**MODIFICATIONS TO MULTIFAMILY LOAN AND SECURITY AGREEMENT**

**(SPE Recourse)**

**[DRAFTING NOTE: If the MORTGAGE loan is a conventional DUS flow loan of $100MM or more and 70% LTV or greater, then Borrower (AND ITS OWNERS) MAY BE REQUIRED TO BE AN SPE AS SET FORTH IN THE FANNIE MAE RESPONSE LETTER. IF REQUIRED, LENDER MUST DETERMINE THAT BORROWER IS a SINGLE PURPOSE ENTITY IN COMPLIANCE WITH THE REPRESENTATIONS AND GUIDANCE BELOW. IN ADDITION, LENDER MUST DETERMINE WHETHER BORROWER’S managing member, sole member, OR general partner (AS APPLICABLE) AND ANY OF THEIR CONTROLLING OWNERS (AS APPLICABLE) ARE REQUIRED TO BE SINGLE PURPOSE ENTITies (or maintain springing members). FOR EACH SINGLE PURPOSE ENTITY, LENDER MUST CONFIRM THAT SUCH ENTIty’s ORGANIZATIONAL DOCUMENTS INCLUDE THE SINGLE PURPOSE COVENANTS SET FORTH HEREIN. WHERE SPRINGING MEMBER(S) ARE REQUIRED, BORROWER’S LOCAL COUNSEL MUST CONFIRM THAT SUCH ENTITy’s OPERATING AGREEMENT INCLUDES APPROPRIATE “SPRINGING” MEMBER LANGUAGE AND, FOR ANY non-delaware llc, PROvIDE AN OPINION THAT THE OPERATING AGREEMENT IS ENFORCEABLE AGAINST BORROWER AND SOLE MEMBER. LENDER MUST REVIEW BORROWER’S AND ALL CONTROLLING OWNERS’ ORGANIZATIONAL DOCUMENTS TO MAKE THE DETERMINATION WHETHER THIS MODIFICATION MAY BE USED. IF BORROWER IS REQUIRED TO BE AN SPE FOLLOW THE GUIDANCE BELOW.]**

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| --- | --- |
| If Borrower is a corporation or multi-member LLC | The shareholders/members of Borrower are not required to be SPEs. |
| If Borrower is an LP | Borrower’s GP must be an SPE. GPs may not be individuals or trusts.  If Borrower’s GP is an LP, then the GP must also be an SPE (SPE requirement continues up the chain for each GP that is an LP until a GP is a multi-member LLC or a corporation).  If Borrower’s GP is a single member LLC, follow the rules below. |
| If Borrower is a single-member LLC | The sole member of Borrower is required to be an SPE unless:  (A) (i) Borrower maintains a springing member (two, if any springing member is an individual), **AND** (ii) Borrower’s LLC operating agreement contains language to prevent premature dissolution/liquidation, **AND** (iii) for non-Delaware single-member LLCs only, Borrower’s counsel provides an opinion (acceptable to Lender and Fannie Mae counsel) that the LLC operating agreement relating to the springing member and dissolution is sufficient to prevent dissolution after the sole member ceases to be a member under applicable law and is enforceable against Borrower and its sole member; **OR** (B) the sole member is an individual and Borrower maintains a springing member (two, if any springing member is an individual).  Note that Borrower may, alternatively, add an additional regular member and become a multi-member LLC. Controlling Trusts are not required to be SPEs. |

**EXHIBIT [\_\_]**

**MODIFICATIONS TO MULTIFAMILY LOAN AND SECURITY AGREEMENT**

**(SPE Recourse)**

The foregoing Loan Agreement is hereby modified as follows:

1. Capitalized terms used and not specifically defined herein have the meanings given to such terms in the Loan Agreement.
2. The Definitions Schedule is hereby amended by adding the following new definitions in the appropriate alphabetical order:

“**Hedging Arrangement**” means any interest rate swap, interest rate cap or other arrangement, contractual or otherwise, which has the effect of an interest rate swap or interest rate cap or which otherwise (directly or indirectly, derivatively or synthetically) hedges interest rate risk associated with being a debtor of variable rate debt or any agreement or other arrangement to enter into any of the above on a future date or after the occurrence of one or more events in the future.

