

## DEED IN LIEU OF FORECLOSURE AGREEMENT

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Sometimes both the borrower and the lender guess wrong about a mortgaged property. Instead of maintaining or increasing its value, the mortgaged property might lose value, because of bad management, bad neighborhood trends, a bad local economy, bad luck, or a correction of previous market-wide overpricing of real estate assets.

When bad things happen to mortgaged property, a typical nonrecourse loan always gives the borrower the option to “walk away” from it. The borrower can let the lender foreclose and take the mortgaged property, but the lender will have no right to chase the borrower if the value of the mortgaged property won’t cover the entire loan.

If a borrower has resigned itself to losing the mortgaged property and wants to maintain its reputation with this lender and others, the borrower will often not force the lender to go to the trouble of holding a foreclosure sale. Instead, the borrower will simply deed the mortgaged property to the lender or the lender’s designee, saving all parties the time, trouble, expense, and bad publicity of a foreclosure action.

A transaction of this type, a “deed in lieu of foreclosure,” formalizes the borrower’s exercise of its option to “walk away” from a bad investment. The borrower recognizes that it has lost its equity investment in the mortgaged property. Although the borrower might have an opportunity to “leverage” the lender by taking advantage of the delays and uncertainties of the foreclosure process, the borrower declines to do so. Instead, the borrower makes life (or at least the transfer of the mortgaged property) easy for the lender.

A borrower that “walks away” gracefully will often find that the same lender that “took back” an unsuccessful investment will happily do business with the same borrower again on another property. Nonrecourse lenders recognize that “taking back” bad investments is part of the risk they’ve agreed to assume. They can’t necessarily complain when the risk actually “hits.”

For any “deed in lieu of foreclosure” transaction, both borrower and lender often want to memorialize the circumstances of the borrower’s abandonment of the mortgaged property. And a lender fears that after the transfer the borrower will somehow try to undo it – a risk that the lender can mitigate by obtaining certain assurances from the borrower. For these reasons, a borrower and a lender that consummate a deed in lieu of foreclosure will often enter into a deed in lieu of foreclosure agreement. Here, the borrower will acknowledge some factual matters about the mortgaged property and the transaction, and the lender will confirm that the borrower has no liability for the loan or most other obligations under the loan documents.

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<sup>1</sup> This article is based on a chapter in LENDER’S GUIDE TO STRUCTURING AND CLOSING COMMERCIAL MORTGAGE LOANS (Mortgage Bankers Association 2004). Copyright (C) 2008 Joshua Stein ([www.joshuastein.com](http://www.joshuastein.com)). Please forward any comments to the author at [joshua@joshuastein.com](mailto:joshua@joshuastein.com).

This Chapter offers a sample deed in lieu of foreclosure agreement, with some exhibits for typical closing documents to further implement the transaction. (Some of those exhibits can be used on their own -- without the deed in lieu of foreclosure agreement -- where the legalities and circumstances justify it.)

This deed in lieu of foreclosure agreement raises a variety of substantive legal issues, including the following.

1. *Mezzanine Lender.* If a transaction also involves a mezzanine lender, the mortgage lender probably entered into an intercreditor agreement that would prevent the mortgage lender from accepting a deed in lieu of foreclosure without first giving the mezzanine lender certain notices and an opportunity to cure the borrower's default. Any mortgage lender should comply with these requirements. Going beyond those requirements, a mortgage lender will often be well advised to try to persuade the mezzanine lender to acquire the mortgage loan, perhaps even at a discount. The mezzanine lender offers the single easiest and most attractive exit opportunity for any defaulted mortgage loan.

2. *Tax Planning.* The borrower may suffer "recapture" income from a deed in lieu of foreclosure, and should consider this issue early in the process of negotiating a deed in lieu of foreclosure. Borrowers often use the following techniques, and others, to avoid "recapture" income: (a) retain some very small interest in the property for a year or two notwithstanding the deed in lieu of foreclosure; (b) close the conveyance as a tax-free exchange; or (c) retain "bare" title to the mortgaged property for a certain period, under an arrangement that gives the lender total control over the mortgaged property, all its income, and the right to resell it. These transactions take time to structure and document.

3. *Disclosed Liabilities.* In the months before a borrower loses a mortgaged property in foreclosure (or through a deed in lieu of foreclosure), the borrower will typically fall behind in paying real estate taxes and operating expenses. To some degree or another, depending on the circumstances, the resulting mess will belong to the lender after the borrower loses the mortgaged property. If a lender has significant leverage (for example, because the lender can show the borrower and its principals may have incurred recourse liability during the collapse and fall of the mortgaged property), then the lender may be able to convince the borrower to bring current all liabilities for the mortgaged property. In the more typical case, the borrower will simply want to walk away and insist on doing so as the price of not forcing the lender to go through the foreclosure process. In these cases, the best the lender can do will be to obtain some representations and warranties from the borrower and its principals about the scope of any continuing liabilities and claims. To deal with that typical set of facts, this deed in lieu of foreclosure agreement sets up a definition of "Disclosed Liabilities," and contains the lender's commitment not to chase the borrower to pay any of these items. On the other hand, this model does not obligate the lender to pay the "Disclosed Liabilities" after closing, but does include a vague commitment to consider paying them if appropriate. The borrower may ask for more, to protect itself from claims and litigation after the closing. How this issue turns out depends entirely on the parties' relative leverage under the circumstances, and the wording and scope of the nonrecourse clause in the loan documents.

4. *“Deed in Escrow.”* A “deed in lieu of foreclosure” should not be confused with a “deed in escrow.” The latter transaction contemplates that the parties remain borrower and lender, the borrower continues to own the mortgaged property, and if the borrower ever misbehaves again the lender can simply release and record the “deed in escrow.” The courts routinely recharacterize such arrangements as mortgages and force the lender to foreclose. A “deed in escrow” is an extremely unreliable arrangement and should be adopted and documented only with extreme care. This deed in lieu of foreclosure agreement is neither suitable nor intended for a “deed in escrow” transaction.

5. *Surviving Liabilities.* Once the borrower gives up the mortgaged property to the lender, should the borrower and its principals retain any liability at all for any loan-related matters? This deed in lieu of foreclosure agreement requires the borrower and its principals to retain liability for pre-closing environmental matters, and also requires them to make a variety of representations and warranties about the transaction, the mortgaged property, and the borrower’s finances. A careful borrower (and particularly the careful principals of that careful borrower) may have no interest in any of this, preferring instead to have the lender absolutely release all claims of any kind as the price of receiving an uncontested deed in lieu of foreclosure. A lender may regard that position as representing something much less than the kind of “outright surrender” that would lead a lender to do business again with the same borrower.

6. *Prepackaged Plan.* If a borrower delivers a deed in lieu of foreclosure through a prepackaged plan of reorganization under Chapter 11 of the Bankruptcy Code, the deed in lieu foreclosure agreement will change substantially. One should also include in the deed itself language such as the following:

This Deed is delivered pursuant to the requirements of, and in accordance with, and subject to the jurisdiction of the United States Bankruptcy Court ( Southern District of New York ) (the “Bankruptcy Court”) pursuant to that certain Plan of Reorganization Proposed by Grantor and Lender confirmed on \_\_\_\_\_ by the Bankruptcy Court in Chapter 11 Case No. \_\_\_\_\_ (the “Plan of Reorganization”). No separate consideration is required to support the delivery of this Deed.

