

The Nuts and Bolts of Negotiating Nonrecourse Carve outs (with Sample Provisions)



James H. Schwarz is a partner with the Real Estate & Environmental Practice Group of Benesch, Friedlander, Coplan & Aronoff LLP, in Indianapolis, Indiana. Mr. Schwarz has acted as developer's counsel in connection with the development and financing of the largest shopping mall in the United States, the Mall of America. Mr. Schwarz has represented real estate developers in the

acquisition, development, financing, leasing and sale of real estate.

Linda A. Striefsky is a partner in the Real Estate practice group of Thompson Hine, in Cleveland, Ohio. She is co-chair of the Real Estate Finance Team and chair of the firm's Global Sourcing & Procurement team. She focuses her practice on acquisitions and sales; real estate financing, including real estate investment trusts and multi-state financing transactions; corporate facilities management, including out-sourcing contracts; leases (including oil and gas leases), easement and related agreements; real estate taxes, including tax complaints, exemptions and abatement. She is a past president of The American College of Real Estate Lawyers.

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James H. Schwarz and Linda A. Striefsky

CMBS loan documentation is not set in stone. Counsel for borrowers should make the effort to negotiate the nonrecourse carve out provisions, especially in light of case law imposing liability on guarantors.

IN THE AFTERMATH of cases such as *Cherryland* and *Gratiot*, which held that nonrecourse carve out provisions in real estate mortgage loans were enforceable against borrowers and guarantors, and the more recent ramp-up of CMBS lending, borrowers, lenders, servicers and rating agencies are reviewing and reconsidering the proper role of nonrecourse carve outs.¹ The purpose of the discussion for which this article was prepared was to review briefly the state of the current case law and to examine sample language from loan documents that reflect reactions of borrowers and lenders to these developments in nonrecourse carve out provisions. Our focus was drafting that allows borrowers and lenders to avoid the unexpected results of recent cases, while preserving the bargain of the parties as to recourse for the loan.

¹ *Wells Fargo Bank, NA v. Cherryland Mall Limited Partnership*, 812 N.W.2d 799 (Mich. Ct. App. 2011); *51382 Gratiot Avenue Holdings, LLC v. Chesterfield Development Co., LLC*, 835 F. Supp.2d 384 (E.D.Mich. 2011), appeal dismissed by stipulation of the parties April 19, 2012.

The case law teaches the lesson that if a borrower is willing to test the limits of these provisions or try to delay the proceedings in which the lender seeks to realize on its collateral, servicers are not afraid to go after the guarantors and seek full recourse liability. These cases stand for the proposition that sometimes it is in the best interest of your client to turn over the property quickly and obtain a full release of the guaranty at such time.

Finally, these cases make it clear that even if a borrower “cures” a breach of the non-recourse provisions prior to a default situation, a court will still impose full recourse liability.

Exhibits A through E to this article include sample nonrecourse carve out, or limitation of liability, provisions from mortgage loan documents.

BACKGROUND • Broadly speaking, whether a loan is secured or not, the lender expects that the borrower will repay the loan in full; otherwise, the loan would not be made. When a lender makes a *secured* real estate loan, the lender receives a mortgage and security interests in specific collateral which can be foreclosed to mitigate the lender’s losses if there is a default.

Notwithstanding the real estate collateral, some secured real estate loans are full recourse, meaning that the borrower, and often also one or more guarantors, are liable for the repayment. A common example is a construction loan, for which the borrower typically has full personal liability, but which typically also has a guaranty of payment and of completion under which the guarantor also agrees to full liability.

For many non-construction real estate loans, however, the lender agrees to make a nonrecourse loan. In the case of a nonrecourse loan, the lender agrees, in the event of default, to look only to the collateral for repayment of the loan. This approach arose initially out of federal tax considerations, but is now a fairly common practice without regard to

whether the borrower has a tax concern with a full recourse loan.

Flavors of Nonrecourse

Typically, if a loan is “nonrecourse,” the limitation of liability for the borrower and guarantor will be on a spectrum. If all goes well, or close to it, the lender’s recourse is limited to the collateral. Certain events will lead to full recourse against the borrower and guarantor. In the case of other events, the lender may have the right to seek personal liability against the borrower and guarantor for damages suffered, plus of course the expenses of collection.

Who Are the Parties?

Beyond the obvious considerations of relative leverage of the parties, a balance sheet lender will take a different approach to nonrecourse carve outs than a CMBS lender. Both will be concerned about “bad acts,” such as fraud or misapplication of insurance proceeds or rents, which cause or exacerbate losses to the lender.

The CMBS loan paradigm goes beyond the “bad acts,” focusing on avoiding interruption of cash flow; requiring disclosure of information up front and during the loan; and minimizing the risk of bankruptcy and insolvency. Accordingly, the CMBS lender aims to lock down the collateral (no transfers or junior liens; cash management); requires financial and other reporting, not just before the closing but throughout the loan; and requires a bankruptcy-remote, single-purpose entity (“SPE”) as the borrower. In connection with the SPE issues, CMBS lenders also require that the borrower agree to specific “separateness” covenants, which are intended to reduce the risk of substantive consolidation of the borrower with related entities.²

² See Samantha J. Rothman, Note, *Lessons From General Growth Properties: The Future of the Special Purpose Entity*, 17 Fordham J. Corp. & Fin. L. 227 (2012).

As to the borrower side of this analysis, it is interesting to note that the focus on nonrecourse carve outs can be more than a little inconsistent with the notion of a borrower that satisfies the SPE and separateness covenants. If the borrower owns only the collateral encumbered by the loan documents and is not permitted to incur indebtedness beyond the mortgage loan, what would be the source of any repayment by the borrower of a loan that shifts to full or even partial recourse? This reality heightens the exposure of the guarantor, of course, as, if the conditions to continued limited liability are met, resulting in full recourse for the loan, the guarantor is the only party at the table against which the lender has any real chance of recovery for the now-recourse loan.