1. Section 3.02(a) (Personal Liability Based on Lender’s Loss) of the Loan Agreement is amended by adding the following provision to the end thereof:

[(\_\_)] failure to comply with each of the single purpose requirements of Section 4.02(d)(3), (4), (7)-(12), **[**and**]** (14)-(16) **[DRAFTING NOTE: INSERT “and (18)” IF SPRINGING MEMBERS OR MULTI-MEMBERS ARE REQUIRED]** of this Loan Agreement (subject to possible full recourse liability as set forth in Section 3.02(b)(1)); provided, however, no such recourse liability shall arise until the expiration of the cure periods set forth in this Section 3.02(a)[(\_\_)] (Personal Liability Based on Lender’s Loss). Borrower must deliver on an annual basis or upon Lender’s written request, a certification as to compliance with the covenants set forth in Section 4.02(d). If Borrower breaches a covenant set forth in Section 4.02(d), then, if such breach can be cured, Borrower shall have thirty (30) days from the earliest of (A) the date of delivery of the annual certification delivered pursuant to Section 8.02(b) indicating such breach, (B) the date Lender notices Borrower of such breach, or (C) the date Borrower discovers such breach, to cure such breach, provided that if such breach can be cured but cannot reasonably be cured within such thirty (30) day period and Borrower shall have commenced to cure such breach within such thirty (30) day period and thereafter diligently and expeditiously proceeds to cure the same, such thirty (30) day period shall be extended for so long as it shall require Borrower in the exercise of due diligence to cure such breach, it being agreed that no such extension shall be for a period in excess of sixty (60) days for any individual breach.

1. Section 3.02(b) (Full Personal Liability for Mortgage Loan) of the Loan Agreement is amended by replacing Section 3.02(b)(1) thereof with the following:

(1) failure to comply with each of the single purpose requirements of:

(A) Section 4.02(d)(1), (2), (5), (6), (13) and (17) of this Loan Agreement; and

(B) Section 4.02(d)(3), (4), (7)-(12), **[**and**]** (14)-(16) **[DRAFTING NOTE: INSERT “and (18)” IF SPRINGING MEMBERS OR MULTI-MEMBERS ARE REQUIRED]** of this Loan Agreement and, pursuant to a final non-appealable court order, a court of competent jurisdiction holds or determines that such failure or combination of failures is the basis, in whole or in part, for the substantive consolidation of the assets and liabilities of Borrower with the assets and liabilities of a debtor pursuant to Title 11 of the Bankruptcy Code;

1. Section 4.01(h) (Borrower Status – Representations and Warranties – Borrower Single Asset Status) of the Loan Agreement is deleted in its entirety and replaced with the following:

**(h) Single Purpose Status.**

Each of Borrower and its **[managing member] [sole member] [general partner] [other controlling entities] [DRAFTING NOTE:** **REVIEW ORGANIZATIONAL STRUCTURE AND INSERT APPROPRIATE ENTITIES IN ACCORDANCE WITH FANNIE MAE SPE GUIDANCE]** at all times since its formation:

* + - 1. has not acquired, held, owned, leased, developed, or improved, and does not own or lease any real property, personal property, or assets other than the Mortgaged Property or equity interests in a Person that owns the Mortgaged Property;
      2. has not acquired or owned and does not own, operate, or participate in any business other than the leasing, ownership, management, operation, and maintenance of the Mortgaged Property;
      3. has no material financial obligation under or secured by any indenture, mortgage, deed of trust, deed to secure debt, loan agreement, or other agreement or instrument to which Borrower is a party, or by which Borrower is otherwise bound, or to which the Mortgaged Property is subject or by which it is otherwise encumbered, other than:
         1. Permitted Equipment Financing and unsecured trade payables incurred in the ordinary course of the operation of the Mortgaged Property (exclusive of amounts for rehabilitation, restoration, repairs, or replacements of the Mortgaged Property) that are not evidenced by a promissory note, are payable within sixty (60) days of the date incurred, and as of the Effective Date, do not exceed, in the aggregate, four percent (4%) of the original principal balance of the Mortgage Loan;
         2. if the Security Instrument grants a lien on a leasehold estate, Borrower’s obligations as lessee under the ground lease creating such leasehold estate;
         3. obligations under the Loan Documents and obligations secured by the Mortgaged Property to the extent permitted by the Loan Documents; and
         4. obligations under the Permitted Encumbrances;
      4. has maintained its financial statements, accounting records, and other partnership, real estate investment trust, limited liability company, or corporate documents, as the case may be, separate from those of any other Person and has not listed its assets on the financial statement of any other Person (unless Borrower’s assets have been included in a consolidated financial statement prepared in accordance with generally accepted accounting principles);
      5. has not commingled its assets or funds with those of any other Person, and has held all its assets or funds under its own name, unless such assets or funds can easily be segregated and identified in the ordinary course of business and in such a manner that it will not be costly or difficult to segregate, ascertain, or identify its individual assets from those of any other Person;
      6. has been adequately capitalized in light of its contemplated business operations;
      7. has not assumed, guaranteed, or become obligated for the liabilities or obligations of any other Person or pledged its assets for the benefit of any other Person (except in connection with the Mortgage Loan or other mortgage loans that have been paid in full or collaterally assigned to Lender, including in connection with any Consolidation, Extension and Modification Agreement or similar instrument), or held out its credit as being available to satisfy the obligations of any other Person;
      8. has not made loans or advances to any other Person;
      9. has not entered into, and is not a party to, any transaction with any Borrower Affiliate, except in the ordinary course of business and on terms which are no more favorable to any such Borrower Affiliate than would be obtained in a comparable arm’s-length transaction with an unrelated third party;
      10. has not sought and has no plans to Divide at any time during the Loan Term;
      11. has not acquired obligations or securities of any other Person;
      12. has paid its own liabilities, including the salaries of its own employees, if any, from its own funds and maintained a sufficient number of employees in light of its contemplated business operations;
      13. has not failed to hold itself out to the public as a legal entity separate and distinct from any other Person or to conduct its business solely in its own name or failed to correct any known misunderstanding regarding its separate identity;
      14. has allocated fairly and reasonably any overhead for shared expenses;
      15. has maintained its existence as an entity duly organized, validly existing, and in good standing (if applicable) under the laws of the jurisdiction of its formation or organization and has done all things necessary to observe organizational formalities;
      16. has not, other than the **[managing member’s] [sole member’s] [general partner’s] [other controlling entities’] [DRAFTING NOTE:** **REVIEW ORGANIZATIONAL STRUCTURE AND INSERT APPROPRIATE ENTITIES IN ACCORDANCE WITH FANNIE MAE SPE GUIDANCE]** ownership interest in Borrower, owned any subsidiary or made any investment in any Person without the prior written consent of Lender; and
      17. without the prior written consent of Lender, or unless otherwise required or permitted by an interest rate cap security agreement approved by Lender, has not entered into or guaranteed, provided security for, or otherwise undertaken any form of contingent obligation with respect to any Hedging Arrangement.

1. Section 4.01(a) (Borrower Status – Representations and Warranties) of the Loan Agreement is amended by adding the following provision to the end thereof:

[(\_\_)] The organizational documents of Borrower **[and Borrower’s]** **[managing member] [sole member] [general partner] [**and**] [insert other entities controlling Borrower] [DRAFTING NOTE:** **REVIEW ORGANIZATIONAL STRUCTURE AND INSERT APPROPRIATE ENTITIES IN ACCORDANCE WITH FANNIE MAE SPE GUIDANCE]** require Borrower **[and Borrower’s]** **[managing member] [sole member] [general partner] [**and**] [insert other entities controlling Borrower] [DRAFTING NOTE:** **REVIEW ORGANIZATIONAL STRUCTURE AND INSERT APPROPRIATE ENTITIES IN ACCORDANCE WITH FANNIE MAE SPE GUIDANCE]** to comply with the provisions of Section 4.02(d) of this Loan Agreement.

