

INTERCREDITOR AND SUBORDINATION AGREEMENT

THIS INTERCREDITOR AND SUBORDINATION AGREEMENT (this "**Agreement**") is made as of _____, between _____, a _____ ("**Mezzanine Lender**"), and _____, a _____ ("**Senior Lender**"), on the following terms and conditions:

Preliminary Statement:

A. _____, a _____ ("**Borrower**"), and Senior Lender are parties to that certain Loan Agreement of even date (as it may be modified or amended the "**Loan Agreement**");

B. _____, a _____, and the sole _____ of Borrower ("**Mezzanine Borrower**") has incurred indebtedness to the Mezzanine Lender pursuant to that certain loan agreement of even date (the "**Mezzanine Loan Agreement**") providing for the issuance of a promissory note in the principal amount of \$_____ dated as of even date and payable to the order of the Mezzanine Lender (the "**Mezzanine Note**"); and

C. Mezzanine Lender wishes to evidence its subordination of the Mezzanine Indebtedness (as hereinafter defined) to the Senior Indebtedness (as hereinafter defined) as hereinafter set forth, and Mezzanine Lender and Senior Lender desire to establish certain agreements between themselves.

Agreement:

NOW, THEREFORE, in consideration of TEN AND NO/100 DOLLARS (\$10.00), and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Mezzanine Lender and Senior Lender covenant and agree as follows:

Section 1. Definitions. For purposes of this Agreement, the following terms shall have the following meanings:

(a) **Additional Cure Period** means, with respect to Non-Monetary Defaults only, a period of ten (10) days from and after the expiration of the applicable cure period in instances where the Borrower has a cure period relating to such Non-Monetary Default.

(b) **Affiliate** means any other person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For purposes of this definition, "control" (including, with correlative meanings, the terms "controlling," "controlled by" and "under common control with"), as used with respect to any person, shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, by agreement or otherwise; provided that beneficial ownership of ten percent (10%) or more of the voting securities of a Person shall be deemed to be control.

(c) **Bankruptcy Code** means the Bankruptcy Reform Act of 1978 (11 U.S.C. §101-1330) as now or hereafter amended or recodified.

(d) Bankruptcy Event means (i) any insolvency or bankruptcy case or proceeding, or any receivership, liquidation, reorganization or other similar case or proceeding in connection therewith, relative to Borrower or Mezzanine Borrower, or (ii) any liquidation, dissolution or other winding up of Borrower or Mezzanine Borrower, whether voluntary or involuntary and whether or not involving insolvency or bankruptcy, or (iii) any assignment for the benefit of creditors or any other marshaling of assets or liabilities of Borrower or Mezzanine Borrower.

(e) Collateral means the property encumbered by the Senior Collateral Documents to secure the obligations of the Borrower under the Loan Agreement and the other Senior Documents, and any additional property of Borrower or any Person other than Mezzanine Borrower that is encumbered by liens or security interests to secure the Senior Indebtedness, but expressly excluding any pledge of the membership interests in Borrower.

(f) Effective Date. See *Section 18*.

(g) Eligible Assignee means (i) Mezzanine Lender, (ii) any Affiliate of Mezzanine Lender, or (iii) one or more of the following:

(A) a real estate investment trust, bank, savings and loan association, investment bank, insurance company, trust company, commercial credit corporation, pension plan, pension fund or pension advisory firm, mutual fund, government entity or plan, provided that any such Person referred to in this clause (A) satisfies the Eligibility Requirements;

(B) an investment company, money management firm or “qualified institutional buyer” within the meaning of Rule 144A under the Securities Act of 1933, as amended, or an institutional “accredited investor” within the meaning of Regulation D under the Securities Act of 1933, as amended, provided that any such Person referred to in this clause (B) satisfies the Eligibility Requirements;

(C) a Qualified Trustee in connection with a securitization of, the creation of collateralized debt obligations (“**CDO**”) secured by or financing through an “owner trust” of, the Mezzanine Loan (collectively, “**Securitization Vehicles**”), so long as (A) the special servicer or manager of such Securitization Vehicle has the Required Special Servicer Rating, (B) the entire “controlling class” of such Securitization Vehicle, other than with respect to a CDO Securitization Vehicle, is held by Eligible Assignees, and (C) Mezzanine Lender or an Affiliate of Mezzanine Lender maintains all approval rights under Section 8 of this Agreement and has not transferred any of such approval rights to such Qualified Trustee; or

(D) an investment fund, limited liability company, limited partnership or general partnership where a Permitted Fund Manager or an entity that is otherwise an Eligible Assignee under clauses (ii)(A), (B) or (C) of this definition acts as the general partner, managing member or fund manager and at least 51% of the equity interests in such investment vehicle are owned, directly or indirectly,

by one or more entities that are otherwise Eligible Assignees under clauses (ii)(A), (B) or (C) of this definition

(h) “Eligibility Requirements” means, with respect to any Person, that such Person (i) has total assets (in name or under management) in excess of \$1,000,000,000 and a net worth in excess of \$100,000,000 and (ii) is regularly engaged in the business of making or owning commercial real estate loans (including mezzanine loans or loan participations) or operating commercial mortgage properties.

