by all the parties hereto. This Agreement shall not be construed against the drafter hereof.

15.3 Severability. If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.

15.4 Full Force and Effect. The Loan Documents shall remain unchanged, in full force and effect and continue to govern and control the relationship between the parties hereto, except to the extent they are inconsistent with, superseded, or expressly modified herein. To the extent of any inconsistency, amendment, or superseding provision, this Agreement shall govern and control.

15.5 Successors and Assigns. This Agreement is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors, and assigns, provided that the Borrower's and Guarantors' rights under this Agreement are not assignable. Agent and Lenders may assign their rights and interests in this Agreement, the Loan Documents, and all documents executed in connection with or related to this Agreement or the Loan Documents, at any time without the consent of or notice to Borrower or any Guarantor.

15.6 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of [NAME OF STATE] without regard to conflict of laws principles thereof.



15.7 No Waiver. No failure to exercise and no delay in exercising, on the part of the Agent or Lenders any right, remedy, power, or privilege hereunder or under the Loan Documents shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege. Further, Agent's acceptance of payment on account of the Obligations or other performance by Borrower or Guarantors after the occurrence of an Event of Default shall not be construed as a waiver of such Event of Default, any other Event of Default, or any of Agent's or Lenders' rights or remedies.

15.8 Cumulative Rights. The rights, remedies, powers, and privileges herein provided are cumulative and not exclusive of any rights, remedies, powers, and privileges provided by law.

15.9 Application of Payments. Agent may apply any and all payments it receives from Borrower, any Guarantor, or any other party, and any proceeds of any Collateral, to such portion of the Obligations as Agent shall determine in its sole discretion.

15.10 Recommendation of Counsel. Borrower and Guarantors acknowledge that Agent has recommended that they each consult with counsel prior to execution of this Agreement and represent that they either have done so or have knowingly waived the right to do so despite the express recommendation of Agent.

15.11 Consent to Jurisdiction; Venue; Service of Process.

(a) **Consent to Jurisdiction**. Borrower and Guarantors each hereby irrevocably and unconditionally consent to the [exclusive] jurisdiction of the US District Court for the District of [NAME OF DISTRICT] and of all [NAME OF STATE] state courts, for the purpose of bringing any litigation, actions, or proceedings in any manner relating to or arising out of this Agreement or any of the Loan Documents. [Nothing herein or in any Loan Document shall affect any right that Agent or Lenders may otherwise have to bring any action or proceeding relating to this Agreement or any Loan Document against Borrower or any Guarantor or its properties in the courts of any jurisdiction.]

(b) **Waiver of Venue**. Borrower and Guarantors hereby each waive any objection they may now or hereafter have to the laying of venue in such court and irrevocably waive, to the fullest extent permitted by applicable law, the defense of forum non conveniens to the maintenance of such action or proceeding in any such court.

(c) **Service of Process**. Borrower and Guarantors each hereby irrevocably consent to the service of process by certified or registered mail sent to the address provided for notices in Section 15.1 and agree that nothing herein will affect the right of Agent to serve process in any other manner permitted by applicable law.

15.12 Waiver of Jury Trial. EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY RELATING TO THIS AGREEMENT OR ANY LOAN DOCUMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER THEORY. EACH PARTY HERETO (A) CERTIFIES THAT NO AGENT, ATTORNEY, REPRESENTATIVE, OR ANY OTHER PERSON HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PERSON WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF LITIGATION, AND (B) ACKNOWLEDGES THAT THIS WAIVER IS A MATERIAL INDUCEMENT TO ENTER INTO THIS AGREEMENT.

15.13 Reimbursement of Costs and Expenses. Borrower and Guarantors agree to pay all costs, fees, and expenses of Agent and any Lender (including attorneys' fees), expended or incurred by Agent or such Lender in connection with the negotiation, preparation, administration, and enforcement of this Agreement, the Loan Documents, the Obligations, any of the Collateral and all fees, costs, and expenses incurred in connection with any bankruptcy or insolvency proceeding (including, without limitation, any adversary proceeding, contested matter, or motion brought by Agent or any other person). Without in any way limiting the foregoing, Borrower hereby reaffirms its agreement under the applicable Loan Documents to pay or reimburse Agent and Lenders for certain costs and expenses incurred by Agent and Lenders. Borrower and Guarantors are jointly and severally liable for their obligations under this Section 15.13.