Enforceability of Nonrecourse Carve out Provisions

The recent cases concerning the enforceability of nonrecourse carve out provisions, such as *Cherryland* and *Gratiot*, have received considerable attention because the holdings turn on the insolvency of the borrowers caused by, roughly speaking, declines in market value, as opposed to “bad acts” by the borrowers.³ We assume our readers are familiar with these cases and therefore do not review them here. There also have been many other decisions regarding the enforceability of nonrecourse carve outs. Suffice it to say that, with few exceptions⁴, courts have enforced loan documents when the recourse provisions, whether full or partial, have been

³ See *Cherryland*, 812 N.W.2d 799; *Gratiot*, 835 F.Supp.2d 384; *Blue Hills Office Park LLC v. J.P. Morgan Chase Bank*, 477 F.Supp.366 (D. Mass. 2007); *CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC*, 980 A.2d 1 (NJ App. Div. 2009); *Bank of America, N.A. v. Laurence H. Freed et al*, 2012 WL 6725894 (Ill. App. Ct.) (Dec. 28, 2012).

⁴ For exceptions, see *GECCMC 2005-C1 Plummer Street Office Limited Partnership v. NRFC NNN Holdings, LLC*, 204 Cal. App. 4th 998 (Cal. App. 2d Dist. 2012); *Freed*, 2012 WL 6725894.

triggered.⁵ Accordingly, the legacy of the *Cherryland*-type cases is to reinforce the necessity for borrower scrutiny of the many representations, warranties, and covenants in the loan documents in light of the nonrecourse provisions, and to work towards final documents that appropriately reflect the nonrecourse nature of the loan.

FULL RE COURSE AND LIMITED RE COURSE PROVISIONS • This section will discuss the types of events that, pursuant to a lender’s draft of loan documents, typically trigger full or limited recourse. A later section in this article will discuss borrower approaches to negotiating changes to the recourse triggers.

Full Recourse

Loan documents for balance sheet loans and securitized loans include events that result in full recourse. Typically both types of loan documents provide for full recourse for these events:

- Borrower filing for bankruptcy;
- Involuntary filing for borrower bankruptcy which is not dismissed within a cure period, typically 90 days;
- Prohibited transfer of the collateral or an interest in borrower;
- Prohibited further encumbrance of the collateral or interests in borrower.

In addition, securitized loan documents call for full recourse for a long list of additional events, such as those listed below. Due to the focus on SPEs and separateness, the triggers often relate not only to borrower but to other parties in the required organizational chart, such as a single purpose manager or general partner of the borrower:

⁵ See also John C. Murray, *Enforceability of Carveouts to Nonrecourse Loans: Recent Cases*, available at: <http://www.acrel.org/Documents/Newsletters/ACRELNewsApril2012.pdf>.

- Borrower admits it is insolvent or is unable to pay its debts as they become due;
- Substantive consolidation occurs as to borrower;
- Borrower contests or opposes any lender motion for bankruptcy stay or other relief;
- Borrower initiates action to contest lender's exercise of remedies after a default;
- Borrower or Guarantor fails to comply with SPE or separateness covenants.

Limited Recourse Provisions

This section will discuss categories of nonrecourse carve outs, including how the approach taken in loan documents has evolved, and approaches borrowers may take in negotiations.

“Bad Boy” Acts

Both balance sheet loan documents and securitization loan documents include carve outs for damages due to so-called “bad boy” acts. Over time, the list of nonrecourse carve outs in this category has grown. While the expansion of items originated in the securitized loan market, balance sheet lenders have adopted many of the elements. The losses indemnified for these bad boy acts should be limited to actual damages incurred by the lender and carve out consequential or punitive damages and should not be applicable for acts of gross negligence or willful misconduct by the indemnified parties.

Here are the traditional bad boy acts, together with some expansions on the features:

- *Fraud*
- Traditional: Intentional, material misrepresentation or breach of warranty or fraud by borrower
- Expanded: Same, plus gross negligence or willful misconduct, by borrower, guarantor or any agent or representative
- *Misappropriation of funds*

- Traditional: acts of misappropriation of insurance or condemnation proceeds or rent; concern was, in part, borrower amassing a “war chest” in anticipation of default and/or bankruptcy filing
- Expanded: add misappropriation of security deposits, lease termination fees; deviations from any waterfall in the loan documents; failure to make payments such as taxes or insurance

Waste

- Traditional: physical waste
- Expanded: borrower omissions that hurt the collateral, such as failure to pay taxes or insurance

Environmental damages

- Traditional: Costs to remediate hazardous conditions or contest same
- Expanded: Broader definition of “hazardous materials” to include substances not clearly regulated (mold) and increased reporting requirements

It is interesting to note that these carve outs are inserted even when the lender requires a separate environmental indemnification agreement to be entered into by the borrower and guarantor.

Securitized Loans Add to Recourse Triggers

In addition to the addition of the focus on single purpose entities and separateness, documents for securitized loans include many other nonrecourse carve outs beyond those that, even now, are listed in documents for balance sheet loans. (Compare Exhibit C to the other Exhibits.) Here are some examples:

- Any borrower commission of a criminal act;
- Borrower's failure to permit inspection or to provide required financial or other reports;

- Borrower's failure to pay taxes or maintain insurance;
- Borrower's failure to pay other charges; this might include ground rents or REA charges;
- Borrower's failure to renew any required letter of credit;
- Borrower's failure to remove mechanics or similar liens (make sure that full recourse only applies to voluntary liens entered into by the borrower and not to liens filed by third parties);
- Borrower's collection of rents more than one month in advance; violation of leasing restrictions; or failure to turn over security deposits to lender upon an event of default;
- Borrower's payment of fees to affiliates in violation of loan documents;
- Borrower's breach of any representation or covenant as to environmental matters;
- Various borrower acts after an event of default, such as failure to pay transfer and recording taxes for foreclosure or deed in lieu; borrower claims that loan documents create joint venture or partnership with lender; interference with lender enforcement of assignment of rents;
- Misappropriation of funds disbursed to borrower from reserve accounts;
- Uninsured matters resulting from terrorism;
- Borrower's failure to appoint a new manager upon lender's request; and
- Borrower's failure to submit required financial and other reporting, with an expanded list of reporting requirements, such as all correspondence with tenants.

