TEXAS ANNOTATED
PROMISSORY NOTE

PRESENTED BY
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John M. Nolan is a shareholder Real Estate Section of the law firm of Winstead Sechrest & Minick P.C. and practices in the Dallas office of that firm. He serves as the head of the firm's Real Estate Section and is a former member of the firm's Advisory Committee. His practice involves representation of all facets of commercial real estate including extensive representation of financial institutions, finance/equity funding, conduit financing, acquisitions and sales, development and construction, loan restructures and workouts. Mr. Nolan is a graduate of The University of Texas at Austin, receiving his B.A. in 1970, graduating cum laude, and his J.D. in 1973. He earned his L.L.M. in taxation in 1976 from George Washington University. He is a member of the State Bar of Texas and the Bar of the District of Columbia as well as the Real Estate Council, Texas College of Real Estate Attorneys and the College of the State Bar of Texas. He has authored numerous articles on real property, finance and development matters, and has spoken extensively at numerous seminars including the Mortgage Lending Institute, the Advanced Real Estate Course, CLE International, Dallas Bar and the 12th Annual Real Estate Law Seminar of South Texas College of Law on a variety of real estate, lending, developmental, environmental and transactional topics. Mr. Nolan is a former member of the Board of Directors and Executive Committee of the American Lung Association and is a member of the Salesmanship Club of Dallas.

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Michael F. Alessio is an associate in the Real Estate Section of Winstead Sechrest & Minick, and practices in the Dallas office of that firm. His practice involves a wide variety of commercial real estate transactions including permanent and construction financing, mezzanine financing, preferred equity transactions, and securitized mortgage lending. He has significant experience in handling multi-site portfolio acquisitions and the related debt and equity structuring on behalf of pension plans, REIT's and other long-term equity investors. He represents clients in the development of retail centers, multifamily projects, industrial facilities, and office build-to-suit projects. He serves as a member of the steering committee of the firm's Leasing and Development Practice Group and serves on the firm's Recruiting Committee and Young Lawyer Committee. He is the 1998 recipient of the firm's award for outstanding associates. Mike is a graduate of The University of Texas at Austin, receiving his B.A. in 1992. He earned his J.D. in 1995 from Southern Methodist University, graduating cum laude and was a member of the Order of the Coif and the SMU Law Review. He is a member of the State Bar of Texas, the College of the State Bar of Texas and the Dallas Real Estate Council, where he served on the Associate Leadership Council of that foundation. He has authored several articles on real property, finance and collateral foreclosure matters for the Mortgage Lending Institute, the Dallas Bar and the SMU Law Review.

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INTRODUCTION

This Annotated Promissory Note, while primarily the effort of John M. Nolan, Michael F. Alessio, Niles W. Holmes and Matthew N. Hudnall, has been a firm-wide effort for over a year. It is intended to provide the reader with a comprehensive form of Promissory Note evidencing a permanent loan in a commercial context which is secured by a first lien on improved real property located in Texas. This form assumes that no loan agreement is being executed in connection with the transaction. Although addressed in certain of the annotations, specific issues relating to construction lending, revolving credit facilities or even significant rehabilitation financing projects are generally outside the scope of this presentation. Similarly, this Promissory Note addresses a series of securitization concerns, but would need further modification to be utilized as a conduit loan instrument. It is important to note that, while this presentation contains significant annotations regarding negotiability and usury concerns, a comprehensive treatment of these topics is outside the scope of this presentation. As with any generic form, the practitioner must tailor the instrument to the specific needs of the client and the factual context of the given loan transaction.

This Promissory Note should be used for the purposes described below in connection with the Annotated Deed of Trust (cited in the annotations to this Promissory Note as the "Annotated Deed of Trust") also authored by this firm, to which reference is often made herein.

The broad purposes of this presentation are to provide the reader with a series of detailed annotations drawing upon statutory law, case law, practical observations and drafting concepts for use by practitioners and their clients in a commercial real estate practice. This presentation contains significant commentary from numerous commercial lending lawyers of this firm and an American Arbitration Association Panelist of this firm (most significantly Michael W. Hilliard and Robert E. Wood), contributing insights not normally available to real estate practitioners. These annotations are not intended to constitute a legal opinion and, while comprehensive (even citing to legislation just recently or yet to be enacted or effective), are not and cannot be dispositive of every issue or factual circumstance that a practitioner or party will encounter in the negotiation and preparation of a Promissory Note. It is our belief that this presentation can, at a minimum, provide the following:

a. assistance in the preparation of promissory notes, deeds of trust and other loan documents;
b. a valuable tool for counsel, whether representing the borrower or the lender, in negotiating a promissory note, and as an ancillary benefit to those negotiations, "educating" their respective clients as to the reasons for the inclusion or, where applicable, modification or exclusion of the provisions contained in this Promissory Note;
c. a resource for the preparation and negotiation of legal opinions in commercial lending transactions; and
d. a valuable tool for the training of lawyers.

As recited above, many attorneys, both within and outside the Real Estate Section at Winstead Sechrest & Minick provided valuable insight and research assistance to the authors in producing this presentation. Our acknowledgment is inadequate thanks for their efforts, but we

would like to acknowledge with gratitude the assistance of Mike Baggett (Litigation), Mark Brannum (Bankruptcy), Randy Matthews, Jennifer Knapek, Doug Wingo and Emeline Yang (Financial Institutions), and Kevin Sullivan, Ed Peterson, Paul Downey, Mike Johnson, Janet Follstaedt, Jay Thompson, Bill Weinberg, Wade Williams and Rob Pivnick (Real Estate). In addition, without the editing efforts of Kirsten Alessio and Rob Pivnick, and the word processing and editing skills of Kathy Arras, Susan Shores, Nancy Cummings, Suzi Law, Gina Villella, Mylinda Carter, Pat Collins, Elizabeth Safran and Nanci Kunce, the quality of the end product would not have been possible.

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PROMISSORY NOTE[1]

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[1] A promissory note is a contract containing a promise to pay money. *See* N.E. Guthrie v. National Homes Corp., 387 S.W.2d 158 (Tex. Civ. App.--Fort Worth), *judgment reformed*, 394 S.W.2d 494 (Tex. 1965); TEX. BUS. & COM. CODE § 3.104(e) (West 2000). The general form and many of the specific terms of a Note are often dictated by the concept of negotiability. If negotiable, the Note may be freely transferred (*i.e.*, negotiated) to a third party who, upon proper transfer and indorsement, acquires immunity from certain defenses of persons whose interest preceded that of the transferee. The protected transferee will generally have Lender's right to enforce Borrower's obligations under the Note, including any right as a holder in due course. *See* TEX. BUS. & COM. CODE § 3.203 (West 2000). This freedom of transferability creates liquidity and facilitates the flow of capital in commercial transactions. Further, if a Note is negotiable, Article 3 of the Texas Business and Commerce Code (which applies only to negotiable instruments) provides a source of predictable results in connection with transactions involving the Note and could provide important terms that may be missing from the Note. *See, e.g.*, TEX. BUS. & COM. CODE § 3.107 (Instrument Payable in Foreign Money), § 3.111 (Place of Payment), § 3.112 (Interest Rate), § 3.113 (Date of Instrument) (West 2000). If a Note is not negotiable, then its transfer is generally governed by the common law rules applicable to the assignment of contracts. *See* FDIC v. Nobles, 901 F.2d 477, 480 (5th Cir. 1990); Bellfort Nat'l Bank v. C.M. Turtur Inv., Inc. 883 F.2d 35, 37 (5th Cir. 1989); First City, Texas - Beaumont, N.A. v. Treece, 848 F. Supp. 727, 735 (E.D. Tex. 1994)(applying Texas law); N.E. Guthrie, 387 S.W.2d at 160.

For the foregoing reasons, among others, it is often critical that a Note be negotiable. For a Note to be negotiable, it must (i) be in writing, (ii) be executed by Borrower, (iii) contain an unconditional promise to pay a fixed amount of money (with or without interest or other charges described in the promise), (iv) be payable to bearer or to order at the time it is issued or first comes into possession of a holder, (v) be payable on demand or at a definite time and (vi) not state any other undertaking by or instruction to Borrower to do any act other than pay money (but the promise may contain, however, (a) an undertaking to give, maintain or protect collateral to secure payment, (b) an authorization or power in favor of Lender to confess judgment or realize on or dispose of collateral, and (c) if not otherwise prohibited by law, a waiver of the benefit of any law intended for the protection of Borrower). TEX. BUS. & COM. CODE § 3.104(a) (West 2000). Negotiability is destroyed when any one or more of the elements contained in section 3.104(a) of the UCC is not satisfied. *See* Pan Am. Bank v Nowland, 650 S.W.2d 879 (Tex.App.--San Antonio 1983, writ ref'd n.r.e.), *overruled on other grounds*, Crimmins v. Lowry, 691 S.W.2d 582 (Tex. 1985) (an instrument not made to "order" or "bearer" was non-negotiable).

There may be, however, no compelling reason for a typical real estate-secured Note to be negotiable. In the current economic environment, and specifically in connection with interim or non-securitized financing instruments, the characterization of a Note as a negotiable instrument is of less importance to Lender. Many practitioners and Lenders will, however, remember the negotiability issues arising in the late 1980's and early 1990's in the "fallout" of the savings and loan failures. In connection with the workouts occurring during that period, negotiability was often the critical issue as to whether the holder of a Note was able to successfully maintain collection efforts where the holder had acquired the Note through one or a series of purchase transactions. Further, if Lender has no intention of transferring the Note (or at least maintaining the largest possible pool of transferees), negotiability is of less importance to Lender. Borrower would ordinarily prefer that the Note be non-negotiable so that if the Note were transferred, Borrower would have more flexibility to assert Borrower's personal defenses to payment on the Note.

While a comprehensive analysis of negotiability is beyond the scope of this presentation, individual elements of negotiability are discussed throughout the annotations to this Note. *See* second, fifth, sixth, ninth and tenth annotations to the introductory paragraph of this Note, second annotation to Section 1.1 (Definition of Deed of Trust), third annotation to Section 2.1 (Payment of Principal and Interest), first and second annotations to Section 2.3 (Payments), annotation to Section 4.11 (Successors and Assigns), annotation to Section 4.12 (Joint and

$_____.00 **_____, 20___**

FOR VALUE RECEIVED[2], _____, a _____ (whether one or more, "Borrower")[3], having an address at _____[4], hereby promises

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Several Liability), second annotation to Rider 2 (Alternative Rate Options), first annotation to Rider 5 (Optional Exculpation Provisions), and first annotation to Rider 9 (Allonge to Promissory Note), *infra*.

[2] The term "for value received" has significance for the Note both as a generic contract and as a negotiable instrument. A Note (whether or not it is negotiable), like any contract, must be supported by consideration. If the Note is not issued for consideration, Borrower has a defense to the obligation to pay on the Note. *See* Hughes v. Belman, 239 S.W.2d 717, 720 (Tex. Civ. App. -- Austin 1951, writ ref'd n.r.e.); TEX. BUS. & COM. CODE § 3.303 cmt. 1 (West 2000). As a practical matter, failure of consideration on a Note is typically not an issue and if a written contract recites consideration or declares that consideration has been paid, this recital is prima facie evidence of the facts recited. *See* Short v. Price, 17 Tex. 397 (1856). Section 1.201(44) of the Texas Business and Commerce Code (which does not apply to Article 3) defines "value" as "any consideration sufficient to support a simple contract." TEX. BUS. & COM. CODE § 1.201(44) (West 2000).

Under Article 3, the concept of "value" is not precisely the same as "consideration," but is relevant to the issue of negotiability. *See* TEX. BUS. & COM. CODE § 3.303(b) (West 2000). An instrument must be transferred for "value" if the holder is to be considered a holder in due course. An instrument is issued or transferred for value if: (i) the instrument is issued or transferred for a promise of performance, to the extent the promise has been performed, (ii) the transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding, (iii) the instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due, (iv) the instrument is issued or transferred in exchange for a negotiable instrument, or (v) the instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument. *See* TEX. BUS. & COM. CODE § 3.303(a) (West 2000). Outside the scope of Article 3, the concepts of consideration and value are generally synonymous. Under Article 3, however, if an instrument is issued for value, it is also issued for consideration. The converse is not necessarily true under Article 3. TEX. BUS. & COM. CODE § 3.303 cmt. 1 (West 2000).

[3] The parties to a Note should be expressly identified on the face of the instrument in such a manner as to remove any doubt as to their identity. However, absolute accuracy in the spelling of Borrower's name is not always required for proper identification of Borrower. As long as an incorrect spelling sounds practically identical to the correct name when commonly pronounced, the incorrect spelling may nevertheless constitute a proper identification of Borrower. *See* Chumney v. Craig, 805 S.W. 2d 864, 866 (Tex. App.--Waco 1991, writ denied); Cockrell v. Estevez, 737 S.W.2d 138, 139 (Tex. App.--San Antonio 1987, no writ); Means v. Protestant Episcopal Church Council of the Diocese of Texas, 503 S.W. 2d 591, 592 (Tex. Civ. App.--Houston [1st Dist.] 1973, writ ref'd n.r.e.). *See also* TEX. PROP. CODE § 112.004 (West 2000).

[4] It is critical for Lender to obtain the correct address for Borrower. Sending notices to an incorrect address could raise questions as to whether default, acceleration and posting notices were effective. If the address included is not correct, sending notices to the incorrect address may be legally sufficient notice under the Note, but such notices will not advance the purpose of reaching the intended recipient. Further, Lender and the drafter of the Loan Documents should confirm that the address for Borrower under each of the Loan Documents is exactly the same (*e.g.*, each comma, period and abbreviation) to avoid having to send multiple notices pursuant to an event which may constitute a default under multiple loan documents.

to pay[5] to the order of[6] _____, a _____[7] (together with its successors and assigns and any subsequent holders of this Promissory Note, the "Lender"), as hereinafter provided, the principal sum of _____ AND NO/100 DOLLARS ($_____.00)[8] or so much thereof as may be advanced by Lender from time to time hereunder[9] to or for the benefit or account of Borrower, together with interest

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[5] The Texas Business and Commerce Code (sometimes referred to in this presentation as the "UCC") divides the universe of negotiable instruments into two general categories: notes and drafts. Simply stated, a note is a promise and a draft is an order. TEX. BUS. & COM. CODE § 3.104 cmt. 4 (West 2000). Under the UCC, a "promise" is defined as "a written undertaking to pay money signed by the person undertaking to pay." *Id.* § 3.103(a)(9). One of the required elements of a negotiable instrument is that the instrument contain a promise or order to pay the amount stated therein. *Id.* § 3.104(a).

[6] The phrase "to the order of" evidences an essential element of negotiability. TEX. BUS. & COM. CODE § 3.104(a)(1) (West 2000). *See* first annotation to the Note, *supra*.

[7] When representing a Lender that is not organized under Texas law, a determination should be made as to whether Lender is required to qualify to do business in Texas by virtue of making and servicing the loan and Lender's other activities in Texas. The mere origination, funding and servicing of the loan (so long as those activities are conducted outside of Texas) by a Lender will not by itself (i) constitute doing business in Texas or (ii) require registration by or licensing of Lender as a foreign corporation in Texas. *See* TEX. BUS. CORP. ACT art. 8.01 (West 2000). The Texas Limited Liability Company Act and Texas Business Corporation Act address the admission of foreign limited liability companies and business corporations, respectively, and the requirements to obtain a certificate of authority (evidence of qualification to do business) from the Secretary of State of the State of Texas. Under the foregoing statutes, there are certain activities by which a foreign company or corporation "shall not be considered to be transacting business in this State, for purposes of this Act, by reason of carrying on in this State any one or more of the following activities: . . . (7) Creating as borrower or lender, or acquiring, indebtedness or mortgages or other security interests in real or personal property; (8) Securing or collecting debts due to it or enforcing any rights in property securing the same." *Id.*

[8] The numbers and words used to describe the principal amount of the Note should exactly match. If the numbers and words are contradictory, the amount of money described by the words will generally prevail over the numbers. TEX. BUS. & COM. CODE § 3.114 (West 2000). However, if the words used in the Note are ambiguous, such as "nineteen hundred eight hundred dollars," the numerical figures will control. *See* Wall v. East Texas Teachers Credit Union, 533 S.W.2d 918, 920 (Tex. 1976); N.E. Guthrie, 394 S.W.2d at 496.

[9] For the Note to be negotiable, the amount promised to be paid must be a fixed amount, with or without interest and other charges as set forth in the Note itself. TEX. BUS. & COM. CODE § 3.104(a) (West 2000). A promise to pay a definite amount plus or minus an indefinite sum or discount makes the instrument nonnegotiable. *See* Harrison v. Hunter, 168 S.W. 1036, 1037 (Tex. Civ. App. 1914, no writ). This requirement is often the most difficult element of negotiability to maintain. If the transaction contemplates or requires multiple advances or establishes a line of credit, the resulting Note does not satisfy the "fixed amount" (or in older terminology the "sum certain") requirement, and therefore, is not negotiable. *See* Resolution Trust Corp. v. Oak Apts. Joint Venture, 966 F.2d 995 (5th Cir. 1992) (note for two million dollars "or so much thereof as may be advanced" is not negotiable); In Re Hipp v. Lawrence Systems, et al., 71 B.R. 643 (N.D. Tex. 1987); Prichard v. Cowick, 287 S.W.2d 689, 691 (Tex. Civ. App. -- Amarillo 1950, writ ref'd n.r.e.)(a promissory note providing for certain discounts to the principal amount if payment was made prior to maturity was contingent as to the amount of pre-maturity payments made by borrower and was therefore non-negotiable); Hinckley v. Eggers, 587 S.W.2d 448, 451 (Tex. Civ. App.-Dallas 1979, writ ref'd n.r.e.)(a promissory note imposing personal liability on maker to pay taxes due on the collateral was non-negotiable because the amount of the taxes could not be determined from the instrument itself); In Re 1301

thereon at the Note Rate (as hereinafter defined)[10], and otherwise in strict accordance with the terms and provisions hereof.[11]

ARTICLE I - DEFINITIONS

1.1 Definitions.[12] As used in this Promissory Note, the following terms shall have the following meanings:

Borrower: as identified in the introductory paragraph of this Note.

Business Day:[13] a weekday, Monday through Friday, except a legal holiday or a day on which banking institutions in Dallas, Texas are authorized or required by law to be

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Connecticut Ave. Assn. v. Resolution Trust Corp., 126 B.R. 823 (D.C. 1991) (construction loan containing a provision whereby the principal could increase is not negotiable); Yin v. Society National Bank Indiana, 665 N.E.2d 58 (Ind. App. 1996) (line of credit note not negotiable).

[10] If the Note is a negotiable instrument that provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues. TEX. BUS. & COM. CODE § 3.112(b) (West 2000). It should be noted that the Texas version of section 3.112 of the UCC contains special non-uniform language that was added to clarify that application of section 3.112 should not be misinterpreted to result in a violation of Texas usury law. In Texas, the judgment interest rate is the lesser of (i) the rate specified in the contract, which may be a variable rate or (ii) 18% per year. TEX. FIN. CODE § 304.002 (West 2000). If the Note is not a negotiable instrument or does not provide for interest, Lender may charge and receive from Borrower legal interest at an annual rate of 6% on the principal amount of the Note, commencing on the 30th day after the date on which the amount is due. *Id*. It is also important to note that an agreement as to the maximum permissible rate of interest for usury purposes under Texas law need not be in writing and may be established by course of conduct. *See* Mercedes-Benz Credit Corp. v. Worldwide Trucks, Inc., 948 F.2d 976 (5th Cir. 1991). Texas courts have further stated that the 6% ceiling on interest applies only if the interest rate cannot be determined from the language of the contract or from the course of the conduct between the parties. Dunnam v. Burns, 901 S.W.2d 628 (Tex. Civ. App.--El Paso 1995, no writ).

[11] The language "in strict accordance with the terms and provisions hereof" is relevant to the "no waiver" issues discussed in the annotations to Section 4.1 (No Waiver), *infra*, and the issue of time being of the essence discussed in the annotation to Section 4.13 (Time is of the Essence), *infra*.

[12] All definitions have been accumulated in this Section 1.1 for easy reference (except for the definition of Charges, Maximum Lawful Rate and Related Indebtedness, which are contained in Section 4.3(c) hereof). This Note also contains Riders which address various optional or additional provisions. If a Rider is incorporated into the body of the Note, the definitions contained in that Rider should be incorporated into this Section 1.1.

[13] References to this term are made in Sections 2.3 (Payments), 2.4 (Computation Period) and 4.8 (Counting of Days) and in Rider 2 (Alternative Rate Options) and Rider 4 (Prepayment Options), *infra*.

closed.[14] Unless otherwise provided, the term "days" when used herein shall mean calendar days.

Charges:[15] as defined under Section 4.3(c) hereof.

Debtor Relief Laws:[16] Title 11 of the United States Code[17], as now or hereafter in effect, or any other applicable law, domestic or foreign, as now or hereafter in effect, relating to bankruptcy, insolvency, liquidation, receivership, reorganization, arrangement or composition, extension or adjustment of debts, or similar laws affecting the rights of creditors.

Deed of Trust:[18] that certain Deed of Trust[19] dated as of the date hereof, executed by Borrower[20], as grantor, to _____, as trustee, for the benefit of Lender, as

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[14] In Texas, legal holidays include the following national holidays: January 1, 3rd Monday in January, 3rd Monday in February, last Monday in May, July 4, 1st Monday in September, November 11, 4th Thursday in November and December 25; and the following state holidays: January 19, March 2, April 21, June 19, August 27, Friday after Thanksgiving and December 26. TEX. GOVT. CODE § 662.021 (West 2000). If a Lender closes during normal business hours due to an event such as a robbery or power failure, that day is considered to be a legal holiday for that Lender to the extent Lender suspends its operations. TEX. FIN. CODE § 93.012 (West 2000).

[15] Reference to this term is made in Section 4.3(c) (Definition of Charges and Maximum Lawful Rate), *infra*.

[16] References to this term are made in Section 2.6 (Unconditional Payment) and in Rider 5 (Optional Exculpation Provisions), *infra*.

[17] 11 U.S.C. § 1 et seq. (1988).

[18] References to this term are made in Sections 1.1 (Definition of Loan Documents and Mortgaged Property) and 4.15 (Controlling Agreement) and in Rider 4 (Prepayment Options), Rider 5 (Optional Exculpation Provisions) and Rider 6 (Debt Coverage Ratio Definitions), *infra*.

[19] The incorporation into the Note of the terms of another document will generally destroy the negotiable status of the Note as not satisfying the "unconditional promise" requirement under section 3.104(a) of the UCC. Sections 3.104(a)(3) and 3.106 of the UCC provide certain guidelines for determining whether a provision contained in the Note constitutes a condition that will destroy negotiability. A promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing. TEX. BUS. & COM. CODE § 3.106(a) (West 2000). However, the mere reference to another document does not necessarily make the promise conditional. *See id.* § 3.106(a) and (b). For example, a reference to the Deed of Trust for a statement of Lender's rights with respect to the Mortgaged Property does not in and of itself destroy negotiability or create a condition; however, stating that Borrower's obligation to pay on the Note is "subject to" certain conditions contained in the Deed of Trust would create a condition. *See id.* § 3.106(b)(i); Resolution Trust Corp. v 1601 Partners, Ltd., 796 F. Supp 238 (N.D. Tex. 1992).

[20] The grantor under the Deed of Trust need not be the maker of the Note that is secured by the Deed of Trust lien, as the grantor may pledge the Mortgaged Property as security for the repayment of the debt or obligation of another. *See* Wilbanks v. Wilbanks, 330 S.W.2d 607, 608 (Tex. 1960); *see also* First Baptist Church v. Baptist

beneficiary, relating to the Mortgaged Property. The indebtedness evidenced by this Note and the obligations created hereby are secured by, among other things, the Deed of Trust and the other Loan Documents.[21]

Default Interest Rate:[22] a rate per annum equal to the Note Rate plus ____ percent (___%), but in no event in excess of the Maximum Lawful Rate.[23]

Event of Default:[24] any event or occurrence described under Section 3.1 hereof.

Bible Seminary, 347 S.W.2d 587, 591 (Tex. 1961); Lawler v. Lomas & Nettleton Fin. Corp., 583 S.W.2d 810, 812 (Tex. Civ. App.--Dallas 1979, no writ). In such cases, the creation of the lien by itself does not impose personal liability on the grantor for the repayment of the debt, but does create liability to the extent of the grantor's interest in the Mortgaged Property (the lien instrument could, however, impose additional liabilities on the grantor beyond the extent of the Mortgaged Property). *See* Hodges v. Roberts, 12 S.W. 222, 223 (Tex. 1889). Any Deed of Trust granted to secure the repayment of the debt of another should include a precise description of the obligations secured by the Deed of Trust and the party primarily liable thereon (*i.e.*, Borrower). *See* Annotated Deed of Trust, Section 1.1 (Definition of Note and Obligations).

[21] *See* second annotation to Section 1.1 (Definition of Mortgaged Property), *infra*, regarding identification of collateral in the Note. *See also* Annotated Deed of Trust, Section 1.1 (Definition of Note) regarding identification of the debt in the Deed of Trust.

[22] Reference to this term is made in Section 2.8 (Late Charge; Default Interest Rate), *infra*.

[23] There are three typical alternatives for dealing with delinquent payments on a Note: (i) Lender charges interest at the specified Default Interest Rate (not to exceed the Maximum Lawful Rate) on the amount of the installment not paid when due (or not paid within a specified number of days after the due date), (ii) Lender imposes a late charge if payment is not made when due (or not paid within a specified number of days after the due date), which late charge is usually expressed as a percentage of the amount of the late installment of principal and interest (*see* annotations to Section 2.8 [Late Charge; Default Interest Rate], *infra*), and/or (iii) Lender charges a higher rate of interest on the entire principal balance on the Note during the continuation of the Event of Default. This Note provides that, in addition to the imposition of a late charge, interest will accrue on the amount of an overdue payment at the specified Default Interest Rate and, further, during the existence of an Event of Default, interest will accrue on the entire principal balance of the Note at the specified Default Interest Rate, not to exceed the Maximum Lawful Rate. Numerous Texas cases have held that interest at the Maximum Lawful Rate may be lawfully charged on past due installments of principal and on past due installments of interest (*i.e.*, interest on interest). *See e.g.*, Bothwell v. Farmers & Merchants State Bank & Trust Co., 30 S.W.2d 289, 291 (Tex. 1930) ("the Court has uniformly decided . . . that interest which has already lawfully matured may, together with principal, thereafter bear interest at the highest lawful rate"); Crider v. San Antonio Real-Estate Bldg. & Loan Ass'n, 35 S.W.2d 1047, 1048 (Tex. 1896) ("when the debt falls due the creditor is as much entitled to his interest as to his principal, and if the parties have elected in good faith to provide for the default, and to agree that after maturity the interest shall bear interest, it is a contract for interest upon the forbearance of a new obligation which has accrued, and not a contract for additional interest upon the original principal. . . . [A]n installment of interest past due becomes principal and bears interest . . ."); Pentico v. Mad-Wayler, Inc., 964 S.W.2d 708, 717 (Tex.App.--Corpus Christi 1998, pet. denied) ("past due or 'matured' interest becomes a new and independent debt for which additional interest may be charged at the maximum lawful rate").

To avoid contracting for or charging usurious interest, care should be taken in instances when the Loan Documents permit Lender to charge interest at the Default Interest Rate and further permit Lender to impose a late

Lender: as identified in the introductory paragraph of this Note.

Loan Documents:[25] this Note, the Deed of Trust, any loan agreement, any assignment of rents, any indemnity or guaranty agreement, any financing statements, and such other agreements, documents and instruments now or hereafter governing, securing or guaranteeing any portion of the indebtedness evidenced by this Note and/or the Related Indebtedness or executed by Borrower or any guarantor or indemnitor or any other person or entity in connection with the loan evidenced by this Note or in connection with the payment of the indebtedness evidenced by this Note or the Related Indebtedness or the performance and discharge of the obligations related hereto or thereto, together with any and all renewals, modifications, amendments, restatements, consolidations, substitutions, replacements, extensions and supplements hereof or thereof.[26]

Maturity Date:[27] _____, 20__.[28] **[*See Rider 1 for Option to Extend Maturity Date.*]**

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charge for the same Event of Default during the same time period. *See* annotations to Section 4.3 (Interest Provisions), *infra*.

[24] References to this term are made in Sections 2.2 (Application), 2.7 (Partial or Incomplete Payments), 2.8 (Late Charge; Default Interest Rate), 3.1 (Event of Default), 3.2 (Remedies), 4.1 (No Waiver; Amendment), 4.19 (Collection Costs) and in Rider 1 (Option to Extend Maturity Date), Rider 4 (Prepayment Options) and Rider 5 (Optional Exculpation Provisions), *infra*.

[25] References to this term are made in Sections 1.1 (Definition of Deed of Trust and Mortgaged Property), 2.2 (Application), 2.6 (Unconditional Payment), 2.8 (Late Charge; Default Interest Rate), 3.1 (Event of Default), 3.2 (Remedies), 4.1 (No Waiver; Amendment), 4.2 (Waivers), 4.3 (Savings Clause and Definition of Charges, Maximum Lawful Rate and Related Indebtedness), 4.5 (Further Assurances), 4.7 (Governing Law; Submission to Jurisdiction), 4.9 (Relationship of the Parties), 4.13 (Time is of the Essence), 4.15 (Controlling Agreement), 4.22 (Entire Agreement) and in Rider 1 (Option to Extend Maturity Date), Rider 4 (Prepayment Options), Rider 5 (Optional Exculpation Provisions), Rider 6 (Debt Coverage Ratio Definitions) and Rider 8 (Participation), *infra*.

[26] As recited in the introduction to this presentation, this form of Note assumes that there is no loan agreement executed in connection with the loan. Many Lenders often use a loan agreement for incorporation of many of the specific provisions found in the form of this Note (especially those found in the Riders to this Note) in part to ensure consistency of definitions and terminology, but also to facilitate enforcement of the Note in a judicial proceeding by making the Note shorter and more easily interpreted by the trier of fact. This same exact term should be used in all of the Loan Documents that relate to the indebtedness evidenced by this Note, the Related Indebtedness or the loan transaction between Lender and Borrower. This definition allows for incorporation of Borrower's default under other Loan Documents, such that a default under any Loan Document will be an Event of Default under Article III (Event of Default and Remedies), *infra*.

[27] References to this term are made in Section 2.1 (Payment of Principal and Interest) and in Rider 1 (Option to Extend Maturity Date), Rider 2 (Alternative Rate Options), Rider 3 (Payment Options) and Rider 4 (Prepayment Options), *infra*.

Maximum Lawful Rate:[29] as defined under Section 4.3(c) hereof.

Mortgaged Property:[30] that certain real property located in _____ County, Texas, as more particularly described in the Deed of Trust, together with certain other rights, estates, interests, collateral and benefits now or at any time hereafter securing the

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[28] As previously noted, one of the required elements of a negotiable instrument is that the instrument be payable on demand or at a definite time. TEX. BUS. & COM. CODE § 3.104(a)(2) (West 2000). If no time for the payment of the principal of the Note is stated therein, the instrument will be considered payable on demand. *See id.* § 3.108(a); Martin v. Ford, 853 S.W.2d 680 (Tex. App.--Texarkana 1993, writ denied); Gill v. Commonwealth Nat'l Bank of Dallas, 504 S.W.2d 521 (Tex. Civ. App.--Dallas 1973, writ ref'd n.r.e.). Further, a Note payable at a fixed Maturity Date but also payable on demand prior to that fixed Maturity Date is deemed payable on demand until that fixed date, whereupon the Note becomes payable at a definite time. TEX. BUS. & COM. CODE § 2.108(c) (West 2000). Lender should be aware of the consequences of having a Note be deemed to be payable on demand. *See, e.g., id.* § 3.118(b) (an action to enforce the obligation to pay on a demand note must be brought within 6 years after the demand; if no demand is made, an action to enforce a demand note on which neither principal nor interest had been paid for a period of 10 years is barred). *See* annotations to Demand Note Option under Rider 3 (Payment Options), *infra*. Unlike some jurisdictions, Texas law does not require that the maturity date of an underlying debt be reflected in its accompanying Deed of Trust. As such, it is not uncommon in Texas for a Deed of Trust to lack a reference to the maturity date. Such an omission, however, does not toll the limitations for the payment of debt. Sections 16.035(a) and (d) of the Texas Civil Practice and Remedies Code provide for a four year limitation period for the enforcement of a lien securing a debt. TEX. CIV. PRAC. & REM. CODE §§ 16.035(a) and (d) (West 2000).

In Cadle Co. v. Butler, 951 S.W.2d 901, 909 (Tex. App.--Corpus Christi 1997, no pet.) the court held that a party wishing to calculate the maturity date of a Deed of Trust silent as to such date must look to the accompanying Note. The Deed of Trust and the Note are essentially one instrument for this particular purpose and must be construed together. *See id. See also* annotation to Section 4.15 (Controlling Agreement), *infra*. As a result, the limitations period begins to run on the date the last installment payment is due, even if not stated in the Deed of Trust. *See* Cadle Co. at 909-10. *See also* Swedlund v. Banner, 970 S.W.2d 107, 111 (Tex. App.--Corpus Christi 1998, pet. denied). It should be noted, however, that if "a demand is an integral part of a cause of action, or a condition precedent to the right to sue, the limitations period does not begin to run until a demand is made. . . ." Martin, 853 S.W.2d at 682. *See also* Cummins and Walker Oil Co. v. Smith, 81 S.W.2d 884 (Tex. App.--San Antonio 1991, no writ); Young v. J&J Bail Bonds Co., 792 S.W.2d 404 (Tex. App.--El Paso 1990, no writ). The parties may suspend the running of the four year limitations period pursuant to a written extension agreement that complies with section 16.036 of the Texas Civil Practice and Remedies Code. If properly drafted and filed, the four year statute of limitations period shall then run from the extended Maturity Date. TEX. CIV. PRAC. & REM. CODE §§ 16.036 (West 2000). *See* annotation to Definition of Extension Option under Rider 1 (Option to Extend Maturity Date) *infra*; *see also* Annotated Deed of Trust, Section 1.1 (Definition of Note) and Section 8.4 (Indemnity).

[29] References to this term are made in Sections 1.1 (Definition of Default Interest Rate), 4.3(a) (Savings Clause), 4.3(b) (Ceiling Election) and in Rider 1 (Option to Extend Maturity Date), *infra*.

[30] References to this term are made in Sections 1.1 (Definition of Deed of Trust) and 3.2 (Remedies) and in Rider 1 (Option to Extend Maturity Date), Rider 4 (Prepayment Options), Rider 5 (Optional Exculpation Provisions), Rider 6 (Debt Coverage Ratio Definitions) and Rider 7 (Arbitration Option), *infra*.

payment of the indebtedness evidenced by this Note or the Related Indebtedness, whether by virtue of the Loan Documents or otherwise.[31]

Note: this Promissory Note.

Note Rate:[32] the rate of _____ percent (__%) per annum.[33] **[*For Fixed Rate Loan*]**

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[31] With respect to claims against the same debtor in a bankruptcy proceeding, holders of a secured indebtedness are afforded priority over holders of an unsecured indebtedness. *See, e.g.*, 11 U.S.C. § 724 (setting forth the order for distribution of the debtor's property in a bankruptcy estate). We are aware of no applicable legal requirement that a Note make reference to the Mortgaged Property as a condition to the perfection of a Deed of Trust lien on the Mortgaged Property nor as a condition to Lender being afforded priority as a secured creditor in a bankruptcy proceeding. Likewise, the absence of a valid lien on the Mortgaged Property does not affect the validity of the Note. *See* Williamson v. Diltz, 101 S.W.2d 833, 836 (Tex. Civ. App.--Eastland 1937, writ dism'd). The invalidity of the lien may, as a practical matter, however, leave Lender with no viable source for repayment of the indebtedness evidenced by the Note (especially if the Note is non-recourse in nature) and may cause Lender to be included in a different class of creditors in a bankruptcy proceeding. There are, however, several practical reasons for making reference to the Mortgaged Property in the Note: (i) Section 3.2 (Remedies), *infra*, specifies that Lender may foreclose its lien on the Mortgaged Property upon the occurrence of an Event of Default, (ii) Rider 1 (Option to Extend Maturity Date), *infra*, allows Lender to establish conditions precedent to an option to extend the Maturity Date based on the status and performance of the Mortgaged Property, (iii) Rider 5 (Optional Exculpation Provisions), *infra*, provides optional provisions for non-recourse liability on the Note except to the extent of the value of the Mortgaged Property and except in connection with the occurrence of certain events with respect to the Mortgaged Property, and (iv) Rider 8 (Debt Coverage Definitions), *infra*, establishes certain definitions, conditions and financial covenants relating to the performance and value of the Mortgaged Property.