15.14 Headings. The section headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

15.15 Counterparts; Electronic Execution. This Agreement may be executed in any number of counterparts, each of which shall be an original, and all of which together shall constitute one and the same instrument. Delivery of an executed counterpart of a signature page to this Agreement by facsimile or in electronic (i.e., "pdf" or "tif") format shall be effective as delivery of a manually executed counterpart of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

[NAME OF ADMINISTRATIVE AGENT]

By \_\_\_\_\_

Name:

Title:

[REQUIRED LENDERS]

By \_\_\_\_\_

Name:

Title:

[NAME OF BORROWER]

By \_\_\_\_\_

Name:

Title:

[NAME OF GUARANTORS]

By \_\_\_\_\_

Name:

Title:

**EXHIBIT A**

**BUDGET**

**EXHIBIT B  
RESTRUCTURING PLAN**

**[EXHIBIT C]**

**FORM OF BORROWING BASE CERTIFICATE**

## EXHIBIT B: Loan Crisis Management Checklist for Borrower

### COVID-19: Commercial Mortgage Loan Crisis Management Checklist (Borrower)<sup>25</sup>

#### Mobilize a Borrower Response

#### Delegate a Response Team

Assemble a response team to coordinate the borrower's actions and communications during the crisis period.

- Establish appropriate protocols and procedures for responding to the mortgage lender and the property tenants.
- Review the borrower's organizational documents to identify:
  - the entities and individuals vested with decision-making authority; and
  - all authorized signatories of the borrower.
- Ensure that the borrower's managers and signatories remain available and able to respond to requests for information, consents, and document review and execution.
- Consider temporarily delegating additional or back-up signatories to handle volume.
- Consider taking company action by resolution to temporarily expand (or limit) decision-making and document execution authority under the organizational documents.
- Evaluate the rights of third parties, including the property manager, and consider whether certain rights can (and should) be limited or suspended.

#### Identify Parties Entitled to Notice

- Identify borrower-related parties who may have a right of notice or consent relative to events that are occurring, or actions being taken, including such parties as:
  - owners, investors, and joint venture partners; and
  - affiliated property and asset managers.
- Identify outside parties who may have right of notice or consent relative to events occurring or actions taken, including such parties as:
  - the mortgage lender;
  - junior lenders and other lien creditors;
  - property insurers;

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<sup>25</sup> A checklist itemizing the steps and actions a commercial mortgage borrower should take to address an actual or imminent default under its mortgage loan caused by a major market disruption, like the 2019 novel coronavirus (COVID-19) pandemic. For current updates on certain state and local laws impacted by COVID-19, including eviction and foreclosure moratoriums, business closures, electronic signatures, recordings and notarization laws, and general crisis management guidance in handling real estate and construction matters, see Real Estate Global Coronavirus Toolkit. Practical Law Real Estate, *COVID-19: Commercial Mortgage Loan Crisis Management, Practical Law Checklist*, Westlaw © 2021 Thompson Reuters. No claim to original U.S. Government Works.

- third-party property managers; and
- property tenants.

### **Establish Response Protocols and Procedures**

Establish protocols and procedures for reviewing and analyzing relevant agreements and files.

- Establish protocols and procedures for communicating with relevant parties.
- Verify if:
  - the borrower or its defaulted tenants qualify for government assistance under any emergency relief program;
  - the borrower (as landlord) is subject to any state or local order imposing a moratorium on tenant evictions or other limitations on lease enforcement; or
  - the lender is subject to any state or local orders imposing a moratorium on other limitations on loan enforcement.
- Establish recordkeeping protocols and procedures.
- Set goals and strategies for addressing an actual or impending loan default that may persist for several months and determine whether the borrower needs a:
  - temporary forbearance of loan payment and performance obligations; or
  - a forbearance agreement to begin workout negotiations.