SUGGESTIONS FOR BORROWERS NEGOTIATING NONRECOURSE CARVE OUTS •

Although the *Cherryland* and similar cases on nonrecourse carve outs cast a pall over the borrower, and even the lender, communities, the good news is that, in a fairly prompt manner, lenders have revised loan documents to accommodate a more accurate reflection of the business understanding that underlies

nonrecourse financing. Recent anecdotal reports on loan negotiations indicate receptivity to a recognition that, at least in many scenarios, and absent true "bad acts" such as fraud or misrepresentation, the borrower and guarantor are not at risk for full recourse and even for limited recourse, if a default is due to lack of cash flow or other causes out of the control of the borrower and guarantor, and lenders will not insist on a representation that the borrower will always be solvent. As is discussed below, this softening of loan documents even extends to treatment of breaches of SPE covenants.

This section will discuss approaches borrowers may take to mitigate the risk of a result such as that faced by the borrower and/or guarantor in the *Cherryland* and similar cases.

Full Versus Limited Recourse

The *Cherryland* and *Gratiot* cases demonstrate that borrowers must consider carefully those events which trigger full recourse, versus those which trigger recourse limited to the lender's damages. This is crucial, because generally courts will not protect a borrower from the hammer of full recourse, even where the actual harm to the lender by the forbidden act is minimal.⁶

While borrowers may find it compelling to limit recourse for many carve outs to actual damages, in the years leading up to *Cherryland*, lenders have expanded the list of carve out triggers to achieve total and absolute shift of the risk of loss to the borrower and guarantor. As is discussed below, in the aftermath of *Cherryland*, this all-or-nothing approach has softened somewhat, particularly with respect to recourse triggered by a breach of the expansive list of SPE/separateness covenants.

SPE and Separateness

When considering the appropriateness of recourse for violations of SPE covenants, it is advan-

⁶ See *Blue Hills Office Park*, supra.

tageous to review the history of single purpose entity covenants and separateness covenants.

Re-read Rating Agency Requirements and Avoid “Drafting Creep”

The various rating agencies have published their respective requirements for single purpose entities and separateness.⁷ Over time, drafters have embellished the rating agency requirements in loan documents by adding features beyond those needed to meet rating agency requirements. Borrowers should object to extraneous additions to the laundry list as well as those the borrower does not follow in practice. For instance, SPE covenants often require that the borrower use its own stationary and have its own employees, but single-purpose entities which are affiliated with a major developer typically do not have separate stationary and rely on a management company to provide the personnel which operate the borrower’s property. Accordingly, the borrower should insist on deleting these covenants. Drafting “creep” can lead to longer lists with less relevance to the legitimate concern as to separateness.

Distinguish between SPE and Separateness Requirements

Lenders will insist on SPE and separateness covenants as necessary for bankruptcy remote borrower. Borrowers should re-focus on which loan document features are truly needed for bankruptcy remoteness (for non-consolidation opinion purposes, for instance).

⁷ See Standard & Poor’s U.S. CMBS Legal and Structured Finance Criteria: Special-Purpose Bankruptcy-Remote Entities (May 1, 2003, republished December 9, 2011), http://1stsss/referencematerials/SP_CMBS_Legal_and_Structured_Finance_Criteria.pdf, as supplemented by Standard and Poor’s, Assessing Borrower-Level Special-Purpose Entities in U.S. CMBS Pools: Methodology And Assumptions (November 16, 2012, republished November 28, 2011), <http://www.standardandpoors.com/prof/ratings/articles/en/us/?articleType=HTML&assetID=1245335064296>.

How Can You Change the Past?

It is not unusual for borrower sponsors to prefer to use recycled borrower entities for a new CMBS loan, as opposed to creating fresh borrower entities, in order to avoid expenses, such as transfer taxes, and the paperwork burden of the transfer of the collateral to a new entity. If a recycled entity is used, it’s important for the borrower to scrutinize the many SPE representations and warranties, focusing not only on whether the borrower is willing and able to make each representation on the closing date and for the future, but also on whether each representation is true as to the past. For instance, lenders often include in the SPE provisions a representation that the borrower *has not incurred* and will not incur indebtedness other than trade payables that must meet a list of conditions, including a cap at three percent of the new loan’s principal amount. How are tenant reimbursements, tenant improvement allowance and leasing commissions treated as part of “trade payables”? Is the cap based on the original principal amount of the loan or does it decrease as the loan is paid down? The standard provision also speaks of payment within 60 days of the date incurred. Shouldn’t this period be extended if the borrower in good faith desires to contest such amount? If the existing borrower entity did incur debt in excess of that amount in the past, and that debt is fully repaid, what is the risk to the lender? One could be forgiven for thinking, “Well, who could ever call a default for such a breach. It’s no harm, no foul.” But, as the guarantor in Princeton Park Corporate Center learned, the existence of a breach, even if cured well before the lender learned of it, is enough to result in full liability for breach of a carve out. Although the breach in the case of Princeton Park was a since-repaid second mortgage, the reasoning is instructive outside of the “prohibited lien” context.

Accordingly, borrowers should keep in mind that it is not possible to change the past, but it is advisable to disclose exceptions to representations

if one is unsuccessful in achieving deletion of those which are untrue.

What is Damage from Breach of Separateness Covenant?

Borrowers should seek to limit recourse for breach of a separateness covenant to the lender's damages, rather than full recourse. If that first choice is not attainable, alternatively, borrowers should argue that full recourse should occur only if substantive consolidation does in fact occur.

Post-*Cherryland*, lenders in fact have revised form documents to condition full recourse due to violation of SPE covenants upon a court determination that the breaches) at issue did in fact cause substantive consolidation. This approach has been taken by Freddie Mac and by a major originator of CMBS loans. See Exhibit D.

Collusive Bankruptcy

In connection with carve outs as to involuntary bankruptcy filings, lenders generally will agree to a carve out triggered by only borrower's collusion or borrower's failure to seek dismissal.