Any type of property which may be sold or conveyed, or which may pass by descent, may be mortgaged to secure an obligation. *See* Bellah v. First Nat'l Bank of Hereford, 478 S.W.2d 636, 638 (Tex. Civ. App.--Amarillo 1972, writ ref'd n.r.e.).

[32] References to this term are made in the introductory paragraph of this Note, in Section 2.1 (Payment of Principal and Interest) and in Rider 1 (Option to Extend Maturity Date), Rider 2 (Alternative Rate Options), Rider 3 (Payment Options) and Rider 4 (Prepayment Options), *infra*.

[33] There are many options for establishing and expressing the Note Rate. The most straight-forward of which is to use a single fixed rate as provided in this Note. Rider 2 (Alternative Rate Options) offers other common devices: (i) a fixed rate that changes for specified periods, (ii) a variable or floating rate that changes from time to time, and (iii) a choice of rates available to a Borrower desiring to carefully manage its interest rate exposure.

A fixed rate is one of the oldest and most common methods used because of the relative simplicity in determining the amount of accrued interest (rate table books were in common use long before the advent of data bases and computer software capable of automatically calculating interest rates and payment schedules). A fixed rate remains popular today because it provides certainty over the term of the loan, enabling Borrower to remove a significant variable in establishing the long-term profitability of the Mortgaged Property and providing Borrower with greater flexibility in negotiating its other long-term obligations, such as leases. A fixed rate of interest is most often used by long-term institutional lenders (such as insurance companies and pension funds) and conduit or similarly-situated lenders that have access to long-term funding sources. A Note with a fixed interest rate will

[*See Rider 2 for Alternative Rate Options*.]

Payment Date:[34] the first day of each and every calendar month during the term of this Note.

Related Indebtedness:[35] as defined in Section 4.3(c) hereof.

Any capitalized terms used in this Note and not otherwise defined herein shall have the meaning ascribed to them in the Deed of Trust. All terms used herein, whether or not defined in Section 1.1 hereof, and whether used in singular or plural form, shall be deemed to refer to the

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typically include a long-term lockout period and impose a prepayment premium to ensure that Lender receives its anticipated yield over the term of the loan. *See* annotations to Rider 4 (Prepayment Options), *infra*.

Many Lenders resist the use of a fixed interest rate because of the short-term nature of the funds available for lending (for example, demand deposits at commercial banks) and the risk of loss if Lender's assets (*i.e.*, loans made to borrowers) do not match Lender's liabilities (*i.e.*, deposits made with Lender). These concerns explain the popularity among many Lenders of the various "cost-plus" methods of determining interest. *See* annotations to Rider 2 (Alternative Rate Options), *infra*, for a discussion of various popular alternate rate options. A Borrower desiring certainty, but faced with the prospect of a variable interest rate, may be able to achieve substantially the same benefit as with a fixed rate by availing itself of one of the interest rate protection products commonly available today (such as swaps, caps, collars and the like).

While a full discussion of interest rate protection products is beyond the scope of this presentation, a few brief comments are illustrative. In common parlance, a "swap" is the trading of one type of rate (floating, for example) with another type (fixed, for example); a "cap" limits the upper level of a floating rate; and a "collar" establishes a minimum and maximum rate at which interest could accrue.

The International Swaps and Derivatives Association (the "ISDA") has promulgated standard forms that are used almost exclusively to document these types of products. In the ISDA promulgated Master Agreement and related Confirmations of specific transactions, the risk of interest rate fluctuations is allocated to one party, thus ensuring that the other party has the effective benefit of a fixed rate (that is, they "swap" the risk) in exchange for payment of a fee. Obviously, the ability of the parties to perform in the future is very important and large swap payments can become due both during the term of the swap and if the agreement is terminated early, for example, because of a default thereunder or an Event of Default hereunder. Depending on the particular interest rate environment, a Borrower's swap obligations can approach, or even exceed, Borrower's liability on the underlying loan transaction. Therefore, despite the lien on the Mortgaged Property securing performance of Borrower's obligations, a Borrower is often required to provide some type of credit enhancement (such as an irrevocable stand-by letter of credit) due to these increased risks. A full risk analysis should be performed in connection with each proposed transaction and extreme care should be taken before accepting the perceived benefits of an interest rate protection product.

[34] This term defines the date on which payments are due under this Note. References to this term are made in Section 2.1 (Payment of Principal and Interest) and in Rider 3 (Payment Options) and Rider 4 (Prepayment Options), *infra*.

[35] References to this term are made in Sections 4.3(a) (Savings Clause) and 4.21 (Statement of Unpaid Balance), *infra*.

object of such term whether such is singular or plural in nature, as the context may suggest or require.

ARTICLE II - PAYMENT TERMS

2.1 Payment of Principal and Interest. **[*Fixed payments of principal and interest:*** The principal and interest on this Note shall be due and payable in equal consecutive monthly installments of $_____ each[36], beginning on _____, 20___, and continuing on each Payment Date thereafter through and including the Maturity Date; provided, however, that if on any Payment Date the accrued but unpaid interest hereon exceeds the installment amount set forth above, then on such Payment Date there shall be due and payable an additional payment in an amount equal to such excess accrued but unpaid interest.[37] The outstanding principal balance hereof and any and all accrued but unpaid interest hereon shall be finally due and payable in full on the Maturity Date or upon the earlier maturity hereof, whether by acceleration or otherwise.**][38] [*See Rider 3 for various alternative Payment Options*.]** If the advance of the principal amount evidenced by this Note is made on a date other than the first day of a calendar month, then Borrower shall pay to Lender contemporaneously with the execution hereof interest at the Note Rate for a period from the date of such advance through and including

[36] Although inclusion of the exact amount and due date of the monthly installments of principal and interest is of practical importance in ensuring timely payment on the Note, the absence of this information will not necessarily affect the validity of the Note itself nor Borrower's obligation to repay the indebtedness evidenced by the Note. Rather, the Note will be deemed payable on demand. *See* annotations to Demand Note Option in Rider 3 (Payment Options), *infra*. *See* Gill v. Commonwealth Nat'l Bank of Dallas, 504 S.W.2d 521, 523 (Tex. Civ. App.--Dallas 1973, writ ref'd n.r.e.).

[37] Lender and Borrower should understand that even in the context of fixed monthly installments, the specified fixed amount of a monthly installment could be less than the amount actually owed on a particular Payment Date for a variety of reasons. Most commonly, an Event of Default has resulted in interest accruing on the Note at the Default Interest Rate rather than at the Note Rate, thereby changing the amount actually due on the next Payment Date. Further, if the loan closing occurs on a date other than the first day of a calendar month and the "stub interest" (being the interest accruing from the date of closing until the end of the calendar month in which the closing occurred) was not actually collected at the time of the closing and has been inadvertently carried forward until the first Payment Date, then the amount actually owed on the first Payment Date will exceed the specified fixed amount of the first monthly installment by the amount of the "stub interest." *See* fourth annotation to Section 2.1 (Payment of Principal and Interest), *infra*.

[38] The inclusion of a right of acceleration will not necessarily affect the negotiability of the Note, so long as the Note is payable on demand or at a definite time. *See* TEX. BUS. & COM. CODE § 3.104(a)(2) (West 2000). A Note is deemed to be "payable at a definite time" notwithstanding Lender's rights of acceleration. *See id.* § 3.108(b)(2); Continental Nat'l Bank of Fort Worth v. Conner, 214 S.W.2d 928, 931 (Tex. 1948) ("it has been held in this state that an acceleration option based on failure to pay an installment of principal or interest as required in the note itself does not so condition or render uncertain the maker's primary obligations as to defeat negotiability"). *See* annotations to the introductory paragraph of this Note, *supra*.

the last day of the calendar month in which this Note is funded.[39] **[*Remove the following only for revolving debt instruments:* No principal amount repaid may be reborrowed.]**[40]

2.2 Application. Except as expressly provided herein to the contrary, all payments on this Note shall be applied in the following order of priority: (i) the payment or reimbursement of any expenses, costs or obligations (other than the outstanding principal balance hereof and interest hereon) for which either Borrower shall be obligated or Lender shall be entitled pursuant to the provisions of this Note or the other Loan Documents, (ii) the payment of accrued but unpaid interest hereon, and (iii) the payment of all or any portion of the principal balance hereof then outstanding hereunder, in the direct order of maturity.[41] If an Event of Default exists under

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[39] Lender's payment scheme under this Note may require, for example, that the first installment of principal and interest be made on the Payment Date occurring one calendar month after the first day of the first full calendar month following funding (*i.e.*, if funding occurs on January 15, the first payment of principal and interest on the Note would be made on March 1, such first payment being "applicable" to the month of February, with interest accruing from and after January 15). Therefore, a funding occurring on any day other than the first day of a calendar month will result in interest accruing prior to the first day of the first full calendar month after funding. This Note requires that Borrower pay at the time of funding the interest which would accrue prior to the first day of the first full calendar month after funding. Because the calculation of payments on the Note are based upon a fixed Note Rate with fixed monthly payments of principal and interest, no principal amount is payable for this period so as to allow for an orderly accounting and to prevent disruption of the applicable amortization schedule. This interest amount is often referred to as the "stub interest."

[40] Although, inclusion of a comprehensive set of revolving credit provisions is beyond the scope of this presentation, it is important to note the issues discussed below in this annotation. Under a revolving debt instrument, a Lender has a continuing obligation to make future advances provided that Borrower has met all requirements under the Note. However, an issue might arise regarding Lender's duty to fund once Borrower has filed a petition under Chapter 11 of the Bankruptcy Code. Notwithstanding a Borrower's continued performance under the terms of the Note, Lender has no further obligation to fund. *See* 11 U.S.C. § 365(c)(2). Rather, Bankruptcy Code § 365(c)(2) prohibits a Borrower that has filed bankruptcy from assuming the benefits of an executory contract to make a loan, extend debt financing or other financial accommodation. *See* Citizens and Southern Nat'l Bank v. Thomas B. Hamilton Co. (In re Thomas B. Hamilton Co.), 969 F.2d 1013 (11th Cir. 1992). This result occurs notwithstanding a Lender's consent to such assumption. *See* TransAmerica Commercial Fin. v. Citibank, N.A. (In re Sun Runner Marine, Inc.), 945 F.2d 1089 (9th Cir. 1991). To allow Borrower and Lender to agree otherwise without specific court approval would violate the Bankruptcy Code's restrictions related to a Borrower's ability to obtain post-petition credit. *Id. See also* 11 U.S.C. § 364(a), (b), (c) and (d).

[41] In the absence of an agreement to the contrary, a Lender must follow a Borrower's instructions with respect to the application of payments. *See* Logan v. Founders National Bank, 443 S.W.2d 610 (Tex. Civ. App.--Austin 1969, no writ). This provision establishes a pre-default order of application essentially identical to the order typically required for application of proceeds following foreclosure. *See* TEX. BUS. & COM. CODE § 9.504(a) (West 2000). The order of application of proceeds is of critical importance when Borrower is the obligor on more than one debt or if there are multiple loans secured by the Mortgaged Property.

The language of this Section 2.2 is often modified for transactions utilizing non-recourse promissory notes. *For non-recourse notes* (see Rider 5 - Optional Exculpation Provisions), *add the following language as the new second application in priority prior to the current second application*: "(ii) to that portion, if any, of the indebtedness evidenced by this Note and the Related Indebtedness with respect to which no person or entity has personal liability for payment (the "Exculpated Portion"), and with respect to the Exculpated Portion as follows:

this Note or under any of the other Loan Documents, then Lender may, at the sole option of Lender, apply any such payments, at any time and from time to time, to any of the items specified in clauses (i), (ii) or (iii) above without regard to the order of priority otherwise specified in this Section 2.2 and any application to the outstanding principal balance hereof may be made in either direct or inverse order of maturity.[42]

2.3 Payments. All payments under this Note made to Lender shall be made in immediately available[43] funds at _____ (or at such other place as Lender, in Lender's sole discretion, may have established by delivery of written notice thereof to Borrower from time to time), without offset, in lawful money of the United States of America,[44] which shall at the

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first, to accrued but unpaid interest on the Exculpated Portion and second, to matured principal on the Exculpated Portion." This provision is designed to prevent Borrower from prematurely discharging any portion of the debt for which Borrower is personally liable by requiring application of the first dollars of the payment to the portion of the debt for which Borrower is not personally liable (*i.e.*, the Exculpated Portion). *See* Annotated Deed of Trust, Section 7.4 (Application of Proceeds) for a discussion of "wrap-around" financing.

[42] This provision of Section 2.2 gives Lender maximum flexibility in application of payments received after an Event of Default.

[43] The requirement that funds be "immediately available" curtails Borrower's ability to tender a check to satisfy the obligation imposed by the Note. The general rule is that, unless the parties agree otherwise, payment of an obligation may be made only in money. *See generally* 60 AM. JUR. 2D *Payment* § 32; 11 AM. JUR. 2D *Bills and Notes* § 403; 58 TEX. JUR. 3D *Payment* § 40. For the Note to qualify as a negotiable instrument, it must be payable in "money." *See* TEX. BUS. & COM. CODE § 3.104(a) (West 2000). "Money" is defined under the UCC as "a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations." *Id.* § 1.201(24); *see also* Clay v. Gage, 20 S.W. 948, 949 (1892, no writ) (receipt for a specified bale of cotton, not money). Unless otherwise agreed, Lender is not required to accept a check in payment of an obligation. Fillion v. David Silvers Co., 709 S.W.2d 240, 247 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.)("in the absence of agreement to the contrary, a check, bill of exchange, or draft does not of itself discharge or constitute payment of a debt, nor does the preparation of such an instrument constitute legal tender"); *see also* Littlejohn v. Johnson, 332 S.W.2d 439, 441 (Tex. Civ. App.--Waco 1960, no writ) ("when money is called for, a check is not valid payment, absent agreement to the contrary"). The specificity of the language of Section 2.3 is intended to put Borrower on notice as to the exact medium of payment acceptable to Lender.

[44] While foreign currency is generally treated as a commodity in the United States, it may generally serve as a medium of payment only if it has a monetary value in terms of an established rate of exchange. *See* 53A AM. JUR. 2D *Money* § 67. *See also* TEX. BUS. & COM. CODE § 1.201(24) (West 2000). Subject to this caveat, the parties to a Note may, without destroying the negotiability of the instrument, specify the type of currency in which the Note is to be paid (*i.e.*, the parties are at liberty to specify that a Note be paid in currency other than, or only in, U.S. dollars). The drafter of the Note should, however, be careful to avoid using the term "dollars" without qualifying such term with the type of dollars intended (*e.g.*, U.S., Canadian, or Australian dollars). If a foreign currency is required, the instrument should clearly indicate that only the specified currency is acceptable. If a Note is negotiable and, by its terms, is payable in a foreign currency, section 3.107 of the UCC provides that (unless the Note specifically states otherwise) the Note may be paid in the stated foreign currency or in an equivalent amount of U.S. dollars calculated by using the current bank-spot rate at the place of payment for the purchase of U.S. dollars on the day on which the instrument is paid. *Id.* § 3.107.

time of payment be legal tender in payment of all debts and dues, public and private.[45] Payments by check or draft shall not constitute payment in immediately available funds until the required amount is actually received by Lender in full.[46] Payments in immediately available funds received by Lender in the place designated for payment on a Business Day prior to _____ p.m. Dallas, Texas time at said place of payment shall be credited prior to the close of business on the Business Day received, while payments received by Lender on a day other than a Business Day or after _____ p.m. Dallas, Texas time on a Business Day shall not be credited until the next succeeding Business Day.[47] If any payment of principal or interest on this Note shall become due and payable on a day other than a Business Day, such payment shall be made on the next succeeding Business Day. Any such extension of time for payment shall be included in computing interest which has accrued and shall be payable in connection with such payment.

2.4 Computation Period. Interest on the indebtedness evidenced by this Note shall be computed on the basis of **[a three hundred sixty (360) day year] [a three hundred sixty five (365) or three hundred sixty six (366) day year, as applicable]**[48] and shall accrue on the actual

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[45] "Money" and "legal tender" are not necessarily synonymous terms. "Money" is a very broad term, generally encompassing "wealth, capital, property, and anything else that is transferable in commerce." 53A AM. JUR. 2D *Money* § 1; *but see* TEX. BUS. & COM. CODE § 1.201(24) (West 2000) (providing a more restrictive definition of "money"). "Legal tender," on the other hand, refers to the circulating medium a creditor is compelled by law to accept from a debtor as payment for a debt. *See id.* § 11. Under federal statute, all coins and currencies of the United States, regardless of when coined or issued, are legal tender for all debts, public charges, taxes, and dues. 31 U.S.C. § 5103. Therefore, payments on the Note are required to be made in "legal tender" to ensure that Borrower makes payment in a circulating medium acceptable to Lender instead of in a less desirable medium which may be permitted if the Note merely required that payments be made in "money."

[46] *See* annotation to Section 2.7 (Partial or Incomplete Payments), *infra*, for a brief discussion of payments made by check.

[47] Lender and Borrower must pay careful attention to the methodology actually used by Borrower in making payments due under the Note. If a payment is made in such a manner that it is not timely received on a Business Day, or payment is received by Lender on a date other than a Business Day, such payment will not be credited by Lender until the next succeeding Business Day. In such event, and in addition to the potential Event of Default that may exist and possible imposition of a late charge, the timing of the crediting of the payment will cause the amount of the payment to be insufficient because the interest was calculated to have been received on an earlier date than the date upon which the payment was actually credited (*i.e.*, more interest will be payable).

[48] Because the Gregorian calendar provides for months containing different numbers of days, it is impossible to have both equal daily interest accruals and equal monthly interest accruals. This fact has led to three common methods of calculating and charging interest, the 365/365 method, the 360/360 method and the 365/360 method. *See* second annotation to Section 2.4 (Computation Period), *infra*.

Title 4 (Regulation of Interest, Loans and Financed Transactions), Subtitle A (Interest) of the Texas Finance Code does not require any specific method of calculating interest under a Note. *See* TEX. FIN. CODE §§ 304, 305, and 339 (West 2000). Therefore, under the Texas Finance Code, any method of calculation could be used, subject to usury considerations. Traditionally, however, Texas courts have required creditors to utilize a 365/365 or 360/360 day calendar (despite the stated method of computation) in connection with usury calculations, a result which could unexpectedly render a loan usurious. *See* Lawler v. Lomas & Nettleton Mortgage Investors, 691

number of days elapsed for any whole or partial month in which interest is being calculated.[49] In computing the number of days during which interest accrues, the day on which funds are initially

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S.W.2d 593, 596 (Tex. 1985); GXG, Inc. v. Texacal Oil & Gas, 977 S.W.2d 403, 421 (Tex. App. Corpus Christi 1998, writ denied); Federal Savings & Loan Insurance v. Kralj, 968 F.2d 500, 505 (5th Cir. 1992) (applying Texas law). Lender and Borrower may agree to compute the term and rate of interest on a commercial loan (that is, one made primarily for business, commercial, investment, agricultural or similar purpose) based upon a 360-day year consisting of twelve 30-day months and the rate ceilings expressed as a rate per year shall mean a rate per year consisting of 360 days and of twelve 30-day months. TEX. FIN. CODE § 306.003 (West 2000).

[49] A discussion of the customary methods of computation of interest is demonstrative of the advantages (and risks) to Lender in using the 365/360 method.

365/365 Method. The 365/365 method is based upon equal daily charges. The annual interest rate is divided by 365 and the resulting daily rate is multiplied by the actual number of days in the payment period and the outstanding principal amount. For example, assuming a $10,000 loan made at an annual rate of 18 % on January 1, 2000, maturing on December 31, 2000, the computation of interest for January, 2000 is as follows:

$$\$10{,}000 \times \frac{.18}{365} \times 31 = \$152.86 \text{ (for January, 2000)}$$

This method uses the exact number of calendar days in the payment period, allowing for the fact that months do not necessarily contain an equal number of days. Therefore, more interest accrues during January than during February. Lender may desire to adjust the computation period for a leap year by dividing the annual rate by 366 rather than 365 for computations applicable to that leap year.

360/360 Method. The 360/360 method assumes that each year consists of 12 months of 30 days each. The annual interest rate is divided by 360 and each month is treated as having 30 days. Interest for each month is constant and, for a full calendar year, the interest under this method is exactly the same as that calculated by using the 365/365 method. For less than a full calendar year, however, the interest calculated under this method may result in a higher rate than using the 365/365 method because of the artificial nature of 30 day months. For example, assuming a $10,000 loan made at an annual rate of 18 % on January 1, 2000, maturing December 31, 2000, interest under the 360/360 method is calculated as follows:

$$\$10{,}000 \times \frac{.18}{360} \times 30 = \$150 \text{ (for each month)}$$

365/360 Method. The 365/360 method combines certain elements of the 365/365 and 360/360 methods. The intent of this calculation is not simplicity or accuracy, but rather to maximize the amount of accrued interest. The annual rate of interest is divided by 360 and the resulting daily rate is multiplied by the actual number of days in the payment period. The calculation is performed precisely as calculated under the 365/365 method, except that the denominator is 360 instead of 365. For example, assuming a $10,000 loan made at an annual rate of 18 % on January 1, 2000, maturing on December 31, 2000, the computation of interest for January, 2000 is as follows:

$$\$10{,}000 \times \frac{.18}{360} \times 31 = \$155 \text{ (for January, 2000)}$$

This method distorts the specified Note Rate, producing 5/360th (assuming a calendar year of 365 days) more interest than under the other two calculation methods. Therefore, interest accruals at or very near the

advanced shall be included regardless of the time of day such advance is made, and the day on which funds are repaid shall be included unless repayment is credited prior to the close of business on the Business Day received as provided in Section 2.3 hereof.

2.5 Prepayment.[50] ***[See Rider 4 for various Prepayment Options.]***

2.6 Unconditional Payment. Borrower is and shall be obligated to pay all principal, interest and any and all other amounts which become payable under this Note or under any of the other Loan Documents absolutely and unconditionally and without any abatement, postponement, diminution or deduction whatsoever and without any reduction for counterclaim or setoff whatsoever.[51] If at any time any payment received by Lender hereunder shall be

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Maximum Lawful Rate may become usurious solely by contracting for or charging interest based on the 365/360 method. For example, if a loan were subject to a maximum lawful rate of 10% and interest accrued at a specified Note Rate of 10%, the loan would be usurious because the 365/360 method would produce an effective rate of 10.139% per annum, which was in excess of the hypothetical 10% Maximum Lawful Rate then in effect. The Texas Supreme Court has held that a loan was usurious where the 365/360 method was used to calculate interest on a Note with a stated interest rate equal to the Maximum Lawful Rate. Lawler v. Lomas & Nettleton Mortg. Investors, 691 S.W.2d 593, 596 (Tex. 1985) ("a lending institution's practice of charging a per diem rate of interest based on a 360-day year cannot be characterized as an 'accidental or bona fide error'").

Obviously, the additional interest accruals under this method can be significant for very large long-term loans. As a practical matter, Lenders using the 365/360 method should explicitly provide for use of that method because simple reference to a "per annum" accrual period may imply a 365-day year (which would result in a denominator of 365 in the example calculation above). Further, mere reference to use of a "360-day year" may not be sufficient because there are two "360-day year" methods. Therefore, it is advisable to include a reference to both the computation period and the accrual period.

The Consumer Credit Commissioner has informally opined that adoption of section 306.003 of the Texas Finance Code explicitly authorizing use of the 360 day year method for commercial loans precludes the use of other methods in connection with loans subject to section 306.003. *See* TEX. FIN. CODE §306.003 (West 2000).

[50] Lenders typically attempt to preclude or limit a Borrower's ability to pay all or part of the principal balance of the Note prior to any scheduled principal payments. *See* annotations to Rider 4 (Prepayment Options), *infra*. In Texas, a "prepayment" is defined as a payment before maturity. *See* General Motors Acceptance Corp. v. Uresti, 553 S.W.2d 660, 663 (Tex. Civ. App. - Tyler 1977, writ ref'd n.r.e.). As a general proposition, prepayment penalties are enforceable. *See* Parker Plaza W. Partners v. UNUM Pension & Ins. Co., 941 F.2d 349 (5th Cir. 1991); Hettig & Co. v. Union Mutual Life Ins. Co., 781 F.2d 1141, 1143-44 (5th Cir. 1986); Vela v. Shacklett, 12 S.W.2d 1007, 1008 (Tex. Comm. App. 1929, judgm't adopted); Affiliated Capital Corp. v. Commercial Federal Bank, 834 S.W.2d 521, 526-27 (Tex. App. - Austin 1992, no writ); American Nat. Ins. Co. v. Gifford-Hall & Co., Inc., 673 S.W.2d 915 (Tex. App. - Dallas 1984, writ ref'd n.r.e.). *See also, e.g.*, 12 C.F.R. § 704.7(h) (2000); TEX. FIN. CODE § 94.01 (West 2000) (a Texas chartered savings bank may charge a prepayment penalty).

[51] Section 2.6 reinforces Borrower's unconditional duty to pay the indebtedness evidenced by the Note, as required for negotiable instruments under section 3.104(a) of the UCC. TEX. BUS. & COM. CODE § 3.104(a) (West 2000). It is important to note that Borrower's unconditional duty to pay also applies to any Related Indebtedness arising under other Loan Documents. The unconditional nature of Borrower's duty to pay effectively trumps the presumption of Borrower's right to assert counterclaims and setoff. Otherwise, in an action between the original parties to a Note, Borrower may assert certain counterclaims and rights of setoff. *See* Trueheart v. Braselton, 875 S.W.2d 412, 415 (Tex.App.--Corpus Christi 1994, no writ). Borrower, however, may expressly waive a defense it

deemed by a court of competent jurisdiction to have been a voidable preference or fraudulent conveyance under any Debtor Relief Law, then the obligation to make such payment shall survive any cancellation or satisfaction of this Note or return thereof to Borrower and shall not be discharged or satisfied with any prior payment thereof or cancellation of this Note, but shall remain a valid and binding obligation enforceable in accordance with the terms and provisions hereof, and such payment shall be immediately due and payable upon demand.[52]

2.7 Partial or Incomplete Payments.[53] Remittances in payment of any part of this Note other than in the required amount in immediately available funds at the place where this

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has to payment. Waiver of an affirmative defense may be established by proof that a party knowingly possessing the right to assert a defense expressly relinquished the right or acted in a manner inconsistent with, or failed to act in a manner consistent with, the intent to exercise the right. *See* Stokley v. Hanratty, 809 S.W.2d 924, 926 (Tex.App.--Houston [14th Dist.] 1991, no writ).

[52] Under Title 11, avoiding a previously made payment will not have the effect of avoiding the underlying Note obligation. In fact, the Bankruptcy Code provides for an avoided payment to be treated in the same manner as the remaining obligation under the Note. 11 U.S.C. § 502(h). However, section 524 of the Bankruptcy Code provides for the discharge of personal liability and enjoins Lender from collecting, on a recourse basis, the amounts due under the Note from Borrower. *Id.* § 524.

The Deed of Trust should contain a representation from Borrower that no bankruptcy or insolvency proceedings are pending or contemplated by or against Borrower or against any other guarantor or endorser of the Note. *See* Annotated Deed of Trust, Section 3.13 (No Bankruptcy). Section 523 of the Bankruptcy Code excepts from an individual debtor's (but not an entity debtor's) discharge any debt for an extension, renewal, or refinancing of credit, to the extent obtained by "false pretenses, a false representation, or actual fraud." *Id.* § 523(a)(2). The suggested representation, if false when made (assuming the other elements of fraud are established), could persuade a bankruptcy judge to hold the debt to be non-dischargeable. Obviously, with the passage of time between the extension of credit and a subsequent bankruptcy filing, it becomes increasingly difficult to establish fraudulent intent. It should be noted that a creditor may be able to determine before the extension of credit whether the proposed borrower is in bankruptcy. Bankruptcy papers are public records. *Id.* § 107. A variety of third-party credit reporting services monitor bankruptcy filings for a fee. However, Bankruptcy Courts have been liberal in allowing debtors to file in various jurisdictions, including a district in which one of the debtor's properties is located; therefore, it is difficult to be absolutely sure Borrower has not filed a bankruptcy proceeding and multiple jurisdictions may need to be checked. Additionally, the filing of a bankruptcy petition operates as a "stay" and prevents Lender from taking certain actions, including without limitation: (i) the commencement or continuation of a judicial or administrative action against Borrower, (ii) enforcement of any judgment against Borrower, (iii) any act to obtain possession or exercise control over the Mortgaged Property, or (iv) any act to create, perfect or enforce any lien against the Mortgaged Property. *Id.* § 362.

[53] Section 2.7 preserves the requirement of immediately available funds while permitting payment by check that may constitute ordinary commercial practice. It is made clear in the Note, however, that a remittance constitutes payment only if and when funds are actually received, that is, any provisional credits created by the banking system have become final. This does not change the rules for payment by ordinary check (that payment by check suspends, but does not discharge, the obligation until the check is paid), but may alter the result if payment is by certified or cashier's check. *See* TEX. BUS. & COM. CODE § 3.310 (West 2000). *See* first annotation to Section 2.3 (Payments), *infra*, regarding payment in immediately available funds.

The other issue addressed by Section 2.7 is the effect of a partial payment. This provision permits Lender to retain a partial payment "on account only" and to continue to assert default in payment.

Note is payable shall not, regardless of any receipt or credit issued therefor, constitute payment until the required amount is actually received by Lender in full in accordance herewith and shall be made and accepted subject to the condition that any check or draft may be handled for collection in accordance with the practice of the collecting bank or banks. Acceptance by Lender of any payment in an amount less than the full amount then due shall be deemed an acceptance on account only, and the failure to pay the entire amount then due shall be and continue to be an Event of Default in the payment of this Note.

2.8 Late Charge; Default Interest Rate. If any payment is not received in full by Lender on the date when due[54], then in addition to interest accruing at the Default Interest Rate on such overdue payment from the date due until paid, Borrower shall also pay to Lender a late charge in an amount equal to ____ percent (___%) of the amount of such overdue payment.[55] For so long as any Event of Default exists under this Note or under any of the other Loan Documents, regardless of whether or not there has been an acceleration of the indebtedness evidenced by this Note, and at all times after the maturity of the indebtedness evidenced by this Note (whether by acceleration or otherwise), and in addition to all other rights and remedies of Lender hereunder, interest shall accrue on the outstanding principal balance hereof at the Default Interest Rate, and such accrued interest shall be immediately due and payable. Borrower acknowledges that it would be extremely difficult or impracticable to determine Lender's actual damages resulting from any late payment or Event of Default, and such late charges and accrued interest are reasonable estimates of those damages and do not constitute a penalty.

[See Rider 1 for Option to Extend Maturity Date.]

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[54] If any grace period or notice and cure period for payment has been afforded to Borrower under the Loan Documents, Borrower will typically request that such opportunity be referenced in this provision of the Note so as to prevent application of the Default Interest Rate until such periods have expired.

[55] The term "late charge" refers to a fixed one-time charge that is usually expressed as a specified percentage of the past due installment and is typically imposed when an installment is not paid when due (or not paid within a specified number of days after the due date). Except as noted below, a late charge is a contingent additional charge that is treated as interest and is added to the amount of interest contracted for if payment of the late charge is received by Lender. *See* Pentico v. Mad-Wayler, Inc., 964 S.W.2d 708, 715 (Tex.App.--Corpus Christi 1998, pet. denied); Dixon v. Brooks, 678 S.W.2d 728, 731 (Tex.App.--Houston [14th Dist.] 1984, writ ref'd, n.r.e.). The statutory definition of "interest" covers late charges because a late charge constitutes compensation for the detention of money past the due date. TEX. FIN. CODE § 301.001(a) (West 2000); Pentico, 964 S.W.2d at 715; Hardwick v. Austin Gallery of Oriental Rugs, Inc., 779 S.W.2d 438, 443 (Tex.App.--Austin 1989, writ denied). However, a late charge will not be deemed to be interest for purposes of a usury calculation if the parties to a loan that is made primarily for business, commercial, investment, agricultural or similar purposes agree to the imposition of a late charge on the amount of any installment that continues unpaid for at least 10 days following its due date in a reasonable amount that is not more than 5% of the total amount of the installment. Note that this form does not expressly incorporate these limitations on the amount or timing of the late charge. TEX. FIN. CODE § 306.006(1) (West 2000). *See* second annotation to Section 1.1 (Definition of Default Interest Rate), *supra*.

ARTICLE III - EVENT OF DEFAULT AND REMEDIES

3.1 Event of Default.[56] The occurrence or happening, at any time and from time to time, of any one or more of the following shall immediately constitute an "Event of Default" under this Note:

(a) Borrower shall fail, refuse or neglect to pay and satisfy, in full and in the applicable method and manner required, any required payment of principal or interest or any other portion of the indebtedness evidenced by this Note as and when the same shall become due and payable, whether at the stipulated due date thereof, at a date fixed for payment, or at maturity, by acceleration or otherwise;[57]

(b) The occurrence of any other default, breach or event of default under this Note other than those described under Section 3.1(a) above;[58]

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[56] An "Event of Default" triggers the rights of Lender to pursue the remedies available under the Loan Documents, including acceleration of the Maturity Date, foreclosure of any liens and security interests covering the Mortgaged Property, and the exercise of any other rights and remedies of Lender under the Loan Documents or at law or in equity. *See* annotations to Section 3.2 (Remedies), *infra*, for a more detailed analysis of the remedies available to Lender upon an Event of Default. The Events of Default described in Section 3.1 are not intended to be all inclusive or exclusive, and may be expanded as deemed appropriate by the particular Lender or with respect to a particular loan. The preferred practice is to include a comprehensive list of defaults in only one of the Loan Documents (typically the Deed of Trust), and to specifically make reference to the default provisions in the Deed of Trust so that no inconsistency or ambiguity exists in the various Loan Documents. A failure to perform may be subject to either a grace period (which is a fixed time period without the requirement of notice from Lender) or a notice and cure period (which is a fixed time period after Lender has provided oral or written notice to Borrower of such failure to perform) within which Borrower may satisfy or "cure" such failure or nonperformance before it constitutes an Event of Default.

[57] Section 3.1(a) is the monetary default provision which makes Borrower's failure to pay any required installment of principal or interest on the Note an Event of Default. Each payment must be fully and timely remitted as required under Article II of the Note. This particular default provision does not include either a grace period or a notice and cure period (which, when included, is often five days for a monetary default). The validity of a monetary default provision in a promissory note merely referring to the "failure to pay any installment" without more specificity has been questioned. *See* Motor & Industrial Fin. Corp. v. Hughes, 302 S.W.2d 386, 394 (Tex. 1957) (a note and deed of trust were not clear as to the right to accelerate if interest was not paid and the court held that "if there is a reasonable doubt as to the meaning of the terms employed, preference should be given to that construction which will avoid the forfeiture and prevent acceleration of the maturity of the debt"). *See also* A.R. Clark Ins. Co. v. Green, 375 S.W.2d 425, 436 (Tex. 1964).