This Deed has been approved by the Bankruptcy Court. This Deed is delivered by authority and direction of the Bankruptcy Court pursuant to the Plan of Reorganization as confirmed by the Bankruptcy Court pursuant to 11 U.S.C. § 1129. Accordingly, neither this Deed, nor the execution, delivery or recording of this Deed, may be taxed under any law imposing a stamp tax or similar tax, as provided in 11 U.S.C. § 1146(c).

Grantor acknowledges, and the Bankruptcy Court has confirmed by its confirmation of the Plan of Reorganization pursuant to which this Deed is delivered, that this Deed constitutes a valid present transfer of the Premises and is not voidable or otherwise subject to being set aside, rescinded, or invalidated under the Bankruptcy Code or otherwise.

7. *Enforceability.* No assurance is offered that the recitations, etc., in this model deed in lieu of foreclosure agreement and the accompanying deed will be enforceable. This entire area is fraught with dangers, and in this context (particularly), courts often disfavor lenders.

8. *“Good Borrower” Letter.* Borrower may request that Lender sign and deliver a letter confirming that Borrower was a “good borrower” and Lender would do business with Borrower again. This letter may help for future loan applications, given that future prospective lenders will require disclosure of any prior deeds in lieu of foreclosure.

9. *Closing.* One should try to sign this agreement and execute, acknowledge, and deliver the deed at the same time, before Borrower changes its mind or identifies new issues or concerns. An exhibit to this deed in lieu of foreclosure agreement lists a typical set of documents required for a closing of this type. A lender might choose to streamline the transaction by accepting just the deed at closing, and accepting all other deliveries within some short period thereafter.

10. *Scope of Opinion.* This agreement provides for delivery of an opinion of counsel related to the usual matters, but excluding enforceability. This reflects a hesitancy to ask borrower’s counsel to provide assurances about enforceability of a document that certainly raises issues of enforceability. Absent such an assurance, the lender must go into a transaction like this with its eyes open, knowing that the transaction creates some residual risk of challenges to enforceability. The use of personal guaranties seeks to mitigate that risk.

11. *Residential Property.* This document was intended only for commercial transactions. Residential property and deed-in-lieu transaction are fraught with consumer protection issues. In New York, for example, the Home Equity Theft Prevention Act, passed in 2007, makes it difficult or impossible for any homeowner to enter into a deed in lieu transaction, thus forcing the lender to proceed through a foreclosure instead (perhaps another example of the law of unintended consequences).

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**DEED IN LIEU OF FORECLOSURE AGREEMENT**

**THIS DEED IN LIEU OF FORECLOSURE AGREEMENT** (the “Agreement”) is entered into as of \_\_\_\_\_, 200\_\_ (the “Transfer Date”) between **LENDER**, a \_\_\_\_\_ (formerly known as \_\_\_\_\_, “Lender”) with an office at \_\_\_\_\_, and **BORROWER**, a \_\_\_\_\_ (“Borrower”) with an office at \_\_\_\_\_.

**WITNESSETH**

WHEREAS, Borrower owns real property commonly known as: (i) \_\_\_\_\_; (ii) \_\_\_\_\_; (iii) \_\_\_\_\_; and (iv) \_\_\_\_\_ (each, a “Mortgaged Property” and, collectively, the “Mortgaged Properties”);

WHEREAS, as of \_\_\_\_\_ (the “Loan Closing Date”), Borrower executed and delivered to Lender a Promissory Note for \$ \_\_\_\_\_ (the “Note”);

WHEREAS, on the Loan Closing Date, Borrower and Lender also entered into the “Loan Agreement,” as defined in the Note;

WHEREAS, as of the Transfer Date, Borrower is in default under the Loan because Borrower has not done the following as the Loan Documents require (collectively, the “Existing Defaults”): (i) make payments to the Reserve Account; (ii) maintain the Mortgaged Properties; (iii) pay Impositions; (iv) pay certain trade payables; and (v) pay the Obligations;

WHEREAS, Lender delivered notice of the Existing Defaults to Borrower and Principals on \_\_\_\_\_ (the “Default Notice”), which Default Notice Borrower and all Principals received on or before \_\_\_\_\_;

WHEREAS, Borrower has not timely cured the Existing Defaults;

WHEREAS, as a result, an Event of Default has occurred and Lender has declared the entire Indebtedness immediately due and payable (the “Acceleration”);

WHEREAS, Lender is therefore entitled to exercise any or all of its rights and remedies under the Loan Documents and at law for the Existing Defaults;

WHEREAS, \_\_\_\_\_ (“Mezzanine Lender”) has [consented to this Agreement and all matters this Agreement contemplates] [received notice and opportunity to cure the Existing Defaults but has not done so and Mezzanine Lender’s cure period has expired]; and

WHEREAS, to avoid delay and expense for Borrower and Lender, recognizing that Borrower has no equity in the Mortgaged Properties, Borrower desires to transfer them to Transferee, and Lender desires to cause Transferee to accept them from Borrower.

**NOW, THEREFORE**, in consideration of \$10, the mutual promises and agreements in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

## 1. DEFINITIONS.

All capitalized terms not defined in this Agreement shall have the same meanings here that they do in the Loan Agreement.

“Acquisition Contracts” means all agreements by which Borrower or Borrower’s predecessor in interest acquired the Mortgaged Property.

“Borrower’s Contribution” means the sum of \$\_\_\_\_\_.

“Disclosed Liabilities” means: (a) the obligations and liabilities for the Mortgaged Properties disclosed and set forth in Exhibit A, in the aggregate amount of \$\_\_\_\_\_; and (b) payables not yet invoiced for goods and services rendered to the Mortgaged Properties in the ordinary course of business consistent with prior practices.

“Further Assurances Document” means any assignment, certificate, or other document that Lender, Transferee, or Title Insurer reasonably requests to remove any Prohibited Exception, insure Transferee’s title to each Mortgaged Property as of the Transfer Date, ratify and confirm the Transfer Documents and their execution and delivery, record each recordable Transfer Document and thereby perfect the Transfer, or effectuate the intent of this Agreement, including the Transfer (subject only to Permitted Exceptions) and the smooth and orderly transition of ownership and management of each Mortgaged Property to Transferee (or the continuation of Manager’s management but on Transferee’s behalf), including all Management Documents. The “Further Assurances Documents” also includes all documents and payments (except for Disclosed Liabilities) necessary or appropriate to terminate any Contract(s) (to the extent Transferee desires such termination) and transfer all utility deposits to Transferee.

“Indemnify” means, as a verb, that the Person obligated to “Indemnify” shall defend, indemnify, and hold harmless the Person entitled to be Indemnified from and against any and all loss, cost (direct or indirect), liability, judgments, and expense, including the payment of reasonable attorneys’ fees, resulting or arising, directly or indirectly, from a specified event or occurrence for which such obligation to Indemnify applies.

“Interference Event” means occurrence of any one or more of the following: (a) commencement of any Voluntary Bankruptcy; (b) any material default by Borrower or any Principal under this Agreement (including any failure to execute, acknowledge, and deliver any Transfer Document or Further Assurances Document), which default is not cured within five Business Days after written notice to any Principal; (c) Borrower’s or any Principal’s commencing (or facilitating, colluding in, or consenting to) any action or proceeding of any kind seeking to enjoin, challenge, set aside, delay, impair, or otherwise invalidate (in whole or in part) this Agreement, any Transfer Document, any Further Assurances Document, the Transfer, or any action this Agreement contemplates; or (d) Borrower’s or any Principal’s asserting in writing (or in any recorded or unrecorded document, notice, or demand to anyone), including via electronic mail, that any Transfer Document should not be recorded or deemed delivered or is invalid, ineffective, or should be set aside, or that Borrower otherwise has any interest, present or contingent, in any Mortgaged Property, or any right to receive any payment on account of any Mortgaged Property or from Lender except as this Agreement expressly provides. Except as this



paragraph expressly provides, neither Borrower nor any Principal shall have any right to notice or cure period for any Interference Event. For purposes of this paragraph, any action by any person acting for or on behalf of Borrower or any Principal shall constitute the action of Borrower or such Principal.