Criminal Acts

Lenders may agree to limit a carve out for borrower's commission of a criminal act to acts resulting in seizure or forfeiture of collateral. A borrower also should be wary of representations and covenants as to future acts of parties outside of the borrower's control. It's one thing for a borrower to covenant to take reasonable steps against a tenant who is engaged in criminal acts on the premises; it's another for a borrower to promise no tenant will commit any criminal act.

Solvency Representations and Covenants

Loan documents commonly include both a representation and an ongoing covenant as to borrower's solvency. It is understandable that the lender wants a representation that the borrower is solvent

at closing, but often loan documents provide that representations are ongoing or are automatically updated periodically. Instead, any such representation should specify that it is made only at closing.

Solvency Covenant

As a related matter, the form of solvency covenant requested by lender may be "Borrower will not become insolvent or fail to pay its debts and liabilities from its assets as the same shall become due." This was at issue in the *Chesterfield* case.⁸ While it could have been argued that the borrower in that case did not "fail to pay its liabilities from its assets as the same shall become due," given that it had no assets other than the collateral, the *Chesterfield* court rejected that approach.

What Solvency Covenant Does the Rating Agency Require?

Rating agencies do not appear to require a solvency covenant in separateness requirements.⁹

Limit Expense Obligations to Cash Flow

Borrower should be wary of covenants that could require borrower to fund the payment of expenses even absent cash flow from the property, or absent lender disbursement of funds (such as taxes or insurance premiums) from reserve accounts. For example, a covenant to avoid waste is common in loan documents. The borrower should be liable only for physical waste, and then only if there is sufficient cash flow available from the mortgaged

⁸ *Gratiot*, *supra*.

⁹ See Standard & Poor's *U.S. CMBS Legal and Structured Finance Criteria: Special-Purpose Bankruptcy-Remote Entities* (May 1, 2003, republished December 9, 2011), http://1stsss.com/referencematerials/SP_CMBS_Legal_and_Structured_Finance_Criteria.pdf, as supplemented by *Standard and Poors, Assessing Borrower-Level Special-Purpose Entities in U.S. CMBS Pools: Methodology And Assumptions* (November 16, 2012, republished November 28, 2011), <http://www.standardandpoors.com/prot/ratings/articles/en/us/?articleType=HTML&assetID=1245335064296>.

property. Similarly, covenants as to maintenance and repair, taxes, and insurance should be tied to availability of cash flow (freed of a lock box) and any breach should trigger only limited recourse.

That Which May Not Be Stated: Borrower Is Insolvent

The lender's draft of loan documents often includes a breach if the borrower admits it is insolvent. If such a provision does stay in the loan documents, borrower should exclude from the recourse trigger any communication to the lender, such as the often needed letter to the servicer advising that borrower does not expect to be able to make the maturity payment.

Inconsistent or Overlapping Covenants

In the decision in the ING Real Estate Finance case, the court refused to enforce a nonrecourse carve out.¹⁰ In this case, the borrower paid a tax bill 19 days late, resulting in a tax lien. This case illustrates the danger of unintended consequences due to overlapping provisions.

The loan documents included a 30-day cure period, and the borrower did cure by the deadline, but the lender argued that the "full recourse" provision governed. The full recourse provision was triggered if the borrower incurred any "Indebtedness," which was defined to include any obligations secured by a lien. In this case, the court held that the cure period was a specific provision and therefore governed over the general provision, and noted that, under New York law, a guaranty is construed in favor of the guarantor. The court also essentially applied a liquidated damages analysis; in this case the tax lien was under \$300,000, while the full liability was \$145 million. (This case is an outlier in a list of cases that generally hold for the lender when

considering whether nonrecourse provisions have been triggered.)

Beware Shorthand Cross-References

The borrower should seek clarity in cross-referencing to loan provisions that trigger recourse. In the *Cherryland* case, the loan documents referred to breach of the requirement that the borrower "maintain its status as a single purpose entity" as triggering full recourse. The casual cross-reference was found by the *Cherryland* court to encompass both SPE and separateness covenants.¹¹

Avoid Sweeping an Entire Section into a Nonrecourse Carve out

Similarly, a loan provision on a particular topic may include many covenants, major and minor. Do the parties truly intend that a breach of any of a list of covenants housed in the same section would trigger the recourse consequence? Consider a transfer provision that addresses permitted and prohibited transfers, and requires only notice of a permitted transfer. If "a breach of the transfer provisions" triggers full recourse, should that be the result if the only breach is a late notice of a permitted transfer of personal property or of a utility easement? Again, the borrower should scrutinize the loan document provisions and avoid unnecessarily broad cross references.

Property Management

The post-crash loan documents may include new features relating to property management, such as a lender right to require a change in the property manager and a nonrecourse carve out if borrower fails to comply with such a request. Since borrowers often retain a related property management firm, the borrower will not want to grant the lender the right to replace the manager absent an event of default.

¹⁰ *ING Real Estate Finance (USA) LLC v. Park Avenue Hotel Acquisition LLC*, 2010 WL 653972 (N.Y. Sup. Ct. Feb. 24, 2010).

¹¹ *Cherryland*, supra.

CONCLUSION • It is a reality of loan transactions that both lender and borrower must carefully review and negotiate the terms of the loan documents. While respecting the appropriate expectation of the lender for repayment, the documents also should respect the borrower's negotiated expectation for nonrecourse or limited recourse. A mutually acceptable balance is the goal and is achievable. The cases on nonrecourse carve outs reinforce the

importance to all parties of clearly drafted documents that reflect the negotiated deal, and in the wake of the cases there is a healthy, renewed focus on the intended versus unintended consequences of the drafting.

As a final reminder, we must note for borrowers that, for maximum effectiveness, the nonrecourse provisions, which are crucial to the borrower, must be negotiated at the term sheet or commitment letter stage.

Exhibit A
Securitized Loan - Nonrecourse Carve out Language
(Pre-*Cherryland* and Pre-Negotiations)

Section 12.1 Limitation on Liability.