1. Section 4.02(a)(1) (Maintenance of Existence; Organizational Documents) of the Loan Agreement is deleted in its entirety and replaced with the following:

(1) make or allow any material change to the organizational documents or organizational structure of Borrower, including changes relating to the Control of Borrower or changes relating to compliance with the provisions of Section 4.02(d), or

1. Section 4.02(d) (Borrower Status – Covenants – Single Purpose Status) of the Loan Agreement is deleted in its entirety and replaced with the following:

**(d) Single Purpose Status.**

Each of Borrower **[and its]** **[managing member] [sole member] [general partner] [**and**] [insert other entities controlling Borrower] [DRAFTING NOTE: REVIEW ORGANIZATIONAL STRUCTURE AND INSERT APPROPRIATE ENTITIES IN ACCORDANCE WITH FANNIE MAE SPE GUIDANCE]**:

* + - 1. shall not acquire, hold, develop, lease, or improve any real property, personal property, or assets other than the Mortgaged Property, or equity interests in a Person that owns the Mortgaged Property;
      2. shall not acquire, own, operate, or participate in any business other than the leasing, ownership, management, operation, and maintenance of the Mortgaged Property;
      3. shall not commingle its assets or funds with those of any other Person, unless such assets or funds can easily be segregated and identified in the ordinary course of business from those of any other Person;
      4. shall maintain its financial statements, accounting records, and other partnership, real estate investment trust, limited liability company, or corporate documents, as the case may be, separate from those of any other Person (unless Borrower’s assets are included in a consolidated financial statement prepared in accordance with generally accepted accounting principles);
      5. shall have no material financial obligation under any indenture, mortgage, deed of trust, deed to secure debt, loan agreement, other agreement or instrument to which Borrower is a party or by which Borrower is otherwise bound, or to which the Mortgaged Property is subject or by which it is otherwise encumbered, other than:
         1. Permitted Equipment Financing or unsecured trade payables incurred in the ordinary course of the operation of the Mortgaged Property (exclusive of amounts to be paid out of the Replacement Reserve Account or Repairs Escrow Account, or for rehabilitation, restoration, repairs, or replacements of the Mortgaged Property or otherwise approved by Lender) so long as such trade payables are not evidenced by a promissory note, are payable within sixty (60) days of the date incurred, and as of any date, do not exceed, in the aggregate, two percent (2%) of the original principal balance of the Mortgage Loan; provided, however, that otherwise compliant outstanding trade payables may exceed two percent (2%) up to an aggregate amount of four percent (4%) of the original principal balance of the Mortgage Loan for a period (beginning on or after the Effective Date) not to exceed ninety (90) consecutive days;
         2. if the Security Instrument grants a lien on a leasehold estate, Borrower’s obligations as lessee under the ground lease creating such leasehold estate;
         3. obligations under the Loan Documents and obligations secured by the Mortgaged Property to the extent permitted by the Loan Documents; and
         4. obligations under the Permitted Encumbrances;
      6. shall not assume, guaranty, or become obligated for the liabilities or obligations of any other Person, or pledge its assets for the benefit of any other Person (except in connection with the Mortgage Loan or other mortgage loans that have been paid in full or collaterally assigned to Lender, including in connection with any Consolidation, Extension and Modification Agreement or similar instrument) or hold out its credit as being available to satisfy the obligations of any other Person;
      7. shall not make loans or advances to any other Person;
      8. shall not enter into, or become a party to, any transaction with any Borrower Affiliate, except in the ordinary course of business and on terms which are no more favorable to any such Borrower Affiliate than would be obtained in a comparable arm’s‑length transaction with an unrelated third party;
      9. shall not acquire obligations or securities of any other Person;
      10. shall pay (or shall cause the property manager on behalf of Borrower from Borrower’s own funds to pay) its own liabilities, including the salaries of its own employees, if any, from its own funds and maintain a sufficient number of employees in light of its contemplated business operations;
      11. shall not fail to hold itself out to the public as a legal entity separate and distinct from any other Person or to conduct its business solely in its own name or fail to correct any known misunderstanding regarding its separate identity;
      12. shall allocate fairly and reasonably any overhead for shared expenses;
      13. shall maintain its existence as an entity duly organized and validly existing, under the laws of the jurisdiction of its formation;
      14. shall be in good standing (if applicable) under the laws of the jurisdiction of its formation or organization;
      15. shall not**[, other than** **[managing member’s] [sole member’s] [general partner’s] [other controlling entities’] [DRAFTING NOTE:** **REVIEW ORGANIZATIONAL STRUCTURE AND INSERT APPROPRIATE ENTITIES IN ACCORDANCE WITH FANNIE MAE SPE GUIDANCE]** **ownership interest in Borrower,]** own any subsidiary or make any investment in any Person without the prior written consent of Lender;
      16. without the prior written consent of Lender, or unless otherwise required or permitted by an interest rate cap security agreement approved by Lender, shall not enter into or guarantee, provide security for, or otherwise undertake any form of contingent obligation with respect to any Hedging Arrangement; **[and]**
      17. shall not Divide**[.] [; and]**
      18. **[DRAFTING NOTE: INSERT THIS SUBSECTION (18) IF AN LLC BORROWER OR ANY CONTROLLING LLC ENTITY IS REQUIRED TO HAVE ONE OR MORE SPRINGING MEMBERS]** if [**Borrower,]** **[Borrower’s]** **[managing member] [sole member] [**and**] [insert other LLC entities controlling Borrower] [DRAFTING NOTE:** **REVIEW ORGANIZATIONAL STRUCTURE AND INSERT APPROPRIATE ENTITIES]** has [have] only one member as of the Effective Date, [**Borrower]** **[Borrower’s]** **[managing member] [sole member] [**and**] [insert other LLC entities controlling Borrower] [DRAFTING NOTE:** **REVIEW ORGANIZATIONAL STRUCTURE AND INSERT APPROPRIATE ENTITY(IES)]** shall maintain organizational documents which provide that upon the occurrence of any event that causes its sole member to cease to be a member while the Mortgage Loan is outstanding, (A) at least one of two special members will automatically be admitted as the sole member of **[Borrower] [such entity]** and (B) such admittance will preserve and continue the existence of **[Borrower] [such entity]** without dissolution.