### **Review and Analyze Relevant Agreements**

#### **Review Loan Documents**

Review the notice provisions (which may appear in more than one loan document) and verify that:

- the mechanisms for sending and receiving notices are consistent among the loan documents; and
- the parties' notice information is correct and up to date.
- Review loan repayment provisions, particularly monthly principal and income payments, loan reserve deposits, and other regularly scheduled debt service payments to verify:
  - due dates; and
  - grace and cure periods, if applicable.
- Analyze the payment default provisions to determine:
  - whether a notice of default from the lender is required for nonpayment;
  - when (and in what amounts) late payment fees can be assessed; and
  - when (and at what rate) default interest accrues.
- Determine if any default (other than a payment default) applies based on the facts and circumstances, such as a breach of the loan's financial covenants due to a decline in values.
- Evaluate the potential recourse liability of the borrower and its guarantors and indemnitors on loan default.



- If the loan is nonrecourse debt, review the nonrecourse carveout provisions to ensure that recourse liability is not inadvertently triggered. In some loan documents, the following actions can trigger full or partial recourse liability:
  - admitting in writing to the borrower's inability to pay its debts as they become due;
  - failing to maintain the loan's required insurance coverages;
  - modifying, terminating, or waiving rights in property leases without the lender's consent;
  - incurring additional debt;
  - misappropriating or misapplying rents; and
  - violating the borrower's single purpose entity (SPE) covenants.
- For guidance reviewing and interpreting nonrecourse carveout provisions see Standard Clause, Nonrecourse Carveout Provisions in Commercial Real Estate (Mortgage Loans) (Pro-Lender).
- In the case of an SPE borrower, review the SPE covenants in the organizational documents and the loan documents to ensure that no action is being contemplated that violates those provisions. For example, incurring additional debt by taking a loan offered under a government relief program would likely violate the organizational documents and the loan documents of an SPE borrower. For guidance reviewing and interpreting SPE covenants see, Standard Clause, Separateness Covenants.
- Review the borrower's loan representations and warranties and identify (for purposes of ratifying those representations and warranties at the lender's request) any that:
  - are no longer true, accurate, or complete; and
  - must be excluded, limited, or qualified to the borrower's knowledge in any certificate ratifying the representations and warranties made in the loan documents.
- For guidance reviewing and interpreting loan representations and warranties, see Standard Clause, Borrower Representations and Warranties (Commercial Real Estate Loan Agreement).
- Determine if the lender has the right to take any action or be excused from any obligation based on a material adverse effect or an adverse change in any financial covenant, such as the loan's:
  - loan to value ratio (LTV); or
  - debt service coverage ratio (DSCR).
- Determine whether the borrower, the guarantors, or the indemnitors have any additional payment or performance obligations based on an adverse change in any financial covenant, such as the loan's:
  - LTV; or
  - DSCR.
- Determine whether the loan imposes a springing cash management system that is triggered on the occurrence of an event of default.
- Determine the borrower's reporting obligations, keeping in mind that after the occurrence of an **event of default**, the limitations imposed on the lender's right to request reporting information may not apply.
- Identify any rights or defenses that the borrower may have to its payment or performance obligations under the loan.

- Identify the extent to which the borrower must:
  - cooperate with the lender to perfect or enforce the loan; or
  - give the lender or lender parties further assurances, including any obligation owed to parties involved in the sale or securitization of the loan.
- Before entering into a lease amendment with a property tenant, consider if the lender's prior consent is required, keeping in mind that in most loan documents, after the occurrence of an event of default, the borrower needs the lender's prior approval for any proposed lease amendment.
- Before entering into an amendment to the property management agreement, obtain the lender's consent.

### **Review Third-Party Documents**

- In anticipation of the lender's request for information on lease defaults, review the lease to establish the parties' respective rights and remedies. For a comprehensive checklist for borrowers in their capacity as property landlord, see COVID-19: Commercial Leasing Crisis Management Checklist (Landlords).
- Review property-related documents with third parties, if applicable, to identify provisions that give rise to any borrower obligations (including notice obligations) or trigger liability after a loan default, such as in:
  - mezzanine or other subordinate mortgage loan documents;
  - credit or security agreements with other lien creditors;
  - contribution agreements;
  - joint venture agreements;
  - development agreements;
  - tenant-in-common agreements;
  - affiliate property management agreements; and
  - asset management agreements.
- If any party (other than the lender) is entitled to notice of a loan default under any agreement:
  - review the notice provisions to ensure notices are properly sent and received;
  - confirm the notice information is up to date; and
  - consider streamlining, if desirable, notice procedures and requirements.
- Review the property management agreement to determine if the borrower should notify the property manager to refrain from modifying any lease without first obtaining the consent of:
  - the borrower;
  - the lender; or both.