[58] Section 3.1(b) is the non-monetary default provision which makes any default, breach or failure by Borrower to perform under the Note (other than a default in the payment of the indebtedness) an Event of Default. The performance by Borrower must be complete and timely pursuant to the terms of the Note. This is listed as a separate default provision for ease of drafting as some Lenders, for example, may allow a notice and cure period for a non-monetary default (such as fifteen or thirty days) while not granting any notice or cure period for a monetary default. It is critical that all default and Event of Default provisions common to one or more of the Loan Documents be consistent in their language and scope.

(c) The occurrence of any default, breach or event of default under any of the other Loan Documents;[59] or

(d) Borrower (i) shall execute an assignment for the benefit of creditors or an admission in writing by Borrower of Borrower's inability to pay, or Borrower's failure to pay, debts generally as the debts become due; (ii) shall allow the levy against the Mortgaged Property or any part thereof, of any execution, attachment, sequestration[60] or other writ which is not vacated within _____ (__) days after the levy; (iii) shall allow the appointment of a receiver, trustee or custodian of Borrower or of the Mortgaged Property or any part thereof, which receiver, trustee or custodian is not discharged within _____ (__) days after the appointment; (iv) files as a debtor a petition, case, proceeding or other action pursuant to, or voluntarily seeks the benefit or benefits of, any Debtor Relief Law, or takes any action in furtherance thereof;[61] (v) files either a petition, complaint, answer or other instrument which seeks to effect a suspension of, or which has the effect of suspending any of, the rights or powers of Lender granted in this Note or in any of the other Loan Documents; or (vi) allows the filing of a petition, case, proceeding or other action against Borrower as a debtor under any Debtor Relief Law or seeks appointment of a receiver, trustee, custodian or liquidator of Borrower or of the Mortgaged Property, or any part thereof, or of any significant portion of Borrower's other property and (a) Borrower admits, acquiesces in or fails to contest diligently the material allegations thereof, (b) the petition, case, proceeding or other action results in the entry of an order for relief or order granting the relief sought against Borrower, or (c) the petition, case,

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[59] Section 3.1(c) is the cross-default clause incorporating as an "Event of Default" under this Note any default, breach or event of default under any of the other Loan Documents. Such cross-default provision is often made expressly subject to any applicable grace period or notice and cure period provided in the other Loan Documents. Should the business transaction require cross-default with other indebtedness owed from Borrower to Lender not evidenced by this Note and not constituting Related Indebtedness, a cross-default provision should be added to the Deed of Trust and incorporated herein by reference and the Deed of Trust should specifically state whether or not such other indebtedness is secured by the Deed of Trust.

[60] Sequestration is a judicial remedy available to secured creditors to obtain a judicial order for possession of collateral that the creditor reasonably concludes is in danger of damage or concealment by the debtor. *See* TEX. CIV. PRAC. & REM. CODE §§ 62.001-.063 (West 2000). The Texas Civil Practice and Remedies Code and Texas Rules of Civil Procedure set forth the specific circumstances under which sequestration may be available. *See id.*; TEX. R. CIV. P. 696-716 (West 2000).

[61] Generally, clauses that provide for the automatic termination of an executory contract or unexpired lease upon the insolvency or financial condition of Borrower, or upon the commencement of a bankruptcy case by Borrower, are invalid and unenforceable. 11 U.S.C. § 365(e)(1). These clauses are commonly referred to as "*ipso facto*" clauses. An important exception to this general rule occurs when this type of "*ipso facto*" clause appears in a contract to make a loan, extend financial accommodation or to provide debt financing. *Id.* § 365(e)(2). *Ipso facto* clauses in these types of agreements are specifically exempted from invalidation. *Id*.

proceeding or other action is not permanently dismissed or discharged on or before the earlier of trial thereon or _____ (__) days next following the date of filing.[62]

3.2 Remedies.[63] Upon the occurrence of an Event of Default, Lender shall have the immediate right, at the sole discretion of Lender and without notice, demand, presentment, notice of nonpayment or nonperformance, protest, notice of protest, notice of intent to accelerate, notice of acceleration, or any other notice or any other action (**ALL OF WHICH BORROWER HEREBY EXPRESSLY WAIVES AND RELINQUISHES**)[64] (i) to declare the entire unpaid balance of the indebtedness evidenced by this Note (including, without limitation, the outstanding principal balance hereof, including all sums advanced or accrued hereunder or under any other Loan Document, and all accrued but unpaid interest thereon) at once immediately due

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[62] In addition to the remedies available to a creditor in dealing with a solvent debtor, every creditor must consider the effect of all Debtor Relief Laws when dealing with insolvent or potentially insolvent debtors. A thorough treatment of all applicable aspects of the Bankruptcy Code is beyond the scope of this annotation; however, it should be noted that the bankruptcy of a Borrower typically does not restrict Lender from pursuing a guarantor upon a default resulting from Borrower's bankruptcy. *See* In re MortgageAm. Corp., 714 F.2d 1266, 1268 (5th Cir. 1983). Notwithstanding this general rule, a creditor of a nonbankrupt guarantor has been prohibited from pursuing the nonbankrupt guarantor outside bankruptcy court because the attempted action for recovery of the bankrupt assets, allegedly fraudulently transferred to an individual nonbankrupt guarantor, was properly the cause of action of the bankruptcy trustee for the benefit of all creditors of the bankrupt. Therefore, the Bankruptcy Code's automatic stay has barred pursuit of an individual nonbankrupt guarantor for fraudulent transfers from a bankrupt party. *See* Union Carbide Corp. v. Newboles, 686 F.2d 593, 594-595 (7th Cir. 1982); Beconta, Inc. v. Schneider, 41 B.R. 878 (E.D. Mich. 1984).

[63] The remedies provisions in a Note are typically more abbreviated than those contained in a Deed of Trust. A well-drafted Deed of Trust will contain numerous representations and covenants and will address specific remedies for the breach of same. *See* Annotated Deed of Trust, Article VII (Remedies). *See generally* W. Mike Baggett and Edward A. Peterson, Remedy Provisions in Deeds of Trust, Southern Methodist University School of Law Real Estate Law: Mortgages - In Depth (1990); Edward A. Peterson and John M. Nolan, Lender's Remedies: What Worked and What Didn't, Advanced Real Estate Course, State Bar of Texas (1991). A Note, by contrast, typically contains fewer covenants, the most important of which is to repay the indebtedness evidenced by the Note. So long as an Event of Default under the Note is included as a default or event of default under the Deed of Trust and the other Loan Documents, Lender will not be limited to the remedies set forth in Section 3.2.

[64] It is important to have a properly drafted waiver of notices. *See* annotation to Section 4.1 (Waivers), *infra*. If the Loan Documents do not include an adequate waiver, Lender will be required to give various notices to Borrower as described throughout the annotations relating to this Section 3.2. *See generally* Annotated Deed of Trust, Article VII (Remedies). Numerous Texas cases have held that contractual waivers similar to the waiver set forth in this Section 3.2 are valid. *See, e.g.*, Shumway v. Horizon Credit Corp., 801 S.W.2d 890, 893 (Tex. 1991) (distinguishing other waiver cases); Real Estate Exch. Inc. v. Bacci, 676 S.W.2d 440, 441 (Tex. App.--Houston [1st Dist.] 1984, no writ); B.W. Cruce v. Eureka Life Ins. Co. of Am., 696 S.W.2d 656, 657 (Tex. App.--Dallas 1985, writ ref'd n.r.e.). *See generally* Baggett, Texas Foreclosure: Law and Practice, § 1.10, Waiver of Acceleration Requirements (1984 & Supp. 1998). Absent unusual circumstances where considerations of timing necessitate a more abrupt approach, however, Lender's counsel should always advise that appropriate and ample notice be given because of the potential causes of action that could be created in favor of Borrower if precipitous action is taken by Lender. *See* third annotation to Section 3.2 (Remedies), *infra*, regarding why this language is printed in all bold and capitalized letters.

and payable (and upon such declaration, the same shall be at once immediately due and payable) and may be collected forthwith, whether or not there has been a prior demand for payment and regardless of the stipulated date of maturity,[65] (ii) to foreclose any liens and security interests

[65] Assuming an Event of Default has occurred under the terms of the Note (which would include the occurrence of a breach or default under the other Loan Documents as provided in Section 3.1(c)), Lender may, under this Section 3.2, accelerate the indebtedness evidenced by the Note with the minimum amount of notice. Texas common law requires written notice of default and acceleration in three distinct methods. *See* Purnell v. Follett, 555 S.W.2d 761, 764 (Tex. Civ. App.--Houston, [14th Dist.] 1977, no writ); Joy Corp., 543 S.W.2d at 694. First, notice of demand and presentment for payment must be delivered by Lender affording Borrower an opportunity to remedy the Event of Default giving rise to the demand. *See* Allen Sales and Servicenter, Inc. v. Ryan, 525 S.W.2d 863, 866 (Tex. 1975). Second, Lender must give "clear and unequivocal" notice of intent to accelerate, which may be incorporated into the notice of demand. *See* Shumway v. Horizon Credit Corp., 801 S.W.2d 890, 893 (Tex. 1991); Ogden v. Gibraltar Sav. Ass'n, 640 S.W.2d 232, 233 (Tex. 1982). Third, Lender must give clear and unequivocal notice that the debt has been accelerated. *See* Shumway, 801 S.W.2d at 893. The notice of acceleration may be combined with the posted notice of foreclosure, but the notice that the debt has been accelerated must be distinct from and subsequent to the notice of intent to accelerate. *See* Ogden, 640 S.W.2d at 233-34. Thus, at least two separate notices are required. *See generally* Shepler v. Kubena, 563 S.W.2d 382, 385 (Tex. Civ. App.--Austin 1978, no writ) (distinguishing intent to accelerate, which may be made by declaration, and acceleration itself, which requires something more than the declaration of intent). *See also* Shumway, 801 S.W.2d at 893. Although each of the above notice requirements may be waived by Borrower, any such waiver must be "clear and unequivocal" and should be made clearly conspicuous in the Note and Deed of Trust. *See id.* at 893. Many practitioners consider this "clear and unequivocal" standard as requiring (or at least making it prudent practice) that such waivers be printed in all bold and capitalized letters, although we are aware of no controlling common law or statutory authority specifically requiring such a drafting technique.

After Borrower has had a reasonable time to remedy the Event of Default giving rise to the demand, Lender may accelerate the entire indebtedness. However, what constitutes a "reasonable time" to cure is not clear. A reasonable time might be specifically stipulated in the Deed of Trust. For example, a ten (10) day period so stipulated has been held to be sufficient. *See* Investors Realty Trust v. Carlton Corp, 541 S.W.2d 289, 291-92 (Tex. Civ. App.--Dallas 1976, no writ). The Texas Supreme Court has used language suggesting that the opportunity to cure must be more than perfunctory; Lender must "bring home to the mortgagor that failure to cure will result in acceleration of the note and foreclosure under the power of sale." Ogden, 640 S.W.2d at 233. Further, "the intention to accelerate maturity must be evidenced by clear and unequivocal acts followed by affirmative action towards enforcing the declared intention." Curtis v. Speck, 130 S.W.2d 348, 351 (Tex. Civ. App.--Galveston 1939, writ ref'd). Some courts have allowed Lender either to declare the entire indebtedness due or to take some unequivocal action, such as filing suit, by which the debtor would necessarily know that the entire indebtedness is now due and payable. *See, e.g.*, Joy Corp., 543 S.W.2d at 694; Shepler, 563 S.W.2d at 385.

In addition to common law notice requirements, in certain situations the Texas Property Code requires that Lender give Borrower a twenty (20) day written certified mail notice prior to acceleration of the indebtedness and before notice of sale by foreclosure. This statutory notice requirement is limited to a "debtor in default" under a deed of trust or other contractual lien on real property used as the debtor's residence. TEX. PROP. CODE § 51.002(d) (West 2000). The language in the Texas Property Code (which applies "notwithstanding any agreement to the contrary") appears to eliminate the ability of a Borrower in this situation to contractually waive its statutory right of notice of intent to accelerate. *See id.*

Of course, Lender must comply with any specific notice requirements in the Note and other Loan Documents prior to acceleration. *See* Swoboda v. Wilshire Credit Corp., 975 S.W.2d 770, 777 (Tex. App.--Corpus Christi 1998, pet. denied); Handelman v. Handelman, 608 S.W.2d 298, 300 (Tex. Civ. App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.). The Note and Deed of Trust are integral parts of the same transaction and are to be read

securing payment hereof or thereof (including, without limitation, any liens and security interests covering any portion of the Mortgaged Property),[66] and (iii) to exercise any of Lender's other

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together for this particular purpose. *See* Joy Corp. v. Nob Hill N. Properties, Ltd, 543 S.W.2d 691, 695 (Tex. Civ. App.--Tyler 1976, no writ). *See* annotation to Section 4.15 (Controlling Agreement), *infra*.

Subsequent to Lender's acceleration of the indebtedness evidenced by the Note, Lender may unilaterally elect to revoke or withdraw the acceleration provided that Borrower has not detrimentally relied upon the acceleration. *See* Swoboda, 975 S.W.2d at 777.

[66] Section 3.2(ii) makes general reference to Lender's foreclosure rights which are typically addressed in much greater detail in the Deed of Trust. Under the Deed of Trust, the lien is granted to a trustee for the benefit of Lender. The power of sale is, therefore, not granted to and exercisable by Lender, but instead to and by the trustee for the benefit of Lender. For a more detailed discussion of Lender's foreclosure rights, *see* Annotated Deed of Trust, Section 7.1(d) (Foreclosure - Power of Sale) (addressing real property foreclosure under the Property Code) and Section 7.1(g) (Beneficiary's Uniform Commercial Code Remedies) (addressing personal property foreclosure under the Uniform Commercial Code). The Mortgaged Property is comprised of several different components, including both real and personal property. Real property foreclosures are conducted on the first Tuesday of each month between the hours of 10:00 a.m. and 4:00 p.m. at the area of the courthouse designated by the County Commissioners Court in the county in which the Mortgaged Property is located, with a notice posted at the courthouse door, personal notice to Borrower, and filing of the notice with the county clerk, all at least 21 days before the foreclosure sale. These requirements are defined by section 51.002 of the Texas Property Code and are unique to Texas law. Personal property foreclosures, on the other hand, are conducted pursuant to Chapter 9, Subchapter F of the UCC, which generally requires a commercially reasonable sale. *See* TEX. BUS. & COM. CODE §§ 9.601 -.628 (West 2000). Thus, real property foreclosures in Texas are very well defined with structured procedures unique to Texas law which do not necessarily require the sale to be commercially reasonable. Personal property foreclosure sales are not as specifically structured by statute; however, such sales must be commercially reasonable as to every aspect of the disposition, including method, manner, time, place and terms. The apparent conclusion is that although the legislature has specifically defined the procedures that must be followed to dispose of real property, personal property may be disposed of in any manner Lender elects, as long as the sale is in all respects commercially reasonable. The differences between real and personal property foreclosure procedures and requirements have had interesting effects upon the historical behavior of Lenders and Borrowers. Because the notice provisions for real property foreclosures mandate procedures known to both Lender and Borrower, the procedures provide certainty as to the mechanics of the sale. Both Lender and Borrower are offered an opportunity to dispose of property, with each fully understanding when, where, and how the sale or purchase will occur. In contrast, the nebulous standard of a "commercially reasonable sale" leaves both Lender and Borrower uncertain as to the satisfactory sale or purchase procedures for personal property. Article Nine of the UCC attempts to place the burden on the creditor seeking a deficiency to sell in a commercially reasonable manner, whatever that may be in the particular circumstances found by that creditor. The more certain real property foreclosure procedures generally work more effectively for both Lender and Borrower. *See generally* Van Brunt v. BancTexas Quorum, N.A., 804 S.W.2d 117 (Tex. App.--Dallas 1989, no writ).

Judicial and nonjudicial foreclosure on personal property may be pursued simultaneously. *See* Hubbard v. Lagow, 576 S.W.2d 163, 165 (Tex. Civ. App.--Austin 1979, writ ref'd n.r.e.); TEX BUS. COM. CODE § 9.601(a) (West 2000) (providing that the secured party has the rights and remedies under the UCC and that Lender may reduce its claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure). The rights and remedies provided in sections 9.601(a) and (b) are cumulative and may be pursued simultaneously. *Id.* § 9.601(c). *See* Annotated Deed of Trust, Section 7.1(g) (Beneficiary's Uniform Commercial Code Remedies) for further discussion of Lender's rights under the UCC.

rights, powers, recourses and remedies under this Note, under any other Loan Document, or at law or in equity,[67] and the same (w) shall be cumulative and concurrent, (x) may be pursued separately, singly, successively, or concurrently against Borrower or others obligated for the repayment of this Note or any part hereof, or against any one or more of them, or against the Mortgaged Property, at the sole discretion of Lender, (y) may be exercised as often as occasion therefor shall arise, it being agreed by Borrower that the exercise, discontinuance of the exercise of or failure to exercise any of the same shall in no event be construed as a waiver or release

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The filing of a suit and entry of an order directing foreclosure may be a more desirable course of action when problems exist with nonjudicial foreclosure or with respect to foreclosure of certain property specifically governed by statutory procedures. Judicial foreclosure may be preferable to nonjudicial foreclosure if there is a question as to the occurrence of an Event of Default or if there are issues relating to notice, organization of Borrower or authorization of Borrower's signatories. If the existence of an Event of Default is contested, a judicial determination of default prevents a subsequent suit for damages or rescission for wrongful foreclosure. If the Mortgaged Property is not subject to dissipation or loss and is of a value sufficient to satisfy a judgment for principal, interest and attorneys' fees, the longer and more elaborate judicial procedure may be advisable. If dissipation or loss of the Mortgaged Property is feared during pendency of the suit, relief enjoining any sale or disposition of the Mortgaged Property is available until a final and nonappealable judgment is entered. If a creditor encounters resistance to nonjudicial self-help repossession of collateral and repossession is not possible without breaching the peace, the secured party may obtain relief by judicial process. *See* Cohen v. Rains, 769 S.W.2d 380, 385 (Tex. App.--Fort Worth 1989, writ denied); Hubbard, 576 S.W.2d at 165; TEX. BUS. & COM. CODE § 9.609(b) (West 2000). *See generally* Baggett, Texas Foreclosure: Law and Practice, § 1.60 (1984 & Supp. 1998).

It is important to note that the filing of a petition under the Bankruptcy Code results in an automatic stay against the enforcement of a lien. *See* 11 U.S.C. § 362(a)(4). For a general discussion of the effect of bankruptcy on the enforcement of a lien in bankruptcy, *see* Baggett, Texas Foreclosure, § 15.01 *et. seq*.

[67] As discussed in the first annotation to Section 3.2, *supra*, the Note does not typically contain an exhaustive list of remedies. Therefore, it is advantageous to include "catch-all" language as provided under Section 3.2(iii) permitting Lender to exercise any other remedies that may be available. Such other remedies would include the various remedies available to Lender under the Deed of Trust and the other Loan Documents (which may include the right to perform Borrower's covenants, a right of entry onto the Mortgaged Property, the right to appointment of a receiver of the Mortgaged Property, certain rights relating to the income from the Mortgaged Property, and various UCC rights). Garnishment is a judicial remedy available to a creditor seeking assets of a debtor held by a third party, the garnishee. Sections 63.001 through 63.006 of the Texas Civil Practice and Remedies Code and Rules 657 through 679 of the Texas Rules of Civil Procedure set forth the specific circumstances in which garnishment may be available. *See* TEX. CIV. PRAC. & REM. CODE §§ 63.001-63.006 (West 2000); TEX. R. CIV. P. 657-679 (West 2000). Attachment is a judicial remedy available to an unsecured creditor seeking control of assets of a debtor that may be secreted or disposed of by the debtor. Sections 61.001 through 61.063 of the Texas Civil Practice and Remedies Code and Rules 592 through 609 of the Texas Rules of Civil Procedure set forth the circumstances in which attachment may be available. *See* TEX. CIV. PRAC. & REM. CODE § 61.001-61.063 (West 2000); TEX. R. CIV. P. 592-609 (West 2000). A sheriff's sale is a procedure available to creditors for disposal of assets of the debtor by way of levy and execution in enforcement of a judgment. Rules 621 through 656 of the Texas Rules of Civil Procedure set forth the procedures for execution on property in satisfaction of a judgment. *See id.* rules 621-656. Section 9.609 of the UCC allows secured parties to take possession of personal property collateral nonjudicially, upon default, if possession is accomplished without a breach of the peace. TEX. BUS. & COM. CODE § 9.609 (West 2000). For a general discussion of the various remedies available to Lender, *see* Annotated Deed of Trust, Article VII (Remedies).

thereof or of any other right, remedy, or recourse[68], and (z) are intended to be, and shall be, nonexclusive.[69] All rights and remedies of Lender hereunder and under the other Loan Documents shall extend to any period after the initiation of foreclosure proceedings, judicial or otherwise, with respect to the Mortgaged Property or any portion thereof. Without limiting the provisions of Section 4.19 hereof, if this Note, or any part hereof, is collected by or through an attorney-at-law, Borrower agrees to pay all costs and expenses of collection, including, but not limited to, Lender's attorneys' fees, whether or not any legal action shall be instituted to enforce this Note.[70]

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[68] If the course of conduct between Borrower and Lender is inconsistent with strict compliance with the contractual requirements of the Note and other Loan Documents, Section 3.2(y) provides that such conduct is not deemed a waiver of Lender's rights and remedies under the Loan Documents. However, some Texas cases indicate that accepting late payments or other conduct inconsistent with strict compliance with the contractual requirements of the Loan Documents may constitute a waiver of Lender's right to accelerate the indebtedness evidenced by the Note without notice. *See* annotations to Section 4.1 (No Waiver), *infra*; *see also* Baggett, Texas Foreclosure, § 1.11.

[69] Filing a suit for a judgment on a debt and for foreclosure of real property constitutes an election by Lender to foreclose upon the Mortgaged Property by legal process and constitutes an abandonment of the right of nonjudicial foreclosure of real property. *See* Coffman v. Brannen, 50 S.W.2d 913, 915 (Tex. Civ. App.--Amarillo 1932, no writ). However, proceeding with judicial foreclosure does not irrevocably bar termination of the judicial foreclosure action and commencing nonjudicial foreclosure so long as no judgment has been entered for judicial foreclosure. *See* Gandy v. Cameron State Bank, 2 S.W.2d 971, 973 (Tex. Civ. App.--Austin 1927, writ ref'd). *See generally* Baggett, Texas Foreclosure, § 1.66.

With respect to real property, the court in French v. May, 484 S.W.2d 420, 428 (Tex. Civ. App.--Corpus Christi 1972, writ ref'd n.r.e.) allowed a Lender to conduct a nonjudicial foreclosure while an action was pending on a Note when the action on the Note did not seek judicial foreclosure. Further, some cases suggest that a suit on a Note and a suit on the Mortgaged Property are separate causes of action and may be pursued separately. For instance, in Middleton v. Nibling, 142 S.W. 968, 969 (Tex. Civ. App.--Austin 1911, no writ), the court held that "it is well settled in this state that a holder of a vendor's lien note, or a debt secured by a mortgage, may bring suit on the same and obtain judgment for the debt; and if no foreclosure is asked in such suit he may subsequently maintain a suit to foreclose his lien." *See also* Kempner v. Comer, 11 S.W. 194 (Tex. 1889). The court in WC Belcher Land Mortgage Co. v. Taylor, 212 S.W. 647, 650 (Tex. Comn. App. 1919) held that "a mortgage or deed of trust secures the debt, not the note or other evidence of the debt." Moreover, a suit by Borrower against Lender does not bar subsequent nonjudicial foreclosure by Lender. *See* Stille v. Colborn, 740 S.W.2d 42, 44 (Tex. App.--San Antonio 1987, writ denied); Kaspar v. Keller, 466 S.W.2d 326, 329 (Tex. Civ. App.--Waco 1971, writ ref'd n.r.e.). Texas law does not require Lender to proceed with liquidation of collateral prior to entry of a judgment on the secured debt. *See* Garza v. Allied Fin. Co., 566 S.W.2d 57, 62 (Tex. Civ. App.--Corpus Christi 1978), *remanded on other issues*, 626 S.W.2d 120 (Tex. App.--Corpus Christi 1981, ref'd n.r.e.); *see also* Melcer v. Warren, 550 S.W.2d 760, 762-763 (Tex. Civ. App.--Austin 1977, writ ref'd n.r.e.); Baggett, Texas Foreclosure, §§ 1.42 and 1.42A. This contractual provision reinforces Lender's rights to pursue collateral independent of an action on the secured debt.

[70] Even if the Loan Documents do not contractually provide for the recovery of attorneys' fees in connection with pursuit or collection of the debt, Texas law provides for recovery of attorneys' fees on a contract, either written or oral. *See* TEX. CIV. PRAC. & REM. CODE § 38.001(8) (West 2000). *See* Lyons v. Montgomery, 701 S.W.2d 641, 643 (Tex. 1985); F.R. Fernandez Construction & Supply Co. v. Nat'l Bank of Commerce, 578 S.W.2d 675, 677 (Tex. 1979); Edwin M. Jones Oil Co. v. Pend Oreille Oil & Gas Co., 794 S.W.2d 442, 449 (Tex. App.--Corpus Christi 1990, writ denied); *but see* Jeffreys v. McGlamery, 96 S.W.2d 572, 576 (Tex. Civ.

3.3 Limitation of Liability. ***[See Rider 5 for Optional Exculpation Provisions.]***

ARTICLE IV - GENERAL PROVISIONS

4.1 No Waiver; Amendment. No failure to accelerate the indebtedness evidenced by this Note by reason of an Event of Default hereunder, acceptance of a partial or past due payment, or indulgences granted from time to time shall be construed (i) as a novation of this Note or as a reinstatement of the indebtedness evidenced by this Note or as a waiver of such right of acceleration or of the right of Lender thereafter to insist upon strict compliance with the terms of this Note, or (ii) to prevent the exercise of such right of acceleration or any other right granted under this Note, under any of the other Loan Documents or by any applicable laws.[71] Borrower

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App.--Amarillo 1936, no writ) (holding that the loan documents must specifically provide for reimbursement of attorneys' fees and expenses incurred by the lender or the trustee in order to receive such reimbursement). It should be noted that the Jeffreys case has not been cited by other courts. Section 38.002(3) of the Texas Civil Practice and Remedies Code requires presentment of the claim for the recovery of attorney's fees by demand letter thirty days before or after filing suit but, in any case, no later than thirty days before entry of judgment. TEX. CIV. PRAC. & REM. CODE § 38.002(3) (West 2000). No particular form of demand or presentment is required. An original complaint containing a demand for payment which was not answered by the defendant with a tender of payment has been found to constitute presentment. *See* Boehringer Mannheim Diagnostics, Inc v. Pan Am. World Airways, Inc., 531 F. Supp. 344, 354 (S.D. Tex. 1981). Many state courts hold, however, that the filing of a lawsuit by itself does not constitute a sufficient presentment pursuant to the statute. *See* European Import Co. v. Lone Star Co., 596 S.W.2d 287, 291 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.); Sterling Const. Co. v. West Texas Equip. Co., 597 S.W.2d 515, 518 (Tex. Civ. App.--Amarillo 1980, no writ). Responses to requests for admissions may constitute a sufficient presentment. *See* Thompson v. Starr Realco, Inc., 648 S.W.2d 25, 29 (Tex. App.--Tyler 1983, writ ref'd n.r.e.); Welch v. Gammage, 545 S.W.2d 223, 226 (Tex. Civ. App.--Austin 1976, writ ref'd n.r.e.).

[71] Waiver is an intentional abandonment or relinquishment of a known right or advantage. *See* Tenneco Inc. v. Enterprise Prod. Co., 925 S.W. 2d 640, 643 (Tex. 1996); Massachusetts Bonding and Ins. Co. v. Orkin Exterminating Co., 416 S.W.2d 396, 401 (Tex. 1967). Waiver may result from implication and usage or from an understanding between parties. *See* Preston Tower Condominium Assn v. S. B. Realty, 685 S.W.2d 98, 103 (Tex. App.--Dallas 1985, no writ). Waiver is essentially unilateral, it results as a legal consequence from some act or conduct of the party against whom waiver is sought and it need not be founded upon a new agreement or supported by consideration. *See* United States Fidelity & Guar. Co. v. Bimco Iron & Metal Corp., 464 S.W.2d 353, 358 (Tex. 1971). A party with full knowledge of the material facts that fails to require the performance that such party has a right to require has been held to waive such right. *See* Scherer v. Wahlstrom, 318 S.W.2d 456 (Tex. App.--Fort Worth 1958, writ ref'd). Accordingly, the elements of waiver can be generally summarized as the intentional relinquishment of a right that the party actually knows exists, or of which such party has constructive knowledge. *See* Ford v. Culverson, 308 S.W.2d 855, 864 (Tex. 1958); Cattle Feeders, Inc. v. Jordan, 549 S.W.2d 29 (Tex. Civ. App.--Corpus Christi 1977, no writ). *See generally* Edward A. Peterson and John M. Nolan, Lender's Remedies: What Worked and What Didn't, Advanced Real Estate Law Course, State Bar of Texas (1991).

Further, it has been held that a non-waiver provision such as the one contained in this Note does not necessarily preclude the waiver of such non-waiver provision. *See* Winslow v. Dillard Dep't Stores, Inc., 849 S.W.2d 862, 863-64 (Tex. App.--Texarkana 1993, writ denied); Zwick v. Lodewijk Corp., 847 S.W.2d 316, 318 (Tex. App.--Texarkana 1993, writ denied). In that regard, the main element of waiver is intent. *See* Heinrich v. Wharton County Livestock, Inc., 557 S.W.2d 830, 834 (Tex. App.--Corpus Christi 1977, writ ref'd, n.r.e.); Smith v. City of Dallas, 425 S.W.2d 467 (Tex. Civ. App.--Dallas 1968, no writ). The intent to waive a right may be either

hereby expressly waives and relinquishes the benefit of any statute or rule of law or equity now provided, or which may hereafter be provided, which would produce a result contrary to or in conflict with the foregoing.[72] The failure to exercise any remedy available to Lender shall not be

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express or implied. *See* Long v. Lee, 777 S.W.2d 158, 164 (Tex. App.--Dallas 1989, no writ). However, waiver by implication will only be applied to prevent fraud or other inequitable consequences. *See* Shook v. Republic Nat'l Bank, 627 S.W.2d 741 (Tex. App.--Tyler 1981), *rev'd on other grounds*, 653 S.W.2d 278 (Tex. 1983).

A claim of continuing waiver is an attempt by Borrower to use a waiver of an Event of Default by Lender in one instance as a waiver for that same Event of Default in all instances until such time as Lender requires strict compliance with the Loan Documents. Section 4.1 attempts to preclude the argument that a "course of conduct" between the parties established a new and contradictory contractual term. However, under the cases hereinbefore outlined, such an argument by Lender might not prevail if Lender has, in fact, continually waived a specific Event of Default over a period of time without requiring strict compliance. In such a case, a prudent course of action is to notify Borrower in writing that strict compliance with the terms of the Loan Documents will thereafter be required. Such a notice is intended to effectively contradict Borrower's course of conduct/continuing waiver argument.

In circumstances where Lender is deemed to have waived certain of its rights by accepting late payments (*see* second annotation to Section 4.1 [No Waiver; Severability], *infra*), notification of Lender's insistence of timely payments and compliance with the terms of the Note can typically cure the past waiver problem with respect to future payments and obligations. Once Borrower has knowledge that it can no longer rely on Lender to further waive Lender's right to insist upon strict compliance with the Loan Documents, the waiver is no longer in effect. *See* Bowie Nat'l Bank v. Stevens, 532 S.W.2d 67 (Tex. 1975); Slusky v. Coley, 668 S.W.2d 930, 933 (Tex. App.--Houston [14th Dist.] 1984, no writ) (citing Baggett, W. Mike, Acceleration and Foreclosure on Texas Real Estate, 14 TEX. TECH L. REV. 704 (1983)); Slivka v. Swiss Ave. Bank, 653 S.W.2d 939 (Tex. App.--Dallas 1983, no writ). In one case where the court held that an acceptance of late payments waived the right to accelerate without notice of intent, the court specifically noted that "where numerous late payments have been accepted, equity will not allow an acceleration of the note unless the holder, within a reasonable time in advance of the receipt of a late payment upon which default is relied, has unequivocally notified the obligor that no further late payments will be accepted." Highpoint of Montgomery Corp. v. Vail, 638 S.W.2d 624, 627 (Tex. App.--Houston [1st Dist.] 1982, writ ref'd n.r.e.). Accordingly, the court found waiver because the holder continued to accept late payments after notice that no further late payments would be accepted. Of course, a finding of waiver depends upon the particular facts in each case. *See* Dobson v. Dobson, 594 S.W.2d 177 (Tex. Civ. App.--Houston [1st Dist] 1980, writ ref'd. n.r.e.). Normally, waiver is decided by the fact-finder after evidentiary presentation of all the facts relevant to an intentional and knowing relinquishment of a known right. While most cases do not discuss whether the facts reviewed in the appellate opinion constitute waiver, factually or as a matter of law, prior cases involving the same facts could be cited as authority for or against a finding of waiver as a matter of law. Waiver fact patterns not previously given legal review remain questions for the finder of fact. If, however, the parties have contractually agreed to the legal effect of factual circumstances, the parties are generally bound by the agreed and enforceable contractual provisions, whether such provisions are labeled "waiver clauses" or otherwise.

[72] Notwithstanding the analysis under the preceding annotation, it has been held that the benefits of a clause waiving notice of acceleration in a note, loan agreement, security agreement, or deed of trust may be waived by Lender. *See* Bodiford v. Parker, 651 S.W.2d 338 (Tex. App.--Fort Worth 1983, no writ); Dhanani Inv. v. Second Master Belt Homes, 650 S.W.2d 220 (Tex. App.--Fort Worth 1983, no writ). In Dhanani, the court held that "acceptance of seven consecutive late payments certainly constituted a waiver by appellee [Lender] of his right to accelerate and foreclose without giving further notice that such tardiness would not be tolerated in the future." Therefore, prior acceptances of late payments may require acceleration notices notwithstanding a waiver provision in the Loan Documents.

deemed to be a waiver of any rights or remedies of Lender under this Note or under any of the other Loan Documents, or at law or in equity. No extension of the time for the payment of this Note or any installment due hereunder, made by agreement with any person now or hereafter liable for the payment of this Note, shall operate to release, discharge, modify, change or affect the original liability of Borrower under this Note, either in whole or in part, unless Lender specifically, unequivocally and expressly agrees otherwise in writing. This Note may not be changed orally, but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, or modification is sought.[73]

4.2 **WAIVERS.**[74] **EXCEPT AS SPECIFICALLY PROVIDED IN THE LOAN DOCUMENTS TO THE CONTRARY, BORROWER AND ANY ENDORSERS OR GUARANTORS HEREOF SEVERALLY WAIVE AND RELINQUISH PRESENTMENT FOR PAYMENT, DEMAND, NOTICE OF NONPAYMENT OR NONPERFORMANCE, PROTEST, NOTICE OF PROTEST, NOTICE OF INTENT TO ACCELERATE, NOTICE OF ACCELERATION OR ANY OTHER NOTICES OR ANY OTHER ACTION. BORROWER AND ANY ENDORSERS OR GUARANTORS HEREOF SEVERALLY WAIVE AND RELINQUISH, TO THE FULLEST EXTENT PERMITTED BY LAW, ALL RIGHTS TO THE BENEFITS OF ANY MORATORIUM, REINSTATEMENT, MARSHALING, FORBEARANCE, VALUATION, STAY, EXTENSION, REDEMPTION, APPRAISEMENT, EXEMPTION AND HOMESTEAD NOW OR HEREAFTER PROVIDED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF EACH STATE THEREOF, BOTH AS TO ITSELF AND IN AND TO ALL OF ITS PROPERTY, REAL AND PERSONAL, AGAINST THE ENFORCEMENT AND COLLECTION OF THE OBLIGATIONS EVIDENCED BY THIS NOTE OR BY THE OTHER LOAN DOCUMENTS.**

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[73] To forestall the possible argument that a subsequent oral agreement (or silence, in the case of waiver) can modify the Loan Documents, this Note specifically requires that any such agreement, modification or waiver must be in writing signed by the party against whom enforcement is sought.