Subject to the qualifications below, neither the Administrative Agent nor any Lender shall enforce the liability and obligation of Borrowers to perform and observe the Obligations by any action or proceeding wherein a money judgment shall be sought against Borrowers, except that Administrative Agent and the Lenders may bring a foreclosure action, an action for specific performance or any other appropriate action or proceeding to enable Administrative Agent and the Lenders to enforce and realize upon its interest under the Note, this Agreement, the Mortgage and the other Loan Documents, or in the Projects, or any other Collateral given to Administrative Agent and the Lenders pursuant to the Loan Documents; provided, however, that, except as specifically provided herein, any judgment in any such action or proceeding shall be enforceable against Borrowers only to the extent of Borrowers' interest in the Projects and in any other collateral given to Administrative Agent and the Lenders to secure the Obligations, and Administrative Agent and each Lender, as applicable, by accepting the Note, this Agreement, the Mortgage and the other Loan Documents, shall not sue for, seek or demand any deficiency judgment against Borrowers in any such action or proceeding under or by reason of or under or in connection with the Note, this Agreement, the Mortgage or the other Loan Documents.

The provisions of this Section 12.1 shall not, however: (i) constitute a waiver, release or impairment of any Obligation evidenced or secured by any of the Loan Documents; (ii) impair the right of Administrative Agent or any Lender to name any Borrower as a party defendant in any action or suit for foreclosure and sale under the Mortgage; (iii) affect the validity or enforceability of any guaranty made in connection with the Loan or any of the rights and remedies of Administrative Agent or any Lender thereunder; (iv) impair the right of Administrative Agent or any Lender to obtain the appointment of a receiver; (v) impair the enforcement of the Assignment of Leases and Rents; (vi) constitute a prohibition against Administrative Agent or any Lender to commence any appropriate action or proceeding in order for Administrative Agent or any Lender to exercise its remedies against the Projects; or (vii) constitute a waiver of the right of Administrative Agent or any Lender to enforce the liability and obligation of Borrowers, by money judgment

or otherwise, to the extent of any loss, damage, cost, expense, liability, claim or other obligation (including attorneys' fees and costs reasonably incurred), causes of action, suits, claims, demands and judgments of any nature or description whatsoever, which may be imposed upon, incurred by or awarded against Administrative Agent or any Lender or any affiliate thereof as a result of, arising out of or in connection with (and Borrowers shall be personally liable and shall indemnify Administrative Agent and such Lender for) the following:

- Any Borrower's commission of a criminal act;
- Borrowers' failure to permit on-site inspections of any Project or to provide the financial reports and other financial information, each as required by, and in accordance with the terms and provisions of, this Agreement and the other Loan Documents;
- The failure by Borrowers or any Borrower Party to apply any funds derived from the Projects, including Security Deposits, Adjusted Revenue, insurance proceeds and condemnation awards as required by the Loan Documents;
- Any misrepresentation by Borrowers or any Borrower Party made in or in connection with the Loan Documents or the Loan;
- Borrowers' collection of rents more than one month in advance or entering into or modifying or canceling Leases, or receipt of monies by Borrowers or any Borrower Party in connection with the modification or cancellation of any Leases, in violation of this Agreement or any of the other Loan Documents;
- Borrowers' interference with Administrative Agent's or any Lender's exercise of rights under the Assignment of Leases and Rents;
- Borrowers' failure to turn over to Administrative Agent all Security Deposits upon Administrative Agent's demand following an Event of Default;
- Borrowers' failure to timely renew any letter of credit issued in connection with the Loan;
- Borrowers' failure to maintain insurance as required by this Agreement or to pay any Taxes or assessments affecting the Projects;
- Damage or destruction to any Project caused by the acts or omissions of any Borrower, its agents, employees, or contractors;
- Any Borrower's failure to perform its obligations with respect to environmental matters under Article 4;
- Borrowers' failure to pay for any loss, liability or expense (including attorneys' fees) incurred by Administrative Agent or any Lender arising out of any claim or allegation made by Borrowers, their successors or assigns, or any creditor of any Borrower, that this Agreement or the transactions contemplated by the Loan Documents and the Environmental Indemnity Agreement establish a joint venture, partnership or other similar arrangement among Borrowers, the Administrative Agent, or any Lender;
- Any brokerage commission or finder's fees claimed in connection with the transactions contemplated by the Loan Documents;
- Uninsured damage to any Project resulting from acts of terrorism;
- The physical waste of any Project; or
- The removal or disposal of any personal property from any Project in which Administrative Agent or the Lenders have a security interest in violation of the terms and conditions of the Loan Documents.

Notwithstanding anything to the contrary in this Agreement, the Note or any of the Loan Documents, all of the Obligations shall be fully recourse to Borrowers and Borrowers shall be personally liable therefor in the event of: (i) any Sale or Pledge of any Project or any Borrower in breach of any of the covenants in this Agreement or the Mortgage; (ii) any Borrower's or Guarantor's failure to comply with the covenants in Section _____ hereof [SPE provisions]; (iii) the commission of fraud by any Borrower or any Borrower Party in connection with the Loan; or (iv) the filing by any Borrower or any Borrower Party or the filing against any Borrower or any Borrower Party by any Borrower, any Borrower Party or any Affiliate of any Borrower of any proceeding for relief under any federal or state bankruptcy, insolvency or receivership laws or any assignment for the benefit of creditors made by any Borrower or any Borrower Party or the consenting to, acquiescing in or joining in any such proceeding by any Borrower or Borrower Party. Borrowers also shall be personally liable to Administrative Agent and the Lenders for any and all attorneys' fees and expenses and court costs incurred by Administrative Agent and the Lenders in enforcing this Section 12.1 or otherwise incurred by Administrative Agent or any Lender in connection with any of the foregoing matters, regardless whether such matters are legal or equitable in nature or arise under tort or contract law. The limitation on the personal liability of Borrowers in this Section 12.1 shall not modify, diminish or discharge the personal liability of any Principal or Guarantor. Nothing herein shall be deemed to be a waiver of any right which Administrative Agent or any Lender may have under Sections 506(a), 506(b), 1111(b) or any other provision of the United States Bankruptcy Code, as such sections may be amended, or corresponding or superseding sections of the Bankruptcy Amendments and Federal Judgeship Act of 1984, to file a claim for the full amount due to Administrative Agent and the Lenders under the Loan Documents or to require that all collateral shall continue to secure the amounts due under the Loan Documents.