- Review all property insurance policies to determine if:
  - the borrower has a potential claim under any special coverages under any property insurance policies;
  - the lender is entitled to notice of a pending insurance claim; and
  - the lender is entitled to payment under any claim.

## **Communicating in a Crisis**

### **Communicate with Mortgage Lender**

- Review and analyze the loan documents before communicating with the lender.
- Verify that the named lender remains the owner and holder of the note and mortgage.
- Delegate a single representative of the borrower to communicate and negotiate with the lender.
- Anticipate that the lender may require evidence of the delegate's authority to act on behalf of the borrower. For a form secretary certificate evidencing authority.
- Begin assembling any documents or information that the borrower anticipates the lender may request, such as:
  - evidence of property and liability insurance coverage;
  - notices of default sent to (or received from) property tenants;
  - information relating to tenant default discussions, including information about the possibility or threat of tenant bankruptcies;
  - updated financial information on the borrower and the loan's guarantors and indemnitors;
  - updated property information, such as rent rolls, operating statements, and profit and loss statements;
  - sworn statements and certificates, including the borrower's ratification of the representations and warranties contained in the loan documents; and
  - statements or evidence concerning government relief funds available to the borrower, if applicable, to the extent the lender's request for this information is not prohibited by law).
- Ensure all official written notices are sent in compliance with the notice provisions of the loan documents, paying attention to:
  - delivery methods required; and
  - parties entitled to be copied on official loan notices.
- Contact the mortgage lender. For a form letter that can be used by a borrower requesting emergency loan payment relief, including a discussion of some typical specific requests.
- Maintain a record of all written communication sent to and received from the lender, including e-mail communications.
- Send copies of official loan notices to all parties entitled to receive those notices.

- Keep the mortgage lender apprised, if required, of change of status to the property:
  - condition or occupancy; and
  - leases.
- Avoid making statements in loan notices that could be later construed as:
  - an admission of fault; or
  - promissory estoppel.
- If appropriate after consultation with the property tenants, request consent to enter into a pre-approved form lease modification agreement, with all (or specifically identified) property tenants.
- If the lender holds escrows for taxes and insurance, confirm:
  - whether the lender will continue paying those property expenses out of escrow, subject to the availability of funds in the respective escrow account; and
  - which party will pay taxes and insurance if the escrow fund is depleted.
- If there is lockbox that receives property rents, monitor tenant deposits into the lockbox account daily.
- If the loan imposes a springing cash management arrangement, request the lender's immediate (albeit temporary) forbearance from implementing a cash management system.
- If the loan imposes any requirements on the borrower due an adverse change in LTV or DSCR, request the lender's immediate forbearance from enforcing those loan provisions.
- Request forbearance if the borrower has an immediate or impending obligation to perform construction or make capital investments.
- Request general temporary relief of payment or forbearance from loan enforcement, to the extent not otherwise mandated by law.

### **Communicate with Third Parties**

- Request forbearance or forgiveness for payment and performance obligations under property-related agreements so that:
  - a technical default under the loan is not triggered by a default under another property-related agreement; and
  - the borrower can ratify the loan representations and warranties to the lender confirming that the borrower is not in default under its other agreements.
- Remember to copy all parties entitled to notices that are sent to or received from the lender.
- Obtain the lender's consent, if required, before modifying agreements with other interested parties, including:
  - the property tenants; and
  - the property manager.

- Contact the property manager to coordinate a consistent, lender-approved response to tenants' requests for:
  - formal lease modifications;
  - rent abatement, forgiveness, or deferrals; or
  - new leases.
- Request that the property manager determine the status of any pending new lease transaction for purposes of ongoing reporting to the lender.

### **Consider Relief Programs**

- Although relief programs are still evolving, determine if:
  - the borrower is entitled to immediate temporary relief against loan enforcement due to the adverse effects of COVID-19;
  - the borrower or its tenants are entitled to any monetary, federally funded relief and CARES Act: Stimulus for Small Businesses Under the SBA Checklist).
- Although state executive orders that impose moratoria on loan enforcement or tenant evictions are still evolving, determine if:
  - the lender is subject to any federal, state, or local executive order to forbear foreclosure of the loan.
  - any tenant is entitled to a temporary moratorium on eviction proceedings; or.
  - If the lender has adopted any voluntary policy for responding to the crisis. Check the lender's website for any information or instructions about requesting loan relief.