[74] Section 4.2 is designed as a waiver of various constitutional, statutory or judicial rights that Borrower (or any endorser or guarantor of the Note) may have under the Loan Documents. For example, the Texas legislature has mandated that the requirement of presentment for payment of an instrument is excused if Borrower has waived the requirement of presentment. *See* TEX. BUS. & COM. CODE § 3.504(a)(4) (West 2000). However, a waiver of presentment, notice of intent to accelerate, and notice of acceleration is effective if, and only if, it is clear and unequivocal. *See* Shumway v. Horizon Credit Corp., 801 S.W.2d 890, 893 (Tex. 1991); *see* annotations to Section 3.2 (Remedies), *supra*. To meet this standard, the waiver provision must specifically and separately state the right surrendered. *Id*. at 893. Waiver of "demand" or "presentment," and "notice" or "notice of acceleration," in just so many words, is only effective to waive presentment and notice of acceleration, but is not effective for a waiver of notice of intent to accelerate, which is a separate right. *Id*. at 894. *See, e.g.*, Real Estate Exchange, Inc. v. Bacci, 676 S.W.2d 440, 441 (Tex. App.--Houston [1st Dist.] 1984, no writ). *See also* second and third annotations to Section 3.2 (Remedies), *supra*.

4.3 Interest Provisions.[75]

(a) Savings Clause.[76] It is expressly stipulated and agreed to be the intent of Borrower and Lender at all times to comply strictly with the applicable Texas law

[75] The following provisions, specifically including the definitional provisions, are grouped together in Section 4.3 for various practical reasons. Our collective experience in working with the usury savings clause and its operative provisions is that they seldom, if ever, require any changes to accommodate the specific terms of any transaction and should not be modified. Placing the definitional provisions in Section 4.3 (instead of in Section 1.1), in the context in which they are used, facilitates the reader's comprehension of the usury savings clause and should discourage modification of same. These provisions are designed to be self-contained and internally consistent within Section 4.3 and should not be the subject of negotiation between Borrower and Lender.

[76] Although great care must be taken by Lender to avoid a usury violation in the process of underwriting, structuring and documenting a loan, events may occur and circumstances may arise under which, quite unexpectedly, it is determined or alleged that Lender has contracted for, charged or received interest at a rate or in an amount exceeding the Maximum Lawful Rate. It is for this reason, essentially to protect Lender from the consequences of unintended and unanticipated violations of the usury law, that the Loan Documents will contain what is commonly referred to as a "usury savings clause." Such a clause is typically found in the Note and should be duplicated identically in all of the other Loan Documents (or, if not included in each of the other Loan Documents, it should be made clear in the Note that such provision is intended to govern and control the other Loan Documents). The usury savings clause typically contains several distinct provisions: (i) an express statement of the intent of Lender not to violate the usury law, (ii) the right to reform the Loan Documents in the event of a determination of usury, to cancel excess amounts of interest and to refund any excess amounts paid or to apply the same to the reduction of the principal balance of the debt, (iii) the right to amortize, or "spread," throughout the entire stated term of the loan all interest contracted for, charged or received thereon so as to achieve a cumulative average rate of return below the Maximum Lawful Rate, and (iv) the right of Lender to receive notice of and opportunity to cure any alleged usury, as a condition precedent to any claim made by Borrower seeking usury penalties against Lender.

The usury savings clause will not necessarily protect Lender from all violations of usury law, such as where the loan is deemed to be "usurious on its face," in which case the spreading concept contained in the typical savings clause is likely to be deemed ineffective. *See* Nevels v. Harris, 102 S.W.2d 1046, 1050 (Tex. 1937) (stating that "a person may [not] exact from a borrower a contract that is usurious under its terms, and then relieve himself of the pains and penalties visited by law upon such an act by merely writing into the contract a disclaimer of any intention to do that which under his contract he has plainly done"); Smart v. Tower Land and Inv. Co., 597 S.W.2d 333, 340-41 (Tex. 1980); First State Bank v. Dorst, 843 S.W.2d 790, 793 (Tex. App.--Austin 1992, writ denied). However, the inclusion of a well-drafted usury savings clause should, in most cases, provide Lender with a contractually enforceable and legally permissible means of avoiding the harsh penalties imposed in the event of a judicial determination that usury has occurred (unless Lender has contracted for usurious interest). A savings clause may cure an open-ended contingency provision, the operation of which may or may not result in a charge of usurious interest. *See* Dorst, 843 S.W.2d at 793; Smart, 597 S.W.2d at 340-341; Pharms v. B&B Ventures, Inc., 938 S.W.2d 199 (Tex. App.--Houston [14th Dist] 1997, pet. denied); Woodcrest Assoc., Ltd. v. Commonwealth Mortgage Corp., 775 S.W.2d 434, 437 (Tex. App.--Dallas 1989, writ denied) (citing 49 years of case law regarding savings clauses).

The Loan Documents should negate any obligation of Borrower to pay or assume the debt of another obligor owing to Lender as protection against the so-called "Alamo Lumber Rule." That rule, established in Alamo Lumber Co. v. Gold, 661 S.W.2d 926 (Tex. 1983), provides that if, as a condition to the extension of credit to a Borrower, such Borrower is required to assume or pay off the debt of another party owing to Lender, then such debt assumed or paid off is deemed, for usury calculation purposes, to be interest on the loan. *See id.* Should Lender

governing the maximum rate or amount of interest[77] payable on the indebtedness evidenced by this Note and the Related Indebtedness (or applicable United States federal law to the extent that it permits Lender to contract for, charge, take, reserve or receive a greater amount of interest than under Texas law). If the applicable law is ever judicially interpreted so as to render usurious any amount (i) contracted for, charged, taken, reserved or received pursuant to this Note, any of the other Loan Documents or any other communication or writing by or between Borrower and Lender related to the transaction or transactions that are the subject matter of the Loan Documents, (ii) contracted for, charged, taken, reserved or received by reason of Lender's exercise of the option to accelerate the maturity of this Note and/or the Related Indebtedness, or (iii) Borrower will have paid or Lender will have received by reason of any voluntary prepayment by Borrower of this Note and/or the Related Indebtedness, then it is Borrower's and Lender's express intent that all amounts charged in excess of the Maximum Lawful Rate shall be automatically canceled, ab initio, and all amounts in excess of the Maximum Lawful Rate theretofore collected by Lender shall be credited on the principal balance of this Note and/or the Related Indebtedness (or, if this Note and all Related Indebtedness have been or would thereby be paid in full, refunded to Borrower), and the provisions of this Note and the other Loan Documents shall immediately be deemed reformed and the amounts

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condition the making of the loan upon any such assumption or payment of the debt of another, the effect for usury calculation purposes would be to increase the effective yield (or rate of interest) to Lender. If, by application of the Alamo Lumber Rule, the yield to Lender exceeds the Maximum Lawful Rate, then the loan will be deemed usurious. Whether Lender will be subject to the penalties for usury will then depend on the relevant factual circumstances, application of appropriate provisions of the usury savings clause and the exercise of any statutory right to cure, if applicable.

[77] "Interest" is defined under Texas law as "compensation for the use, forbearance, or detention of money." *See* TEX.FIN.CODE § 301.002(a)(4) (West 2000). Accordingly, it is critical for Lender to be aware that "interest" in a given transaction will, for purposes of the usury law, include more than just the stipulated interest on the Note at the rate or rates specified therein. A thorough treatment of Texas usury law is beyond the scope of this annotation, but certain basic concepts are illustrative. The existence of usury is determined by a construction of all of the documents constituting the transaction, interpreted as a whole, and in light of the surrounding circumstances (*i.e.*, not just the Note itself). *See* Spanish Village Ltd. v. American Mortgage Co., 586 S.W.2d 195, 199 (Tex. Civ. App.--Tyler 1979, writ ref'd n.r.e.). A court applying Texas law will look beyond the form of the transaction to its substance in determining the existence or non-existence of usury. Nomenclature assigned to a particular charge is not controlling. *See* Gonzalez County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976). In this regard, Lender should be careful to avoid an "Alamo Lumber" structure or, should the same be present, to determine that it does not contribute to a usurious loan when combined with all other aspects of the transaction.

The usury savings provision contained in this Note is specifically designed to apply to any and all interest contracted for, charged, taken, reserved, received, paid or payable in connection with the Note or any of the other Loan Documents no matter how the indebtedness evidenced by the Note may be described in this Note or the other Loan Documents. In other words, while there may be reason to alter the definition or description of the "indebtedness" for purposes of this Note or the other Loan Documents (such as the definition of Indebtedness secured by the Deed of Trust), there is no justification for negotiating the language of this usury savings provision, which the reader is encouraged not to entertain, because this provision should remain applicable no matter how "indebtedness" is defined elsewhere in the Loan Documents.

thereafter collectible hereunder and thereunder reduced, without the necessity of the execution of any new document, so as to comply with the applicable law, but so as to permit the recovery of the fullest amount otherwise called for hereunder and thereunder; provided, however, if this Note has been paid in full before the end of the stated term of this Note, then Borrower and Lender agree that Lender shall, with reasonable promptness after Lender discovers or is advised by Borrower that interest was received in an amount in excess of the Maximum Lawful Rate, either refund such excess interest to Borrower and/or credit such excess interest against this Note and/or any Related Indebtedness then owing by Borrower to Lender.[78] Borrower hereby agrees that as a condition precedent to any claim seeking usury penalties against Lender, Borrower will provide written notice to Lender, advising Lender in reasonable detail of the nature and amount of the violation, and Lender shall have sixty (60) days after receipt of such notice in which to correct such usury violation, if any, by either refunding such excess interest to Borrower or crediting such excess interest against this Note and/or the Related Indebtedness then owing by Borrower to Lender.[79] All sums contracted for, charged, taken, reserved or received by Lender for the use, forbearance or detention of any debt evidenced by this Note and/or the Related Indebtedness shall, to the extent permitted by applicable law, be amortized or spread, using the actuarial method, throughout the stated term of this Note and/or the Related Indebtedness (including any and all renewal and extension periods) until payment in full so that the rate or amount of interest on account of this Note and/or the Related Indebtedness does not exceed the Maximum Lawful Rate from time to time in effect and applicable to this Note and/or the Related Indebtedness for so long as debt is outstanding.[80] In no event shall the provisions of Chapter 346 of the Texas Finance Code

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[78] Lender's right to either refund excess interest paid or apply excess interest to the reduction of principal indebtedness is a common law remedy recently codified in the Texas Finance Code at section 306.004(b). Lenders who comply with section 306.004(b) are not subject to the penalties provided by law for contracting for, charging, or receiving interest in excess of the maximum rate authorized. *See* TEX. FIN. CODE § 306.004(c) (West 2000).

[79] Not later than the sixty-first (61st) day before the date Borrower files suit seeking penalties for Lender's violation of the usury law, Borrower is required to give Lender written notice stating in reasonable detail the nature and amount of the violation. Lender is then entitled to correct such violation within the sixty day period beginning with the date such notice is received. If Lender timely corrects such violation, Lender will not be liable to Borrower for such violation. Such notice requirement, however, does not apply to a Borrower who, as a defendant, files a counterclaim alleging usurious interest in an original suit filed by Lender. *See* TEX.FIN.CODE § 305.006 (West 2000). Lender is also not liable to Borrower for a violation of the usury penalty statute if Lender gives written notice to Borrower of Lender's usury violation before Borrower itself gives written notice of the violation or files an action alleging the violation, and provided Lender corrects such violation not later than the sixtieth day after the date Lender actually discovered the violation. *See id.* § 305.103. The penalties, both civil and criminal, provided in Chapter 305 of the Texas Finance Code are the only penalties for violation of the Texas Finance Code prohibitions on usurious interest. Common law penalties do not apply. *See id.* §§ 305.001 and 305.007.

[80] This is the so called "spreading" provision. The theory of spreading, well supported by Texas case law, is that the interest contracted for, charged or received in connection with a loan should be analyzed in the context of the full, contractual loan term over which such interest is to be paid, rather than any shorter period (such as when the loan has been accelerated) over which the impact of loan fees, front-end charges and other compensation received

(which regulates certain revolving credit loan accounts and revolving triparty accounts) apply to this Note and/or any of the Related Indebtedness.[81] Notwithstanding anything to the contrary contained herein or in any of the other Loan Documents, it is not the intention of Lender to accelerate the maturity of any interest that has not accrued at the time of such acceleration or to collect unearned interest at the time of such acceleration.

(b) Ceiling Election. To the extent that Lender is relying on Chapter 303 of the Texas Finance Code to determine the Maximum Lawful Rate payable on the Note and/or any other portion of the Indebtedness, Lender will utilize the weekly ceiling from time to time in effect as provided in such Chapter 303, as amended. To the extent United States federal law permits Lender to contract for, charge, take, receive or reserve a greater amount of interest than under Texas law, Lender will rely on United States federal law instead of such Chapter 303 for the purpose of determining the Maximum Lawful Rate. Additionally, to the extent permitted by applicable law now or hereafter in effect, Lender may, at its option and from time to time, utilize any other method of establishing the Maximum Lawful Rate under such Chapter 303 or under other applicable law by giving notice, if required, to Borrower as provided by applicable law now or hereafter in effect.[82]

(c) Definitions.[83]

(i) As used hereunder, the term "Maximum Lawful Rate" shall mean the maximum lawful rate of interest which may be contracted for, charged, taken, received or reserved by Lender in accordance with the applicable laws of the State of Texas (or applicable United States federal law to the extent that such law permits Lender to contract for, charge, take, receive or reserve a greater amount of interest than under Texas law), taking into account all Charges made in

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by Lender might otherwise result in a determination of usury. *See* TEX. FIN CODE § 306.004 (West 2000) (codifying the spreading concept).

[81] This provision is of critical importance in the context of a commercial loan. Unless the account provides otherwise, Chapter 346 of the Texas Finance Code regulates revolving credit loan accounts and revolving triparty accounts, including provisions regarding maximum chargeable interest rates, regardless of whether the loan or extension of credit is for consumer or business purposes. TEX. FIN. CODE § 346.004 (West 2000). Generally, the maximum rates set forth in Chapter 346 are lower than the maximum rate available to creditors in the State of Texas absent applicability of Chapter 346.

[82] Other Texas statutes also apply, such as the corporate borrower statutes, but none of these statutes will provide a usury ceiling any higher than that of Chapter 303 of the Texas Finance Code. *See* TEX. REV. CIV. STAT. ANN. art. 1302-2.09, 1302-2.09A (Vernon 1995 & Supp. 1999).

[83] These definitions have been included in Section 4.3(c) instead of in Section 1.1 for ease of reference and to facilitate the goals enumerated under the first annotation to Section 4.3(a) (Savings Clause), *supra*.

connection with the transaction evidenced by this Note and the other Loan Documents.[84]

(ii) As used hereunder, the term "Charges" shall mean all fees, charges and/or any other things of value, if any, contracted for, charged, taken, received or reserved by Lender in connection with the transactions relating to this Note and the other Loan Documents, which are treated as interest under applicable law.[85]

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[84] The Texas Finance Code stipulates the permissible rates of interest in Texas. The maximum lawful rate or amount of interest is ten percent (10%) per annum, except as otherwise provided by law. *See* TEX. FIN. CODE § 302.001 (West 2000). Other Texas statutes provide alternative ceilings. The most significant of these, and most relevant to the real estate practitioner, are those optional rate ceilings found in Chapter 303 of the Texas Finance Code. Chapter 303 provides for optional weekly, monthly, quarterly and annualized ceilings. These alternative ceilings are computed by the Texas Consumer Credit Commissioner in accordance with the provisions of Chapter 303 and published on a weekly basis. As of the date of this presentation, the maximum rate of interest permitted under Texas law pursuant to Chapter 303, applicable to each of the four alternative optional ceilings, is eighteen percent (18%) per annum (as to consumer and commercial loans, regardless of amount).

United States federal law provides certain possible exceptions to the application of Texas statutes for determination of the Maximum Lawful Rate. For example, 12 U.S.C. § 85 of the National Bank Act provides an alternative maximum rate of interest that may be charged by national banks. Likewise, 12 U.S.C. § 1831(d) creates a "most favored lender" status for state-chartered insured depository institutions and certain other banks; 12 U.S.C. § 1463(g) is a "most favored lender" statute applicable to insured savings and loan associations; 12 U.S.C. § 1785(g) creates a "most favored lender" status for credit unions whose accounts are insured by the National Credit Union Administration Board. All of these federal statutes, among others, provide for an alternative means of determining the Maximum Lawful Rate of interest on a loan. However, it is likely that, with one exception, the federal statutes will provide no higher interest ceiling than is already available under Texas law for a typical real estate secured loan. The typical exception, however, is for loans made by federally-insured or federally-regulated lenders secured by first liens on residential real property, in which case federal law preempts any state law limitation on the rate or amount of interest, discount points, finance charges or other charges which may be charged, taken, received or reserved in connection with such loans. *See* 12 U.S.C. § 1735f-7a. The effect of this federal preemption is that there is no usury ceiling for appropriately qualified lenders and loans. *See* annotations to definition of Default Interest Rate, in Section 1.1, *supra*, regarding limitations on interest. *See* TEX. FIN. CODE § 303 (West 2000). *See also* Michael R. Boulden and Sanford A. Weiner, Usury Update, 33rd Annual Mortgage Lending Institute, The University of Texas School of Law (September 1999).

[85] Violations of the usury laws may occur in the pre-commitment, commitment, closing, funding, servicing (both prior to and after the occurrence of an Event of Default) and enforcement stages of a loan and may arise from any event or circumstance of contracting for, charging or receiving of interest, or any combination thereof, which by itself or collectively with all other interest contracted for, charged or received with respect to such loan exceeds the Maximum Lawful Rate. In order to avoid contracting for usurious interest, it is critical to expressly establish within the Loan Documents the limit on interest that may under any circumstance be paid or payable on the indebtedness evidenced by the Note or the Related Indebtedness. The aggregate amount of interest includes (i) interest accruing on the indebtedness evidenced by the Note or the Related Indebtedness after the occurrence of an Event of Default, (ii) commitment fees and other charges required to be paid at any time by Borrower in connection with the loan and that would or could by judicial determination or otherwise be deemed interest on the loan, and (iii) interest specified in the Note to be paid prior to the occurrence of an Event of Default. If the Note Rate is a variable rate, such rate should be contractually capped to avoid a usury problem. This "cap" is achieved by stipulating the Default Interest Rate to be the Note Rate plus a margin, but not to exceed the Maximum Lawful Rate in any event. The Maximum

(iii) As used hereunder, the term "Related Indebtedness" shall mean any and all indebtedness paid or payable by Borrower to Lender pursuant to the Loan Documents or any other communication or writing by or between Borrower and Lender related to the transaction or transactions that are the subject matter of the Loan Documents, except such indebtedness which has been paid or is payable by Borrower to Lender under this Note.[86]

4.4 Use of Funds.[87] Borrower hereby warrants, represents and covenants that (i) the loan evidenced by this Note is made to Borrower solely for the purpose of acquiring or carrying on a business or commercial enterprise, (ii) all proceeds of this Note shall be used only for business and commercial purposes, and (iii) no funds disbursed hereunder shall be used for personal, family, agricultural or household purposes.

4.5 Further Assurances and Corrections.[88] From time to time, at the request of Lender, Borrower will (i) promptly correct any defect, error or omission which may be

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Lawful Rate is defined as set forth in Section 1.1, *supra*, reserving to Lender the benefit of the highest limit on interest (often referred to as the "usury ceiling") that may be available under applicable state or federal statutes.

[86] It is the intent of this usury savings clause to distinguish between the indebtedness that is the subject of and evidenced by the Note from any and all other indebtedness (*i.e.* the "Related Indebtedness") that may have been paid or that may become payable by Borrower pursuant to the other Loan Documents. This distinction is relevant in the context of the Savings Clause and is critical to the proper functioning of that provision, as drafted. As previously noted in the annotations to Section 4.3, *supra*, Texas courts will consider the totality of the circumstances in analyzing a loan for usury purposes and, therefore, the practitioner should note that the Loan Documents other than the Note may evidence indebtedness constituting interest or provide a source of additional interest for usury calculation purposes. *See* Annotated Deed of Trust, Section 1.1 (Definition of Indebtedness) for a discussion of the need for a future advances clause and a "dragnet" clause in the Deed of Trust.

[87] If this representation is correct, Lender's collection methods are not subject to the Texas Debt Collection Practices Act (TEX. FIN. CODE §§ 392.001-.404 (West 2000)) or the Federal Fair Debt Collection Practices Act (15 U.S.C. § 1692). The reach of these statutes does not extend to debts incurred for business purposes. *See* Garza v. Bancorp Group, Inc., 955 F. Supp. 68 (S.D. Tex. 1996). In order for a debt to be subject to the Federal Fair Debt Collection Practices Act or the Texas Debt Collection Practices Act, the obligation to pay must arise out of a transaction where "the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes . . ." 15 U.S.C. § 1692(5); *see* TEX. FIN. CODE § 392.001 (West 2000).

[88] Many Borrowers may view this particular "further assurances" provision as too broad in scope, as this language was drafted in a manner to encourage discussion of the issue. Section 4.5 provides a covenant which, if not performed, would constitute an Event of Default under Section 3.1(b) and thus allow Lender the contractual right to accelerate the indebtedness evidenced by this Note. Generally, a covenant of "further assurances" is a covenant that Borrower will, on demand, perform all acts necessary to provide further assurances of title. This covenant carries with it a future obligation of Borrower, its heirs, assigns and successors to make any further conveyance, provide documentation of title, and undertake any and all other acts as may be reasonably necessary to vest in Lender the title intended to be conveyed. *See* New Marshall Engine Co. v. Marshall Engine Co., 223 U.S. 473 (1912), where the United States Supreme Court upheld an action for specific performance of a covenant of further assurances. *See also* New Jersey v. Delaware, 291 U.S. 361 (1934). If a further assurance covenant is not

discovered in the contents of this Note or in any other Loan Document or in the execution or acknowledgment thereof; (ii) execute, acknowledge, deliver, record and/or file (or cause to be executed, acknowledged, delivered, recorded and/or filed) such further documents and instruments (including, without limitation, further deeds of trust, security agreements, financing statements, continuation statements and assignments of rents) and perform such further acts and provide such further assurances as may be necessary, desirable, or proper, in Lender's opinion, (A) to carry out more effectively the purposes of this Note and the Loan Documents and the transactions contemplated hereunder and thereunder, (B) to confirm the rights created under this Note and the other Loan Documents, (C) to protect and further the validity, priority and enforceability of this Note and the other Loan Documents and the liens and security interests created thereby, and (D) to subject to the Loan Documents any property of Borrower intended by the terms of any one or more of the Loan Documents to be encumbered by the Loan Documents; and (iii) pay all costs in connection with any of the foregoing.

4.6 WAIVER OF JURY TRIAL.[89] BORROWER, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, HEREBY KNOWINGLY, INTENTIONALLY, IRREVOCABLY, UNCONDITIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COMPETENT COUNSEL, WAIVES, RELINQUISHES AND FOREVER FORGOES THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING BASED UPON, ARISING OUT OF, OR IN ANY WAY RELATING TO THIS NOTE OR ANY CONDUCT, ACT OR OMISSION OF LENDER OR BORROWER, OR ANY OF THEIR DIRECTORS, OFFICERS, PARTNERS, MEMBERS, EMPLOYEES, AGENTS OR ATTORNEYS, OR ANY OTHER PERSONS AFFILIATED WITH LENDER OR

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included in the Note, or is for some reason held to be unenforceable, Lender will be forced to rely on its common law rights to correct any defects, errors and omissions by asserting that fraud or a mutual mistake has occurred.

[89] The Supreme Court of Texas has not ruled directly on the issue of the enforceability of civil jury waiver provisions in Texas. The Court in Rivercenter Associates v. Rivera, 858 S.W.2d 366, 368 at footnote 2 (Tex. 1993) noted, "[w]e do not reach the parties' arguments concerning the constitutionality of jury waiver provisions generally or those concerning the enforceability of the provisions at issue in this case." Although we are aware of no published Texas case holding directly on this issue, Texas courts have enforced statutes and procedural devices that waive juries. Further, Texas courts have firmly held that parties have the utmost freedom of contract, and agreements voluntarily and fairly made are generally upheld and enforced to ensure that the parties' expectations are protected. *See, e.g.*, DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990). As early as 1847, the Texas Supreme Court upheld a statute in which the parties to a bond renounced their right to notice and trial by jury. *See* Janes v. Adm.'ors of Reynolds, 2 Tex. 250 (Tex. 1847). "[W]hen a party agrees to have a dispute resolved through arbitration rather than a judicial proceeding, that party has waived its right to a jury trial." Massey v. Galvan, 822 S.W.2d 309, 318-19 (Tex. App.--Houston [14th Dist.] 1992, writ denied). The submission of a case to arbitration involves a greater compromise of procedural protection than does the waiver of the right to a jury. *See* Telum, Inc. v. E.F. Hutton, 859 F.2d 835 (10th Cir. 1988) (also holding that general allegations of fraud in the inducement to sign the contract are not sufficient to invalidate a jury waiver provision), *cert. denied* 490 U.S. 121 (1989). *See* annotations to Rider 7 (Arbitration Option), *infra*. *See* Annotated Deed of Trust, Section 12.20 (Waiver of Jury Trial) for a detailed discussion of the enforceability of contractual civil jury waiver provisions in various other states and in each federal circuit court.

BORROWER, IN EACH OF THE FOREGOING CASES, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE.

4.7 Governing Law; Submission to Jurisdiction.[90] This Note is executed and delivered as an incident to a lending transaction negotiated and consummated in _____ County, Texas, and shall be governed by and construed in accordance with the laws of the State of Texas.[91] Borrower, for itself and its successors and assigns, hereby irrevocably (i) submits to the nonexclusive jurisdiction of the state and federal courts in Texas, (ii) waives, to the fullest extent permitted by law, any objection that it may now or in the future have to the laying of venue of any litigation arising out of or in connection with this Note or any Loan Document brought in the District Court of _____ County, Texas, or in the United States District

[90] Section 35.51(b) of the Texas Business and Commerce Code provides that if the parties to a "Qualified Transaction" agree in writing that "the law of a particular jurisdiction governs an issue relating to the transaction, including the validity or enforceability of an agreement relating to the transaction or a provision of the agreement and the transaction bears a reasonable relationship to that jurisdiction," the law, without regard to conflict of law rules, of such jurisdiction will govern the issue, notwithstanding that the application of the law of another state is contrary to a fundamental public policy of Texas or of any other jurisdiction. TEX. BUS. & COM. CODE § 35.51(b) (West 2000). A "Qualified Transaction" is defined in section 35.51(a)(2) as a transaction in which a party "pays or receives or is obligated to pay or entitled to receive, consideration with an aggregate value of at least $1,000,000, or lends, advances or is entitled to borrow or receive funds or credit with an aggregate value of at least $1,000,000." A transaction bears a "reasonable relation" to a jurisdiction under section 35.51(d) "if the transaction, the subject matter of the transaction, or a party to the transaction is reasonably related to the jurisdiction." Further, a transaction bears a reasonable relation to a jurisdiction "if one of the following five factors is present: (i) a party to the transaction is a resident of that jurisdiction; (ii) a party to the transaction has its place of business or, if the party has more than one place of business, its chief executive office or an office from which it conducts a substantial part of the negotiations relating to the transaction, in that jurisdiction; (iii) all or a part of the subject matter of the transaction is located in such jurisdiction; (iv) a party to the transaction is required to perform a substantial part of its obligations relating to the transaction, such as delivering payments in that jurisdiction; or (v) a substantial part of the negotiations relating to the transaction, and the signing of an agreement relating to the transaction by a party to the transaction, occurred in that jurisdiction." *Id.* § 35.51(b).

[91] This Note contemplates a loan in which Texas law governs the entire transaction. Parties to a loan transaction often, however, designate the law of another jurisdiction to govern significant aspects of the transaction (primarily the provisions of the Note) and will typically designate the laws of the State of Texas to govern all or only a portion of the remedial provisions of the Deed of Trust or certain of the other Loan Documents, such as a separate assignment of rents. In such cases, precision and care must be exercised in drafting the applicable choice of law provisions in order to appropriately bifurcate the aspects of the transaction to be governed by the laws of another jurisdiction. If the Loan Documents provide that the laws of the State of Texas are to govern only the remedial provisions, such choice of law provision needs to clearly and specifically identify that the remaining portions of the Loan Documents are to be governed by the laws of the other jurisdiction. By way of example, if a Deed of Trust makes specific reference to a Note governed in its entirety by the laws of the State of New York, a choice of law provision in the Deed of Trust indicating that the entirety of the Deed of Trust (and not solely the remedial portions thereof) is governed by the laws of the State of Texas while the other Loan Documents (including the remedial portions thereof) are governed by the laws of the State of New York is not only imprecise, but may create inconsistencies frustrating the intention of the parties to the transaction.

Court for the _____ District of Texas, _____ Division, (iii) waives any objection it may now or hereafter have as to the venue of any such action or proceeding brought in such court or that such court is an inconvenient forum, and (iv) agrees that any legal proceeding against any party to any of the Loan Documents arising out of or in connection with any of the Loan Documents may be brought in one of the foregoing courts.[92] Borrower hereby agrees that service of process upon Borrower may be made by certified or registered mail, return receipt requested, at its address specified herein. Nothing herein shall affect the right of Lender to serve process in any other manner permitted by law or shall limit the right of Lender to bring any action or proceeding against Borrower or with respect to any of Borrower's property in courts in other jurisdictions. The scope of each of the foregoing waivers is intended to be all encompassing of any and all disputes that may be filed in any court and that relate to the subject matter of this transaction, including, without limitation, contract claims, tort claims, breach of duty claims, and all other common law and statutory claims. Borrower acknowledges that these waivers are a material inducement to Lender's agreement to enter into the agreements and obligations evidenced by the Loan Documents, that Lender has already relied on these waivers and will continue to rely on each of these waivers in related future dealings. The waivers in this Section 4.7 are irrevocable, meaning that they may not be modified either orally or in writing, and these waivers apply to any future renewals, extensions, amendments, modifications, or replacements in respect of any and all of the applicable Loan Documents. In connection with any litigation, this Note may be filed as a written consent to a trial by the court.

4.8 Counting of Days.[93] If any time period referenced hereunder ends on a day other than a Business Day, such time period shall be deemed to end on the next succeeding Business Day.

4.9 Relationship of the Parties.[94] Notwithstanding any prior business or personal relationship between Borrower and Lender, or any officer, director or employee of Lender, that

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[92] The Texas Civil Practice and Remedies Code provides that parties to a "major transaction" may choose the venue for an action arising from that major transaction. *See* TEX. CIV. PRAC. & REM. CODE § 15.020 (West 2000). The choice of venue must be contained in a written agreement and a "major transaction" is defined as a non-consumer transaction evidenced by a written agreement under which a person pays, receives or is obligated to pay consideration greater than or equal to $1,000,000. *See id.*

[93] *See* second annotation to Section 1.1 (Definition of Business Day) and second annotation to Section 2.1 (Payment of Principal and Interest*), supra.*

[94] The relationship between Lender and Borrower does not ordinarily create a fiduciary relationship under Texas law. "[t]he great weight of authority is that while the relationship between the mortgagor and mortgagee is often described as one of trust, technically it is not of a fiduciary character." Lovell v. Western Nat'l Life Ins. Co., 754 S.W.2d 298, 303 (Tex. App.--Amarillo 1988, writ ref'd n.r.e.). Thigpen v. Locke, 36 S.W.2d 247, 253 (Tex. 1963). *See* Edward A. Peterson and John M. Nolan, Lender's Remedies: (And Other Provisions in Loan Documents) What Worked and What Didn't, Advanced Real Estate, State Bar of Texas (1991).

Further, the relationship between Lender and Borrower does not ordinarily involve a duty of good faith and fair dealing. *See* FDIC v. Coleman, 795 S.W.2d 706, 709 (Tex. 1990); English v. Fischer, 660 S.W.2d 521, 522

may exist or have existed, the relationship between Borrower and Lender is solely that of debtor and creditor, Lender has no fiduciary or other special relationship with Borrower, Borrower and Lender are not partners or joint venturers, and no term or condition of any of the Loan Documents shall be construed so as to deem the relationship between Borrower and Lender to be other than that of debtor and creditor.

4.10 Lender's Discretion.[95] Whenever pursuant to this Note, Lender exercises any right given to it to approve or disapprove, or any arrangement or term is to be satisfactory to Lender, the decision of Lender to approve or disapprove or to decide whether arrangements or terms are satisfactory or not satisfactory shall be (except as is otherwise specifically and expressly provided herein to the contrary) in the sole discretion of Lender and shall be final and conclusive.

4.11 Successors and Assigns. The terms and provisions hereof shall be binding upon and inure to the benefit of Borrower and Lender and their respective heirs, executors, legal representatives, successors, successors-in-title and assigns, whether by voluntary action of the parties, by operation of law or otherwise, and all other persons claiming by, through or under them.[96] The terms "Borrower" and "Lender" as used hereunder shall be deemed to include their respective heirs, executors, legal representatives, successors, successors-in-title and assigns,

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(Tex. 1983); Lovell, 754 S.W.2d at 302. The duty of good faith and fair dealing between Lender and Borrower does not generally exist unless created by express contract language or unless a special relationship of trust and confidence exists. *See* Coleman, 795 S.W.2d at 709; English, 660 S.W.2d at 524. As Section 4.9 expressly disavows any such duty, one should only be found to exist if the actual conduct of Borrower and Lender creates a special relationship of trust and confidence between the parties. *See id*. Such a duty often arises from a special relationship of trust and confidence or situation of unequal bargaining power, as often does in the context of the insurance industry, oil and gas executory rights, partnerships, joint ventures, agency relationships and in certain contracts governed by the UCC. *See id*. Lenders should be very careful that their actions do not create such a relationship, potentially giving rise to a cause of action in tort for breach of that relationship. *See* Aranda v. Ins. Co. of N. Am., 748 S.W.2d 210 (Tex. 1988); Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987); Manges v. Guerra, 673 S.W.2d 180 (Tex. 1984); Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502 (Tex. 1980). *See also* n Olney Sav. & Loan Ass'n v. Farmers Market of Odessa, Inc., 764 S.W.2d 869 (Tex. App.--El Paso 1989, writ denied).

[95] *See* Barbara J. LeBarron, Words and Phrases Frequently Used But Poorly Understood, Mortgage Lending Institute (1988).

[96] Most Notes include language similar to "successors, assigns and subsequent holders of the Promissory Note" within the definition of "Lender" or "Payee." The addition of this language, while not required, reflects that the Note may be transferred or assigned. Even if the Note is nonnegotiable, it may nevertheless be assigned provided it does not contain language limiting its assignability. Lexington Ins. Co. v. Gray, 775 S.W.2d 679 (Tex.App.-Austin 1989, writ denied). However, it is prudent practice to include language in the Note expressly permitting an assignment. Conduit lenders and other securitized lenders who intend to eventually assign every loan they make, will routinely include a provision stating not only that the Note may be assigned, but that any one or more of Lender's rights thereunder may be separately assigned (*i.e.*, exit fees, extension fees, prepayment or other fees). *See* annotations to Rider 8 (Participation), *infra*.

whether by voluntary action of the parties, by operation of law or otherwise, and all other persons claiming by, through or under them.

4.12 Joint and Several Liability.[97] If Borrower consists of more than one person or entity, each shall be jointly and severally liable to perform the obligations of Borrower under this Note.

4.13 Time is of the Essence.[98] Time is of the essence with respect to all provisions of this Note and the other Loan Documents.

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[97] Under certain circumstances, proceeds from the Loan evidenced by the Note will be shared among multiple entities. In such a case, each such entity should be required to sign the Note as a Borrower. This provision for joint and several liability creates liability on the part of each of the Borrowers for payment and performance of the entirety of each of Borrowers' obligations under the Note. If one Borrower should become completely unable to perform any of its obligations under the Note, Lender could seek full performance from the other Borrower. In other cases, only one entity will receive proceeds from the loan, but other related individuals or entities (*e.g.*, a parent company or sole individual shareholder) with a high net worth or a strong credit history may be asked to guarantee payment of the loan or co-sign as a Borrower.