“Lender Releases” means Lender, Transferee, and each of their agents, servants, employees, directors, officers, attorneys, branches, affiliates, subsidiaries, participants, successors and assigns, and all other persons, firms, corporations, and other organizations acting on their behalf.

“Management Documents” means originals (or, where unavailable, copies certified by Principals as true and correct) of all the following documents (both on paper and, where available, in machine-editable form), to the extent in Borrower’s or Manager’s possession for each Mortgaged Property: (a) the Leases; (b) the Permits; (c) the Contracts (which term shall include the Acquisition Contracts); (d) books, records, correspondence, files, registers, and other documents, including any relating to guaranties, construction claims, Security Deposits, utility deposits, or any Personalty; and (e) all other documents, agreements, and other property pledged to Lender under the Contract Assignment.

“Mortgaged Property–Related Payment” means any payment made by Borrower, Manager, or any other person relating to the Mortgaged Property and directly or indirectly funded from the revenue of the Mortgaged Property.

“Permitted Exceptions” means any: (a) recorded Loan Document; (b) matter set forth as an exception to title (and not marked “omit”) in the Title Policy; or (c) lien securing any Disclosed Liability.

“Potential Unwind Period” means a period starting on the Transfer Date and ending only when no person could, through a bankruptcy proceeding, debtor-creditor law, or otherwise, set aside or invalidate any Transfer Document as a preference, fraudulent transfer, voidable transfer, or otherwise.

“Principal” means each Guarantor under the Loan Agreement.

“Prohibited Exceptions” means any exception to or encumbrance of title to the Mortgaged Property, whether voluntary or involuntary, except a Permitted Exception.

“Prohibited Payee” means: (a) Borrower or Principal; (b) any Affiliate or other related party of “a”; or (c) any family member, employee, former employee, officer, partner, agent, or representative of “a” or “b.”

“Security Deposits” means the security deposits for all Leases, including all letters of credit and other arrangements in substitution for security deposits.

“Surviving Liabilities” means liability for any and all damage, loss, claims, demands, liabilities, obligations, actions, and causes of action (including Lender’s payment of reasonable attorneys’ fees) arising under or from any of the following: (a) breach of any provision of the Loan Agreement or the Environmental Indemnity Agreement concerning

Environmental Laws, Hazardous Substances, or any indemnification benefiting Lender in either document; (b) any Voluntary Bankruptcy; (c) if, before the Transfer Date, Borrower or any Principal commits or has committed intentional physical waste to the Mortgaged Property; (d) if any fraud or misappropriation or misapplication of funds is or has been committed by or on behalf of Borrower or any Principal in contravention of the Loan Documents or if any Loan Document or report furnished under any Loan Document contains or contained any intentional misrepresentation; or (e) breach of any representation, warranty, or covenant of Borrower or any Principal in this Agreement.<sup>2</sup>

“Title Insurer” means \_\_\_\_\_ Title Insurance Company or another title insurance company reasonably satisfactory to Lender.

“Transaction Costs” means transfer taxes and title insurance premiums on recording the recordable Transfer Documents and issuing policies of title insurance for Transferee providing coverage in an aggregate amount equal to the principal amount of the Loan as of the Transfer Date subject only to Permitted Exceptions.<sup>3</sup>

“Transfer” means the conveyance and transfer of all the Collateral, including all the Mortgaged Properties and all escrow, reserve, and impound accounts arising under the Loan Documents, to Transferee under the Transfer Documents.

“Transfer Documents” means the documents and deliveries listed in Exhibit B, and such other documents as Lender reasonably requires to accomplish the Transfer. All Transfer Documents shall be in form and substance satisfactory to Lender, provided that neither Borrower nor any Principal shall have any personal liability under any Transfer Document beyond the Surviving Liabilities.

“Transferee” means \_\_\_\_\_ or such other designee as Lender specifies by notice to Borrower. At Lender’s option, the Transfer Documents shall leave blank the Transferee’s name and address, in which case: (a) Transferee shall not be determined unless and until Lender has filled in such blank; and (b) Lender shall then promptly notify Borrower of Transferee’s name and address.

“Voluntary Bankruptcy” means any arrangement, assignment for the benefit of creditors, bankruptcy, composition, insolvency, or other debtor relief proceeding of any kind whatsoever affecting Borrower, whether under federal or state law, commenced voluntarily by Borrower or with any direct or indirect collusion, consent, facilitation, or instigation by Borrower or any Principal.

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<sup>2</sup> Edit as appropriate to reflect Principals’ post-closing obligations.

<sup>3</sup> Borrower will usually refuse to pay these Transaction Costs, but Lender will usually still want to ask, unless circumstances dictate otherwise. Lender’s existing policy of title insurance will probably still cover Lender after Lender takes title to the collateral, but the coverage will refer only to title conditions at date of policy. Thus, the policy will not protect against, for example, the validity of the deed in lieu conveyance, or the existence of any new liens.

## 2. THE TRANSFER.

2.1 Delivery of Transfer Documents. Borrower intends to presently and irrevocably transfer all Collateral to Transferee pursuant to the Transfer Documents as of the Transfer Date. Borrower's conveyance of the Collateral to Transferee is absolute, present, and unconditional. At any time on or after Transferee's receipt of each Transfer Document Transferee may record each recordable Transfer Document and otherwise further effectuate the Transfer. On the Transfer Date, Borrower is delivering to Transferee possession of all Personalty, as is and where is, and control and possession of all Collateral, as owner thereof and not as a mortgagee in possession. As more fully described in the Transfer Documents, the parties intend that the Transfer shall cause no merger between Lender's Mortgage and Transferee's equity interests in the Collateral. Such Mortgage and such equity interests are intended to remain separate and distinct interests in the Collateral.

2.2 Present Effectiveness. Effective on the Transfer Date, Borrower hereby assigns, conveys, delivers, grants, and transfers to Transferee (and Lender confirms on Transferee's behalf that Transferee has taken possession of and accepted) ownership of the Collateral, including all Management Documents, subject to the Loan Documents. This transfer of ownership is intended to be and is effective as of the Transfer Date. Except as this Agreement otherwise provides, within 10 days after the Transfer Date, Borrower shall implement, formalize, and complete such Transfer by signing, acknowledging, and delivering to Transferee all documents listed in Exhibit B (except those identified as Lender's responsibility).<sup>4</sup> The deferred delivery of such documents is not intended to and shall not limit the present effectiveness of the Transfer as of the Transfer Date. As of the Transfer Date, Transferee owns all Collateral. The delivery of actual Transfer Documents is being deferred by up to 10 days merely to allow time to prepare and finalize such documents.