### **Recordkeeping**

- Keep a file of all notices, demands, requests, and agreements (including those made by e-mail) sent to or received by the borrower with:
  - the mortgage lender;
  - property tenants;
  - property managers;
  - governmental entities; and
  - interested third parties.
- Keep a separate record of all payments and payment dates (and record whether the payment was made in full, in part, or missed) for:
  - the loan;
  - each property lease; and
  - the property management agreement.
- Memorialize important telephone conversations by making a contemporaneous written business record for the property files.

## EXHIBIT C: Loan Crisis Management Checklist for Lenders

### COVID-19: Commercial Mortgage Loan Forbearance Agreement Drafting Checklist (Lender)<sup>26</sup>

#### Identify All Interested Parties

- Identify all parties who must be notified of (or consent to) the loan forbearance, such as:
  - loan servicers;
  - mezzanine and subordinate lenders;
  - co-lenders and participants; and
  - lockbox banks.
- Make all loan guarantors and indemnitors party to the forbearance agreement or have them sign a separate consent and reaffirmation.
- Require the borrower and any entity guarantor or indemnitor to submit evidence that the entity is:
  - in good standing in its respective state of formation; and
  - authorized to do business in the property's jurisdiction (if required under the loan documents).

#### Describe the Loan Status and Consideration for the Agreement

- State the loan amount. If the loan is not fully advanced, state the maximum principal loan amount.
- Describe the loan documents with particularity. Consider attaching a schedule that separately lists each loan document. Document descriptions should include:
  - the exact document title;
  - the date of the document;
  - the parties to the document; and
  - any recording information.
- Describe the defaults that have occurred.
- Establish adequate consideration for the forbearance by including recitations (that borrower must acknowledge in the acknowledgment section) that:

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<sup>26</sup> A Checklist of key considerations for commercial mortgage lenders drafting a short-term forbearance agreement. This Checklist is suitable if addressing the temporary non-performance of a loan caused by a major market disruption, like the 2019 novel coronavirus global pandemic (COVID-19), not for a long-term forbearance that contemplates a loan workout. For current updates on certain state and local laws impacted by COVID-19, including eviction and foreclosure moratoriums, business closures, electronic signatures, recordings and notarization laws, and general crisis management guidance in handling real estate and construction matters, see Real Estate Global Coronavirus Toolkit. Practical Law Real Estate, *COVID-19: Commercial Mortgage Loan Forbearance Practical Law Checklist*, Westlaw © 2021 Thompson Reuters. No claim to original U.S. Government Works.

- the lender is entitled to exercise all rights and remedies available at law and in equity in response to the events of default;
- the borrower parties have requested a forbearance against loan enforcement; and
- the lender has agreed to the terms of the forbearance subject to and in consideration of the representations, warranties, and covenants made by the borrower parties in the forbearance agreement.

### **Include Borrower Acknowledgments, Reaffirmations, and Representations**

- Require the borrower parties to acknowledge and agree that:
  - the recitals are true;
  - an event of default has occurred under the loan;
  - the lender has properly notified the borrower of the event of default or, in the alternative, the borrower waives notification;
  - the loan documents are enforceable and remain unchanged, except as modified by the forbearance agreement;
  - the borrower has no claims or counterclaims against the lender; and
  - if applicable, the lender has the right to reallocate or reapply funds held in escrow and reserve accounts.
- Require the borrower to affirm the original representations and warranties made in the loan documents. If there are exceptions to the original representations and warranties, the lender should:
  - require the borrower to submit a certified schedule of exceptions for the lender's approval and consider attaching that schedule as an exhibit to the forbearance agreement; and
  - consider if additional covenants, conditions, or limitations should apply in the forbearance period due to changed circumstances.
- Require the borrower to confirm the amount of the outstanding indebtedness.
- Require the borrower parties to represent and warrant that:
  - the borrower parties are authorized to execute and deliver the forbearance agreement;
  - the signatories are authorized to execute the agreement on the entities' behalf;
  - no litigation is pending (or threatened) against any borrower party;
  - there are no defaults or events of default, other than the ones identified and acknowledged by the parties; and
  - the borrower is represented by legal counsel or has knowingly waived the right to legal counsel.