**OR**

**[DRAFTING NOTE: INSERT THIS SUBSECTION (18) IF AN LLC BORROWER OR ANY CONTROLLING LLC ENTITY IS REQUIRED TO MAINTAIN TWO OR MORE MEMBERS TO COMPLY WITH THE SPE GUIDANCE]** if [**Borrower]** **[Borrower’s]** **[managing member] [sole member] [**and**] [insert other LLC entities controlling Borrower] [DRAFTING NOTE:** **REVIEW ORGANIZATIONAL STRUCTURE AND INSERT APPROPRIATE ENTITIES]** has two or more members as of the Effective Date, **[Borrower]** **[managing member] [sole member] [other controlling entities] [DRAFTING NOTE:** **REVIEW ORGANIZATIONAL STRUCTURE AND INSERT APPROPRIATE ENTITY(IES)]** shall maintain at least two members at all times and at no time shall become a single-member limited liability company.

1. Section 8.02(b) (Items to Furnish to Lender) of the Loan Agreement is hereby amended by adding the following provision to the end thereof:

[(\_\_)] Borrower shall furnish to Lender within one hundred twenty (120) days after the end of each Calendar Year, or upon Lender’s written request, a certification stating whether or not Borrower **[and DRAFTING NOTE: INSERT ANY CONTROLLING ENTITIES REQUIRED TO COMPLY WITH THE SPE COVENANTS IN SECTION 4.02(d)]** is **[are]** in compliance with the covenants set forth in Section 4.02(d) and, if not in compliance, setting forth the particulars of such noncompliance and the steps that Borrower **[and DRAFTING NOTE: INSERT ANY CONTROLLING ENTITIES REQUIRED TO COMPLY WITH THE SPE COVENANTS IN SECTION 4.02(d)]** has **[have]** taken, are taking or intend to take to cure such noncompliance.

**[Remainder of Page Intentionally Blank]**