2.3 Use of Conduit. At Borrower's option, Borrower may structure the Transfer as a Transfer from Borrower to an intervening entity or accommodation party (the "Conduit") immediately followed by a Transfer from Conduit to Grantee, in all cases and at all times subject to the Loan Documents, provided only that: (a) Conduit is a newly formed single-purpose entity or otherwise satisfactory to Lender; (b) the use of Conduit shall not impair or limit the scope of Collateral transferred to Grantee, increase Lender's or Grantee's costs, materially delay delivery of any Transfer Document, impair Grantee's title, or otherwise materially adversely affect Lender or Grantee; (c) Conduit assumes, and Borrower and the Principals reaffirm, all obligations of Borrower and the Principals under this Agreement; (d) Borrower pays (and delivers to Lender proof of payment of) all transfer taxes imposed on any transfer from Borrower to Conduit and claims no transfer tax exemption the use of which could prevent Lender or Grantee from subsequently qualifying for any transfer tax exemption; (e) Conduit delivers all documentation required of Borrower under this Agreement; (f) Conduit is liquidated promptly after the Transfer; and (g) all documentation related to all of the foregoing is satisfactory to

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<sup>4</sup> It is preferable, but often not practical, to sign, acknowledge, and deliver all Transfer Documents on the Transfer Date.

Lender. If Borrower uses a Conduit, then wherever this Agreement refers to Borrower, such reference shall be deemed to include a reference to both Borrower and Conduit.<sup>5</sup>

### 3. ACKNOWLEDGMENTS AND ASSURANCES.

Borrower and the Principals acknowledge, admit, certify, confirm, represent, and warrant to Lender as follows, and shall execute such further documentation as Lender shall require to further evidence, substantiate, and confirm the following acknowledgments, admissions, certifications, confirmations, and representations. Borrower and each Principal shall Indemnify Lender and Transferee against any inaccuracy in or breach of any of the following acknowledgments, admissions, certifications, confirmations, and representations.

3.1 Absolute Transfer. Lender and Transferee shall have no obligation under any circumstance to reconvey any Collateral to Borrower or to pay Borrower any or all proceeds that Lender or Transferee realizes on any sale of any Collateral (to any Person whatsoever), whether such proceeds are more than, equal to, or less than the balance of the Loan. Regardless of the identity of any purchaser or transferee of the Collateral, Borrower shall not be entitled to participate in any way in such proceeds or to receive any commission, compensation, or fee on account of any such sale, even if Borrower directly or indirectly introduced Lender to the purchaser. The consideration for the Transfer is exactly as this Agreement states. The Transfer is intended as an absolute, present, and outright conveyance and transfer of all of Borrower's right, title, and interest in and to all Collateral, in fact as well as in form. Borrower has and shall have no right to refuse to deliver any Transfer Document based on any circumstance whatsoever. No further performance by Lender or Transferee is required as a condition to Borrower's delivery or the full effectiveness of the Transfer Documents. Borrower has and shall have no right, title, interest, or contingent interest (including any right of possession, repurchase, cure, or redemption) or claim in and to any Collateral or the proceeds and profits, if any, that Transferee may derive therefrom (including resale proceeds or any brokerage commissions), during Transferee's ownership or on any subsequent resale or conveyance by Transferee regardless of the identity of the purchaser or grantee. If it is ever determined that Borrower or any Principal has any equitable or other right in or with respect to any Collateral, or any right of redemption, then, for good and valuable consideration, Borrower and the Principals: (a) acknowledge that any such determination would be incorrect and erroneous; and (b) hereby sell, transfer, and convey to Transferee, and waive, any and all such equitable or other rights.

3.2 Analysis of Transfer. Borrower has analyzed the financial, legal, taxation, and other implications of the Transfer with independent advisors and has decided independently to proceed with the Transfer on the terms and conditions of this Agreement. Borrower acknowledges that Borrower's agreement to make the Transfer and present making of the Transfer as of the Transfer Date [notwithstanding the deferred delivery of formal Transfer Documents] is freely and fairly made, in exchange for good and sufficient consideration, and such agreement does not constitute a security arrangement for the Loan or a continuation of any

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<sup>5</sup> The Conduit structure allows Borrower to convey the collateral first to a "straw man," owned by a third party, with the "straw man" actually conveying the collateral to Lender. This may enable Borrower to represent and warrant in the future that it has never been subject to a deed in lieu transaction. Whether Lender will accommodate any such request raises other issues.

security for the Loan. To the contrary, this Agreement fully effectuates the Transfer as between the parties, and the subsequent delivery of the Transfer Documents constitutes a ministerial formality. Borrower's making of the Transfer (as set forth in this Agreement) is an absolute present transfer by Borrower, all as if the parties were entering into and simultaneously performing an unconditional agreement of purchase and sale of the Mortgaged Properties. Borrower has made the Transfer to Transferee freely and voluntarily, with full knowledge and without duress.

3.3 Bad Faith Filing. Because Borrower cannot reorganize, any Voluntary Bankruptcy would be commenced solely as a means to frustrate the Transfer and would have no other purpose. Therefore, Borrower agrees not to file any Voluntary Bankruptcy. Borrower acknowledges that any such filing would constitute a bad faith filing and should be immediately dismissed on motion by Lender and any "automatic stay" relating thereto immediately lifted. There is no basis for Borrower to defend any motion for such a dismissal.

3.4 Consideration. Lender's actions simultaneously taken under this Agreement constitute valid and sufficient consideration for the Transfer and all other consideration that Lender may receive under this Agreement.

3.5 Creditors. Borrower has no creditors or liabilities except the Loan and the Disclosed Liabilities. Each Disclosed Liability represents an arm's length account payable of Borrower incurred in the ordinary course of operation and management of the Properties, in compliance with the Loan Documents, for actual goods or services provided. No portion of any Disclosed Liability is (and no Mortgaged Property-Related Payment made during the \_\_\_ months before the Transfer Date was) payable, directly or indirectly, in whole or in part to or for the benefit of any Prohibited Payee. No creditor under any Disclosed Liability (and no person to whom any Mortgaged Property-Related Payment was made during the \_\_\_ months before the Transfer Date) has agreed or at any time did agree to pay any rebate, kickback, or other consideration to any Prohibited Payee. The Transfer does not violate the rights of any creditor of Borrower. No creditor of Borrower is entitled to require the Transfer to be set aside or to assert any rights or remedies as a result of the Transfer.

3.6 Disbursements. Lender is under no obligation to release, or permit to be released, any funds to pay for any capital improvements to any of the Mortgaged Properties or any other expenses related to any of the Mortgaged Properties. As a result of the Default, Lender or Transferee is entitled to apply all funds under Lender's possession or control (or the possession or control of any servicer or lockbox administrator acting for Lender), to the Loan, the Mortgaged Properties, or otherwise, as Lender or Transferee in its sole and absolute discretion may determine.

3.7 Due Authorization. Borrower and each Principal has all requisite power and authority to enter into and perform all the transactions and obligations this Agreement contemplates. This Agreement is a legal, valid and binding obligation of Borrower and each Principal. This Agreement, including the Transfer, has been duly authorized, approved, and executed in accordance with Borrower's organizational and governance documents. The execution, delivery and performance of this Agreement does not and will not violate any other agreement, judicial decree, statute or regulation to which Borrower or any Principal (or any

principal, owner, or affiliate of any of them) is a party or by which Borrower or any Principal (or any principal, owner, or affiliate of any of them) may be bound or affected. This Agreement and the Transfer each complies with all obligations of Borrower and the Principals (and their principals, owners, and affiliates) to Mezzanine Lender.