In Texas, guarantors and other sureties have the right to require Lender to exhaust its remedies against Borrower for payment of the loan before seeking enforcement of the guaranty. *See* TEX. BUS. & COM. CODE § 34.02 (West 2000). Contractual waiver of these rights, however, has been held to be enforceable. Hanks v. NCNB Texas Nat'l Bank, 815 S.W.2d 763, 764, (Tex.App.--Eastland 1991, no writ). Therefore, Lender's counsel should be careful to include in any guaranty a general waiver of all rights under applicable law that a surety may have, specifically including an express waiver of the rights under Chapter 34 of the Texas Business and Commerce Code. *See* TEX. BUS. & COM. CODE §§ 34.01-.05 (West 2000).

A related individual or entity who co-signs the Note as a Borrower, even though not receiving any of the proceeds of the loan, is an "accommodation party" and is primarily liable on the Note as a Borrower. *See id.* § 3.419(a) and (b). If an accommodation party's signature is accompanied, however, by an unambiguous statement that such party is guaranteeing collection and not payment of the loan, then section 3.419(d) of the UCC applies, and Lender is not permitted to seek payment from the accommodation party unless (i) judgment against the other Borrower has been returned unsatisfied, (ii) the other Borrower is insolvent or subject to an insolvency proceeding, (iii) the other Borrower cannot be served with process, or (iv) "it is otherwise apparent" that Lender will be unable to collect from the other Borrower. *Id.* § 3.419(d)(1)-(4). Irrespective of Lender's knowledge that one of the Borrowers signing the Note will not receive direct benefit from the loan, the accommodation party is liable for payment on the Note and not entitled to the protections of section 3.419(d) of the UCC unless the "unambiguous statement" referenced above accompanies its signature. *Id.* § 3.419(c). If the Note is negotiable, joint and several liability is automatic (unless the parties specify otherwise) by section 3.116 of the UCC. *See* Caldwell v. Stevenson, 567 S.W.2d 278 (Tex. Civ. App. --Austin 1978, no writ).

[98] Generally, time is of the essence when it is expressly made so in a contract, but the benefit of this provision is subject to waiver by conduct. Hage v. Westgate Savage Commercial, 598 S.W.2d 709 (Tex. Civ. App. --Waco 1980, writ ref'd n.r.e.). *See* annotations to Section 4.1 (No Waiver; Amendment), *supra*. If time is not of the essence, the performance on the contract is not necessarily required at the agreed upon time for performance. Rather, the parties will be afforded a "reasonable" period of time in which to perform. Moore v. Dilworth, 179 S.W.2d 940, 942 (Tex. 1944). If time is made of the essence, however, a party must perform or tender performance in literal compliance with the terms of the contract or such non-performance would constitute a material breach thereof. Liedeker v. Grossman, 206 S.W.2d 232, 234 (Tex. 1947).

4.14 Headings. The Article, Section, and Subsection entitlements hereof are inserted for convenience of reference only and shall in no way alter, modify, define, limit, amplify or be used in construing the text, scope or intent of such Articles, Sections, or Subsections or any provisions hereof.

4.15 Controlling Agreement. In the event of any conflict between the provisions of this Note and the Deed of Trust, it is the intent of the parties hereto that the provisions of the Deed of Trust shall control.[99] In the event of any conflict between the provisions of this Note

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[99] Section 4.15 contractually recites the parties' intent that the Note is the controlling Loan Document except for between the Note and the Deed of Trust, and any conflicts between the Note and any of the other Loan Documents (other than between the Note and the Deed of Trust) will be resolved in favor of the Note. Without a statement as to the hierarchy between conflicting documents, the interpretation of the Loan Documents together may be left up to the common law. In Texas, one line of authority holds that separate instruments contemporaneously executed as a part of the same transaction and relating to the same subject matter may be construed together as a single instrument. *See* Harris v. Rowe, 593 S.W.2d 303, 306 (Tex. 1979). Other Texas cases state the rule differently, holding that contemporaneously executed agreements by the same parties, for the same purposes, and as part of the same transaction must be construed together. *See* Jim Walter Homes, Inc. v. Schuenemann, 668 S.W.2d 324, 327 (Tex. 1984). For example, Miles v. Martin, 321 S.W.2d 62, 65 (Tex. 1959) stated that instruments may be construed together when executed at the same time, between the same parties, and when relating to the same subject matter. Jones v. Kelley, 614 S.W.2d 95, 98 (Tex. 1981), another Texas Supreme Court case, cites Miles for the general rule, yet states Miles as requiring separate instruments to be construed together when executed at the same time, for the same purpose, and in the course of the same transaction.

Although these lines of authority appear to present a framework by which to consider whether to construe several documents together as one contract, the case law applying this framework does not appear to assign it much importance. For example, two contracts may be construed together if they are made "for the same purpose and in the course of the same transaction" even though they are not between the same parties. *See* American Petrofina, Inc. v. PPG Indus., Inc., 679 S.W.2d 740, 751-52 (Tex. App.--Fort Worth 1984, writ dism'd by agr.). Likewise, the contemporaneous requirement is also not always controlling. Courts have held that where instruments relate to the same transaction, the time of execution of the respective instruments is not necessarily a controlling issue. For example, two instruments are to be read together although they do not expressly refer to each other and were not executed at the same time. *See* Board of Ins. Comm'rs v. Great Southern Life Ins. Co., 239 S.W.2d 803, 809 (Tex. 1951); U.S. Life Title Co. of Dallas v. G. M. Andreen, 644 S.W.2d 185, 190 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.).

Further, the courts have often placed their emphasis on an entirely different element, the intent of the parties. Although the construction rules cited above are factors to consider, they are not necessarily dispositive. Two instruments will not be construed together where it is contrary to the intent of the parties. *See* First Nat'l Bank of Amarillo v. Jarnigan, 794 S.W.2d 54, 59 (Tex. App.--Amarillo 1990, writ denied). For example, in Jarnigan, the appellate court rejected the argument that all of the documents in a transaction constituted a single transaction and should therefore be construed together. The appellate court held that when instruments executed contemporaneously have been intended to be separate instruments and to provide for entirely different agreements, they will not be construed together. *Id* at 59.

The Supreme Court of Texas has held that, although these construction rules are sound in principle when the several instruments are truly part of the same transaction, these instruments are simply a device for ascertaining and giving effect to the intention of the parties and cannot be applied arbitrarily and without regard to the realities of the situation. *See* Jones, 614 S.W.2d at 99; Miles, 321 S.W.2d at 65. In Miles, the court held that there was no reasonable basis for construing the instruments together or treating them as one contract. The court made the

and any of the other Loan Documents (other than the Deed of Trust), it is the intent of the parties hereto that the provisions of this Note shall control. The parties hereto acknowledge that they were represented by competent counsel in connection with the negotiation, drafting and execution of this Note and the other Loan Documents and that this Note and the other Loan Documents shall not be subject to the principle of construing their meaning against the party which drafted same.

4.16 Notices.[100] All notices or other communications required or permitted to be given pursuant to this Note shall be in writing and shall be considered as properly given if (i) mailed by first class United States mail, postage prepaid, registered or certified with return receipt requested, (ii) by delivering same in person to the intended addressee, (iii) by delivery to a reputable independent third party commercial delivery service for same day or next day delivery and providing for evidence of receipt at the office of the intended addressee, or (iv) by prepaid telegram, telex, telecopier or telefacsimile transmission to the addressee. Notice so mailed shall be effective upon its deposit with the United States Postal Service or any successor thereto; notice sent by such a commercial delivery service shall be effective upon delivery to such commercial delivery service; notice given by personal delivery shall be effective only if and when received by the addressee; and notice given by other means shall be effective only if and when received at the office or designated place or machine of the intended addressee. For purposes of notice, the addresses of the parties shall be as set forth herein; provided, however, that either party shall have the right to change its address for notice hereunder to any other location within the continental United States by the giving of thirty (30) days' prior notice to the other party in the manner set forth herein.

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important distinction that, although certain documents were executed as a part of the same transaction in the sense that they were necessary to effectuate the transaction, they were not the "same transaction" in the sense that they together formed one entire agreement. The court in Miles held that related conveyance and financing transactions did not in fact form one entire agreement. While such contracts may work together to achieve the same end, the acquisition of a piece of property by the purchaser, they are not necessarily the same transaction. *Id*.

The Dallas Court of Appeals has held that "the overriding consideration is always to determine the intention of the parties through their acts and conduct, particularly as manifested through the writings in question." Dodson v. Stevens Transp., 776 S.W.2d 800, 805 (Tex. App.--Dallas 1989, no writ); B.F. Goodrich Co. v. McCorkle, 865 S.W.2d 618, 620-21 (Tex. App.--Houston [14th Dist.] 1993, no writ) (the language of the agreements themselves must be examined determine the intent of the party). Although intent should be the controlling consideration, it is possible that a court could follow the conflicting precedent of other courts that have considered the identity of the parties, their relationship to one another, and the common date of execution in making its determination.

[100] If Lender inadvertently fails to give proper notice in any respect, Lender can generally remedy the situation by sending another notice. Notices ineffective for any reason do not necessarily bar later effective notices. *See also* fourth annotation to the introductory paragraph of this Note, *supra*.

4.17 Severability.[101] If any provision of this Note or the application thereof to any person or circumstance shall, for any reason and to any extent, be invalid or unenforceable, then neither the remainder of this Note nor the application of such provision to other persons or circumstances nor the other instruments referred to herein shall be affected thereby, but rather shall be enforced to the greatest extent permitted by applicable law.

4.18 Right of Setoff.[102] In addition to all liens upon and rights of setoff against the money, securities, or other property of Borrower given to Lender that may exist under applicable law, Lender shall have and Borrower hereby grants to Lender a lien upon and a right of setoff against all money, securities, and other property of Borrower, now or hereafter in possession of or on deposit with Lender, whether held in a general or special account or deposit, for safe-keeping or otherwise, and every such lien and right of setoff may be exercised without demand upon or notice to Borrower. No lien or right of setoff shall be deemed to have been waived by any act or conduct on the part of Lender, or by any neglect to exercise such right of setoff or to enforce such lien, or by any delay in so doing, and every right of setoff and lien shall continue in full force and effect until such right of setoff or lien is specifically waived or released by an instrument in writing executed by Lender.

4.19 Costs of Collection.[103] If any holder of this Note retains an attorney-at-law in connection with any Event of Default or at maturity or to collect, enforce, or defend this Note or

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[101] Section 4.17 attempts, by making the various provisions of the Note "severable" from the whole of the Note, to preclude the invalidity or unenforceability of the Note and the other provisions contained in the Note if for some reason certain specific provisions of the Note are found to be invalid or unenforceable.

[102] A depository institution lender in Texas, as in many states, has the right as a creditor to setoff against or reduce certain matured debt by an amount equal to the deposit account of Borrower maintained with Lender. *See* TEX. FIN. CODE § 34.307 (West 2000). *See also* Sears v. Continental Bank & Trust Co., 562 S.W.2d 843 (Tex. 1977) (the bank had the right to setoff against an amount on deposit an equal amount of indebtedness owed by the depositor to the bank; however, the bank had the burden of proving the indebtedness which justified the bank's deduction from borrower's account).

The elements of a valid and proper setoff are (i) the debt and the relationship of Lender and Borrower must both be in existence, (ii) the debt must have matured (unless Borrower or Borrower's estate is insolvent), (iii) mutuality of obligation must exist, (iv) Borrower must be the owner of the funds, and (v) the account must be a general as opposed to a special account. *See* Bandy v. First State Bank, 835 S.W.2d 609 (Tex. 1992) for a general discussion of the foregoing. Although delivering written notice prior to setoff is prudent practice or may be contractually required, Lender is not always be required to do so. *See* TEX. FIN. CODE § 34.407(a) (West 2000). *See also* Elizarraras v. Bank of El Paso, 631 F.2d 366, 372 (5th Cir. 1980); Balidwin v. Peoples Nat'l Bank, 327 S.W.2d 616 (Tex. Civ. App.--Texarkana 1959, no writ). However, Lender should disclose the right of set off to Borrower prior to exercising that right. TEX. FIN. CODE § 34.407(a) (West 2000). Also, Lender may waive its right to setoff. *See* annotations to Section 4.1 (No Waiver; Amendment), *supra*. There also may be a constitutional limitation. The U.S. Supreme Court has held that a debtor must be given notice and opportunity to be heard prior to any **state** action depriving the debtor of property. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[103] *See* final annotation to Section 3.2 (Remedies), *supra*.

any part hereof, or any other Loan Document in any lawsuit or in any probate, reorganization, bankruptcy or other proceeding, or if Borrower sues any holder in connection with this Note or any other Loan Document and does not prevail, then Borrower agrees to pay to each such holder, in addition to the principal balance hereof and all interest hereon, all costs and expenses of collection or incurred by such holder or in any such suit or proceeding, including, but not limited to, reasonable attorneys' fees.

4.20 Gender. All personal pronouns used herein, whether used in the masculine, feminine or neuter gender, shall include all other genders; the singular shall include the plural and vice versa.

4.21 Statement of Unpaid Balance.[104] At any time and from time to time, Borrower will furnish promptly, upon the request of Lender, a written statement or affidavit, in form satisfactory to Lender, stating the unpaid balance of the indebtedness evidenced by this Note and the Related Indebtedness and that there are no offsets or defenses against full payment of the indebtedness evidenced by this Note and the Related Indebtedness and the terms hereof, or if there are any such offsets or defenses, specifying them.

4.22 ENTIRE AGREEMENT.[105] THIS NOTE AND THE OTHER LOAN DOCUMENTS CONTAIN THE FINAL, ENTIRE AGREEMENT BETWEEN THE PARTIES

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[104] We are aware of no independent legal basis whereby Lender can require Borrower to execute an estoppel certificate if such requirement is not expressly contracted for in the agreement among the parties. *See* Dempsey v. King, 662 S.W.2d 725, 727 (Tex. App.--Austin, 1983, writ dism w.o.j.); Phillips Petroleum Co. v. Gillman, 593 S.W.2d 152, 154 (Tex. Civ. App.--Amarillo 1980, writ ref n.r.e.). The courts will not make a new contract between the parties that did not exist. *See* Borders v. KRLB, Inc., 727 S.W.2d 357, 359 (Tex. App.--Amarillo 1981, writ ref n.r.e.); Neece v. A.A.A. Realty Co., 322 S.W.2d 597, 600 (Tex. 1959). If this provision were not contained in the Note or in the other Loan Documents, Borrower could refuse to execute the most simple of estoppel certificates, even one that is factually accurate and, in some circumstances, such refusal may cause the Note and the lien securing payment on the Note to be unsalable. To protect Lender against just such a possibility, Section 4.21 requires that Borrower provide an estoppel certificate and failure to do so would be an Event of Default under Section 3.1(b).

[105] A written contract is deemed to represent the complete agreement of the parties thereto as to all terms contained in the written contract. *See* Whiddon v. General Mills, Inc., 347 S.W.2d 7, 10 (Tex. Civ. App.--Fort Worth 1969, no writ). Section 4.22 is an attempt to evidence the intent of the parties so that should any question of merger or integration arise, the express intent of Borrower and Lender could be gleaned from the document itself; such intent being that the parties expressly agreed that all previous and contemporaneous agreements be included in the Loan Documents executed in connection with the underlying transaction evidenced by the Note. Such a provision is particularly important in a loan context to avoid any future claim by Borrower that the Loan Documents are "inconsistent" with the loan application, loan commitment or loan term sheet. This merger doctrine is closely related to the parol evidence rule, which generally states that extrinsic evidence cannot be admitted to vary or contradict the terms of a written agreement. *Id.*

The Texas Business and Commerce Code codifies the merger rule with regard to loan transactions. *See* TEX. BUS. & COM. CODE § 26.02 (West 2000). Any "loan agreement" (which includes promissory notes, deeds of trust, security agreements and certain other documents) executed in connection with a loan in excess of $50,000 must be in writing and signed by the debtor or such loan agreement shall be unenforceable. Furthermore, any

HERETO RELATING TO THE SUBJECT MATTER HEREOF AND THEREOF AND ALL PRIOR AGREEMENTS, WHETHER WRITTEN OR ORAL, RELATIVE HERETO AND THERETO WHICH ARE NOT CONTAINED HEREIN OR THEREIN ARE SUPERSEDED AND TERMINATED HEREBY, AND THIS NOTE AND THE OTHER LOAN DOCUMENTS MAY NOT BE CONTRADICTED OR VARIED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OR DISCUSSIONS OF THE PARTIES HERETO. THERE ARE NO UNWRITTEN ORAL AGREEMENTS AMONG THE PARTIES HERETO.

[See Rider 6 for Debt Coverage Ratio Definitions.]
[See Rider 7 for Arbitration Option.]
[See Rider 8 for Participation Insert.]
[See Rider 9 for example Allonge Form.]
[See Rider 10 for example Lost Note Affidavit Form.]

[Definitions contained in any Rider should be moved to Section 1.1 hereof when included in the body of this Note.]

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agreement subject to section 26.02 may not be varied by any oral agreements or discussions that occurred prior to or contemporaneously with the execution thereof and section 26.02(e) sets out the language that must be contained in the written notice notifying all parties of such fact. *See id.* The scope of the statute's protection essentially covers state or federal banks, savings and loans, credit unions or HUD approved lenders. *See id.* The notice must be conspicuous and the notice language must substantially state: "This written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between [Lender and Borrower]." *See id.*

Section 4.22 is a way of "bootstrapping" the notice of final agreement, as such is typically set out in a separate document. Although the statute requires the inclusion of the notice only in any one of the loan documents in the transaction, the more prudent route is to include the notice in each of the Loan Documents which could be construed as a "loan agreement" under section 26.02 (such as the Note, the Deed of Trust, any loan agreement and any separate assignment of rents). Although outside the scope of this annotation, it should be noted that notwithstanding the above, extrinsic evidence may be admitted in certain limited circumstances to show the following: nonexistence of an agreement, incapacity, fraud, undue influence, mutual mistake, failure of consideration, agreements contrary to public policy or public morals or illegality.

IN WITNESS WHEREOF, Borrower, intending to be legally bound hereby, has duly executed this Note as of the day and year first written above.

BORROWER:[106]

_____,
a _____

By: _____,
a _____
its general partner

By:_____
Name:_____
Title:_____

[106] A forged or unauthorized signature is generally ineffective against Borrower. *See* TEX. BUS. & COM. CODE § 3.401 (West 2000). However, a forged or unauthorized signature may be ratified retroactively by Borrower. Such ratification may be found from Borrower's prior or subsequent conduct as well as from prior or subsequent statements expressly made by Borrower. For example, ratification may be found from the retention by Borrower of the benefits received in connection with the transaction (*i.e.*, keeping the loan proceeds) with knowledge of the unauthorized signature and the terms of the unauthorized instrument. Although the forger or unauthorized signatory is not an agent of Borrower, the issue of ratification is generally governed by the rules and principles applicable to ratification of unauthorized acts of an agent. *Id.* §§ 3.401-.403. It is important to note that, absent an independent requirement in an organizational document to the contrary, a Note executed by an authorized officer or director of a corporation generally does not need to be sealed. *See* Texas Electric Service Co. v. Commercial Standard Ins. Co., 592 S.W. 2d 677 (Tex. Civ. App.--Fort Worth 1980, writ ref'd n.r.e.). However, inclusion of a corporate seal on the instrument is prima facie evidence that the instrument is the duly authorized act of the corporation. Emory v. Bailey, 234 S.W.2d 660 (Tex. 1921) (also indicating that this presumption may be overcome by adequate evidence to the contrary.)

Certain Lenders often require Borrowers to initial each page of a Note for evidentiary purposes. This practice can be problematic in instances where the signatory accidentally fails to initial one or more of the pages. One uninitialed page in a Note with every other page initialed may raise questions as to the validity of the Note or the specific terms thereof. *See* Otto v. Republic Nat'l Co., 173 S.W.2d 235 (Tex. Civ. App.--Dallas 1943, writ ref'd); Republic Nat'l Bank of Dallas v. Strealy, 350 S.W.2d 914 (Tex. 1961). Further, although not required under Texas law, some Lenders require as a matter of policy that Borrower's execution of the Note be acknowledged by a notary public for evidentiary purposes, a practice which has become increasingly common as the execution of the Note typically occurs outside of the presence of the loan officer and Lender's attorney. However, in such event, if a legal description were later attached, the Note potentially could be recorded in the public records; a result which may be problematic for Borrower if the Note contains sensitive financial covenants or confidential financial information. *See* TEX. PROP. CODE §§ 11.00 -.007 and 12.001-.018 (West 2000) (setting forth the requirements for recordation of an instrument in Texas). Therefore, under such circumstances, Borrower might request that a negative covenant regarding recordation of the Note be included in the Loan Documents. Lender is not likely to object to this negative covenant as Lender similarly would not want to disclose in the public records the interest rate or other financial terms provided to Borrower.

Address of Lender for purposes
of notice hereunder:

_____
_____
_____
_____
_____

::ODMA\PCDOCS\DALLAS_1\3435808\3

Rider 1

OPTION TO EXTEND MATURITY DATE[107]

[PLEASE NOTE THAT THE FOLLOWING PROVISIONS APPLY TO A ONE-TIME EXTENSION OPTION; THESE PROVISIONS MUST BE MODIFIED ACCORDINGLY IN THE CONTEXT OF MULTIPLE EXTENSION OPTIONS]

Extension Option: Borrower's one-time right to extend the term of this Note from the Original Maturity Date to the Extended Maturity Date, subject to the terms and conditions of Section 2.9 hereof.[108] **[*Add this definition to Section 1.1 of the Note.*]**

Original Maturity Date: _____, 20__. **[*Add this definition to Section 1.1 of the Note.*]**

Extended Maturity Date: _____, 20__. **[*Add this definition to Section 1.1 of the Note.*]**

Extended Term: The period from the Original Maturity Date through and including the Extended Maturity Date. **[*Add this definition to Section 1.1 of the Note.*]**

Loan to Value Ratio: A fraction, expressed as a percentage, calculated as follows: the sum of (i) the outstanding principal balance hereof, all accrued but unpaid interest hereon and the amount of the Related Indebtedness, all as of the date of the determination of the Loan to Value Ratio, divided by (ii) the appraised "As-Is" value of the Mortgaged Property. The appraised "As-Is" value of the Mortgaged Property shall be based upon an appraisal, satisfactory to Lender in all respects, as reviewed, adjusted and approved by Lender. Such appraisal shall be prepared by an appraiser acceptable to Lender at Borrower's sole cost and expense. **[*Add this definition to Section 1.1 of the Note*]**

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[107] Although typically included in a loan agreement, this option to extend has been included in Rider 1 as no loan agreement has been contemplated in connection with the loan transaction.

[108] For any extension of the Maturity Date, an extension agreement modifying the Deed of Trust should be executed and acknowledged by Borrower and filed for record in the county clerk's office of the county in which the Mortgaged Property is located. Although not expressly required by the Texas Civil Practice and Remedies Code, it is often prudent practice (although often not practical) as Borrower's counsel to have Lender also sign and acknowledge the extension agreement to signify Lender's concurrence. The filing of this extension agreement suspends the applicable four-year limitations period and the lien of the Deed of Trust will then remain in effect for four years after the extended Maturity Date. *See* TEX. CIV. PRAC. & REM. CODE § 16.036 (West 2000). *See* second annotation to Section 1.1 (Definition of Maturity date), *supra*. For a discussion of references to the Maturity Date in the Deed of Trust, *see* Annotated Deed of Trust, Section 1.1 (Definition of Note).

Material Adverse Change: Any material and adverse effect on (i) the business or financial condition, operations, prospects, results of operations, capitalization, liquidity or any properties of Borrower or any guarantor, taken as a whole, (ii) the value of the Mortgaged Property, (iii) the ability of Borrower (or if Borrower is a partnership, joint venture, trust or other type of business association, of any of the parties comprising Borrower) to pay the indebtedness evidenced by this Note and the Related Indebtedness and to perform the obligations of Borrower under this Note and the other Loan Documents, respectively, (iv) the validity, enforceability or binding effect of any of the Loan Documents, or (v) any other state of facts submitted to Lender in connection with the Loan Documents. **[*Add this definition to Section 1.1 of the Note*]**

[*Add the following as Section 2.9 of the Note*:] 2.9 Option to Extend Maturity Date.[109] Borrower shall have the right to exercise the Extension Option upon and subject to the satisfaction (as determined by Lender in Lender's discretion) of the following terms and conditions precedent:

(a) Borrower shall provide Lender with written notice of Borrower's election to exercise the Extension Option not more than sixty (60) days, but not less than thirty (30) days, prior to the Original Maturity Date (the "Option Notice Date"), and Borrower's failure to timely exercise the Extension Option in accordance herewith shall be deemed a waiver and relinquishment of the one-time right to exercise the Extension Option;

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[109] The extension option under Section 2.9 is available primarily for short-term mortgage loans with maturities ranging from one to three years, for construction loans and for other types of interim financing. The option to extend provides Borrower with a certain amount of flexibility to select the real estate market and financial conditions under which Borrower will refinance the Mortgaged Property. Additionally, an option to extend will generally result in cost savings to Borrower as the costs incurred to extend the loan will likely be significantly lower than the costs of either obtaining a new loan with another Lender or modifying, amending or renewing the loan with the current Lender. Further, by negotiating the extension option up front (instead of seeking an extension at maturity), the performance standards and other requirements for extension are known in advance to Borrower and Borrower will be able to adjust its operations or to plan business contingencies accordingly. The conditions precedent for extension are typically the subject of extensive negotiations. For example, it is often critical to Lender that the condition under Section 2.9(b) include circumstances which would constitute an Event of Default after the passage of time and giving of notice, while Borrower may view this condition as effectively preventing the Extension Option from ever being exercised. In addition to negotiating the business points related to the conditions precedent for the extension (such as the required level and manner of calculation of the Debt Coverage Ratio or the Loan to Value Ratio), both parties can expect heavy negotiation of the standard of discretion Lender may use in determining whether or not Borrower has satisfied those conditions. To allow maximum flexibility for an "exit strategy" from the loan, Lender will prefer the "sole discretion" standard; however, Borrower will prefer a "reasonable" standard to impose some measure of objectivity on Lender's decisions and to provide an opportunity for Borrower to contest Lender's decision if Lender determines that the conditions precedent have not been satisfied. In addition to the conditions precedent listed above, Lender will often require (i) achievement of specified leasing levels, (ii) a specified payment reducing the principal balance of the Note, (iii) an adjustment of the interest rate, or (iv) a change in the amortization period over which the principal is paid. *See* annotation to Additional Provisions Applicable to the Extended Term of the Note under this Rider 1, *infra*.

(b) As of both the Option Notice Date and the Original Maturity Date, there shall not exist any Event of Default nor any condition or state of facts which after the passage of time and/or the delivery of notice would constitute an Event of Default under this Note or any of the other Loan Documents;

(c) On the Original Maturity Date, Borrower shall pay to Lender (i) a non-refundable extension fee,[110] in immediately available funds at the place designated for payment, in the amount of **[$_____.00] [_____ percent (__%) of the outstanding principal balance hereof determined as of the Original Maturity Date]**, which extension fee is deemed earned in full upon receipt by Lender of Borrower's election to exercise the Extension Option,[111] (ii) whether or not the extension becomes effective, all costs and expenses incurred by Lender in connection with the exercise of the Extension Option, including, without limitation, appraisal fees and reasonable attorneys' fees incurred in connection therewith, and (iii) all accrued but unpaid interest hereon and all other sums then due and payable under this Note and the other Loan Documents (other than the portion of the principal balance hereof which at such time is not yet due and payable);

(d) Borrower shall represent and warrant to Lender in writing (without any limitation or qualification to Borrower's knowledge) that, as of the Original Maturity Date, (i) there does not exist any Event of Default nor any condition or state of facts which after the passage of time and/or the delivery of notice would constitute an Event of Default under this Note or any of the other Loan Documents, and (ii) the conditions precedent in this Section 2.9 applicable to the Extension Option have been fully and timely satisfied by Borrower;

(e) Borrower shall execute, acknowledge and deliver (or cause the execution, acknowledgment and delivery) to Lender of all documents and instruments reasonably required by Lender in connection with the exercise of the Extension Option and shall deliver to Lender, at Borrower's sole cost and expense, such title insurance endorsements and such then current evidence of the state of title in and to the Mortgaged Property as Lender may require in its sole discretion;

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[110] A fee paid merely for the extension of the maturity of a debt is not a bona fide commitment fee and is generally considered interest. Rollingbrook Inv. Co. v. Texas Nat. Bank, 790 S.W.2d 375, 378 (Tex. App.-Amarillo 1990, writ denied). Consequently, an extension fee should be considered in any usury calculation. *See* TEX. FIN. CODE § 301.002(a)(4) (West 2000).

[111] The amount of the extension fee may vary significantly from loan to loan, based generally upon the length of the extension, the credit quality of Borrower, the type of loan, the interest rate, and the general market conditions existing as of the date of the Note. Payment of this extension fee (together with any related costs or expenses incurred by Lender in connection with the extension) are secured by the Deed of Trust because clause (ii) of the term "Indebtedness" under the Deed of Trust covers amounts payable under this Note. *See* Annotated Deed of Trust, Section 1.1 (Definition of Indebtedness).

(f) Current financial statements regarding Borrower and each guarantor (dated not earlier than thirty (30) days prior to the Option Notice Date) and all other financial statements and other information as may be required under the Loan Documents regarding Borrower, each guarantor and the Mortgaged Property, shall have been promptly submitted to Lender, and there shall not have occurred, in the opinion of Lender, any Material Adverse Change from that which existed on the date of this Note;

(g) For the ____ (__) month period immediately preceding the Original Maturity Date, Borrower shall have satisfied and maintained a Debt Coverage Ratio **[*incorporate Debt Coverage Ratio definitions from Rider 6*]** of at least ____:1, as determined by Lender in Lender's discretion; **[and]**

(h) As of the Original Maturity Date, the Mortgaged Property shall have a Loan to Value Ratio of not greater than _____ percent (____%), as determined by Lender in Lender's discretion. In the event the foregoing Loan to Value Ratio requirement is not satisfied, Borrower shall be entitled to cause the satisfaction of same by (i) making a principal payment on this Note prior to the Original Maturity Date in an amount sufficient to cause the Loan to Value Ratio to be in compliance with the foregoing requirement (provided that any such prepayment shall be made subject to and in accordance with Section 2.5 of this Note) and/or (ii) providing prior to the Original Maturity Date additional collateral to the benefit of Lender acceptable in character to Lender, which shall have a value (as determined by Lender) which, when added to the value of the Mortgaged Property, is sufficient to cause satisfaction of the foregoing requirement **[.] ;and]**

(i) **[incorporate any additional conditions as the particular lender may require.]**

Upon the timely and proper exercise of the Extension Option and the timely satisfaction, as determined by Lender in Lender's discretion, of the conditions set forth above in this Section 2.9, the term "Maturity Date" shall thereafter refer to and mean the Extended Maturity Date for all purposes hereunder and under the Loan Documents. The Option to Extend is exercisable by Borrower on only one (1) occasion and is hereby deemed to be a one-time right. Any failure to timely and properly exercise the Option to Extend or any failure to timely satisfy the conditions set forth in this Section 2.9 in accordance herewith shall be deemed a waiver and relinquishment of the one time right to exercise the Option to Extend.[112]

[112] By inclusion of this provision, Borrower is expressly put on notice (*e.g.*, Borrower will have full knowledge of the consequences) that failure to timely exercise the Extension Option will cause Borrower to waive and relinquish this contractual right. *See* annotations to Section 4.1 (No Waiver; Amendment), *supra*.

Additional provisions regarding changes in loan terms applicable to the Extended Term (IF CERTAIN LOAN TERMS CHANGE AFTER THE EXTENSION, ADD LANGUAGE SIMILAR TO THE FOLLOWING, AS APPLICABLE):

All of the terms, provisions and conditions of the Loan Documents shall continue in full force and effect during the Extended Term, except to the extent changed as indicated in this Section 2.9 below (such changes to be effective on and after the Original Maturity Date and at all times during the Extended Term, if the Maturity Date of this Note is extended as provided herein):

(x) Extension Rate: a rate per annum equal to the lesser of (i) the Note Rate plus ____ percent (___%) or (ii) the Maximum Lawful Rate. If the Maturity Date of this Note is extended as provided herein, then, effective as of the Original Maturity Date and at all times during the Extended Term, the term "Note Rate" shall thereafter refer to and mean the Extension Rate for all purposes hereunder and under the Loan Documents; and

(y) Payment of Principal and Interest. If the Maturity Date of this Note is extended as provided herein, then, effective as of the Original Maturity Date and at all times during the Extended Term, **[*insert payment option from Rider 3*] [.] [; and]**[113]

(z) **[incorporate any additional changed loan terms as the particular circumstances may require.]**

[113] If an extension of the Maturity Date is granted, Lender is likely to require (i) for interest-only loans, that, upon extension, Borrower commence payment of principal installments based upon an amortization schedule determined by Lender or (ii) for principal and interest loans, that, upon extension, Borrower commence payment of an increased amount of monthly installments of principal and interest based upon an adjustment of the applicable amortization schedule and/or interest rate. Such payment terms, for example, may be similar in effect to the payment option for "Separate Installments of Principal and Interest" under Example 1 of Rider 3, (Payment Options), *infra* (whereby the Original Maturity Date, for example, may be substituted for the "Conversion Date" under that payment option). *See also* third annotation to Rider 1 (Option to Extend Maturity Date), *supra*.

Rider 2

ALTERNATIVE RATE OPTIONS

[Note Rate definition for Changing Rate Option:

Note Rate: the rate of: (i) _____ percent (___%) per annum for the first _____ (___) calendar months for the period commencing on the date hereof and ending on _____, 20__; (ii) _____ percent (___%) per annum for the next succeeding _____ (___) calendar months thereafter for the period commencing on _____, 20__ and ending on _____, 20__; and (iii) _____ percent (___%) per annum for the next succeeding _____ (___) calendar months thereafter for the period commencing on _____, 20__ and ending on the Maturity Date.**]**[114]

[Note Rate definitions for Floating Prime Rate Option:

Base Rate: the rate of interest per annum established from time to time by Lender and designated as Lender's "base" or "prime" rate of interest, which Borrower hereby acknowledges and agrees may not necessarily be the lowest interest rate charged by Lender. Fluctuations in the Base Rate shall become effective immediately, without necessity for any notice whatsoever.

Note Rate: the rate of interest per annum equal to the sum of the Base Rate in effect from day to day plus _____ percent (_____%).**]**[115]

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[114] This option provides Borrower with a fixed rate pricing structure for specific periods of time over the term of the Note, which is particularly useful for a Borrower desiring greater certainty in the amount of interest to be paid over the term of the loan. *See* second annotation to Section 1.1 (Definition of Note Rate), *supra*, for further discussion of this benefit to Borrower.

[115] This option establishes a variable rate pricing structure based on a floating rate of interest that is initially set by Lender (or, in some cases, set by another institution other than Lender) and may change daily. The exact wording of a "base" or "prime" rate pricing option may vary significantly by lending institution. Most large institutional Lenders impose certain required language making reference to their own Base Rate, while many smaller Lenders often elect to rely either on a larger institution's announced rate or a published rate (such as those found in The Wall Street Journal).