(i) Event of Default means the occurrence of an Event of Default as defined in the Loan Agreement.

(j) Government Lists means (i) the Specially Designated Nationals and Blocked Persons List maintained by OFAC, (ii) any other list of terrorists, terrorist organizations or narcotics traffickers maintained pursuant to any of the Rules and Regulations of OFAC that Lender notifies Borrower or Mezzanine Borrower in writing is now included in “Governmental Lists”, or (iii) any similar list maintained by the United States Department of State, the United States Department of Commerce or any other Governmental Authority or pursuant to any Executive Order of the President of the United States of America that Lender notifies Borrower or Mezzanine Borrower in writing is now included in “Governmental Lists.”

(k) Lenders means collectively the Senior Lender and the Mezzanine Lender.

(l) Loan Agreement. See Preliminary Statement.

(m) Membership Pledge means the pledge of the membership interests in Borrower by Mezzanine Borrower in favor of the Mezzanine Lender as of even date.

(n) Membership Pledge Foreclosure Conditions. See **Section 7**.

(o) Mezzanine Collateral means Mezzanine Borrower’s membership interests in Borrower and related items described in the Membership Pledge.

(p) Mezzanine Collateral Documents means the documents and instruments described on **Exhibit “A”** attached hereto and made a part hereof which are given by Mezzanine Borrower to Mezzanine Lender to secure the payment of the Mezzanine Indebtedness.

(q) Mezzanine Documents means the Mezzanine Note, the Mezzanine Loan Agreement, and the Mezzanine Collateral Documents.

(r) Mezzanine Indebtedness means all principal, interest, fees, costs, enforcement expenses (including legal fees and disbursements), collateral protection expenses and other obligations created or evidenced by the Mezzanine Note, or any prior, concurrent or subsequent notes, instruments or agreements of indebtedness, liabilities, preferred stock or obligations of any type or form whatsoever relating thereto in favor of the Mezzanine Lender and all renewals, extensions, refinancings, and modifications thereof. Mezzanine Indebtedness shall also include any note, advance, stock or any other instrument or agreement, and all amounts which may be due under such instruments or agreements, received by the Mezzanine Lender,

directly or indirectly in payment of or on account of the Mezzanine Indebtedness, in violation of the terms of the Senior Documents.

(s) Mezzanine Lender means the entity designated in the preamble, together with its Eligible Assignees.

(t) Mezzanine Loan Agreement. See Preliminary Statement.

(u) Mezzanine Loan Debt Service means any scheduled interest payments with respect to the Mezzanine Indebtedness.

(v) Mezzanine Note. See Preliminary Statement.

(w) Monetary Default means a Potential Default or Event of Default which can be cured by the payment of money to the Senior Lender or the payment of money for taxes or insurance.

(x) Mortgage means, collectively, those instruments of Deed of Trust, Security Agreement and Fixture Filing as of even date by Borrower for the benefit of Senior Lender which encumbers and conveys the Property and is included in the Senior Documents.

(y) Non-Monetary Default means a Potential Default or Event of Default wherein the expenditure or payment of money to the Senior Lender or third parties will not result in the cure of such Potential Default or Event of Default or the correction of the underlying condition which caused or resulted in the occurrence of a Potential Default or Event of Default.

(z) OFAC means the Office of Foreign Assets Control, United States Department of the Treasury, or any other office, agency or department that succeeds to the duties of OFAC.

(aa) Overnight Delivery Service. See *Section 17*.

(bb) Payment Date means the date on which all obligations under the Loan Agreement and secured by the Senior Documents have been paid in full.

(cc) Permitted Fund Manager means any Person that on the date of determination is (i) a nationally-recognized manager of investment funds investing in debt or equity interests relating to commercial real estate, (ii) investing through a fund with committed capital of at least \$200,000,000, and (iii) not subject to a Proceeding.

(dd) Person means any individual, corporation, partnership, joint venture, association, joint stock company, trust, trustee, estate, limited liability company, unincorporated organization, real estate investment trust, government or any agency or political subdivision thereof, or any other form of entity.

(ee) Proceeding means any action, litigation, arbitration or similar judicial or quasi-judicial proceeding, at law or in equity.