3.8 Equity. The Loan exceeds the value of the Mortgaged Properties. Borrower has no equity in any Mortgaged Property.

3.9 Lender Liability. Lender has performed all, and has not breached any, of its obligations under the Loan Documents and is not in default under any Loan Document or common law or other obligations of Lender to Borrower or any Principal. Neither Borrower nor any Principal is entitled to assert any “lender liability” claims against Lender. Lender has not violated any express or implied obligation of “good faith” or “fair dealing” relating to Borrower, the Loan, or the relationship between Borrower and Lender. Lender has no obligation or liability to Borrower or any Principal except as this Agreement expressly states. Lender has done nothing to impair any right or remedy under any Loan Document.

3.10 Management Documents. Borrower has delivered to Lender or Transferee all Management Documents.

3.11 No Commission. No broker, finder, consultant, or other person is entitled, as a result of any dealings, acts, or omissions of Borrower or any Principal, to receive any commission, fee, expense reimbursement, or other compensation on account of: (a) the Transfer; or (b) Transferee’s subsequent transfer of the Collateral to any transferee.

3.12 No Prior Transfer. Borrower has not transferred or assigned any right, title, or interest it may have in and to any Collateral or any Security Deposit except the Permitted Exceptions. There exists no contract for deed, land contract, or other executory agreement to sell or transfer any Collateral or any direct or indirect interest in or to Borrower.

3.13 No Violation. Nothing in this Agreement or Borrower’s performance of this Agreement violates any applicable law or any common law or contractual rights of any person.

3.14 Outstanding Balance. As of the effective date below, Borrower does not dispute and irrevocably waives any right to challenge (but shall not be deemed to represent and warrant the correctness of) Lender’s calculation of the Loan balance as set forth below. The total amount of such Loan balance exceeds the aggregate value of the Mortgaged Properties.

<b>Component</b>	<b>Amount</b>
Principal Indebtedness	\$
Accrued but Unpaid Interest	\$
Late Charges	\$
Default Interest	\$
Tax Escrow Deposits Not Made	\$

<b>Component</b>	<b>Amount</b>
_____ Deposits Not Made	\$
<b>TOTAL</b>	\$
Effective Date of Preceding Loan Amount	_____, 200__

3.15 Personalty. Since \_\_\_\_\_, 200\_\_, Borrower has removed no Personalty from any Mortgaged Property except Personalty that at the time of removal was both: (a) obsolete, old, or worn-out; and (b) replaced with new or substantially new Personalty to perform at least the same functions and having at least the same value as the Personalty removed.

3.16 Releases. Borrower has not entered into or otherwise relied on any agreement or understanding with Lender or Transferee, except the Loan Documents and this Agreement. Borrower and the Principals release the Lender Releasees, in all respects, from all damages, losses, claims, demands, liabilities, obligations, actions, and causes of action whatsoever that Borrower or any Principal may now have or claim to have against the Lender Releasees as of the Transfer Date, and whether presently known or unknown, and of every nature and extent whatsoever on account of or in any way touching, concerning, arising out of, or founded upon the Loan Documents, the Loan, or the Collateral, including all such loss or damage arising or allegedly arising as a consequence of the dealings between or among Borrower, the Principals, and Lender or the relationship or legal obligations among any of the foregoing. Borrower and the Principals agree upon Lender's request to deliver a general release of the Lender Releasees, in form and substance satisfactory to Lender. Nothing in this paragraph or in any release this paragraph contemplates shall be deemed to release any party's obligations under this Agreement.

3.17 Representation by Counsel. Borrower has been represented by counsel in negotiating and consummating this Agreement. Such counsel has fully advised Borrower of the implications of this Agreement and, particularly, the fact that after the Transfer Date Borrower has no interest whatsoever in any Collateral and has been fully divested of all such interest.

3.18 Security Deposits. The Security Deposits are all security deposits, and all arrangements in substitution for security deposits, for the Mortgaged Property. Borrower and Manager have at all times complied with all applicable law, the Loan Documents, and the Leases in holding, applying, and administering the Security Deposits. Borrower has applied no Security Deposit to any Tenant's obligations under its Lease except \_\_\_\_\_.

3.19 Status of Loan Documents. Borrower is in default under the Loan Documents and has no defenses to Lender's immediate enforcement of the Loan Documents and all Lender's rights and remedies. Lender has not waived or modified any Loan Document or any right or remedy thereunder, orally or in writing. The Loan Documents remain in full force and effect in accordance with their terms notwithstanding the Transfer. Borrower has no basis to challenge, set aside, or invalidate any claim, lien, security interest or other rights or remedies of Lender relating to any Collateral. Borrower's and Principals' obligations and Lender's rights and remedies under the Loan Documents are subject to no offset, defense, claim, counterclaim, set-off, or right of recoupment. The parties intend not to merge Borrower's (or Transferee's) interest and Lender's interest in any Collateral. The Default Notice is entirely accurate or Borrower

waives any right to dispute it. An Event of Default exists under the Loan. The Acceleration is fully valid and effective. The Loan is presently due and payable in full. Neither Borrower nor any Principal has any remaining right to cure any Existing Default.

3.20 Waivers. To the maximum extent law allows, Borrower waives Borrower's right of redemption and any statutory or other right that Borrower may have to redeem any Collateral. Borrower waives any right to require Lender or Transferee to proceed against any person or any Collateral, or pursue any other remedy in its power. Borrower waives any defense arising by reason of any disability or other defense of Borrower or any other person, or the cessation from any cause whatsoever of the liability of Borrower or any other person.

#### **4. ADDITIONAL OBLIGATIONS.**

Borrower shall (and the Principals shall cause Borrower to) promptly perform or cause to be performed the following obligations. Borrower and each Principal shall Indemnify Lender and Transferee against any failure to perform any of the following obligations.

4.1 Borrower's Contribution. On the Transfer Date Borrower shall pay Lender, by certified or bank check or wire transfer (to the bank account identified in Exhibit B), an amount equal to Borrower's Contribution. Lender may hold and retain such sum free of any claim of Borrower.

4.2 Communications. Neither Borrower, any Principal, nor any party related to any of them shall intentionally communicate in any way with any Tenant or vendor (except Manager) about the Transfer or publicly announce, disclose, issue any press release, or in any other manner publicly cause to be known that the Transfer has occurred.

4.3 Delivery of Management Documents. On the Transfer Date, Borrower shall deliver to Transferee all Management Documents.

4.4 Dissolution. The Principals shall cause their counsel to advise them of the earliest possible date when they can reasonably dissolve, liquidate, terminate, and wind up the affairs of (hereafter, "Liquidate") each of the following without having any legal obligation to contribute additional funds to the entity to pay its creditors: (a) Borrower; (b) each related entity that owned any Mortgaged Property before the Transfer Date; and (c) every general partner (except a natural person) of "a" or "b." Promptly after such earliest possible date for each such entity, the Principals shall Liquidate each such entity. To the extent that any such entity's organizational documents require the approval of any special member, special director, or similar person to Liquidate such entity, the parties shall cooperate to obtain such approval.

4.5 Environmental Indemnity. Borrower and each Principal shall Indemnify Lender and Transferee against any discharge, existence, use, deposit, spill, or other release of Hazardous Substances in, at, or from any Mortgaged Property, that occurred at any time before the Transfer Date. Each Principal reaffirms its obligations under the Environmental Indemnity Agreement and confirms that such obligations remain in full force and effect notwithstanding the Transfer.

4.6 Further Assurances. Borrower shall execute and deliver such Further Assurances Documents as Lender, Transferee, or Title Insurer shall require.