Some Borrowers may perceive Base Rate pricing as establishing an interest rate unreasonably favorable to Lender because fluctuations in the Base Rate are generally within the unilateral control of Lender. However, although Lender is able to set whatever Base Rate it so chooses (so long as such rate is not usurious), Borrower is in theory protected by the competitive nature of the lending market. If one Lender's Base Rate pricing yields an interest rate consistently higher than its competitors, then Borrower could in theory, but not necessarily in practice, seek refinancing of the loan by another Lender whose pricing is lower. There are, however, advantages for both

[Note Rate definitions for LIBOR Option:

Note Rate: at the rate equal to **[the greater of (i) the Minimum Rate or (ii)]** the sum of LIBOR plus _____ basis points (rounded upwards, if necessary, to the nearest one-eighth of one percent [.125%]), per annum. The Note Rate shall be adjusted on each LIBOR Determination Date to account for any changes in LIBOR, which adjustment shall be effective on the commencement of the next succeeding LIBOR Reference Period. Without limiting the provisions of Section 4.3 hereof, the Note Rate shall in no event exceed the maximum rate of interest permitted under applicable law.[116] The determination by Lender of the Note Rate shall, in the absence of manifest error, be conclusive and binding in all respects. Notwithstanding anything contained herein to the contrary, if (i) at any time, Lender determines (which determination shall be conclusive in the absence of manifest error) that any applicable law or regulation or any change therein or the interpretation or application thereof or compliance therewith by Lender (A) prohibits, restricts or makes impossible the charging of interest based on LIBOR or (B) shall make it unlawful for Lender to make or maintain the indebtedness evidenced by this Note in eurodollars, or (ii) at the time of or prior to the determination of the Note Rate, Lender determines (which determination shall be conclusive in the absence of manifest error) that by reason of circumstances affecting the London interbank market generally, (A) deposits in United States Dollars in the relevant amounts and of the relevant maturity are not available to Lender in the London interbank market, (B) the Note Rate does not adequately and fairly reflect the cost to Lender of making or maintaining the loan, due to changes in administrative costs, fees, tariffs and taxes and other matters outside of Lender's reasonable control, or (C) adequate and fair means do not or will not exist for determining the Note Rate as set forth in this Note, then Lender shall give Borrower prompt notice thereof, and this Note shall bear interest, and continue to bear interest until Lender determines that the applicable circumstance described in the foregoing clauses (i) (A) or (B) or (ii) (A), (B) or (C) no longer pertains, at a fluctuating rate per annum equal to the fluctuating per annum rate identified as the "Thirteen Week U.S. Treasury Bill" in the "Money Rates" section of The Wall Street Journal (or comparable index selected by Lender if the publication of such prime rate is

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Borrower and Lender under a Base Rate pricing structure. Lender's Base Rate is easily determined because it is established by Lender itself. A Base Rate loan is relatively simple to administer. Base Rate pricing, unlike LIBOR pricing, also does not inherently restrict Borrower with respect to the number and amount of advances or the ability of Borrower to make prepayments. *See* annotations to Rider 4 (Prepayment Options), *infra*.

While many practitioners and some Texas courts believe that negotiability is destroyed by a variable interest rate, the court in Amberboy v. Societe de Banque Privee, 831 S.W.2d 793, 797 (Tex. 1992) held that a variable interest rate instrument, even if indexed to the bank's prime rate, is still a negotiable instrument. This point is buttressed by § 3.112(b) of the UCC, which allows for a "fixed or variable" rate.

[116] Lender should be careful when utilizing this provision to avoid limiting the usury savings protections provided under Section 4.3 of this Note. *See* annotations to Section 4.3 (Interest Provisions), *supra*.

discontinued) plus _____ basis points (rounded upwards, if necessary, to the nearest one-eighth percent [.125%]).[117]

LIBOR Business Day: any day on which commercial banks in the City of London, England are open for interbank or foreign exchange transactions.

LIBOR Determination Date: with respect to any LIBOR Reference Period, the date that is two (2) LIBOR Business Days prior to the first day of such LIBOR Reference Period.

LIBOR:[118] with respect to each LIBOR Reference Period, the rate (expressed as a percentage per annum) for deposits in United States Dollars, for a one-month period, that appears on Telerate Page 3750 (or the successor thereto) as of 11:00 a.m., London, England time, on the related LIBOR Determination Date. If such rate does not appear on Telerate Page 3750 as of 11:00 a.m., London, England time, on such LIBOR Determination Date, the LIBOR Rate shall be the arithmetic mean of the offered rates (expressed as a percentage per annum) for deposits in United States Dollars for a one-month period that appear on the Reuters Screen LIBOR Page as of 11:00 a.m.,

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[117] It is becoming increasingly common practice for Lenders to round up to the nearest 1/16th or 1/100th instead of using a 1/8th rounding as provided in this option.

[118] This option establishes an interest rate that changes not with Lender's self-adjusted "base" rate, but instead with a market-determined cost-of-funds calculation referred to as LIBOR. Each Lender typically uses its own definition for LIBOR (which is often called the "Eurodollar Rate") which has been specifically tailored to the manner in which that Lender conducts its business. Currently, there is a trend to refer not to a specific page (such as "Telerate page 3750") but to the page on the Telerate screen that displays an average British Bankers Association Interest Settlement Rate for Deposit in Dollars; therefore, the practitioner should exercise caution in adopting any particular language. Practitioners are urged to consult with Lender to determine the precise language required by Lender and to ensure that any additional requirements (such as a "gross-up" provision intended to protect Lender's anticipated yield in light of reserve requirements) are included. *See* annotation to the definition of LIBOR Reference Period under Rider 2, *infra*, for a discussion of LIBOR as an index rate.

"Eurodollars" is the term referring to U.S. dollar-denominated deposits held in banks located outside of the United States. These deposits are traded or sold by and among banks in auction markets. Banks seeking the use of those deposits offer to pay an interest rate and sellers of those deposits state or "bid" the rate they are willing to accept. There are several active markets for these exchanges, such as Hong Kong and Singapore, but the London interbank market is the market most often cited for determining interest rates. LIBOR is simply the London Interbank Offered Rate, that is the rate offered by buyers of deposits in that specific market. The rate must be tied to a particular size of deposit for a specified interest period. A Lender who makes a loan accruing interest at LIBOR has readily available information regarding the cost of funds (or at least the potential costs of funds) incurred by Lender in making the loan. *See* first annotation to LIBOR Prepayment Example 1 under Rider 4 (Prepayment Options), *infra*, for a discussion of match-funding.

The LIBOR Option in this Rider 2 provides (i) a Minimum Rate to protect Lender's anticipated yield, (ii) an interest rate calculated from LIBOR, (iii) a primarily electronic means of establishing the rate, and (iv) a deposit period of one month. The London Interbank market in effect establishes a "base" rate for the loan. The interest rate in this LIBOR option is determined by reading a particular quote on a particular page on a particular day at a particular time.

London, England time, on such LIBOR Determination Date, if at least two such offered rates so appear. If fewer than two such offered rates appear on the Reuters Screen LIBOR Page as of 11:00 a.m., London, England time, on such LIBOR Determination Date, Lender shall request the principal London, England office of each of any four major reference banks in the London interbank market selected by Lender to provide such bank's offered quotation (expressed as a percentage per annum) to prime banks in the London interbank market for deposits in United States Dollars for a one-month period as of 11:00 a.m., London, England time, on such LIBOR Determination Date for amounts approximately equal to the principal balance hereof. If at least two such offered quotations are so provided, the LIBOR Rate shall be the arithmetic mean of such quotations. If fewer than two such offered quotations are so provided, Lender shall request each of any three major banks in New York City selected by Lender to provide such bank's rate (expressed as a percentage per annum) for loans in United States Dollars to leading European banks for a one-month period as of approximately 11:00 a.m., New York City time, on the applicable LIBOR Determination Date for amounts approximately equal to the principal balance hereof. If at least two such rates are so provided, LIBOR shall be the arithmetic mean of such rates. If fewer than two such rates are so provided, then LIBOR for the applicable LIBOR Reference Period shall be the LIBOR as in effect for the immediately preceding LIBOR Reference Period. LIBOR shall be determined in accordance with this paragraph by Lender or its designee.

LIBOR Reference Period: (i) initially, the period commencing on _____, 20__, and ending one month thereafter, and (ii) thereafter, a period commencing on the first day after the end of the immediately preceding LIBOR Reference Period and ending one month thereafter. Each successive calendar month period (or portion thereof with respect to the final LIBOR Reference Period) during the term of this Note (including any extensions) shall constitute a separate LIBOR Reference Period.[119]

[119] Notwithstanding this example of LIBOR as an index rate, LIBOR is more commonly used as an optional rate providing Borrower with the opportunity to select between (i) different interest rates (such as LIBOR ___% or Lender's prime rate) for different advances under a multiple advance loan or (ii) different interest rates for different periods of time for the entire loan or for specified portions thereof. For example, a Borrower may have the option to elect that interest accrue at LIBOR plus a specified margin for a portion or portions of the outstanding principal while the remaining outstanding principal accrues interest at Lender's prime rate. A Note providing for multiple advances or multiple portions of a single advance with different maturities (sometimes called "tranches") allows Borrower to select among various rates and may provide Borrower with flexibility in the amount of the advance (a tranche) and the length of time of the advance (the interest period for the tranche). Eurodollar deposits are generally short term, typically one month, three months or six months in length and interest calculations are typically made on 360 day basis. Borrower will often have the option of selecting LIBOR for either a one, two, three, or six-month interest period (and sometimes longer). These time periods correspond to the respective maturities of the deposits that may be purchased by Lender to fund the advance; provided, however, Lender should always prohibit the selection of any interest period that matures after the Maturity Date of the loan. Therefore, different LIBOR based rates may be available depending on the interest period selected by Borrower. Under a multiple advance Note, it is possible to have several tranches outstanding at any given time accruing interest at different rates and maturing at different times. Providing Borrower with a large number of options with respect to

Minimum Rate: the rate of _____ percent (__%) per annum. ***End of LIBOR Option*.]**[120]

interest rates and the number and length of advances creates an administrative burden for Lender. Consequently, Lender will usually limit the number of outstanding tranches possible at any one time.

Typically, at the end of a LIBOR interest period, Lender will provide a mechanism in the Loan Documents for Borrower to elect between continuation of that advance as a LIBOR loan or elect among the other optional rate structures, such as Base Rate pricing. As the loan nears maturity, Borrower must carefully manage not only the interest rate of its tranches, but also the interest periods so that a tranche does not mature without sufficient time remaining to make another LIBOR election.

As provided in the final annotation to Section 2.1 (Payment of Principal and Interest), *supra*, upon the filing of a petition under the Bankruptcy Code, Lender no longer has an obligation to fund advances. Similarly, in the context of a default on a LIBOR based loan, a Lender is exposed to potential loss under a LIBOR pricing structure, which loss is typically passed through to Borrower. Therefore, Lender will want to restrict Borrower's flexibility in selecting the number, size or the length of LIBOR tranches otherwise available to Borrower. In addition to the potential administrative "burden" for Lender in administering multiple LIBOR tranches (as previously noted in this annotation), the potential default and bankruptcy losses and concerns need to be carefully examined by any Lender in its underwriting. Given the fact that there are costs associated with prepaying a LIBOR tranche, both Lender and Borrower need to carefully manage the timing of the tranche selections, especially in the construction or mini-perm context, so as to not inadvertently or carelessly designate a tranche selection which would cause costs to be incurred in the early prepayment of a LIBOR tranche which could have otherwise been avoided. These costs can typically be avoided by carefully managing the time lines of construction, sale or refinance, and the corresponding time lines of the LIBOR tranches available to Borrower.

[120] This Minimum Rate provision is used when Lender's underwriting requirements for the transaction necessitate an absolute minimum return to Lender to protect its anticipated yield.

Rider 3

PAYMENT OPTIONS

[FOR USE AS THE FIRST TWO SENTENCES OF SECTION 2.1 OF THE NOTE]

INTEREST ONLY OPTION:[121]

[All accrued but unpaid interest on the outstanding principal balance hereof shall be due and payable in monthly installments beginning on _____, 20___, and continuing on each Payment Date thereafter through and including the Maturity Date. The outstanding principal balance hereof and any and all accrued but unpaid interest hereon shall be finally due and payable in full on the Maturity Date or upon the earlier maturity hereof, whether by acceleration or otherwise.**]**

[121] Interest-only Notes are popular when the term of the Note is relatively short and, therefore, neither Borrower nor Lender are particularly concerned with the retirement of principal during the term of the Note. An interest-only payment scheme is common for construction loans, development loans, bridge loans and other types of interim financing. It is not uncommon, however, for a Lender to require periodic payments of principal in addition to interest upon an extension of the Maturity Date of an interest-only loan. *See* final annotation to Rider 1 (Option to Extend Maturity Date), *supra*. Such principal payments are typically based upon an amortization schedule utilizing (i) a fixed interest rate or an interest rate being the highest of certain variables (such as the highest of the interest rate set forth in the Note, a pre-determined spread above the treasury note rate, or some other rate determined by Lender) and (ii) an amortization term substantially longer than the extended Maturity Date. *See* Rider 1 for examples of changes in loan terms often applicable to an extension period.

SEPARATE INSTALLMENTS OF PRINCIPAL AND INTEREST:

Example 1 (self-converting installments of principal; separate installments of interest):[122]

[The principal on this Note shall be due and payable (a) in equal consecutive monthly installments of $_____ each, beginning on _____, 20___, and continuing on each Payment Date thereafter through and including _____, 20___ (the "Conversion Date"), and (b) in equal consecutive monthly installments of $_____ each, beginning on the Conversion Date and continuing on each Payment Date thereafter through and including the Maturity Date; and accrued but unpaid interest on the outstanding principal balance of this Note shall be due and payable in monthly installments beginning on _____, 20___, and continuing on each Payment Date thereafter through and including the Maturity Date. The outstanding principal balance hereof and any and all accrued but unpaid interest hereon shall be finally due and payable in full on the Maturity Date or upon the earlier maturity hereof, whether by acceleration or otherwise.**]**

Example 2 (interest-only for the first __ months; principal payments to begin in month __):[123]

[All accrued but unpaid interest on the outstanding principal balance of this Note shall be due and payable in monthly installments beginning on _____, 20__, and continuing on each Payment Date thereafter through and including the Maturity Date. The principal on this Note shall be due and payable in equal consecutive monthly installments **[of $_____.00 each] [in an amount equal to 1/12th of the amount of principal that would be owing during the applicable year of this Note based upon a _____ (__) year mortgage-style amortization schedule at a constant rate equal to the higher of (a) ____ percent (__%) per annum, or (b) the Note Rate]**, beginning on _____, 20__, and continuing on each Payment Date

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[122] Self-converting Notes or so-called "mini perm" loans (as illustrated in Examples 1 and 2 of this Rider 3) are routinely used for lot development, rehabilitation and construction loans where the potential for generating income from the Mortgaged Property is likely to increase in the future, thus enabling Borrower to begin paying down the principal of the loan upon the occurrence of certain contingencies. These options are popular for Borrowers who prefer the "automatic" conversion feature and the ability to postpone the necessity of a second formal loan closing. Another variation is the hyper amortization or "Hyper-Am" loan, which typically provides for regular monthly installments of principal and interest but, for all payments due after the occurrence of a date certain (usually described as the "Preferred Payment Date"), Borrower pays to Lender, in addition to the regular monthly payments of principal and interest, an additional amount, usually in one of the following forms: (i) a fixed monthly installment, (ii) excess cash flow from the Mortgaged Property, or (iii) all funds on deposit in certain reserves (such as a curtailment reserve). Such additional amounts are credited against the unpaid principal balance of the Note. In addition, Hyper-Am notes will generally accrue a second tranche of interest from and after the Preferred Payment Date in order to effectively encourage Borrower to pay down the principal balance of the Note.

[123] Lender should be aware that, as a practical matter, if the loan is structured with a payment scheme other than payments of a fixed amount of principal and interest, Lender must calculate the amount of principal due (such as, in this Example 2, the amount of principal due under such an amortization schedule, if selected) and the amount of accrued interest, and timely communicate to Borrower on a monthly basis the specific amount of interest and/or principal (as the case may be) next due to permit Borrower to timely make payment in the proper amount.

thereafter through and including the Maturity Date. The outstanding principal balance hereof and any and all accrued but unpaid interest hereon shall be finally due and payable in full on the Maturity Date or upon the earlier maturity hereof, whether by acceleration or otherwise.**]**

DEMAND NOTE OPTION:[124]

[Without affecting the demand nature of this Note, principal and interest on this Note shall be payable in equal consecutive monthly installments of $_____ each, beginning on _____, 20___, and continuing on each Payment Date thereafter until paid in full. Notwithstanding the foregoing, the outstanding principal balance hereof, together with all accrued but unpaid interest hereon, will be due and payable in full on demand, or if no demand is sooner made, on _____, 20___ (the "Outside Payment Date").**][*The term "Maturity Date" should be changed to "Outside Payment Date" throughout the body of the Note when using this Demand Note Option; also insert the following definition in lieu of the Maturity Date definition*:** Outside Payment Date: on demand, or if no demand is sooner made, in no event later than _____, 20___.**]**[125]

[124] A demand note is a promissory note which requires all outstanding principal and interest to be due and payable on "demand" by Lender (without a stated Maturity Date or with a stated "Outside Payment Date" if no demand is sooner made). However, as this example illustrates, Lender may require certain portions of principal and interest to be payable in periodic installments prior to and irrespective of a "demand" by Lender for payment in full of all amounts then outstanding. Actions to enforce demand notes have sometimes been subject to challenge by Borrowers alleging that collection efforts were made in bad faith. However, several courts have held that a demand note is literally a note payable on demand (*i.e*, that the only obligation of Lender is to make demand within the applicable statute of limitations). *See* Centerre Bank of Kansas City, N.A. v. Distributors, Inc., 705 S.W.2d 42 (Mo. App. 1985) (demand note held to be just that; the duty of good faith and fair dealing applies to matters "not regulated by contract"); Rigby Corp. v. Boatmen's Bank & Trust Co., 713 S.W.2d 517 (Mo. App. 1986) (demand note not subject to the good faith requirements of the UCC); Allied Sheet Metal Fabricators, Inc. v. Peoples Nat. Bank of Washington, 518 P.2d 734 (Wash. App. 1974), cert. denied, 419 U.S. 967 (1974) (good faith under UCC is not a factual issue in determining the bank's right to call a demand note); Fulton Nat. Bank v. Willis Denney Ford, Inc., 269 S.E.2d 916 (Ga. App. 1980) (the only duty of the holder of a demand note is to seek enforcement within the applicable statute of limitations). *See also* second annotation to this Demand Note Option, *infra*.

[125] A Note which does not specify a particular time for repayment is a "demand note" and is payable (and actionable) immediately upon demand by Lender. Martin v. Ford, 853 S.W.2d 680 (Tex. App. - Texarkana 1993, writ den'd). *See* Gill, 504 S.W.2d at 523. The demand by Lender must be made within a reasonable time, however. Leinen v. Buffington's Bayou City Services Co., 824 S.W.2d 682 (Tex. App. - Houston [14th Dist.] 1993, no writ). Demand notes are common in affiliate entity loans, family loans or other circumstances in which a flexible time for the repayment of the indebtedness is important to Borrower or Lender. *See* second annotation to Section 1.1 (Definition of Maturity Date), *supra*.

Rider 4

PREPAYMENT OPTIONS

[FOR INCLUSION IN SECTION 2.5 OF THE NOTE]

PREPAYMENT IN WHOLE OR IN PART WITHOUT PREPAYMENT FEE: [126]

Example 1:

[Borrower shall have the right to prepay, at any time and from time to time upon ___ (__) days prior written notice to Lender, without fee, premium or penalty, all or any portion of the outstanding principal balance hereof, provided, however, that such prepayment shall also include any and all accrued but unpaid interest on the amount of principal being so prepaid through and including the date of prepayment, plus any other sums which have become due to Lender under the other Loan Documents on or before the date of prepayment, but which have not been fully paid. If this Note is prepaid in full, any commitment of Lender to make further advances shall automatically terminate and shall be of no further force or effect. Any partial prepayments of principal shall be applied in inverse order of maturity to the last maturing installment(s) of principal under this Note.**]**

***Example 2 (for use with a permanent loan commitment, tri-party agreement or when Lender has a 3rd party obligation relating to the Loan*):**[127]

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[126] Borrower has no common law right to pay principal to Lender prior to the date that is contractually stipulated in the Note, even if the Note is silent as to prepayment. Thus, Lender has the right, subject to usury considerations, to impose whatever penalty Lender desires in connection with a voluntary prepayment. Gulf Coast Investment Corp. v. Prichard, 438 S.W.2d 658 (Tex. Civ. App.--Dallas 1969, writ ref'd n.r.e.); A.Y. Creger Co. v. Horton, 96 S.W.2d 790 (Tex. Civ. App.--El Paso 1936, no writ). *See* annotation to Section 2.5 (Prepayment), *supra*. In Examples 1 and 2, Lender permits Borrower, subject to certain conditions, to make prepayments of principal without penalty.

[127] Example 2 permits prepayment in whole or in part without any prepayment fee or premium, but imposes additional restrictions and limitations on the amount and ability of Borrower to prepay principal. For example, as the language provides, Borrower may only prepay a certain minimum amount of principal (or a larger integral multiple thereof) at any one time and Borrower may not prepay principal if any such prepayment would, in Lender's discretion, contravene or prejudice any future funding under any applicable permanent loan commitment, tri-party agreement or the like (which prepayment could, in effect, jeopardize certain rights of Lender with respect to third parties or certain obligations of Lender owed to third parties). Accordingly, such limitations on prepayment should be included when a permanent loan commitment or tri-party agreement exists or when Lender has third-party obligations relating, at least in part, to the loan.

[Borrower shall have the right to prepay at any time and from time to time, without fee, premium or penalty, all or any portion of the outstanding principal balance hereof, provided, however, that: (a) no prepayment may be made which, in Lender's discretion, would contravene or prejudice any future funding under any applicable permanent loan commitment, tri-party agreement or the like by and among Lender, Borrower and any other third party; (b) Lender shall have actually received from Borrower prior written notice of (i) Borrower's intent to prepay, (ii) the exact amount of principal which will be prepaid (the "Prepaid Principal"), and (iii) the date on which the prepayment will be made; (c) each prepayment shall be in the amount of $_____ or a larger integral multiple of $____ (unless the prepayment retires the outstanding principal balance hereof in full); and (d) each prepayment shall be in the exact amount of the Prepaid Principal, plus accrued but unpaid interest thereon through and including the date of prepayment, plus any other sums which have become due to Lender under this Note or the other Loan Documents on or before the date of prepayment, but which have not been fully paid. If this Note is prepaid in full, any commitment of Lender to make any further advances shall automatically terminate and shall be of no further force or effect. Any partial prepayments of principal shall be applied in inverse order of maturity to the last maturing installment(s) of principal under this Note.**]**

PREPAYMENT IN WHOLE WITHOUT PREPAYMENT FEE; PARTIAL PREPAYMENTS NOT ALLOWED:

[Borrower shall have the right to prepay, at any time upon ___ (__) days prior written notice to Lender, in whole but not in part, however, without fee, premium or penalty, the entire outstanding principal balance hereof, provided, however, that such prepayment shall also include any and all accrued but unpaid interest on the amount of principal being so prepaid through and including the date of the prepayment, plus any other sums which have become due to Lender under this Note or the other Loan Documents on or before the date of prepayment but which have not been fully paid. Partial prepayments of the principal balance hereof are expressly prohibited.**]**[128]

[128] Due to the fact that Lender is not required to grant Borrower a prepayment right, Lender may, subject to usury considerations, contractually stipulate the terms and conditions of a prepayment right that Lender has contractually granted to Borrower. *See* first annotation to this Rider 4, *supra*.

PREPAYMENT FEE OPTION FOR LIBOR RATE/PRIME RATE OPTION:

Example 1 (prepayment in whole or in part with LIBOR Consequential Loss):[129]

(a) **[**Borrower shall have the right to prepay at any time, and from time to time, all or any portion of the outstanding principal balance hereof, provided, however, that: (i) Lender shall have actually received from Borrower prior written notice of (A) Borrower's intent to prepay, (B) the exact amount of principal which will be prepaid (the "Prepaid Principal"), and (C) the date on which the prepayment will be made; (ii) each prepayment shall be in the amount of $_____ or a larger integral multiple of $_____ (unless the prepayment retires the outstanding balance of this Note in full); (iii) each prepayment shall be in the exact amount of the Prepaid Principal, plus accrued but unpaid interest thereon through and including the date of prepayment, plus any other sums which have become due to Lender under this Note or the other Loan Documents on or before the date of prepayment, but which have not been fully paid; and (iv) no portion of the principal balance of this Note accruing interest at LIBOR ("LIBOR Principal") may be prepaid except on the last day of the LIBOR Reference Period applicable thereto, unless (x) the prior written consent of Lender is obtained which consent, if given, shall provide, without limitation, the manner and order in which the prepayment is to be applied to the indebtedness evidenced by this Note, and (y) Borrower pays to Lender any Consequential Loss (as hereinafter defined) resulting therefrom, in accordance with Section 2.5(b) below. If this Note is prepaid in

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[129] In order to insure that Lender's cost of obtaining funds used to make the loan corresponds to Lender's anticipated yield from the loan (*i.e.,* corresponds to the LIBOR based rate), Lender could "match-fund" its LIBOR loans. The term "match-funding" refers to the actual funding of a loan by purchasing funds in the market used to set the interest rate. The loan is made using funds obtained by Lender and accepted for deposit for a specified period of time and for which Lender has agreed to pay a fixed rate of interest. The funds are then advanced to Borrower at the same rate paid by Lender, plus a margin. By match-funding, Lender protects itself from the risk that the cost of funding the loan may increase over time. Obviously, Lender could generate additional profit on the loan if Lender were able to obtain funds at a lower cost. For example, Lender could choose to fund the loan using funds obtained with a different interest period than the interest period selected by Borrower if the rate Lender must pay on such funds is less than the rate applicable to the interest period selected by Borrower. Borrower should be aware that a domestic loan with LIBOR pricing could be funded by Lender through a source other than through the interbank market. In fact, in the case of a high volume Lender, such Lender's LIBOR funding requirements are usually viewed in the aggregate rather than on a loan-by-loan basis. Nevertheless, the Loan Documents permitting selection of LIBOR based rates are generally unaffected by these issues as the Loan Documents are typically drafted as if Lender is actually match-funding its LIBOR loans in the interbank market.

The "Consequential Loss" language incorporated into Example 1 is related to the "match-funding" concept previously discussed in this annotation, and requires that Borrower pay and compensate Lender for any "Consequential Loss" incurred by Lender on a LIBOR based loan arising from Borrower's prepayment of the loan or failure to make timely payments. Borrower's prepayment or failure to make timely payments may detrimentally affect Lender's obligations, or the amount of interest (and thus profit) actually received by Lender, under a "match-funding" scenario and this provision attempts to rectify such effect by passing such loss on to Borrower. The last sentence of Section 2.5(b) is intended to compensate Lender for its hypothetical LIBOR-related Consequential Loss, regardless of whether or not Lender has match-funded the loan.

full, any commitment of Lender for further advances thereunder shall automatically terminate and shall be of no further force or effect.

(b) Consequential Loss. Within _____ (__) days after written request by Lender (or at the time of any prepayment), Borrower shall pay to Lender such amount as will compensate Lender for any loss, cost, expense, penalty, claim or liability, including, without limitation, any loss incurred in obtaining, prepaying, liquidating or employing deposits or other funds from third parties and any loss of revenue, profit or yield, as determined by Lender in Lender's reasonable judgment (collectively, a "Consequential Loss") incurred by Lender with respect to LIBOR, including any election of LIBOR, any LIBOR Reference Period or any LIBOR Principal as a result of: (i) the failure of Borrower to make payments on the date specified under this Note or in any notice from Borrower to Lender; (ii) the failure of Borrower to borrow, continue or convert into LIBOR Principal on the date or in the amount specified in a notice given by Borrower to Lender; (iii) the early termination of any LIBOR Reference Period for any reason; or (iv) the payment or prepayment of any amount on a date other than the date such amount is required or permitted to be paid or prepaid, whether voluntarily, by reason of acceleration or otherwise, including, but not limited to, acceleration upon any transfer or conveyance of any right, title or interest in the Mortgaged Property giving Lender the right to accelerate the maturity of this Note as provided hereunder or under the other Loan Documents. Notwithstanding the foregoing, the amount of the Consequential Loss shall never be less than zero nor greater than is permitted by applicable law. If any Consequential Loss shall be due hereunder, Lender shall deliver to Borrower notice as to the amount of the Consequential Loss, which notice shall be conclusive in the absence of manifest error. Lender shall have no obligation to purchase, sell and/or match funds in connection with the funding or maintaining of the loan evidenced by this Note and the other Loan Documents or any portion thereof. The obligations of Borrower under this Section 2.5(b) shall survive any release, expiration or earlier termination of the Loan Documents and the requirement of payment of this Note and shall not be waived by any delay by Lender in seeking such compensation. For purposes of this Section 2.5(b), Lender shall be deemed to have funded any indebtedness evidenced by this Note bearing interest at LIBOR by matching deposit or other borrowing in the offshore U.S. Dollar interbank market, whether or not such indebtedness was actually so funded.**]**

Example 2 (Prepayment in whole or in part with LIBOR fee calculation):[130]

[Borrower shall have the right to prepay, at any time and from time to time, all or any portion of the outstanding principal balance hereof (and all such prepayments shall be applied first to accrued but unpaid interest hereon, with the balance thereof to the outstanding principal balance hereof); provided, however, that if Borrower prepays any portion of the principal balance of this Note accruing interest at LIBOR (the "LIBOR Principal") prior to the expiration of the term of

[130] Example 2 is often used by Lenders whose cost of funds is more closely associated with treasury note rates instead of LIBOR match-funding (*i.e.*, for some Lenders, the treasury note rate is often a more realistic indication of the cost to Lender of obtaining loan funds).

the LIBOR Reference Period applicable thereto, Borrower shall pay to Lender a prepayment fee in an amount calculated as follows:

$$D \times (A-B) \times \frac{C}{360}$$

A = the 360-day interest yield (as of the beginning of the term of the applicable LIBOR Reference Period and expressed as a decimal) on a U.S. Government Treasury bill, note or bond (a "Treasury Obligation") selected by Lender in Lender's sole discretion and having, as of the beginning of the term of the applicable LIBOR Reference Period, a remaining term until its maturity is approximately equal to the term of the LIBOR Reference Period.

B = the 360-day interest yield (as of the Business Day immediately preceding the prepayment date and expressed as a decimal) on a Treasury Obligation selected by Lender in Lender's sole discretion and having, as of the Business Day preceding the prepayment date, a term approximately equal to the unexpired term of the term of the applicable LIBOR Reference Period.

C = the number of calendar days from the date of the prepayment through and including the date on which the applicable LIBOR Reference Period would have expired but for the prepayment.

D = the amount of the principal associated with the applicable LIBOR Reference Period that is being prepaid.

The amount so determined shall then be discounted to its present value as of the date of prepayment; the interest rate used to compute such discount shall be the rate used in item B in the above formula. In no event shall the result of A-B be less than 0.00. The Treasury Obligation selected by Lender shall be from among those included in the over the counter quotations supplied to The Wall Street Journal by the Federal Reserve Bank of New York City based on transactions of $1,000,000 or more.**]**

PREPAYMENT OPTION WITH YIELD MAINTENANCE AND LOCKOUT PERIOD:

Lockout Expiration Date: the date which is _____ (__) months prior to the Maturity Date. **[*Add this definition to Section 1.1 of the Note.*]**[131]

Required Yield Maintenance:[132] an amount equal to the greater of (a) ____ percent (_____%) of the principal amount being prepaid, and (b) the positive excess of (i) the present value ("PV") of

[131] This definition relates to the first day on which Borrower may prepay the Note without a prepayment premium as determined under Section 2.5. *See* annotation to Section 2.5 (Prepayment), *supra*, and first and third annotations to Rider 4, *supra*.

all future installments of principal and interest due under this Note including the principal amount due at maturity (collectively, "All Future Payments"), discounted at an interest rate per annum equal to the Treasury Constant Maturity Yield Index published during the second full week preceding the date on which such premium is payable for instruments having a maturity coterminous with the remaining term of this Note, over (ii) the principal balance hereof outstanding immediately before such prepayment [(PV of All Future Payments) - (principal balance at time of prepayment) = prepayment fee.] **[*Add this definition to Section 1.1 of the Note*]**

Treasury Constant Maturity Yield Index: the average yield for "This Week" as reported by the Federal Reserve Board in Federal Reserve Statistical Release H.15 (519). If there is no Treasury Constant Maturity Yield Index for instruments having a maturity coterminous with the remaining term of this Note, then the index shall be equal to the weighted average yield to maturity of the Treasury Constant Maturity Yield Indices with maturities next longer and shorter than such remaining average life to maturity, calculated by averaging (and rounding upward to the nearest whole multiple of 1/100 of 1% per annum, if the average is not such a multiple) the yields of the relevant Treasury Constant Maturity Yield indices (rounded, if necessary, to the nearest 1/100 of 1% with any figure of 1/200 of 1% or above rounded upward).[133] **[*Add this definition to Section 1.1 of the Note*]**

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[132] This definition relates to the calculation of the prepayment premium or charge under Section 2.5 of the Note. *See* previous annotations to this Rider 4, *supra*. Under a yield maintenance formula, Borrower prepays the indebtedness evidenced by the Note with a fee sufficient to enable Lender to reinvest the funds at a then current rate of return to earn no less than if Borrower had made all payments through maturity (*i.e.,* allowing Lender to protect its anticipated yield). Lender should be aware that the calculation of any prepayment premium or charge should include careful consideration of usury concerns. *See* annotations to Section 4.3 (Interest Provisions), *supra.*

The premium amount is equal to the greater of alternatives (a) and (b). Although subparagraph (b) is a mathematical calculation based on a yield maintenance, subparagraph (a) is a prepayment premium floor equal to a stated percentage of the amount of the prepayment. Thus, although it appears that the purpose of the prepayment premium is for a lost opportunity cost to Lender, this formula provides for a premium to Lender even in the event that interest rates have actually increased subsequent to the effective date of the Note. The mathematical calculation described in subparagraph (b) is the discounted cash flow of all scheduled principal and interest payments, less the amount of the outstanding principal balance at the time of the prepayment. Obviously, a higher rate used for discounting the cash flow will result in a lower prepayment premium. The discount factor described in this definition is the interest yield of a United States Treasury obligation. It is important to note that, even if the interest rate environment has remained constant, there will nevertheless be a prepayment premium because of the interest rate differential between the Note Rate and the Treasury Constant Maturity Yield Index. *See* second annotation to Section 1.1 (Definition of Note Rate), *supra.*

[133] This definition identifies the discount rate to be utilized in the calculation of the yield maintenance portion of the prepayment premium in a stable or rising interest rate calculation. This interest rate is equal to the rate of United States Treasury Department obligations with a maturity equal to the remaining term of the Note. If there is not an identically matching term, then the rate is calculated utilizing the average of the next longer and shorter maturities. The utilization of the interest rate accruing on a loan made to the United States is obviously an artificially low discount rate in comparison to a private loan transaction.

[*Insert the following provisions as Section 2.5 of the Note*:

(a) Borrower shall have the right to prepay the outstanding principal balance hereof in whole, but not in part, at any time after the Lockout Expiration Date, provided, however, that (i) written notice of such prepayment is received by Lender not more than sixty (60) days and not less than thirty (30) days prior to the date of such prepayment, and (ii) such prepayment is made on a Payment Date (or, if such prepayment is not received on a Payment Date, interest is paid by Borrower through the last day of the calendar month immediately prior to the next succeeding Payment Date) and is accompanied by all accrued but unpaid interest hereon and all other sums which have become due to Lender under this Note or under the other Loan Documents or before the date of prepayment, but which have not been fully paid.