Exhibit B

Securitized Loan—Nonrecourse Carve out Language

(Pre-Cherryland and Pre-Negotiations)

Recourse Liabilities

- (a) Borrower acknowledges and agrees that the Loan shall be fully recourse to Borrower, subject to the limitation set forth in Section XX below, to the extent of any actual losses, costs, claims, expenses and damages (excluding exemplary, punitive, consequential and special damages) incurred by Lender (including reasonable attorneys' fees and other costs of enforcement and collection) arising out of or in connection with the following:
 - (i) Fraud or intentional misrepresentation by or on behalf of Borrower or Guarantor in connection with or relating to the Loan or the transactions contemplated by the Loan Documents;
 - (ii) The misappropriation (including application contrary to the requirements of this Agreement) by or on behalf of Borrower or Guarantor of (A) any Insurance Proceeds, (B) any Awards or other amounts received in connection with or relating to the Condemnation of the Property, (C) any Gross Revenues (including net sales proceeds, reserves, Rents, security deposits, advance deposits or any other deposits, Lease Termination Payments, and other

- revenues received in connection with or relating to the Property), or (D) any other amounts collected or received by or on behalf of Borrower or Guarantor, in each case, which are required to be delivered to Lender or paid into any reserve or other account in accordance with the provisions of the Loan Documents and to the extent such amounts are not (1) applied to the payment of the Loan, used to pay Approved Operating Expenses, or deposited into any reserve or other account under the control of Lender, in each case, in accordance with the provisions of the Loan Documents, or (2) otherwise applied in a manner expressly permitted or not restricted under the Loan Documents;
- (iii) Any forfeiture of, or material impairment of any material right under, all or any part of the Property or all or any part of any other Collateral, in each case, as a result of or in connection with the conduct by Borrower or Guarantor which is (A) criminal activity, (B) a Patriot Act Offense, or (C) a violation of the rules and regulations of OFAC;
 - (iv) Any physical waste of all or any part of the Property or all or any part of any other Collateral, in each case caused by or resulting from the willful misconduct of Borrower or Guarantor;
 - (v) Any damage to or the wrongful removal or destruction of all or any part of the Property or all or any part of any other Collateral, in each case, caused by or resulting from the willful misconduct of Borrower or Guarantor;
 - (vi) Failure by Borrower to pay any charges consented to by Borrower or Guarantor for labor or materials or other charges that can create Liens on the Property (other than Taxes and Insurance Premiums), in each case, to the extent that Borrower has funds available from the Operation of the Property, the Reserve or as Additional Advances, to pay such charges, provided such failure is not cured within the applicable grace or cure period, if any, set forth in the Loan Documents;
 - (vii) The voluntary creation or imposition of any Liens, or the agreement to create or impose any Liens, by Borrower or Guarantor on (x) all or any part of the Property or any other Collateral or any direct or indirect interest in the Property or any other Collateral, or (y) the direct or indirect interests in Borrower, at any level of ownership, in each case, without Lender's prior written consent, except, in each case, to the extent such Lien constitutes a Permitted Transfer or a Permitted Encumbrance or any of the matters described in Section XX;
 - (viii) Any Transfer of a direct or indirect interest in Borrower or in any Person owning a direct or indirect interest in Borrower without Lender's prior written consent to the extent such consent is required by this Agreement or any other Loan Document (other than a Permitted Transfer or a Permitted Encumbrance or any of the matters described in Section XX);
 - (ix) Any failure to comply in any material respect with the provisions of [SPE/BRE Provisions] of the Loan Agreement (other than any provision with respect to solvency or adequacy of capital);
 - (x) The breach of any representation, warranty, covenant or indemnification provision in the Environmental Indemnity or in any other Loan Document concerning environmental laws, hazardous substances and/or asbestos and/or any indemnification of Lender with respect thereto in any such document;

- (xi) Failure to pay when due any and all transfer taxes, deed stamps, intangible taxes, mortgage recording, stamp or similar taxes, or any other amounts in the nature of transfer taxes (collectively, "Transfer Taxes") required to be paid under applicable Legal Requirements in connection with the transfer of the Property and/or any legal or beneficial direct or indirect interest therein (A) to Borrower or Guarantor, (B) at the direction or with the consent of Borrower or Guarantor, or (C) with the consent of Borrower or Guarantor in connection with or relating to the transactions contemplated under the Loan Documents, but in each case excluding any such Transfer Taxes directly resulting from the exercise by Lender of its remedies under the Loan Documents (but for the avoidance of doubt, the Lien of the Mortgage will continue to secure such amounts) or any transfer pursuant to a deed-in-lieu or other proceeding or otherwise in a manner consistent with the provisions of the Loan Documents; and/or
 - (xii) [Alternative A]: if Borrower or Guarantor or any Affiliate of any of the foregoing, in connection with any enforcement action or exercise or assertion of any right or remedy by or on behalf of Lender under or in connection with the Guaranty, the Note, any Mortgage or any other Loan Document, seeks, a defense, judicial intervention or injunctive or other equitable relief of any kind, or asserts in a pleading filed in connection with a judicial proceeding any defense against Lender or any right in connection with any security for the Loan (provided, however, that good faith defenses raised by Borrower or Guarantor and/or any Affiliate of any of the foregoing shall not give rise to any liability under this clause).
 - (xiii) [Alternative B]: in connection with any enforcement action or exercise or assertion of any right or remedy by or on behalf of the Lender, under or in connection with its loan documents, seeks a defense, judicial intervention or injunctive or other equitable relief of any kind, or asserts in a pleading filed in connection with a judicial proceeding any defense against Lender or any right in connection with any security for the Loan, and a court of competent jurisdiction issues a final order (for which the appeal period expires without appeal or which is affirmed on appeal) finding that Borrower asserted such defense or sought judicial intervention or injunctive or equitable relief in each case in bad faith, on the basis of a frivolous position and with the intention and primary purpose of delaying the exercise of Lender's remedies.
- (b) Notwithstanding anything to the contrary in this Agreement or any of the other Loan Documents, the Obligations shall be fully recourse to Borrower in the event that any of the following occur: (i) the voluntary Transfer {covers both sales and encumbrances}, or the agreement to Transfer, by Borrower of a direct interest in the Collateral, in each case, without Lender's prior written consent to the extent such consent is required by this Agreement or any other Loan Document (but expressly excluding any Permitted Transfers or Permitted Encumbrances); (ii) Borrower or Guarantor files a voluntary petition under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law; (v) the filing of an involuntary petition against Borrower or Guarantor under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law by any other Person in which Borrower or Guarantor colludes with or otherwise assists such Person, and/or Borrower or Guarantor solicits or causes to be solicited petitioning creditors for any involuntary petition against