4.7 Lender's Costs and Expenses. Borrower and the Principals shall pay Lender and Transferee, on demand, in addition to the Transaction Costs, all costs and expenses, including reasonable attorneys' fees, Lender or Transferee incurs or has incurred in enforcing the Loan Documents, negotiating this Agreement, enforcing this Agreement or any Transfer Document (including in any bankruptcy proceeding), and all other matters this Agreement or any Transfer Document contemplates.

4.8 Noninterference. Neither Borrower nor any Principal or Affiliate of either shall cause any Interference Event or participate in, facilitate, or collude in initiating any Interference Event. If any Interference Event occurs, then: (a) each Principal shall Indemnify Lender regarding such Interference Event; (b) solely at Lender's option, the Principals shall as their personal obligation pay Lender, within five Business Days after Lender's demand, good funds in an amount equal to all Obligations under the Loan Documents as of the Transfer Date; and (c) upon Lender's receipt of such good funds, Lender shall cause Transferee to convey the Mortgaged Properties to Borrower or Borrower's designee free and clear of the Loan Documents and otherwise in their as is condition of title and as is physical condition.

4.9 Post-Closing Payments. If after the Transfer Date Borrower or Manager receives any refund or other payment arising from or relating to any Collateral, including any tax refund (a "Post-Closing Payment"), whether it relates to periods before or after the Transfer Date, such Post-Closing Payment shall be Transferee's sole and exclusive property. Borrower shall promptly remit such Post-Closing Payment to Lender or Transferee. If after the Transfer Date Borrower, Lender, or Manager receives any bill for expenses arising before the Transfer Date, except any Disclosed Liability, Borrower and each Principal shall promptly pay such expense and deliver to Lender reasonable evidence of such payment.

4.10 Prohibited Exceptions. At Lender's request, Borrower and the Principals shall promptly remove from title to each Mortgaged Property any and all Prohibited Exceptions, and shall Indemnify Lender from and against the Prohibited Exceptions.

4.11 Security Deposits. On the Transfer Date, Borrower is delivering to Transferee the Security Deposits. Lender shall cause Transferee to Indemnify Borrower regarding the proper use and application of the Security Deposits after the Transfer Date.

4.12 Utility Deposits. To the extent, if any, that Borrower previously posted or as of the Transfer Date is or was otherwise actually or contingently entitled to the return of any utility deposit for any Mortgaged Property, Borrower transfers to Transferee all rights in and to such utility deposit as of the Transfer Date, as part of the Transfer.

## **5. LIMITED RELEASE AND COVENANT NOT TO SUE**

Lender releases the Principals from all damage, loss, claims, demands, liabilities, obligations, actions, and causes of action arising under the terms or provisions of the [Guaranty of Nonrecourse Obligations] or under Section \_\_\_ of the Loan Agreement, except that this release does not extend to, the Principals shall remain personally liable for, and Lender does not release any Principal from, the Surviving Liabilities. Lender covenants not to sue Borrower personally for any liability arising under the Loan Documents, but the Loan shall continue to

constitute a bona fide nonrecourse obligation secured by the Mortgage and Borrower shall remain personally liable for, and Lender does not agree not to sue Borrower regarding, any Surviving Liabilities. The Principals and Borrower shall Indemnify Lender and Transferee for all Surviving Liabilities. Such obligation shall continue for the duration of the applicable statute of limitations. For purposes of the Principals' liability under this paragraph, all consents, waivers, acknowledgments, and agreements made by each Principal in the [Guaranty of Nonrecourse Carveouts] are incorporated by reference as if set forth in full (but any reference to the [Guaranteed Obligations] shall be deemed to refer to the Surviving Liabilities). The limited releases and covenant not to sue contained in this paragraph shall be of no force or effect if any Interference Event occurs.

## **6. MISCELLANEOUS.**

6.1 Allocation. Any consideration under this Agreement shall be allocated (and the parties shall report such allocation in their tax returns) as follows: \_\_\_\_\_.

6.2 Assignment. Lender may assign this Agreement in whole or in part to any assignee, including Transferee. Lender shall cause Transferee and any other assignee of this Agreement to comply with this Agreement.

6.3 Disclosed Liabilities. Notwithstanding anything to the contrary in this Agreement, Lender confirms that Lender intends (but does not covenant) to cause Transferee to exercise reasonable efforts to pay or resolve the Disclosed Liabilities to the extent that Transferee in good faith determines appropriate and in the best interests of the Mortgaged Properties, but this sentence imposes no legal obligations or liability of any kind upon Lender or Transferee. Neither Lender nor Transferee shall look to Borrower or any Principal (and neither Borrower nor any Principal shall look to Lender, Transferee, or their successors or assigns) to pay any Disclosed Liability, reimburse any sum paid (or caused to be paid) for any Disclosed Liability or indemnify against or contribute to any such sums paid (or caused to be paid).

6.4 Interpretation. This Agreement shall be interpreted under the laws of the State of New York. Every reference to "include" and its variations shall be interpreted as if followed by the words "without limitation."

6.5 Joint and Several Liability. Each Principal is jointly and severally liable and obligated under this Agreement for all obligations of Principal(s) and Borrower under this Agreement. Lender may enforce all such obligations against each Principal and all its assets without regard to any limitation of liability in any Loan Document.

6.6 Jury Trial Waiver. THE PARTIES WAIVE JURY TRIAL IN ANY DISPUTE ARISING FROM THE ENFORCEMENT OR INTERPRETATION OF THIS AGREEMENT OR THE RELATIONSHIP BETWEEN THE PARTIES.

6.7 Merger. This Agreement sets forth the entire agreement (and no oral agreement exists) between the parties about the Loan, its resolution, any Collateral, any waiver or obligation by any party, or any related matter. This Agreement is not a Loan Document and does not impair, limit, or supersede any Loan Document except to the extent that terms of this Agreement vary from the terms of any Loan Document.

6.8 Notices. Any notices under this Agreement shall be given, and shall become effective, as set forth in the Loan Agreement. A copy of any notice to Borrower shall simultaneously be delivered by the same means to Borrower's counsel: \_\_\_\_\_, at \_\_\_\_\_ . Lender appoints each of the following as its authorized representative with full power and authority to give any notice relating to this Agreement: \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_.

6.9 Survival. Borrower's and the Principals' obligations under this Agreement shall survive the Transfer Date and the Transfer and terminate only if and when the Potential Unwind Period has expired, no Interference Event has occurred, and no undischarged Surviving Liabilities exist.

*No Further Text on This Page.*

**IN WITNESS WHEREOF**, the parties have executed and delivered this Agreement as of the Transfer Date.

[SIGNATURE BLOCKS]<sup>6</sup>

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<sup>6</sup> Add for Borrower and all Principals. For each individual signature block, include **NAME OF SIGNER, IN HIS OR HER INDIVIDUAL AND PERSONAL CAPACITY**. Try to obtain residence address, social security number, and driver's license number.