### **Require Releases and Indemnities**

- Require the borrower parties to release the lender from all existing claims to the extent not prohibited during any state-mandated forbearance period. Releases and waivers should be as broad as possible.
- Determine if state law limits or prohibits specific waiver or release provisions. Some states may limit or prohibit the enforceability of:

- waiving specific statutory borrower rights;
  - releasing the lender from future claims; or
  - releasing the lender from liability for its own misconduct or negligence.
- Determine if state law imposes any requirements for waivers or releases. Some states require waivers and releases to:
    - contain specific statutory language;
    - be separately initialed or signed by the releasing party; or
    - be conspicuously set out in the document, including specific font size or document formatting.
  - Require the guarantors to indemnify the lender against loss and liability that may arise from the transaction unless the indemnity language in loan documents is broad enough to cover potential liability during the forbearance.

### **Describe Scope of Forbearance**

#### **Establish Forbearance Period**

- Determine if mandatory forbearance is required under state law.
- Consider whether the forbearance period should be automatically extended if the state:
  - mandates extensions to stay-at-home orders; or
  - orders businesses to remain.
- Consider the need for additional extensions to the forbearance period based on:
  - the property tenants' ability to reopen after the emergency ends; and
  - the effect of any state-mandated moratoria on tenant evictions.
- Ensure the forbearance period automatically terminates if the borrower:
  - defaults under the forbearance agreement; or
  - defaults again under the loan documents.

### **Define Rights and Obligations Modified and Reserved in Forbearance**

#### **Modifying Borrower Obligations**

- Determine if state law or executive order requires the lender to waive late fees or default interest, or both, for:
  - payments owed before any mandatory forbearance period;
  - payments owed during mandatory forbearance periods and extensions, if permitted; or
  - payments owed during any voluntary forbearance periods and extensions, if any.
- Determine if the lender must defer debt service payments during any state-mandated forbearance period. If so, consider entering into a separate agreement for periods beyond state-mandated forbearances and moratoria.



- Consider the need to temporarily modify the debt service payment schedule.
- Consider, if requested, consenting to:
  - suspend the borrower's obligation to make deposits into some or all loan reserves and **escrow** accounts;
  - allow the redirection or reallocation of account balances in certain loan reserves and escrows;
  - allow modification to all or specifically identified property leases;
  - suspend the borrower's obligation to perform scheduled capital improvements or projects requiring construction or capital investment;
  - allow the borrower to incur additional debt by taking loans available from government-funded relief programs; or
  - extend deadlines for performing obligations incapable of the borrower's performance in present circumstances.
- If the lender forgives any payments or waives any fees, ensure that waiver or forgiveness is not effective until the borrower has fully performed under the forbearance agreement.

### **Modifying Lender Obligations**

- Suspend any monetary obligations of the lender under the loan documents, such as the obligation to:
  - make further loan advances (in the case of a construction loan or revolving line of credit);
  - reimburse the borrower from loan escrow and reserve accounts; or
  - allow the disbursement of excess cash flow from an established lockbox account.

### **Modifying Lender Rights**

- Ensure that the lender reserves all rights and remedies that are not specifically modified by the forbearance agreement.
- Identify the specific rights and remedies the lender is forbearing, ensuring that forbearance is conditioned on no further default occurring. In short-term forbearances, lenders may agree, if requested, to temporarily suspend the right to:
  - accelerate the loan;
  - commence judicial foreclosure or trustee sale;
  - petition for the appointment of a rent receiver;
  - impose additional payment obligations because of an adverse change to the property's loan to value ratio or debt service coverage ratio; or
  - require additional guaranties because of an adverse change to the guarantor's net worth.
- Depending on the length of the forbearance period and the lender's confidence in the borrower parties, consider waiving or deferring the right triggered by the loan default to establish a cash management lockbox account for collection of property rent.

## **Reserving Lender Rights**

- Ensure that the agreement preserves the lender's enforcement rights not specifically modified by the agreement, such as the right to protect and defend:
  - the collateral;
  - the lien and security interest of the mortgage against the interest of third parties, including subordinate lenders; and
  - the lender's rights in bankruptcy, including the right to reinstate any payment later determined to be preferential transfer within the meaning of the Bankruptcy Code.