Borrower or Guarantor by any Person; (vi) Borrower or Guarantor files an answer consenting to, or otherwise acquiescing in, or joining in, any involuntary petition filed against it by any other Person under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law; (vii) Borrower or Guarantor, or any officer or director that Controls Borrower or Guarantor consents to, or acquiesces in, or joins in, an application for the appointment of a custodian, receiver, trustee or examiner for Borrower or Guarantor and/or any portion of the Collateral; or (viii) Borrower or Guarantor makes an assignment for the benefit of creditors or admits, in writing or in any legal proceeding (unless advised by counsel that failure to make such admission in a particular legal proceeding would be a violation of law), its insolvency or inability to pay its debts as they become due (provided, that if Borrower admits in writing to Lender that (x) Borrower cannot pay the Operating Expenses, (y) Borrower cannot pay its Obligations or (z) Borrower cannot refinance or repay the Debt on the Stated Maturity Date, and Borrower makes no other admission in writing other than those described in clauses (x) through (z) above, such admission shall not constitute Borrower's "admission in writing its insolvency or inability to pay its debts as they become due" pursuant to this Section XX).

- (c) Borrower acknowledges and agrees that Lender shall be entitled to enforce the liability and obligation of Borrower and Guarantor for any or all of the Recourse Liabilities by any action or proceeding wherein a money judgment shall be sought against Borrower or Guarantor, such rights being in addition to Lender's rights to bring a foreclosure action, an action for specific performance or any other appropriate action or proceeding to enable Lender to enforce and realize upon its interest under the Note, this Agreement, the Mortgage and the other Loan Documents, the Property, the Gross Revenues, the Reserve Funds or any other collateral granted, given, pledged or otherwise available to Lender pursuant to the Loan Documents.
- (d) Notwithstanding anything to the contrary in this Agreement or in any of the other Loan Documents, Lender shall not be deemed to have waived any right which Lender may have under Section 506(a), 506(b), 1111(b) or any other provisions of the Bankruptcy Code to file a claim for the full amount of the Obligations or to require that all collateral shall continue to secure all of the Obligations owing to Lender in accordance with the Loan Documents.

Exhibit C

Insurance Company Balance Sheet Loan—Nonrecourse Carve out Language (*Pre-Cherryland and Pre-Negotiations*)

Liability of Borrower.

- (a) Upon the occurrence of an Event of Default, except as provided in this Section 11 and similar provisions in any Loan Document or Affiliate Loan Document, Holder will look solely to the Property, the Assignment and the other security under the Loan Documents and the Affiliate Loan Documents for the repayment of the Loan and will not seek or enforce a deficiency judgment against Borrower or its mem-

bers. However, nothing contained in this section shall limit the rights of Holder to proceed against Borrower and/or the Liable Party: (i) to enforce any Leases entered into by Borrower or its affiliates as tenant, guarantees, or other agreements entered into by Borrower in a capacity other than as borrower; (ii) to recover damages for fraud, intentional material misrepresentation, intentional material breach of warranty or intentional physical waste; (iii) to recover any Condemnation Proceeds or Insurance Proceeds or other similar funds which have been misappropriated by Borrower or which, under the terms of the Loan Documents, should have been paid to Holder; (iv) to recover any tenant security deposits, tenant letters of credit or other deposits (which have not been properly applied by Borrower, as landlord, following a tenant default) or fees paid to Borrower that are part of the collateral for the Loan or prepaid rents for a period of more than 30 days which have not been delivered to Holder; (v) to recover Rents and Profits received by Borrower after the first day of the month in which an Event of Default occurs and prior to the date Holder acquires title to the Property which have not been applied to the Loan or in accordance with the Loan Documents to operating and maintenance expenses of the Property; (vi) to recover damages, costs and expenses arising from, or in connection with Article VI of the Security Instrument pertaining to hazardous materials or the Indemnity Agreement; (vii) to recover all out-of-pocket expenses incurred by Holder after the occurrence of an Event of Default in realizing upon the Property or any other collateral for the Loan to the extent such expenses are incurred as a consequence of the acts of Borrower in resisting or interfering with the foreclosure process; (viii) to recover damages arising from Borrower's failure to comply with Section 8.01 of the Security Instrument pertaining to ERISA; and/or (ix) to recover any Impositions or Premiums not paid by Borrower to the extent Borrower is not required to pay Impositions or Premiums directly to Holder pursuant to Section 2.05 of the Security Instrument (but only to the extent there was available cash flow generated by the Property during the time such deposits were not required under said Section 2.05 as long as such Impositions and Premiums were treated with first priority out of such available cash flow).