**EXHIBIT A**

DISCLOSED LIABILITIES

[SEE ATTACHED]

[BORROWER TO PROVIDE]

## EXHIBIT B

### CHECKLIST OF DELIVERABLES<sup>7</sup>

1. Borrower's Contribution, by cashier's check, bank check, or wire transfer to this account:  
\_\_\_\_\_
2. Deed in Lieu of Foreclosure Agreement, signed by Borrower and Lender, with all exhibits
3. Default notice from Lender to Borrower, Guarantors, and Mezzanine Lender
4. Designation notice re: Transferee (from Lender or its counsel)
5. Estoppel certificate from Mezzanine Lender regarding nonexercise of cure rights and consent to Transfer
6. FIRPTA affidavit
7. For Each Mortgaged Property, from Borrower to Transferee (the "Transfer Documents"):
  - a. Assignment of contracts
  - b. Assignment of lessor's interest in leases
  - c. Bill of sale for all personalty
  - d. Deed in lieu of foreclosure in substantially the form of Exhibit D
  - e. Management Documents
  - f. Notice to Tenants
  - g. Owner's affidavit
  - h. Security Deposits held by Borrower, with reconciliation against rent roll, leases, and Manager-held Security Deposits
  - i. Title insurance policy or endorsement as of Transfer Date, with: (a) affirmative insurance that the transaction is not subject to invalidation or rescission as an equitable mortgage, preference, fraudulent transfer, or otherwise; and (b) removal of the creditors' rights exclusion
  - j. Transaction Costs (good funds)
  - k. Transfer tax returns, affidavits, and other ancillary documents to record each deed

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<sup>7</sup> Borrower shall provide all items except as stated.

1. Utility deposit transfer forms, if any
8. For Each Mortgaged Property, from Lender, as desired:
  - a. Appraisal
  - b. Engineering report
  - c. Environmental report
  - d. Insurance coverage
  - e. Local counsel advice on transfer tax, documents, etc.
  - f. Management arrangements
  - g. UCC search
9. Instruction letter to Manager on change of ownership; estoppel; and delivery of Management Documents, countersigned and confirmed by Manager, including confirmation of Manager-held Security Deposits
10. Opinion of counsel of Borrower in substantially the form of Exhibit E
11. Prewriteout agreement, executed by Borrower and Lender
12. Resolutions and consents
13. Transferee's entity formation documents (from Lender)

**EXHIBIT C**

**SECURITY DEPOSITS**

[SEE ATTACHED]



**EXHIBIT D**

**FORM OF DEED IN LIEU OF FORECLOSURE**

[SEE ATTACHED]

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
GRANTOR

and

\_\_\_\_\_,

GRANTEE

\_\_\_\_\_  
**DEED IN LIEU OF FORECLOSURE**

\_\_\_\_\_, 200\_\_

\_\_\_\_\_  
\_\_\_\_\_

This instrument affects real and personal property situated, lying and being in the City of \_\_\_\_\_, County of \_\_\_\_\_ State of New York. \_\_\_\_ [NYC ONLY The foregoing real property is commonly known as \_\_\_\_\_.]

**RECORD AND RETURN TO:**

\_\_\_\_\_

**DEED IN LIEU OF FORECLOSURE**

THIS **DEED IN LIEU OF FORECLOSURE** (the "Deed") is made as of \_\_\_\_\_, 200\_\_ (the "Effective Date"), between \_\_\_\_\_, a \_\_\_\_\_ with an office at \_\_\_\_\_ "Grantor", and \_\_\_\_\_, a \_\_\_\_\_, with an office at \_\_\_\_\_ ("Grantee").

Grantor, in consideration of Ten Dollars and other good and valuable consideration paid by Grantee, does hereby grant and release to Grantee and Grantee's legal representatives, heirs, successors and assigns, forever,

**ALL THAT CERTAIN PLOT, PIECE OR PARCEL OF LAND** situate, lying and being in the County of \_\_\_\_\_, State of New York, more particularly described in **Exhibit A** (the "Land"),

**TOGETHER WITH** all buildings, warehouses, mini-warehouses, foundations, parking structures, other structures, other improvements and fixtures erected, installed or located in, on or at the Land (the "Improvements");

**TOGETHER WITH** all of Grantor's right, title and interest, if any, in and to all easements, rights of way, and other rights appurtenant to the Land, and all of Grantor's right, title and interest, if any, in and to the land lying in the bed of any street or highway, opened or proposed, abutting, in front of or adjoining the Land, to the center line of such street or highway, and in and to any strips or gores abutting or adjacent to the Land;

**TOGETHER WITH** all of Grantor's right, title and interest, if any, in and to any award made or to be made in lieu thereof and in and to any unpaid award for damage to the Land by reason of change of grade or a closing of any such street or highway, together with all right, title and interest of, in and to any streets and roads abutting the Land;

**TOGETHER WITH** the appurtenances and all the estate and rights of Grantor in and to the Land and the Improvements (together, the "Premises");

**SUBJECT, HOWEVER, TO** all those certain encumbrances described in **Exhibit B** (the "Permitted Encumbrances");

**TO HAVE AND TO HOLD** the Premises, subject to the Permitted Encumbrances, unto Grantee and Grantee's legal representatives, heirs, successors and assigns forever.

Grantor further covenants that except as to leases previously disclosed to Grantee in writing and the Permitted Encumbrances: (a) Grantor is seized of the Premises in fee simple, and has good right to convey the same; (b) Grantee shall quietly enjoy the Premises; (c) the Premises are free from encumbrances; (d) Grantor will execute or procure any further necessary assurance of the title to the Premises; and (e) Grantor will forever warrant the title to the Premises.

If Grantee or any other person holds any mortgage(s) affecting the Premises (any of the foregoing, the "Mortgage"), the parties confirm that it is their intention that the Mortgage shall not merge into the fee interest conveyed hereby, but that such Mortgage shall remain as a good and valid mortgage, separate and apart from any other interest of the Grantee or any other person in the Premises.

This Deed is an absolute, present, unconditional and irrevocable conveyance of title, in effect as well as form, and is not intended as a mortgage, trust conveyance or security of any kind. There is no agreement for Grantee or anyone else to reconvey the Premises to Grantor under any circumstances whatsoever. This Deed is delivered pursuant to that certain Deed in Lieu of Foreclosure Agreement dated \_\_\_\_\_, 200\_\_, entered into between Grantor and \_\_\_\_\_, which agreement is incorporated by reference in this Deed.

Grantor agrees to execute any additional documents that Grantee may reasonably deem necessary or desirable in order to more fully effectuate the purposes hereof.

Grantor acknowledges, represents and confirms that by delivery of this Deed Grantor is not rendered insolvent and this Deed is not being delivered for the purpose of defrauding creditors or avoiding the payment of any just debt. Grantor further acknowledges that there is nothing unconscionable in this transaction; Grantor considers this transaction to be fair and equitable based on Grantor's determination of the value and financial condition of the Premises; and Grantor acts under no misapprehension as to the effect of this Deed, freely and voluntarily, and not under any coercion or duress.

All assurances and acknowledgments made by Grantor in this Deed are made to induce any title company to issue policies of title insurance affecting the Premises and are further made for the protection and benefit of Grantee and Grantee's successors and assigns, and all other persons who may hereafter acquire an interest in the Premises.

Grantor, in compliance with Section 13 of the Lien Law, covenants that Grantor will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will so apply the same before using any part of the total of the same for any other purpose.

The words "Grantor" and "Grantee" shall be construed as if they read "Grantors" or "Grantees" (respectively) whenever the sense of this Deed so requires.

[NEW YORK CORPORATE GRANTOR -- include one of the following sentences per BCL § 909 if Grantor is a corporation. Not necessary if Grantor is a partnership with a corporate general partner.] This conveyance is made in the regular course of business actually conducted by Grantor. The Premises do not constitute all or substantially all of the assets of Grantor. The shareholders of Grantor have duly authorized Grantor's disposition of the Premises in accordance with Business Corporation Law § 909.