## **Require Additional Borrower's Covenants During the Forbearance Period**

- Consider the need to expand property financial reporting or the frequency of financial reporting, requiring items, such as:
  - rent rolls;
  - operating statements,
  - budgets;
  - profit and loss statements; or
  - cash flow statements.
- Consider requiring net worth statements or tax returns from the borrower parties, including individual guarantors and indemnitors.
- Ensure that any pre-approval to the borrower's actions is:
  - clearly and narrowly defined; or
  - set out in a pre-approved sample form.
- Require the borrower to notify the lender of adverse events, such as tenant defaults or bankruptcies.
- Require the borrower to deliver, on request, instruments needed to correct the loan documents or perfect the mortgage lien (to the extent this requirement is not prohibited by law in any state-mandated forbearance period).
- Consider requiring the borrower to acknowledge or reaffirm:
  - the lender's right to reallocate funds in one or more loan reserves; or
  - apply funds in escrow or reserve to debt service payments.
- Set out the borrower's payment obligations during the forbearance period, if applicable.
- Consider requiring the borrower to suspend distributions under the entity's organizational documents.

## **Include Important Boilerplate Provisions**

- Include important boilerplate provisions, such as:
  - an integration clause, making the agreement the final expression of the parties' intent;
  - no waiver or modification, specifying that the lender waives no rights or changes loan obligations except to the extent modified during the forbearance period;
  - time of the essence;
  - severability, which may emerge as an important provision as emergency executive orders continue to promulgate; and
  - waiver of jury trial.
- If the agreement is executed before the conditions precedent to the effectiveness of lender's forbearance have been satisfied, identify all borrower covenants that are conditions precedent to the effectiveness of lender's forbearance, such as:
  - the payment of fees; or
  - the delivery of documents and information.
- Ensure that the agreement either:
  - sets out how notices must be sent and received during the forbearance period; or
  - reaffirms the notice provisions under the loan documents.

## **Describe Debt Service Payments During Forbearance Period**

- If debt service payments are modified during the forbearance agreement, specify any change that applies to:
  - payment amounts;
  - the accrual of interest;
  - payment due dates or repayment schedule;
  - amortization rates or schedules;
  - grace periods;
  - late fees;
  - the method of payment; or
  - the application of payments to outstanding indebtedness.
- Consider if the borrower is to be given the right to make partial payments of debt service and the implications of partial payment.
- Consider activating, if the loan documents allow, a springing cash management lockbox account for the collection of rents.
- Determine if adjustments are appropriate to the cash management waterfall provisions of any existing cash management agreement.

## **List Events of Default**

- Ensure that existing defaults are identified with specificity. Forbearance should not apply to unknown, unidentified, or later occurring defaults.
- Make it is an event of default under the forbearance agreement if:
  - any borrower party breaches its covenants under the forbearance agreement;
  - conditions precedent to the lender's continued forbearance, if any, are not timely satisfied;
  - the borrower party representations prove to be false or misleading; or
  - the warranties or indemnities of any borrower party are repudiated.
- Specify that the forbearance period terminates automatically if an event of default, other than the defaults on which the forbearance is based, occurs under either:
  - the forbearance agreement; or
  - the loan documents.

## **Consider Fees, Costs, and Expenses**

- Consider charging a forbearance fee for the initial forbearance period and any extension period to the extent not prohibited or limited by state law or moratoria during:
  - mandatory forbearance periods and extensions; and
  - voluntary forbearance periods and extensions.
- Require, to the extent not prohibited by law, that the borrower pay the lender's transactional costs and expenses, including the lender's legal fees.

## **Establish Document Execution Protocols**

- Confirm that electronic signatures and remote notarization are permitted in the governing jurisdiction before allowing any borrower request to execute documents electronically or notarize documents remotely.
- Require the borrower parties to deliver (with the signed forbearance agreement) a secretary's certificate attesting to:
  - the agreement's due execution; and
  - the signatory's authority to sign the forbearance agreement on behalf of the entity.
- Ensure that the agreement allows for counterpart execution.
- If the forbearance agreement permits electronic delivery, require an original signature within a specific period after the effective date of the agreement.
- Ensure that the agreement provides that is not effective until executed and delivered by the lender to the borrower.