(b) (1) If, prior to the Lockout Expiration Date and following the occurrence of any Event of Default, Borrower shall tender payment of an amount sufficient to satisfy all of the indebtedness evidenced by this Note, Borrower shall pay, in addition to the amounts payable under this Note and under the other Loan Documents, a prepayment fee in an amount equal to Required Yield Maintenance plus ____ percent (__%) of the principal amount being prepaid.[134]

(2) If any prepayment fee is due hereunder, Lender shall deliver to Borrower a written statement setting forth the amount and determination of the prepayment fee, and, provided that Lender shall have in good faith applied the formula described above, Borrower shall not have the right to challenge the calculation or the method of calculation set forth in any such written statement in the absence of manifest error, which calculation may be made by Lender on any day during the thirty (30) day period preceding the date of such prepayment. Lender shall not be obligated or required to have actually reinvested the prepaid principal balance at the Treasury Constant Maturity Yield or otherwise as a condition to receiving the prepayment fee. No prepayment fee or premium shall be due or payable in connection with any prepayment of the indebtedness evidenced by this Note if made after the Lockout Expiration Date, or upon prepayment resulting from application of insurance or condemnation proceeds as provided in the Deed of Trust at any time during the loan term. With regard to any prepayment made hereunder (except for a prepayment resulting from the application of condemnation or insurance proceeds as provided in the Deed of Trust), if prior written notice required in Section 2.5(a)(i) above has not been received by Lender, the prepayment fee shall be increased by an amount equal to the lesser of (x) thirty (30) days' unearned interest computed on the outstanding principal balance hereof so prepaid and (y) unearned interest computed on the

[134] This provision relates to the factual scenario where Lender accelerates the indebtedness evidenced by the Note pursuant to an Event of Default. In the event that Borrower tenders full payment, Borrower must also pay a prepayment premium, which includes the standard fee defined as the Required Yield Maintenance plus an additional penalty calculated as a percentage of the amount of the prepayment. This precludes Borrower from attempting to create a prepayment opportunity during a closed period by intentionally defaulting so that Lender will accelerate the indebtedness evidenced by the Note. *See* final annotation to Yield Maintenance Option under Rider 4, *infra*.

outstanding principal balance hereof so prepaid for the period from, and including, the date of prepayment through the Maturity Date.[135]

(c) Partial prepayments of this Note shall not be permitted, except partial prepayments resulting from Lender applying insurance or condemnation proceeds to reduce the outstanding principal balance hereof as provided in the Deed of Trust, in which event no prepayment fee or premium shall be due. No notice of prepayment shall be required under the circumstance specified in the preceding sentence. Partial payments of principal shall be applied to the outstanding principal balance hereof on the next succeeding Payment Date following Lender's determination to apply insurance or condemnation proceeds to the partial prepayment of the outstanding principal balance hereof.[136] In such event, as of the date such proceeds are applied by Lender to reduce the outstanding principal balance hereof, the monthly installment of interest and principal set forth in Section 2.1 hereof shall be recomputed at the Note Rate and the outstanding principal balance hereof remaining following such application, based upon an amortization schedule of _____ years[137] less the period (A) from the first day of the calendar month following the date of the advance hereunder to the date of the application of such proceeds, or (B) if the date of the advance hereunder is the first day of a calendar month, from the date of the advance hereunder to the date of the application of such proceeds.

(d) Except as otherwise expressly provided in Section 2.5(c) hereof, the prepayment fees provided above shall be due, to the extent permitted by applicable law, under any and all circumstances where all or any portion of this Note is paid prior to the Maturity Date, whether such prepayment is voluntary or involuntary, even if such prepayment results from Lender's exercise of its rights upon an Event of Default and acceleration of the Maturity Date (irrespective of whether or not foreclosure proceedings or any other proceedings against Borrower, the Mortgaged Property or any guarantor hereof have been commenced), which shall be deemed a voluntary payment, and shall be in addition to any other sums due under this Note or under any

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[135] The Note provides Borrower the ability to prepay in full during a certain open period and to partially prepay at any time if the source of prepayment is either insurance or condemnation proceeds.

[136] The Note permits a partial or full prepayment at any time that relates to Lender's application of insurance or condemnation proceeds in accordance with the Deed of Trust. We are aware of no Texas case ruling on a Lender's ability to charge a prepayment premium for accelerated indebtedness where the Mortgaged Property has been condemned or destroyed and Lender has the option to either collect the applicable proceeds or require restoration of the Mortgaged Property. Some commentators have suggested that this may be an exception to the enforceability of prepayment penalties. *See* Reed, Prepayment Premiums After In Re Skyler Ridge and In Re Kroh Bros., 2. UNIV. TEX. 24TH ANNUAL MORTGAGE LENDING INST. 20-1 (1990).

[137] In the event of a partial prepayment resulting from the application of condemnation or insurance proceeds, a Borrower may argue that, due to the fact that the principal balance is reduced and the income producing ability of the Mortgaged Property is diminished, the Note payments should be similarly reduced. This provision provides for a recomputation of the principal and interest payments based on the specified amortization period and the reduced principal balance. The length of the amortization period that is utilized in this recomputation is the original amortization period less the time that has passed prior to the date of prepayment.

of the other Loan Documents.[138] No tender of a prepayment of this Note with respect to which a prepayment fee is due shall be effective unless and until such prepayment is accompanied by the applicable prepayment fee.**]**

[138] Without a clear provision in the Loan Documents requiring payment of a prepayment fee or premium upon acceleration of the indebtedness evidenced by the Note, by the very nature of the definition of "prepayment" (payment before, not after, maturity), there can be no prepayment after acceleration and, consequently, no prepayment fee or premium would be due. *See*, General Motors Acceptance Corp. v. Uresti, 553 S.W.2d 660, 663 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.) (addressing unearned time-price differential). A Lender may contractually charge a prepayment premium on the accelerated amount of principal that is the result of Lender's exercise of Lender's right to accelerate the indebtedness evidenced by the Note. This is sometimes described as an "acceleration penalty." Parker Plaza West Partners v. Unum Pension and Thrift Co., 941 S.W.2d 349, 355-56 (5th Cir. 1991); Affiliated Capital Corp. v. Commercial Federal Bank, 834 S.W.2d at 521, 526-27 (Tex. App.--Austin 1992, no writ); Meisler v. Republic of Texas Sav. Ass'n, 758 S.W.2d 878, 882-85 (Tex. App. - Houston [14th Dist.] 1988, no writ). However, in contrast to a voluntary prepayment, the Note must clearly state that the premium is to be charged subsequent to an acceleration of the maturity of the Note. Hettig & Co. v. Union Mutual Life Ins. Co., 781 F.2d 1141 (5th Cir. 1986); Affiliated Capital Corp., 553 S.W.2d at 663. The enforceability of a prepayment fee or premium clause may be limited when combined with a clause providing for acceleration of the indebtedness evidenced by the Note for any breach of a due on transfer clause because the combination of these two provisions may be deemed an unreasonable restraint on alienation. In order for the prepayment fee or premium to be enforceable upon acceleration of the indebtedness evidenced by the Note for a breach of a due on transfer clause (i) the Loan Documents should clearly state when a prepayment fee or premium is payable and the specific requirements upon which Lender may condition its approval of any transfer under the due on transfer clause, and (ii) Lender must act reasonably. *See* Meisler at 882; North Pointe Patio Offices Venture v. United Benefit Life Ins. Co., 672 S.W.2d 35, 37 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.). It should be noted that a Texas bankruptcy court held that the mere presence of a due on transfer clause with a prepayment fee or premium in the same loan documents is void and unenforceable as an unreasonable restraint on alienation. Abramoff v. Life Ins. Co. of Georgia, 92 B.R. 698, 703 (W.D. Tex. 1988). However, many Texas practitioners commonly distinguish the Abramoff decision as being an inaccurate statement of Texas law.

The Abramoff court also held that because the prepayment of a loan after acceleration is not voluntary, the prepayment fee or premium must be considered interest under the loan for purposes of usury calculations. Consequently, this Note also contains a contractual stipulation that the payment will be considered a voluntary prepayment. While the Abramoff case did not involve this particular contractual stipulation, the Texas Supreme Court has recognized the rights of parties to contract with regard to their property as the parties see fit, so long as the contract does not offend public policy and is not illegal. Sonny Arnold, Inc. v. Sentry Sav. Ass'n. 633 S.W.2d 811, 815 (Tex. 1982).

DEFEASANCE OPTION:[139]

[*Insert the following as the first sentence of the prepayment alternative selected for Section 2.5 of the Note:* Borrower shall have the right and option to release the Mortgaged Property from the lien of the Deed of Trust in accordance with the terms and conditions of the Defeasance provisions set forth in Section ___ of the Deed of Trust.**]**

[Defined terms in the following example language should be modified to match the defined terms used in the Deed of Trust, not necessarily those used in the Note. Example defeasance language for insertion into the Deed of Trust (not for use in the body of the Note and included here only for example purposes):

Section ____ Defeasance. Notwithstanding anything to the contrary contained in the Note, this Deed of Trust or the other Loan Documents, at any time after the second (2nd) anniversary of the date that is the "startup day," within the meaning of Section 860G(a)(9) of the Internal Revenue Code of 1986, as amended from time to time or any successor statute (the "Code"), of a "real estate mortgage investment conduit" ("REMIC") within the meaning of Section 860D of the Code, that holds the Note and this Deed of Trust and provided (unless Beneficiary shall otherwise consent, in its sole discretion) no default or Event of Default has occurred and is continuing hereunder or under any of the other Loan Documents, Borrower shall have the right to obtain the release of the Property from the lien of this Deed of Trust and the other Loan Documents (the "Defeasance") upon the satisfaction of each of the following conditions precedent:

(1) not less than thirty (30) days' prior written notice to the Beneficiary specifying a regular Payment Date under the Note (the "Defeasance Election Date") on which the Defeasance Deposit (hereinafter defined) is to be made;

(2) the remittance to the Beneficiary on the related Defeasance Election Date of interest accrued and unpaid on the outstanding principal amount of the Note to and including the Defeasance Election Date and the scheduled amortization payment due on such Defeasance Election Date, together with all other amounts then due and payable under the Note, this Deed of Trust and the other Loan Documents;

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[139] Defeasance is an option typically included in real estate loans structured for securitization. Essentially, defeasance is a process whereby Borrower can obtain a release of the lien against the Mortgaged Property, a right typically granted in loans subject to a long-term prepayment prohibition. In contrast with yield maintenance, defeasance does not result in an early termination of the debt. To obtain the lien release, Lender will require that Borrower purchase and pledge U.S. treasury obligations as substitute collateral. If a loan is subject to a long-term prepayment prohibition and Borrower desires to sell property which is encumbered with a securitized loan, Borrower will typically have the choice of either (i) undertaking a sale for cash and exercising Borrower's defeasance option, or (ii) selling the property with the purchaser assuming the securitized loan. *See* Kevin A. Sullivan, Assumptions of Securitized Loans, CMBS World (Spring 2000, Volume 2, No. 1).

(3) the irrevocable deposit with the Beneficiary of an amount (the "Defeasance Deposit") of U.S. Government Securities (hereinafter defined), which through the scheduled payment of principal and interest in respect thereof in accordance with their terms will provide, not later than the due date of any payment, cash in an amount sufficient, without reinvestment, in the opinion of a nationally recognized firm of independent certified public accountants expressed in a written certification thereof delivered to the Beneficiary, to pay and discharge the Scheduled Defeasance Payments (hereinafter defined);[140]

(4) the delivery on or prior to the Defeasance Election Date to the Beneficiary of:

(A) a security agreement, in form and substance satisfactory to the Beneficiary, creating a first priority lien on the Defeasance Deposit (the "Defeasance Security Agreement"), which Defeasance Security Agreement shall be included within the definition of 'Deed of Trust" for purposes of each Loan Document from and after the date of its execution;

(B) a release of the Property from this Deed of Trust, the Assignment and any UCC Financing Statements relating thereto (for execution by the Beneficiary) in a form appropriate for cancellation of such documents in the jurisdiction in which the Property is located;

(C) certificate of an authorized representative of Grantor certifying that the requirements set forth in this subparagraph (a) have been satisfied;

(D) an opinion of counsel for Grantor in form and substance satisfactory to the Beneficiary to the effect that the Beneficiary has a perfected first priority security interest in the Defeasance Deposit;

(E) an opinion of counsel for Beneficiary, prepared and delivered by the servicer at Grantor's reasonable expense, stating that any trust formed as a

[140] Typically, the loan servicer will provide the accountant with a detailed schedule of the remaining debt obligations. Often, Lender will provide Borrower a choice of accountants with whom arrangements have been made to furnish these types of opinions or "comfort" letters. Upon issuance of the accountant's letter, Borrower must provide trade confirmations or other appropriate evidence that the U.S. Government Securities offered as substitute collateral exactly reflect the amount, interest rate and maturity dates of those in the accountant's letter. If the loan is cross-defaulted and cross-collateralized, Borrower will generally be required to provide a premium amount (*e.g.* 125%) of the deposit otherwise necessary for the defeasance of the amount allocated to the Mortgaged Property. Deposit of this premium is required by Lender in exchange for Lender giving up the potential excess equity on the released property which had benefitted the crossed loan. *See* Kevin A. Sullivan, A Guide to Dealing With a Conduit Lender, 34th Annual William F. Gibson, Jr. Mortgage Lending Institute (University of Texas, September 2000).

REMIC in connection with any Secondary Market Transaction will not fail to maintain its status as a REMIC as a result of such Defeasance; and

(F) such other certificates, documents or instruments as Beneficiary may reasonably request;

(5) the payment by Grantor to Beneficiary of all reasonable out-of-pocket costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements) incurred or anticipated to be incurred by Beneficiary in connection with the release of the Property from the lien of this Deed of Trust and the other Loan Documents pursuant to this Section ____[141] including, without limitation, Beneficiary's determination of whether Grantor has satisfied all of the related conditions and requirements set forth in this Section ____; and

(6) if required by Beneficiary, Beneficiary's receipt of evidence in writing from the Rating Agency to the effect that the proposed transfer will not result in a re-qualification, reduction, downgrade or withdrawal of any rating initially assigned or to be assigned in a Secondary Market Transaction or, if no such rating has been issued, in Beneficiary's good faith judgment, such Defeasance shall not have an adverse effect on the level of rating obtainable in connection with the Loan.

(e) Upon compliance with the requirements of subparagraph (a) above, the Property shall be released from the lien of this Deed of Trust, the Assignment and any UCC Financing Statements related thereto, the obligations hereunder and under the other Loan Documents with respect to the Property shall no longer be applicable and the Defeasance Deposit shall be the sole source of collateral securing the Note. Beneficiary shall apply the Defeasance Deposit and the payments received therefrom to the payment of all scheduled principal and interest payments (the "Scheduled Defeasance Payments") due on all successive Payment Dates under the Note after the Defeasance Election Date including the payment due on the Maturity Date (as defined in the Note). Grantor, pursuant to the Defeasance Security Agreement or other appropriate document, shall direct that the payments received from the Defeasance Deposit shall be made directly to Beneficiary and applied to satisfy the obligations of Grantor under the Note. In connection with such release, if Grantor shall continue to own any assets other than the Defeasance Deposit, Grantor shall establish or designate a single-purpose, bankruptcy-remote successor entity acceptable to Beneficiary (the "Successor Trustor"), with respect to which a nonconsolidation opinion satisfactory in form and substance to Beneficiary has been delivered to Beneficiary (if such nonconsolidation opinion was required of Grantor in connection with the origination of the indebtedness secured hereby) in which case Grantor shall transfer and assign to

[141] The cost associated with a defeasance can be substantial. One author has described a hypothetical circumstance where the cost of undertaking a defeasance transaction on a $3,500,000 loan could approximate $600,000. *See* Mark A. Hill and Jim Hebert, Defusing Defeasance: The Real CMBS Millennium Bug, CMBS World (Fall 1999, Volume 1, No. 3).

the Successor Trustor all obligations, rights and duties under the Note and the Defeasance Security Agreement, together with the pledged Defeasance Deposit. The Successor Trustor shall assume the obligations of Grantor under the Note and the Defeasance Security Agreement, and Grantor shall be relieved of its obligations hereunder and thereunder. Grantor shall pay One Thousand and No/100 Dollars ($1,000.00) to the Successor Trustor as consideration for assuming such Grantor obligations.

(f) As used herein, the term "U.S. Government Securities" shall mean securities that are direct obligations of the United States of America for the full and timely payment of which its full faith and credit is pledged. ***End of Example Defeasance Language commonly found in a Deed of Trust*.]**[142]

[142] The U.S. Government Securities obtained by Borrower must be non-prepayable and non-callable.

Rider 5

OPTIONAL EXCULPATION PROVISIONS

[FOR INCLUSION IN SECTION 3.3 OF THE NOTE]

NON-RECOURSE TRANSACTIONS - FULL EXCULPATION:[143]

[3.3 Exculpation.[144] Notwithstanding anything contained in the Loan Documents to the contrary, **[, but subject to the qualifications provided in this Section 3.3 - *use only with non-recourse carve-outs below*]**, Lender agrees that (i) Borrower shall be liable upon the indebtedness evidenced by this Note to the full extent (but only to the extent) of the Mortgaged Property, (ii) if an Event of Default occurs under this Note or under the other Loan Documents, any judicial proceedings brought by Lender against Borrower shall be limited to the preservation,

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[143] In the introductory paragraph of the Note, Borrower expressly promises to pay to Lender the stated principal amount together with interest. Absent exculpatory language, this promise imposes personal liability on Borrower for the payment of such principal and interest. *See* Texas Export Dev. Corp. v. Schlederer, 519 S.W.2d 134 (Tex. Civ. App.- Dallas 1974, no writ); Town North Nat'l Bank v. Broaddus, 569 S.W.2d 489 (Tex. 1978). Furthermore, a non-recourse provision in a Note does not necessarily mean that Borrower is not liable in any manner on the Note. Rather, if the proceeds gained from foreclosure on the Mortgaged Property do not satisfy the Note in its entirety, Borrower would not be responsible for any resulting deficiency. *See* Le Boeuf v. Davis, 306 S.W.2d 185 (Tex. Civ. App.--Amarillo 1957, no writ). In connection with the enforcement of a non-recourse Note, it is important to distinguish between the remedies available for enforcing a debt or mortgage and the question of whether a debt exists. *See* City of Joliet v. Alexander, 62 N.E. 861, 863 (Ill. 1902) and Bedian v. Cohn, 134 N.E. 2d 532 (Ill. 1956) (not essential to the validity of a debt or a mortgage that there be a promise by the mortgagor to pay, and that debt exists in many cases where there is no personal liability); Shelley v. Byers, 238 P. 177 (Cal. App. 1925) (personal liability for the repayment of a debt is not a requisite of a valid mortgage).

It is important to note that the non-recourse nature of a Note does not in and of itself destroy the negotiability of the Note. *See* TEX. BUS. & COM. CODE § 3.106(b)(ii) and cmt. 1 (West 2000) (comment 1 to section 3.106 states that there is "no cogent reason why the general credit of a legal entity must be pledged to have a negotiable instrument"); *but see* Hinckley v. Eggers, 587 S.W.2d 448, 451 (Tex. Civ. App.-Dallas, 1979 writ ref'd n.r.e.) (a non-recourse promissory note was held to be non-negotiable where the note was not for "a sum certain in money" because the maker was required to pay on the note only out of a specified source of funds). A non-recourse provision in a Deed of Trust barred an action against the grantor of the Deed of Trust for breach of warranty of good title. *See* Rampart v. Egmont Corp. and Westland Oil Development Corp., 18 S.W.3d 318 (Tex. Civ. App.--Beaumont 2000, no writ) (the particular non-recourse provision in question was very broad in its scope).

[144] Section 3.3 restricts Lender's recourse against Borrower upon the occurrence of an Event of Default by limiting (i) Borrower's personal liability for the indebtedness evidenced by the Note to Borrower's interest in the Mortgaged Property, and (ii) Lender's remedies against Borrower to the preservation, enforcement and foreclosure of the liens covering the Mortgaged Property. Consequently, Lender has no right to pursue a deficiency judgment against Borrower if the indebtedness is not fully repaid from the proceeds of the foreclosure sale of the Mortgaged Property.

enforcement and foreclosure, or any thereof, of the liens, security titles, estates, assignments, rights, benefits and security interests now or at any time hereafter securing the payment of this Note and the satisfaction of the other obligations of Borrower under this Note or under the other Loan Documents, and confirmation of any sale under power of sale, and no attachment, execution or other writ of process shall be sought, issued or levied upon any assets, properties or funds of Borrower or its general or limited partners other than the Mortgaged Property **[, except with respect to the liability described below in this Section 3.3 - *use only with non-recourse carve-outs below*]**, and (iii) in the event of a foreclosure of such liens, security titles, estates, assignments, rights, benefits or security interests securing the payment of this Note or the other obligations of Borrower under the Loan Documents, whether by judicial proceedings or exercise of power of sale, no judgment for any deficiency upon the indebtedness evidenced by this Note shall be sought or obtained by Lender against Borrower **[, except with respect to the liability described below in this Section 3.3 - *use only with non-recourse carve-outs below*]**.

ADDITIONAL INSERT FOR NON-RECOURSE CARVE-OUTS:

[*Common non-recourse carve-outs for use with non-recourse transactions - add the following language to the above*: Notwithstanding the foregoing provisions of this Section 3.3, Borrower shall be fully and personally liable and subject to legal action for the following:[145]

(a) for proceeds paid under any insurance policies (or paid as a result of any other claim or cause of action against any person or entity) by reason of damage, loss or destruction to all or any portion of the Mortgaged Property, to the full extent of such proceeds not previously delivered to Lender, but which, under the terms of the Loan Documents, should have been delivered to Lender;

(b) for proceeds or awards resulting from the condemnation or other taking in lieu of condemnation of all or any portion of the Mortgaged Property, or any of them, to the full extent of such proceeds or awards not previously delivered to Lender, but which, under the terms of the Loan Documents, should have been delivered to Lender;

[145] The items set forth in clauses (a) through (j) represent common "carve-outs" or exceptions to the exculpation of Borrower from personal liability for the indebtedness evidenced by the Note. Typically, these carve-outs are contained in only one of the Loan Documents and an exculpatory provision making reference to Section 3.3 is contained in the other Loan Documents. Accordingly, if in the course of pursuing Lender's remedies after the occurrence of an Event of Default, Lender correctly determines that one or more of these items has occurred, then Borrower shall be personally liable for such item and Lender may seek a deficiency judgment against Borrower to the extent of such item if the proceeds of the foreclosure sale of the Mortgaged Property are insufficient to cover both the indebtedness evidenced by the Note and the applicable item. These non-recourse carve-outs, which are commonly referred to as "bad boy" acts, represent Lender's efforts to protect itself from, and encourage Borrower to prevent, the loss or erosion of value of the Mortgaged Property or the inappropriate diversion of related proceeds. Generally, these are acts or omissions that no prudent property owner would allow in the ordinary course of business.

(c) for all tenant security deposits or other refundable deposits paid to or held by or on behalf of Borrower or any other person or entity in connection with leases of all or any portion of the Mortgaged Property which are not applied in accordance with the terms of the applicable lease or other agreement;

(d) for rent and other payments received from tenants under leases of all or any portion of the Mortgaged Property paid more than one (1) month in advance;

(e) for rents, issues, profits and revenues of all or any portion of the Mortgaged Property received or applicable to a period after any Event of Default hereunder or any default under the other Loan Documents which are not either applied to the ordinary and necessary expenses of owning and operating the Mortgaged Property or paid to Lender;

(f) for damage or waste to the Mortgaged Property as a result of the intentional misconduct or gross negligence of Borrower or any of its principals, officers, managers, members or general partners, or any agent or employee of any such persons, or any removal of all or any portion of the Mortgaged Property in violation of the terms of the Loan Documents, to the full extent of the losses or damages actually incurred by Lender on account of such damage or removal;

(g) for Borrower's failure to pay any valid taxes, assessments, mechanic's liens, materialmen's liens or other liens which could create liens on any portion of the Mortgaged Property, accruing prior to the date Lender acquires actual possession and control of the Property, which would or could be superior to the lien or security title of the Deed of Trust or the other Loan Documents, to the full extent of the amount claimed by any such lien claimant;

(h) for all obligations and indemnities of Borrower under the Loan Documents relating to hazardous or toxic substances or compliance with environmental laws and regulations to the full extent of any losses or damages (including those resulting from diminution in value of any Mortgaged Property) incurred by Lender as a result of the existence of such hazardous or toxic substances or failure to comply with environmental laws or regulations;[146]

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[146] Given the specifics of a transaction, Borrower and Lender may view this particular carve-out as providing insufficient specificity and may modify this provision to make reference to the actual defined terms used under the Loan Documents for "hazardous or toxic substances" and "environmental laws or regulations" instead of these general references to provide greater certainty. The definitions from the Deed of Trust can be incorporated by reference, and typical definitions include: (A)"Environmental Law: Any federal, state, or local law, statute, ordinance, or regulation, whether now or hereafter in effect, pertaining to health, industrial hygiene, or the environmental conditions on, under, or about the Mortgaged Property, including without limitation, the following, as now or hereafter amended: Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 et seq.; Resource, Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq. as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499, 100 Stat. 1613; the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. § 1101 et seq.; Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq.; Clean Air Act ("CAA"), 42 U.S.C. § 7401 et seq.; Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1251 et seq.; and

(i) for fraud or material misrepresentation by Borrower or any of its principals, officers, managers, members or general partners, any guarantor, any indemnitor or any agent, employee or other person authorized or apparently authorized to make statements or representations on behalf of Borrower, any principal, officer, manager, member or general partner of Borrower, or any guarantor or any indemnitor, to the full extent of any losses, damages and expenses of Lender on account thereof; and

(j) for any amounts paid to Borrower, or any of its principals, officers, managers, members or general partners, or any agent or employee of any such persons, and not delivered to Lender to be held under the Deed of Trust, under leases containing early lease termination options in favor of tenants thereunder, in connection with the exercise of such tenant's lease termination rights, other than amounts paid for rent and other charges in respect of periods prior to the lease termination date.

References herein to particular sections of the Loan Documents shall be deemed references to such sections as affected by other provisions of the Loan Documents relating thereto.

Notwithstanding anything to the contrary contained in this Note or any of the other Loan Documents (x) nothing herein shall be deemed to be a waiver of any right which Lender may have under Section 506(a), 506(b), 1111(b) or any other provision of the U.S. Bankruptcy Code to file a claim for the full amount of the indebtedness evidenced by this Note, the Related Indebtedness and the other obligations of Borrower under the Loan Documents or to require that all collateral shall continue to secure all indebtedness evidenced by this Note and the other obligations owing to Lender in accordance with this Note, the Deed of Trust and the other Loan Documents,[147] and (y) Borrower shall be fully and personally liable and subject to legal action

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any corresponding state laws or ordinances including, but not limited to, the Texas Water Code ("TWC") § 26.001 et seq; Texas Health & Safety Code ("THSC") § 361.001 et seq.; Texas Solid Waste Disposal Act, Tex. Rev. Civ. Stat. Ann. art. 4477-7; and the regulations, rules, guidelines, or standards promulgated pursuant to such laws, statutes and regulations, as such statutes, regulations, rules, guidelines, and standards are amended from time to time;" and (B) "Hazardous Substance: Any substance, product, waste, or other material which is or becomes listed, regulated, or addressed as being a toxic, hazardous, polluting, or similarly harmful substance under any Environmental Law, including without limitation: (i) any substance included within the definition of "hazardous waste" pursuant to Section 1004 of RCRA; (ii) any substance included within the definition of "hazardous substance" pursuant to Section 101 of CERCLA; (iii) any substance included within (a) the definition of "regulated substance" pursuant to Section 26.342(11) of TWC; or (b) the definition of "hazardous substance" pursuant to Section 361.003(11) of THSC; (iv) asbestos; (v) polychlorinated biphenyls; (vi) petroleum products; (vii) underground storage tanks, whether empty, filled or partially filled with any substance; (viii) any radioactive materials, urea formaldehyde foam insulation or radon; (ix) any substance included within the definition of "waste" pursuant to Section 30.003(b) of TWC or "pollutant" pursuant to Section 26.001(13) of TWC; and (x) any other chemical, material or substance, the exposure to which is prohibited, limited or regulated by any governmental authority on the basis that such chemical, material or substance is toxic, hazardous or harmful to human health or the environment."

[147] Under section 506(a) of the Bankruptcy Code, an allowed claim of a creditor secured by a lien on property is secured to the extent of the value of such collateral. To the extent that a secured creditor's claim is

for the indebtedness evidenced by this Note and the other obligations of Borrower under the Loan Documents and the foregoing limitation of liability under this Section 3.3 shall be null and void and of no force or effect in the event that (i) Borrower or any employee, agent or designee of Borrower should raise any defense, counterclaim and/or allegation in any foreclosure action by Lender relative to the Mortgaged Property or any part thereof in which Borrower or such representative does not prevail, or (ii) an action or proceeding is commenced by or against Borrower under any Debtor Relief Laws, including, without limitation, the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. Sections 101 et seq., and the regulations adopted and promulgated pursuant thereto.[148] Furthermore, all amounts for which Borrower is fully and personally liable and subject to legal action hereunder shall include all liabilities, obligations, losses, damages, costs and expenses (including, without limitation, attorneys' fees), causes of action, suits, claims, demands and judgments of any nature or description whatsoever which may at any time be imposed upon, incurred by or awarded against Lender in connection with this Section 3.3. Nothing contained in this section shall (1) be deemed to be a release or impairment of the indebtedness evidenced by this Note or the other obligations of Borrower under this Note or the other Loan Documents or the lien of the Loan Documents upon the Mortgaged Property, or (2) preclude Lender from foreclosing under the Loan Documents in case of any Event of Default or from enforcing any of the other rights or remedies of Lender except as stated in this section, or (3) limit or impair in any way whatsoever any indemnity or guaranty agreement executed and delivered by Borrower or otherwise in connection with the indebtedness evidenced by this Note or release, relieve, reduce, waive or impair in any way whatsoever, any obligation of any party to any such indemnity or guaranty agreement.**][149]**

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greater than the value of the secured creditor's collateral and the secured creditor has recourse for the deficiency against the debtor personally, the secured creditor's claim is "bifurcated" into a secured claim to the extent of the value of the collateral and an unsecured claim for such deficiency amount. Thus, an undersecured creditor will in essence have two claims: one as a secured creditor to the extent of the value of its collateral and one as an unsecured creditor for the amount of its deficiency claim. 11 U.S.C. § 506(a). Notwithstanding the foregoing, in a Chapter 11 reorganization, a non-recourse secured claim generally must be treated as if the holder of such claim had recourse against the debtor, whether or not the secured creditor does indeed have recourse. *Id.* § 1111(b). A secured creditor may, however, elect to forego this treatment, seeking instead to have the full amount of its allowed claim treated as a secured claim for purposes of the plan of reorganization. *Id.* § 1111(b)(2).

[148] Notwithstanding the general exculpation language of Section 3.3, Borrower shall be fully and personally liable and subject to legal action for the indebtedness evidenced by the Note and the other obligations of Borrower under the Loan Documents if an action or proceeding is commenced by or against Borrower under any of the Debtor Relief Laws. Borrower is sometimes able to negotiate a "middle-ground" on this issue limiting Borrower's personal liability to any costs and losses incurred by Lender arising out of the actions described under items (i) and (ii), rather than for the entire indebtedness. Many Texas practitioners question the enforceability of this springing recourse provision in a bankruptcy context; we are aware of no controlling Texas case ruling directly on this point.

[149] In addition to the standard carveouts exculpating Borrower from personal liability enumerated in clauses (a) through (j) above, some Lenders often provide that the loan becomes fully recourse against Borrower upon the occurrence of certain events which are either considered blameworthy or within Borrower's control, such as (i) a sale or subsequent encumbrance of the collateral in violation of the Loan Documents without Lender's prior

ADDITIONAL EXAMPLES OF LIMITING LIABILITY:

Example 1 ***(Up-front Limitation on personal liability for principal amount)*:**[150]

[Notwithstanding anything to the contrary set forth herein, Borrower shall be fully and personally liable and subject to legal action for a portion of the indebtedness evidenced by this Note in an amount equal to (i) _____ percent (___%) of the stated original principal amount hereof (for a maximum guaranteed principal amount of $_____) (the "Guaranteed Principal"), plus (ii) any and all accrued but unpaid interest hereon, plus (iii) any and all costs of collection incurred by or on behalf of Lender pursuant to Section 4.19 of this Note. The amount of the Guaranteed Principal shall be reduced by ONE DOLLAR ($1.00) for every TWO DOLLARS ($2.00) of principal reductions made on this Note. This limitation of liability, however, shall in no way affect, diminish or limit the other obligations of Borrower or any guarantor under this Note or the other Loan Documents.**][*Add non-recourse carve-outs as appropriate*]**

written consent, (ii) a voluntary bankruptcy (*see* preceding annotation to this Rider 5, *supra*), (iii) any resistance to foreclosure or other enforcement proceedings, or (iv) any assertion of lender liability claims or other counterclaims in an enforcement proceeding. These provisions are commonly referred to as "springing recourse" clauses.

[150] Another common limitation is based upon liability for a stated dollar amount or a specific percentage of the indebtedness evidenced by the Note. Care should be taken in specifying the effect of principal payments on such personal liability and defining the percentage parameters (*i.e.*, whether the percentage is applied to the current outstanding balance or to the stated original balance).

Example 2 ***(Sample of a Springing Non-Recourse Provision)*****:**[151]

[Notwithstanding anything to the contrary set forth herein, provided that (i) the Mortgaged Property has achieved for a period of ____ (__) consecutive months a Debt Coverage Ratio **[*incorporate Debt Coverage Ratio definitions from Rider 6*]** of at least ____ to 1.0**[,][and]** (ii) there shall not exist any Event of Default nor any condition or state of facts which after the passage of time and/or the delivery of notice would constitute an Event of Default under this Note or under any of the other Loan Documents **[and (iii)][*include any additional condition as may be required by Lender*]**, then Borrower's personal liability for the indebtedness evidenced by this Note shall be limited to the full extent (but only to the extent) of the Mortgaged Property. This limitation of liability, however, shall in no way affect, diminish or limit the other obligations of Borrower or any guarantor under this Note or the other Loan Documents.**]** **[*Add non-recourse carve-outs as appropriate*]**

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[151] Another common type of limitation on Borrower's personal liability, sometimes referred to as "start-up liability," imposes personal liability on Borrower until such time as certain occupancy or net operating income levels have been achieved. This option provides Lender with additional comfort and security during the start-up phase of the Mortgaged Property until specified criteria have been met, and permits a reduction in Borrower's personal liability only upon Lender's satisfaction that the income from the Mortgaged Property will be sufficient to support operating expenses and debt service later in the term of the Note.

A similar provision (and set of limitations) may also be used to reduce the amount of principal for which Borrower is personally liable upon achievement of certain criteria, rather than making the entire loan non-recourse. Such a provision should include (i) the conditions or criteria necessary for a reduction in the principal amount for which Borrower is personally liable, (ii) the principal amount for which Borrower will thereafter remain personally liable upon achievement of such criteria (such as ___% of the stated original principal amount of the Note), and (iii) incorporating other language similar to Example 1 above, as appropriate. In structuring such a liability "burn-off" provision, Lender and Borrower should be aware that (a) the principal amount of the Note could increase over the term of the Note if additional sums are advanced and added to the original principal balance of the Note, (b) the entirety of the principal for which Borrower is personally liable could be reduced to zero, yet Borrower would remain liable for any unpaid interest accruing on the principal, and (c) any limitation on liability relating to principal and interest would not limit Borrower's liability for satisfaction of Borrower's other obligations under the Note or the other Loan Documents. *See also* first annotation to Rider 6 (Debt Coverage Ratio Definitions), *infra*.