**IN WITNESS WHEREOF**, Grantor has duly executed this Deed effective as of the Effective Date.

**NAME OF ENTITY**

By: \_\_\_\_\_

Its: \_\_\_\_\_

Attachments:

Acknowledgments

Exhibit A = Legal Description

Exhibit B = Permitted Encumbrances

**EXHIBIT E**

**FORM OF BORROWER'S OPINION OF COUNSEL**

[Lender Name and Address]

*Deed in Lieu of Foreclosure Agreement and Transfer Documents Dated \_\_\_\_\_*

We have acted as special counsel to \_\_\_\_\_, a \_\_\_\_\_ (the "Borrower") in connection with (a) the Deed in Lieu of Foreclosure Agreement dated \_\_\_\_\_, between \_\_\_\_\_, a \_\_\_\_\_ (the "Lender") and Borrower (the "Agreement") and (b) the Transfer Documents. All definitions in the Agreement apply here.

Borrower has requested that we deliver this letter to you, has consented to your reliance on this letter in executing the Agreement and accepting the Transfer Documents, and has waived any privity between Borrower and us in order to permit you to so rely on this letter. We understand and, with the consent of Borrower, consent to your so relying on this letter.

In our capacity as counsel to Borrower, we have examined the following (collectively, the "Documents"), all dated as of \_\_\_\_\_ unless otherwise expressly stated:

- A. The Agreement;
- B. The following documents executed by Borrower in favor of Transferee: Assignment of Contracts; Bill of Sale; and Deed (with the Agreement, the "Closing Documents");
- C. The "Organizational Documents," which for purposes of this letter consist of only the following of Borrower: Articles of Organization dated \_\_\_\_\_; Limited Liability Company Agreement dated \_\_\_\_\_; Foreign Limited Liability Company Registration in the State of \_\_\_\_\_, dated \_\_\_\_\_; and Certificate of Good Standing, issued by \_\_\_\_\_ Secretary of State on \_\_\_\_\_; and
- D. Such other documents, matters, statutes, ordinances, published rules and regulations, published judicial and governmental decisions interpreting or applying the same, and other official interpretations as we deem applicable in connection with this letter.

We have assumed, without investigation or inquiry, (i) the authenticity of all documents submitted to us as originals, (ii) the genuineness of all signatures (other than Borrower's), (iii) the legal capacity of natural persons and (iv) the conformity to the originals of all documents submitted to us as copies.

We have assumed, without investigation or inquiry, that: (a) all parties to the Documents except Borrower have all requisite power and authority to execute, deliver and perform their

respective obligations under each of the Documents to which they are party; and (b) the Agreement creates valid, binding and enforceable obligations of all parties except Borrower.

As to all questions of fact (except facts known to us) material to this letter we have relied upon (w) certificates or other comparable documents of Managing Member of Borrower or other representatives of Borrower, copies of which are attached as Exhibit A (the "Borrower's Certificate"); and (x) the representations and warranties of the parties in the Closing Documents, and (y) the relevant facts stated therein, all of which we have assumed to be true and complete. To our actual current knowledge, no information has come to our attention that would make our reliance set forth in this paragraph inaccurate or unreasonable.

We have assumed, without investigation or inquiry, that no party to any Transaction Document has been, or will be, a party to any fraud or illegality, or affected by any mistake that would permit any party to rescind any Transaction Document or related document or transaction or avoid any obligation under any Transaction Document.

Whenever any of the phrases "to our current actual knowledge," "to our knowledge" or "known to us" appears in this letter, it means, unless otherwise expressly stated herein, that no attorney who has (i) participated in the negotiation of the Transaction Documents or otherwise devoted substantive attention to the legal representation of Borrower on behalf of this firm within the last 12 months and (ii) who is currently employed by the firm, has any conscious awareness of facts or other information which indicates that any such statement covered by this letter is inaccurate. Unless otherwise expressly stated herein, we have made no examination of public records (including, without limitation, plaintiff or defendant indices of any state or federal court), whether or not such an examination or investigation might otherwise be reasonable or prudent, and we have not undertaken any independent investigation to determine the existence or non-existence of any factual matters.

"Material Contract" means those agreements, indentures, mortgages, leases, notes or other obligations or instruments described in an exhibit to the applicable Borrower's Certificate, certified to us as constituting a complete list of all of such instruments that are material to operation of Borrower's business.

On the basis of the foregoing and in reliance thereon, and on the basis of such other matters as we deemed relevant under the circumstances, and upon consideration of applicable \_\_\_\_\_ (the "State") and United States federal laws, subject to the limitations, qualifications and assumptions set forth herein, we are of the opinion that as of the date hereof;

(1) Based solely upon the applicable good standing certificates, copies of which are attached as Exhibit B, Borrower is a \_\_\_\_\_, duly organized, validly existing and in good standing under the laws of \_\_\_\_\_ and qualified to transact business in the State.

(2) Borrower has duly executed and delivered the Closing Documents. The individuals executing the Closing Documents for Borrower have the authority and legal capacity to do so.

(3) Borrower's execution and delivery of, and performance under, the Closing Documents, and consummation of the transactions they contemplate: (a) have all been duly and validly authorized by all necessary limited liability company action of Borrower; and (b) do not violate the Organizational Documents.

(4) Based solely upon (a) our knowledge and (b) Borrower's Certificate, the execution and delivery of, and performance under, the Closing Documents will not (i) cause Borrower to be in violation of, or constitute a material default under the provisions of any Material Contract, (ii) conflict with, or result in the breach of, any court judgment, decree or order of any governmental body to which Borrower is subject, (iii) contravene any law, statute or regulation of the United States of America or the State or any agency or subdivision known to us to apply to Borrower, (iv) violate any order, writ, injunction, or decree of which we have current actual knowledge, issued by any court or governmental authority of the United States of America or the State and known to us to apply to Borrower,

(5) Based solely on (a) our knowledge and (b) Borrower's Certificate, no authorization, consent, approval, or other action by, or filing with, any State or federal court or governmental authority is required in connection with Borrower's execution and delivery of, or performance under, the Closing Documents.

\* \* \* \*

We have not been requested to opine, and we have not opined, as to any issues other than those expressly set forth herein. In rendering this letter, our review has been limited to laws, rules and regulations currently in effect which we believe (based on our experience with similar transactions) should apply to those transactions contemplated by the Closing Documents, and we have not made any special investigation concerning any other law, rule or regulation.

We are attorneys licensed to practice law in the State and we do not purport to be experts as to the law of any jurisdiction other than the State or the federal law of the United States of America; accordingly, our opinions extend only to questions of law of such jurisdictions.

The opinions expressed herein are subject to statutory, regulatory, and case law developments after the date hereof. This letter is limited to facts and applicable law in existence as of the date hereof. We do not undertake and expressly disavow any duty or obligation to advise you of any change in facts or applicable law after the date hereof, whether or not relating to the specific issues addressed in this letter. You may not rely upon us in any respect for continuing advice about changes in applicable law or facts after the date of this letter.



This letter is solely for the benefit of the addressee hereof and its successors and assigns, loan participants, regulators, auditors, subsequent purchasers and the benefit of their counsel, in connection with the transactions contemplated by the Agreement. This letter may not be relied upon by any other person or for any other purpose without our prior written consent.

Very truly yours,

Attachments:

Exhibit A – Borrower’s Certificate(s)

Exhibit B – Good Standing Certificate(s)