Example 3 ***(Liable for only the "Top" 25% of principal)*****:**[152]

[Notwithstanding anything to the contrary contained herein, Borrower's personal liability for the indebtedness evidenced by this Note shall not exceed an amount equal to the sum of (a) twenty-five percent (25%) of the stated original principal amount hereof, plus (b) all indebtedness evidenced by this Note not constituting principal hereof (including, without limitation, all accrued but unpaid interest hereon and any and all costs of collection incurred by or on behalf of Lender pursuant to Section 4.19 of this Note.) Provided that an amount of principal equal to twenty-five percent (25%) of the stated original principal amount hereof has been paid in full by Borrower, and there shall not exist any Event of Default nor any condition or state of facts which after the passage of time and/or the delivery of notice would constitute an Event of Default under this Note or under any of the other Loan Documents, then Borrower's personal liability for the indebtedness evidenced by this Note shall not include the remaining outstanding principal balance hereof. This limitation of liability, however, shall in no way affect, diminish or limit the other obligations of Borrower or any guarantor under this Note or the other Loan Documents.**] [*Add non-recourse carve-outs as appropriate*]**

Additional language regarding confirmation of limited liability (*include at the end of any of the foregoing options, as appropriate*):[153]

[Any reduction of Borrower's liability under this Note shall be effective only upon the execution and delivery by Lender of a written confirmation that the conditions or requirements necessary to allow such reduction have been satisfied and discharged in full to Lender's satisfaction and, in each instance, Lender shall have the right to condition delivery of such written confirmation upon an additional appraisal of the Mortgaged Property to be provided at Borrower's sole cost and expense and such other information and documentation as Lender may require.**]**

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[152] Example 3 presents (as do Examples 1 and 2) a calculation issue for Borrower and Lender in that care must be taken in calculating the amount for which Borrower is personally liable, such as, in this Example 3, the "top 25%" of the principal amount of the Note. The principal balance of the Note could increase as a result of a default or as a result of additional advances made by Lender. Therefore, as a practical matter, the parties must be careful in documenting the satisfaction or lack of satisfaction of the "burn off" of the liability of Borrower for principal and interest. Example 3 releases Borrower from personal liability for the outstanding principal balance of the Note upon satisfaction of the "burn off" threshold. This example, however, could be revised to provide that Borrower's personal liability for the "top 25%" would "resurrect" if the outstanding principal balance at some time in the future increased above the "top 25%" threshold.

[153] This additional language is intended to address the aforementioned concerns with respect to the methodology used to determine the satisfaction or lack of satisfaction of a "burn off" requirement. Under this provision, Borrower is not released from personal liability until Lender has established the satisfaction of the condition or conditions in question and such determination has been reduced to writing.

Rider 6

DEBT COVERAGE RATIO DEFINITIONS

[Add the following definitions to Section 1.1 of the Note whenever the term "Debt Coverage Ratio" is used in the Note (e.g., as a condition to an Extension Option)]

[Debt Coverage Ratio:[154] the ratio of (i) Net Operating Income from the Mortgaged Property for any calendar month in question, as verified to Lender's sole satisfaction, to (ii) the greater of (A) the amount of principal and interest that would be due monthly on a promissory note with an outstanding principal balance equal to the outstanding principal balance hereof and an obligation of Borrower to pay equal monthly installments of principal and interest calculated by amortizing the outstanding principal balance hereof over thirty (30) years at a rate of interest equal to the higher of (1) _____ percent (__%) per annum, (2) the per annum rate equal to the sum of the Treasury Constant Maturity Yield Index plus _____ percent (__%) or (3) the rate of interest then actually accruing hereon or (B) the actual regularly scheduled debt service payment(s) of principal and interest due under this Note for the calendar month in question.**]**

[Gross Income:[155] for the applicable annual period, all rentals, revenues, income and other recurring forms of consideration, received by, or paid to or for the account of or for the

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[154] Many Lenders will require, as a condition to granting an extension of the Maturity Date (*see* Rider 1 - Option to Extend Maturity Date, *supra*), or as a condition to reducing Borrower's personal liability for repayment of the indebtedness (*see* Rider 5 - Optional Exculpation Provisions, *supra*), that the Mortgaged Property generate sufficient net operating income to cover the debt service on the loan (*i.e.*, the payments of principal and interest on the Note as they become due). For example, a Lender may require that the Mortgaged Property maintain a Debt Coverage Ratio of at least 1.20 to 1.00 (*i.e.*, net operating income of at least 120% of the amount of the debt service payments as they become due) for a specified period of time (such as six consecutive months) (i) prior to the original Maturity Date before the Extension Option may be exercised or (ii) before allowing a reduction in Borrower's personal liability on repayment of the indebtedness. Lender and Borrower should carefully review these definitions and consider the consequences of each. *See also* annotation to the "Springing Non-Recourse Provision" provided in Example 2 under Rider 5 (Optional Exculpation Provisions), *supra*.

The following is a common variation of this definition: "Debt Coverage Ratio: the ratio calculated by dividing the Net Operating Income by the Target Monthly Amortization on an annualized basis. As used under this Note, the term "Target Monthly Amortization" means the hypothetical monthly payment of principal and interest which would be required for each month during the term of this Note assuming an amortization of the outstanding principal balance hereof in level payments of principal and interest over a period of thirty (30) years, at an interest rate per annum equal to the greater of (a) ____ percent (__%) per annum, (b) the per annum rate equal to the sum of the Treasury Constant Maturity Yield Index plus ____ percent (__%), or (c) the per annum rate of interest then actually accruing on this Note."

[155] Although this list of inclusions and exclusions from Gross Income is relatively common, such definition may need to be modified given the character of the Mortgaged Property (whether retail, restaurant, office, multi-family or hotel) and is often subject to heavy negotiation based upon the manner in which Borrower operates

benefit of, Borrower resulting from or attributable to the operation, leasing and occupancy of the Mortgaged Property determined on a cash basis (except as specifically provided herein to the contrary) and using for all calculations hereunder the greater of (x) the actual vacancy rate of the Mortgaged Property at the time of such calculation or (y) an applied vacancy factor of _____ percent (__%); the term "Gross Income" as used hereunder shall include, without limitation, the following:

(i) rents actually paid by any tenants or occupants of all or any portion of the Mortgaged Property;

(ii) proceeds actually received by, for the account of or on behalf of Borrower in connection with any rental loss or business interruption insurance with respect to the Mortgaged Property;

(iii) any other fees or rents actually collected by, for the account of or on behalf of Borrower with respect to the leasing and operation of the Mortgaged Property; and

(iv) any interest earned by Borrower on security deposits and other type deposits or advance rentals paid by any tenants or occupants of all or any portion of the Mortgaged Property.

Notwithstanding anything included within the foregoing definition of Gross Income, there shall be excluded from Gross Income the following: (1) any security deposits or other type deposits or advance rentals paid by tenants and occupants of all or any portion of the Mortgaged Property (even when applied to sums due under leases), (2) rents and receipts received by, for the account of or on behalf of Borrower to the extent applicable to services provided by Borrower for the benefit of tenants or occupants, (3) the proceeds of any financing or refinancing with respect to all or any portion of the Mortgaged Property, whether or not same has been previously approved by Lender, (4) the proceeds of any sale or other capital transaction (excluding leases made for occupancy purposes only) of all or any portion of the Mortgaged Property, whether or not same has been previously approved by Lender, (5) any insurance or condemnation proceeds paid with respect to the Mortgaged Property to the extent such proceeds are used to restore or rebuild the Mortgaged Property as may be provided under Section ____ of the Deed of Trust (except for rental loss or business interruption insurance as specifically provided above), (6) any insurance and condemnation proceeds applied in reduction of the outstanding principal balance hereof as may be provided under Section ____ of the Deed of Trust, and (7) the application of any sums on deposit with Lender in the reduction of the outstanding principal balance hereof as may be

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its business and the accounting methods utilized by Borrower in determining gross income from the Mortgaged Property. Lender should, however, maintain approval rights as to the method of calculation and the items included and excluded from such calculation, as these issues will have a significant impact on the rights and obligations of Borrower under the Loan Documents.

provided under this Note or the other Loan Documents and any interest earned on such sums; provided, however, nothing set forth in this Note shall in any manner imply Lender's consent to any sale, refinancing, disposition or other capital transaction relative to or affecting all or any portion of the Mortgaged Property.**]**

[Net Operating Income:[156] all Gross Income for the applicable annual period less all Operating Expenses for such corresponding annual period, as determined or approved by Lender in Lender's sole discretion.**]**

[Operating Expenses:[157] for the applicable annual period, an amount equal to the greater of (x) the product of the number of **[units contained on the Mortgaged Property] [gross leasable square feet contained in the Mortgaged Property]** multiplied by $_____, or (y) the reasonable costs and expenses actually incurred and paid by Borrower with respect to the ownership, operation, management, leasing and occupancy of the Mortgaged Property determined on a cash basis (except where accrual basis is required hereunder) including, but not limited to, any and all of the following (but without duplication of any item):

(i) ad valorem taxes calculated on an accrual basis (and not on a cash basis) of accounting for the applicable annual period; such accrual accounting for ad valorem taxes shall be based upon taxes actually assessed for the current applicable annual period, or if such assessment for the current applicable annual period has not been made, then until such assessment has been made (and with any retroactive adjustments for prior calendar months as may ultimately be needed when the actual assessments have been made), ad valorem taxes for the applicable annual period shall be estimated to be an amount equal to one hundred five percent (105%) of the assessment for the immediately preceding annual period;

(ii) foreign, U.S., state, municipal and local sales, excise, tourism, use or other similar taxes (but not including taxes measured by net income);

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[156] Net Operating Income from the Mortgaged Property should be determined by Lender from information contained in the periodic (whether monthly, quarterly and/or annual) operating and income statements pertaining to the Mortgaged Property and other financial statements provided by Borrower to Lender in connection with the reporting covenants under the Loan Documents. *See* Annotated Deed of Trust, Sections 4.9 (Property Reports) and 4.10 (Financial Reporting). All such financial or performance information should be required to be certified to in writing by Borrower as being true, accurate and complete so that any rights relinquished by Lender in connection with achievement of a specified level of net operating income based upon false or inaccurate information will give rise to Lender's remedies under the Loan Documents for violation of the representations and warranties default provision under the Deed of Trust. *See* Annotated Deed of Trust, Sections 3.3 (Accuracy of Information) and 6.2 (Performance of Obligations).

[157] This list of inclusions and exclusions from Operating Expenses are relatively common, but like the definition of "Gross Income", are often modified based upon the character of the Mortgaged Property and the accounting methods utilized by Borrower (which must be acceptable to Lender).

(iii) special assessments or similar charges imposed or assessed against all or any portion of the Mortgaged Property;

(iv) costs of utilities, HVAC services, and similar services for the Mortgaged Property to the extent not paid by or chargeable to tenants or occupants of the Mortgaged Property;

(v) maintenance and repair costs for the Mortgaged Property, including the replenishment of any reserve account for maintenance and repair established pursuant to the Loan Documents and assuming a minimum annual capital expenditure of **[$_____ per unit contained in the Mortgaged Property] [$_____ per square foot of gross leasable area in the Mortgaged Property]**;

(vi) the greater of the actual management fees under any property management agreement for the Mortgaged Property or an applied annual management fee of _____ percent (__%) of the annual Gross Income of the Mortgaged Property;

(vii) all salaries, wages and other benefits paid to employees of Borrower or Borrower's property manager (excluding all salaries, wages and other benefits paid to officers and supervisory personnel, and other general overhead expenses of Borrower and Borrower's property manager) employed in connection with the leasing, maintenance operation and management of the Mortgaged Property;

(viii) insurance premiums calculated on an accrual basis (and not on a cash basis) of accounting for the applicable annual period; such accrual accounting for insurance premiums shall be based upon the insurance premiums for the Mortgaged Property for the current applicable annual period which was last billed to Borrower, adjusted to an annualized premium if necessary, and multiplied by one hundred and five percent (105%);

(ix) costs and expenses (including leasing commissions, advertising and promotion costs, even if in excess of a reasonable and necessary amount for same) incurred in obtaining new leases or to extend, expand or renew existing leases, and the cost of work performed and materials provided to cause any tenant space in the Mortgaged Property to be "rent ready" for new or renewal occupancy under leases;

(x) third-party accounting and audit fees and costs and administrative expenses incurred by Borrower in connection with the leasing, maintenance, operation and management of the Mortgaged Property;

(xi) any payments, and any related interest thereon, to tenants or occupants with respect to security deposits or other deposits required to be paid to tenants, but only to the extent any such security deposits and related interest thereon have been previously included in Gross Income; and

(xii) to the extent not included in any other Operating Expense category, the sums paid (or, if not paid, which should have been paid in accordance with the Loan Documents) by Borrower into any reserve account for the applicable annual period in accordance with the Loan Documents.

Notwithstanding anything to the contrary as being included in the definition of Operating Expenses, there shall be excluded from Operating Expenses the following: (1) any depreciation and other non-cash deductions allowed to or taken by Borrower for income tax purposes, (2) all salaries, wages and other benefits paid to "off-site" employees of and all other general "off-site" overhead expenses incurred by Borrower, Borrower's property manager or any other professional manager of the Mortgaged Property, except to the extent related to the leasing, maintenance, operation and management of the Mortgaged Property, (3) any and all payments of ad valorem taxes for either real or personal property (except for the accrual included under item (i) above), (4) the initial funding of any reserve account and any subsequent replenishment thereof (except for amounts included under item (v) above), (5) any and all payments of insurance premiums (except for the accrual amount included under item (viii) above), (6) any and all principal, interest or other costs paid under or with respect to the loan transaction evidenced by this Note and by the other Loan Documents, and (7) capital improvements to the Mortgaged Property (only to the extent not paid from any reserve account).**]**[158]

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[158] Lenders often require that, if a certain Debt Coverage Ratio is not satisfied within a specified period of time, Borrower must deposit additional funds in a separate cash collateral account subject to a security interest in favor of Lender so that adequate funds have been set aside to repay the indebtedness if the Mortgaged Property continues its poor performance. If required by Lender, such a provision is typically included in a loan agreement or in the Deed of Trust. A comprehensive analysis of cash collateral accounts is beyond the scope of this presentation; however, it is important to note that the funding and maintenance of these types of accounts often create a usury problem and careful consideration should given to the usury effect of the balances of these accounts. *See* First State Bank v. Miller, 563 S.W.2d 572 (Tex. 1978); Moody v. Main Bank of Houston, 667 S.W.2d 613 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.); Conte v. Greater Houston Bank, 641 S.W.2d 411 (Tex. App. -- Houston [14th Dist] 1982, writ ref'd n.r.e.); Texas Int'l Mortgage Co. v. M.P. Crum Co., 564 S.W.2d 421 (Tex. Civ. App. -- Dallas 1978, writ ref'd n.r.e.).

[*The following is an example of debt coverage covenants to be included in a loan agreement or in the Deed of Trust*: "Additional Financial Covenants. Borrower shall provide to Lender, on a monthly basis, the financial and operating information required under Section ____ of this Deed of Trust. If, at the end of any quarter of a calendar year during the term of the Note, such financial and operating information indicates that the Debt Coverage Ratio for the Mortgaged Property is less than ____ to 1.00, then Lender shall so notify Borrower and, within five (5) Business Days of such notice, Borrower (i) if not already established pursuant to this Deed of Trust, shall establish with Lender a collateral account (the "Collateral Account") and (ii) shall deposit into the Collateral Account sufficient funds, which shall not include any proceeds of the loan evidenced by the Note, such that if such funds in the Collateral Account were to be applied to reduce the outstanding principal balance of the Note, the Debt Coverage Ratio would return to a ratio equal to or greater than ____ to 1.00 (the "Collateral Account Payment"). Concurrently herewith, Borrower shall execute and deliver to Lender an "Account Pledge Agreement" (herein so called) wherein Borrower, among other things, grants to Lender a security interest in all funds deposited in the Collateral Account and all interest earned thereon. A Collateral Account Payment shall not be applied to reduce the outstanding principal balance of the Note, but, unless an Event of Default has occurred, shall be held by Lender pursuant to the terms of the Account Pledge Agreement and this Deed of Trust. If at the end of the next calendar

[Treasury Constant Maturity Yield Index:[159] the average yield for "This Week" as reported by the Federal Reserve Board in Federal Reserve Statistical Release H.15 (519). If there is no Treasury Constant Maturity Yield Index for instruments having a maturity coterminous with the remaining term of this Note, then the index shall be equal to the weighted average yield to maturity of the Treasury Constant Maturity Yield Indices with maturities next longer and shorter than such remaining average life to maturity, calculated by averaging (and rounding upward to the nearest whole multiple of 1/100 of 1% per annum, if the average is not such a multiple) the yields of the relevant Treasury Constant Maturity Yield indices (rounded, if necessary, to the nearest 1/100 of 1% with any figure of 1/200 of 1% or above rounded upward).**]**

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quarter (or any subsequent quarter) such financial and operating information indicates that the Debt Coverage Ratio for the Mortgaged Property is equal to or greater than ____ to 1.00, then after Lender's determination of such ratio, Lender shall promptly refund to Borrower any Collateral Account Payment then on deposit in the Collateral Account. If, during any subsequent quarter of a calendar year, the Debt Coverage Ratio is again less than ____ to 1.00, Borrower shall make an additional Collateral Account Payment in an amount such that if such Collateral Account Payment were to be applied to reduce the outstanding principal balance of the Note, the Debt Coverage Ratio would return to a ratio equal to or greater than ____ to 1.00; provided, however, that so long as no Event of Default has occurred or exists (or after the passage of time and/or the delivery of notice would exist) under this Deed of Trust, the Note or any of the other Loan Documents, any funds then being held in the Collateral Account shall be applied to reduce the amount of such subsequent Collateral Account Payment. If an Event of Default has occurred or exists (or after the passage of time and/or the delivery of notice would exist) under this Deed of Trust, the Note or any of the other Loan Documents, Lender shall be entitled to exercise all rights and remedies available to Lender under this Deed of Trust, the Note, the other Loan Documents or the Account Pledge Agreement, including using the funds in the Collateral Account and all interest accrued thereon at Lender's sole discretion for any purpose whatsoever permitted under this Deed of Trust, the Note or the other Loan Documents. If no Event of Default has occurred or exists (or after the passage of time and/or the delivery of notice would exist) under this Deed of Trust, the Note or any of the other Loan Documents, upon the end of the term of the Note or earlier payment in full to Lender of the outstanding principal balance of the Note, any monies then on deposit in the Collateral Account and any interest accrued thereon shall, at Lender's sole election, (i) be applied to reduce the outstanding principal balance of the Note or (ii) be paid by Lender to Borrower. In determining the outstanding principal balance of the Note for purposes of this Section ___, no monies deposited in the Collateral Account or any interest earned thereon shall be considered to reduce the outstanding principal balance of the Note unless and until such deposits and interest have actually been applied to the outstanding principal balance of the Note in accordance herewith."**]**

[159] *See* third annotation to Yield Maintenance Option under Rider 4, *supra*, for an explanation of this definition.

Rider 7

ARBITRATION OPTION

[*Use the following for Arbitration Option*: 4.__ Requirement of Arbitration.[160] Upon written notice from either Borrower or Lender (whether delivered before or after the institution of any legal proceeding), any action, dispute, claim or controversy of any kind or character whatsoever, whether in contract or tort, legal or equitable, or pursuant to statutory or common law (a "Dispute"), arising out of, pertaining to or in connection with this Note or the Loan Documents, shall be determined by arbitration ("Arbitration") in accordance with the provisions of this Section 4.___.

(a) Governing Rules.[161] The Arbitration shall be conducted in _____, Texas, and shall be administered by the American Arbitration Association (the "AAA") in accordance with the terms of this Section 4.___, the Commercial Arbitration Rules of the AAA, and, to the maximum extent applicable, the Texas General Arbitration Act (Chapter 171 of the Texas Civil Practice and Remedies Code). In the event of any inconsistency between this Section and such rules and statutes, this Section shall govern and control. The Arbitration shall utilize only one

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[160] As a general rule, a Note does not typically contain an arbitration clause, as established jurisprudence and summary procedures allow the judicial system to be a comparatively reliable and predictable forum for enforcing Borrower's obligations under a Note. Historically, doubts as to the objectivity of arbitration left many Lenders feeling relatively comfortable with the judicial process. The era of Lender liability in the 1980's and early 1990's, however, caused many Lenders to seek alternative methods to limit exposure to class actions, punitive damages and "runaway" juries. Therefore, many Lenders often now require that mandatory arbitration clauses be included in the Note (or, more commonly, in one of the other Loan Documents). This form of arbitration clause addresses the primary issues that should be covered by an arbitration agreement to be used in connection with a Note: enforceability of the clause, applicable procedure, and preservation of Lender's remedy of foreclosure and other ancillary rights.

[161] Historically, arbitration agreements were not favored at common law and, therefore, external authority was necessary to facilitate the enforcement of arbitration agreements. The Federal Arbitration Act (9 U.S.C. § 1 et seq.), for example, applies to a "contract evidencing a transaction involving commerce," a scope broad enough to cover most commercial transactions. However, at least one court has held that the Federal Arbitration Act would not support enforcement of an arbitration agreement in a real estate transaction because the purchase of real estate did not involve "commerce." *See* Mathews v. Fluor Corporation, 440 S.E. 2d 880 (S.C. 1994) (a real estate transaction is uniquely local even though it involves an out-of-state buyer, out-of-state seller, out-of-state lenders and out-of-state consultants). However, Texas courts have recognized and enforced an agreement to arbitrate. *See, e.g.*, L.H. Lacy Co. v. City of Lubbock, 559 S.W. 2d 348 (Tex. 1977). *See also* annotation to Section 4.6 (Waiver of Jury Trial), *supra*. To be enforceable at common law, the arbitration clause must be sufficiently specific and comprehensive in its terms so as to provide for a complete procedure (*e.g.*, selection of arbitrators, selection of forum, identification of the applicable rules, etc.), the most common means of which is to incorporate by reference the rules of the AAA or some other nationally or regionally recognized organization supplying the necessary procedures. *See* L.H. Lacy Co., 559 S.W.2d at 351.

arbitrator (the "Arbitrator") who shall be a practicing attorney licensed to practice law in the State of Texas and shall be knowledgeable in the subject matter of the Dispute. The Arbitrator shall be empowered to impose sanctions and to take such other actions as the Arbitrator deems necessary to the same extent to which a judge presiding over a court of competent jurisdiction would be empowered pursuant to the Federal Rules of Civil Procedure, the Texas Rules of Civil Procedure, and all other applicable laws. Judgment upon any award rendered in the Arbitration may be entered in any court having jurisdiction over such subject matter. All statutes of limitations that would otherwise be applicable shall also apply to any Arbitration proceeding.

(b) No Waiver; Provisional Remedies, Self-Help and Foreclosure.[162] No provision of, nor the exercise of any rights under, this Section shall limit, diminish or restrict in any manner whatsoever the right of Lender during any Dispute to seek, utilize and employ any ancillary remedies, judicial or otherwise, for the purposes of realizing upon, preserving, protecting or foreclosing upon any property or collateral (including, without limitation, the Mortgaged Property), or any lien or security interest securing repayment of the loan evidenced by this Note and the other obligations of Borrower hereunder and under the other Loan Documents. The institution and maintenance of such an action for judicial relief or pursuit of provisional or ancillary remedies shall not constitute a waiver of the right of Lender or Borrower to submit the Dispute to Arbitration nor render inapplicable the compulsory nature of this Section 4.___.

(c) Miscellaneous. If enforcement of this Section 4.__ is not permitted under Section 171.002(b) of the Texas Civil Practice and Remedies Code, but same is permitted under the Federal Arbitration Act or applicable common law, all provisions of Chapter 171 of the Texas Civil Practice and Remedies Code shall apply, save and except for such Section 171.002(b). Lender and Borrower hereby agree to keep all Disputes and Arbitration proceedings strictly confidential; provided, however, that Lender and Borrower may disclose such confidential information as is necessary in any litigation between Lender and Borrower or as required by applicable law and, on a confidential basis, to accountants, attorneys and other consultants in the ordinary course of business. The provisions of this Section 4.__ shall survive any termination, amendment, release or expiration of the Loan Documents, unless Lender and Borrower expressly agree otherwise in writing. ***End of Arbitration Option.***]

[162] This arbitration clause provides, among other things, that injunctive relief to preserve the status quo of the Mortgaged Property (whether judicial or otherwise) is available to Lender during the pendency of any arbitration proceeding. *See* Ortho Pharmaceutical Corp. v. Amazon, 882 F.2d 806 (3d Cir. 1989). Further, arbitrators can often grant injunctive relief as well. *See* Pacific Reinsurance Management v. Ohio Reinsurance Corp., 935 F.2d 1019 (9th Cir. 1991). It is often of critical importance to Lender that Lender's remedy of foreclosure and right to use of the courts for ancillary matters be preserved and not relinquished in any manner.

Rider 8

PARTICIPATION[163]

[4.___ Participation**.** Lender may, from time to time and without notice to Borrower, sell or offer to sell the loan evidenced by this Note, or interests therein, to one or more assignees or participants and is hereby authorized to disseminate and disclose any information (whether or not confidential or proprietary in nature) Lender now has or may hereafter obtain pertaining to Borrower, the Mortgaged Property or the loan evidenced by this Note (including, without limitation, any credit information regarding Borrower, any of its principals or any guarantor of this Note), to (i) any assignee or participant or any prospective assignee or prospective participant, (ii) any of Lender's affiliates, (iii) any regulatory body having jurisdiction over Lender or the loan evidenced by this Note, and (iv) to any other parties as may be necessary or appropriate in Lender's reasonable judgment. Borrower shall execute, acknowledge and deliver any and all instruments reasonably requested by Lender in connection therewith and, to the extent specified in any of the documents evidencing any such assignment or participation, such assignee(s) and participant(s) shall have the rights and benefits with respect to this Note and the other Loan Documents as such assignee(s) and participant(s) would have had if such assignee(s) and participant(s) had been Lender hereunder. Lender, as a courtesy to Borrower, will endeavor to notify Borrower of any such assignees or participants, or prospective assignees or participants, to which Lender disseminates any of the information described above in this Section 4.___ and will instruct all parties receiving such information to treat all such information as confidential in nature.**]**

[163] Lender may desire to expressly reserve the right to sell or to offer to sell the loan or any interest therein to one or more assignees or participants and to disseminate certain information in connection with such a sale or offer to sell. This provision helps to avoid a potential conflict or claim by Borrower that Lender unlawfully disclosed confidential or proprietary information to such parties. Any such provision should impose an obligation on Borrower to execute, acknowledge and deliver any instruments reasonably requested by Lender in connection with such assignment or participation, which may include, for example (i) an acknowledgment by Borrower that the assignees or participants have rights (subject to the rights of Lender, the "lead" bank or the "agent" bank) to enforce Borrower's obligations under the Note and (ii) the execution by Borrower of separate substitute promissory notes in favor of each assignee evidencing their respective pro rata shares of the total principal amount of the indebtedness. If this provision is included in the Note, the other Loan Documents should incorporate this provision by reference. *See also* annotation to Section 4.11 (Successors and Assigns), *supra*.

Rider 9

ALLONGE TO PROMISSORY NOTE[164]

DATED _____, 20__
EXECUTED BY _____, AND PAYABLE
TO THE ORDER OF _____

Pay to the order of _____, without warranty or recourse.[165]

[164] The Note may be transferred or indorsed by Lender for the purpose of granting to the transferee Lender's right to enforce Borrower's obligations under the Note. *See* TEX. BUS. & COM. CODE § 3.203 (West 2000). An "allonge" is a common method for effecting such a transfer or indorsement and has traditionally been defined as "a piece of paper annexed to a negotiable instrument on which to write endorsements." BLACK'S LAW DICTIONARY, 76 (6th Ed., 1997). To be effective, an allonge must be "affixed" to the instrument transferred. *See* TEX. BUS. & COM. CODE § 3.204 (West 2000); *see* Southwestern Resolution Corp. v. Watson, 964 S.W.2d 262 (Tex. 1997) (holding that stapling fulfills the "affixed" standard); Federal Financial Co. v. Delgado, 1 S.W.3d 181 (Tex.App.--Corpus Christi 1999, no pet.). Contrary to earlier requirements, an affixed allonge may be valid even if the transferred instrument contains adequate space for inclusion of the allonge on the instrument itself. *Id* § 3.204 cmt. 1 (expressly stating that the validity of an allonge no longer depends on a lack of space on the instrument itself). *See* Crossland Sav. Bank FSB v. Constant, 737 S.W.2d 19 (Tex.App.--Corpus Christi 1987, no writ); Estrada v. River Oaks Bank & Trust Co., 550 S.W.2d 719 (Tex. Civ. App.--Houston [14th Dist.] 1977, writ ref'd n.r.e).

[165] Unless otherwise stated in the allonge to the contrary, the transferor warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee that: (i) the transferor has authority to enforce the instrument, (ii) all signatures on the instrument are authentic, (iii) the instrument is unaltered, (iv) the instrument is not subject to any claim by a third party against the transferor, (v) the transferor has no knowledge of any insolvency proceeding concerning the maker or acceptor, and (vi) if the instrument is a demand draft, the creation of the instrument was authorized by the drawer. TEX. BUS. & COM. CODE § 3.416(a) (West 2000). If the instrument is not a check, the transferor may expressly disclaim these warranties by including a statement that the transfer is being made "without warranty." *Id* § 3.416 cmt. 5. Failure to expressly disclaim these warranties may allow a transferee accepting the instrument in good faith to recover for breach of warranty against the transferor for the amount of loss caused by the breach (any such recovery is, however, generally limited to the amount of the instrument plus costs of collection and loss of interest incurred as a result of the breach). *Id* § 3.416(b). Under certain circumstances, section 3.415 of the UCC requires that the transferor pay to the transferee the amount due on a dishonored instrument unless the allonge states that the transfer is made "without recourse." *Id* § 3.415(a) and (b).

EXECUTED effective as of _____, 20___.

_____,
a _____

By:_____
Name:_____
Title:_____

Rider 10

LOST NOTE AFFIDAVIT[166]

STATE OF TEXAS §
§
COUNTY OF _____ §

BEFORE ME, the undersigned notary public, on this day personally appeared _____, as _____ of _____, a _____ ("Lender"), being first duly sworn upon **[his][her]** oath, and deposed and said as follows:

"My name is _____ and I have the power and authority to execute this Affidavit on behalf of Lender. I am at least eighteen (18) years of age. I am of sound mind and of sufficient intellect to make this Affidavit. I have never been convicted of a felony. I am fully competent to make this Affidavit. I have personal knowledge of the facts contained in this Affidavit and state that the same are true and correct in all respects.[167]

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[166] As a general rule, a Lender must produce the original Note in order to seek enforcement of the Note against Borrower. *See* Life Insurance Company of Virginia v. Gar-Dal, Inc., 570 S.W.2d 378, 380 (Tex. 1978). However, notwithstanding this general rule, a lost, destroyed, or stolen Note may be enforced as governed by section 3.309 of the UCC, providing, in part, that (a) a person who is not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and was entitled to enforce it when the loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process, and (b) a person seeking enforcement of an instrument under item (a) must prove the terms of the instrument and the person's right to enforce the instrument. TEX. BUS. & COM. CODE § 3.309(a) (West 2000). If such proof is adequately made, section 3.308 of the UCC (regarding authenticity and validity of signatures) will apply to the situation as if the instrument itself had actually been produced. *Id*. § 3.309. *See* third annotation to this Rider 10, *infra*, regarding use of this affidavit in making such proof.

[167] The Texas Jurisprudence Pleading and Practice Forms suggests that an affidavit should include: a caption or title, a statement of venue, a statement of facts, the signature of the affiant, and a certificate by a competent officer that the content of the affidavit was sworn to by the affiant. *See* Texas Jurisprudence Pleading and Practice Forms § 16:3 (Lawyers Coop. Publ'g ed., 2d ed. 1994).

The Texas Rules of Civil Procedure require that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as a witness to the matters stated therein." TEX. R. CIV. P. 166a (f) (West 2000). The Texas Rules of Evidence provide that every person is generally competent to be a witness except for insane persons and children who do not "possess sufficient intellect" when examined by a court. TEX. R. EVID. 601(a) (West 2000). Additionally, the credibility of a witness may be impeached, under certain circumstances, by evidence of a criminal

On _____, 20__, _____, a _____ ("Borrower") executed a certain promissory note (the "Note") in the original principal amount of $_____, payable to the order of Lender, a true and correct copy of which is attached hereto as Exhibit A.[168] In my capacity as the _____ of Lender, I was responsible for receiving and processing original loan documents, specifically including the Note, on behalf of Lender. As of the date hereof, Lender is the sole owner of the loan evidenced by the Note. Lender has not assigned, pledged, sold, endorsed or in any way transferred or hypothecated the Note or any interest therein. The original Note was duly executed and delivered by Borrower to Lender but has been inadvertently lost or misplaced by Lender, and Lender has been unable to locate the original Note despite diligent efforts to do so. Lender cannot reasonably obtain possession of the original Note because the whereabouts of the original Note cannot be determined. Lender would have been entitled to enforce the Note when loss of possession occurred. The loss of possession of the Note was not the result of a transfer by Lender of the Note nor the result of a lawful seizure of the Note.[169]

The original Note has been replaced with that certain **[Replacement Promissory Note]** executed by Borrower dated effective _____, 20__, in the original principal amount of $_____. The Replacement Promissory Note is hereby substituted for the original Note for all purposes effective as of _____, 20__."[170]

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conviction. *Id*. rule 609. This form of affidavit conservatively states that the affiant is not a minor nor a felon, despite the fact that under applicable Texas law the affidavit of a minor or a witness with a criminal record could be acceptable under certain circumstances, as previously mentioned in this annotation. *See id*.

[168] Section 3.309(b) of the UCC requires proof of the terms of the instrument. The Texas Supreme Court has held that a photocopy of the Note attached to a Lost Note Affidavit swearing the copy to be true and correct was proper summary judgment evidence of the terms of the instrument. Gar-Dal, Inc., 570 S.W.2d at 380. Further, the Texas Supreme Court has explained that "the function of the required affidavit and the sworn or certified copy of the note is to furnish some reliable proof of the allegations of the plaintiff's petition including the ownership of the note. . . . " Perkins v. Crittenden, 462 S.W.2d 565, 566 (Tex. 1970); Gar-Dal, Inc., 570 S.W.2d at 380.

[169] Section 3.309(a) of the UCC requires that (i) Lender was "in possession of the instrument and entitled to enforce it when loss of possession occurred," (ii) the "loss of possession was not the result of a transfer by the person or a lawful seizure," and (iii) Lender "cannot reasonably obtain possession of the instrument because the instrument was destroyed [or] its whereabouts cannot be determined. . . ." TEX. BUS. & COM. CODE § 3.309(a) (West 2000). The Texas Rules of Civil Procedure require that the affiant have personal knowledge of the facts recited in the affidavit. TEX. R. CIV. P. 166a (f) (West 2000). Further, the affiant must state that the affiant "has personal knowledge of the facts because of her duties." Geiselman v. Cramer Financial Group, Inc., 965 S.W.2d 532, 537 (Tex. App. - Houston, 1997, no pet.). This form of Lost Note Affidavit incorporates these requirements as a part of the affiant's sworn statement.

[170] This Lost Note Affidavit contemplates the execution and delivery of a Replacement Promissory Note. The final paragraph of the Lost Note Affidavit should be removed if no such replacement instrument is executed and delivered.

_____

Name:_____

Title:_____

STATE OF TEXAS[171] §

§

COUNTY OF _____ §

The foregoing instrument was ACKNOWLEDGED before me this _____ day of _____, 20__, by _____, the _____ of _____, on behalf of said _____.

[S E A L]

_____

Notary Public, State of Texas

My Commission Expires:

_____

_____

Printed Name of Notary Public

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05/09/2001 - 999998-698

[171] Within the State of Texas, an acknowledgment may be taken by the clerk of a district court, a judge or clerk of a county court or a notary public. *See* TEX. CIV. PRAC. & REM. CODE § 121.001 (West 2000). Outside the State of Texas, but within the United States or U.S. territories, an acknowledgment may be taken by a clerk of a court of record having a seal or a notary public; the official seal of the notary public must be affixed to the instrument only if the jurisdiction in which certificate is made requires the notary to do so. *See id.* § 121.004(c); *see also* Steven Calens Haley, Texas Law of Acknowledgments, 30th Annual Mortgage Lending Institute (1996); James Noble Johnson, Acknowledgments, Advanced Real Estate Drafting Course, State Bar of Texas (1993).