(b) The limitation of liability set forth in this Section 11 shall not apply and the Loan shall be fully recourse to the Borrower and the Liable Party in the event that Borrower commences a voluntary bankruptcy or insolvency proceeding or an involuntary bankruptcy or insolvency proceeding is commenced against Borrower (other than by Holder or a party acting at the request of Holder) and is not dismissed within 90 days of filing. In addition, this agreement shall not waive any rights which Holder would have under any provisions of the U.S. Bankruptcy Code to file a claim for the full amount of the Secured Indebtedness or to require that the Property shall continue to secure all of the Secured Indebtedness. Furthermore, the limitation of liability set forth in this Section 11 shall not apply and the Loan shall be fully recourse to Borrower, the Liable Party and any mediate or immediate transferee of the proceeds of a prohibited Transfer or prohibited Subordinate Financing in the event that prior to the repayment of the Secured Indebtedness, in the event of a Transfer or Subordinate Financing (as those terms are defined in the Security Instrument) except as expressly permitted in the Loan Documents or as may otherwise be approved in writing by Holder (which consent may be given or withheld in the exercise of Holder's sole and absolute discretion).

Exhibit D
Freddie Mac SPE/Separateness Provisions

Note Provisions

9. Limits on Personal Liability.

- (c) ... Borrower will be personally liable to Lender for the repayment of a further portion of the Indebtedness equal to any loss or damage suffered by Lender as a result of the occurrence of any of the following events . . .
- (vi) Borrower fails to comply with any provision of Section 6.13(a)(iii) through (xxvi) of the Loan Agreement or any SPE Equity Owner fails to comply with any provision of Section 6.13(b)(iii) through (v) of the Loan Agreement (subject to possible full recourse liability as set forth in Section 9(f)(ii)).

(f) ... Borrower will become personally liable to Lender for the repayment of all of the Indebtedness upon the occurrence of any of the following Events of Default:

- (i) Borrower fails to comply with Section 6.13(a)(i) or (ii) of the Loan Agreement or any SPE Equity Owner fails to comply with Section 6.13(b)(i) or (ii) of the Loan Agreement.

Borrower fails to comply with any provision of Section 6.13(a)(iii) through (xxvi) of the Loan Agreement or any SPE Equity Owner fails to comply with any provision of Section 6.13(b)(iii) through (v) of the Loan Agreement and 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 or any SPE Equity Owner with the assets and liabilities of a debtor pursuant to Title 11 of the Bankruptcy Code.

Guaranty Provisions

2. Scope of Guaranty.

- (a) Guarantor hereby absolutely . . .
- (i) Guarantor guarantees the full and prompt payment when due, whether at the Maturity Date or earlier, by reason of acceleration or otherwise, and at all times thereafter, of each of the following . . .

(B) . . . Guarantor guarantees all other amounts for which Borrower is personally liable under Sections 9(c), 9(d) and 9(f) of the Note (provided, however, that Guarantor will have no liability for failure of Borrower or SPE Equity Owner to comply with (I) Section 6.13(a)(xviii) of the Loan Agreement, and (II) the requirement in Section 6.13(a)(x)(B) of the Loan Agreement as to payment of trade payables within 60 days of the date incurred). (CME loans only)

Loan Agreement Provisions

6.13 Single Purpose Entity Requirements.

(a) Single Purpose Entity Requirements. Until the Indebtedness is paid in full, each Borrower and any SPE Equity Owner will remain a “**Single Purpose Entity**,” which means a corporation, limited partnership, or limited liability company which, at all times since its formation and thereafter will satisfy each of the following conditions:

- (i) It will not engage in any business or activity, other than the ownership, operation and maintenance of the Mortgaged Property and activities incidental thereto.
- (ii) It will not acquire, own, hold, lease, operate, manage, maintain, develop or improve any assets other than the Mortgaged Property and such Personality as may be necessary for the operation of the Mortgaged Property and will conduct and operate its business as presently conducted and operated.
- (iii) It will preserve 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 will do all things necessary to observe organizational formalities.
- (iv) It will not merge or consolidate with any other Person.
- (v) It will not take any action to dissolve, wind-up, terminate or liquidate in whole or in part; to sell, transfer or otherwise dispose of all or substantially all of its assets; to change its legal structure; transfer or permit the direct or indirect transfer of any partnership, membership or other equity interests, as applicable, other than Transfers permitted under this Loan Agreement; issue additional partnership, membership or other equity interests, as applicable, or seek to accomplish any of the foregoing.
- (vi) It will not, without the prior unanimous written consent of all of Borrower’s partners, members, or shareholders, as applicable, and, if applicable, the prior unanimous written consent of 100% of the members of the board of directors or of the board of Managers of Borrower or the SPE Equity Owner, take any of the following actions:
 - (A) File any insolvency, or reorganization case or proceeding, to institute proceedings to have Borrower or any SPE Equity Owner be adjudicated bankrupt or insolvent.
 - (B) Institute proceedings under any applicable insolvency law.
 - (C) Seek any relief under any law relating to relief from debts or the protection of debtors.
 - (D) Consent to the filing or institution of bankruptcy or insolvency proceedings against Borrower or any SPE Equity Owner.
 - (E) File a petition seeking, or consent to, reorganization or relief with respect to Borrower or any SPE Equity Owner under any applicable federal or state law relating to bankruptcy or insolvency.
 - (F) Seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian, or any similar official for Borrower or a substantial part of its property or for any SPE Equity Owner or a substantial part of its property.
 - (G) Make any assignment for the benefit of creditors of Borrower or any SPE Equity Owner.
 - (H) Admit in writing Borrower’s or any SPE Equity Owner’s inability to pay its debts generally as they become due.

1. (I) Take action in furtherance of any of the foregoing.

2. ...

(vii) It will not amend or restate its organizational documents if such change would cause the provisions set forth in those organizational documents not to comply with the requirements set forth in this Section 6.13.

(viii) It will not own any subsidiary or make any investment in, any other Person.

(ix) It will not commingle its assets with the assets of any other Person and will hold all of its assets in its own name.

(x) It will not incur any debt, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than, (A) the Indebtedness (and any further indebtedness as described in Section 11.11 with regard to Supplemental Instruments) and (B) customary unsecured trade payables incurred in the ordinary course of owning and operating the Mortgaged Property provided the same are not evidenced by a promissory note, do not exceed, in the aggregate, at any time a maximum amount of two percent of the original principal amount of the Indebtedness and are paid within 60 days of the date incurred.

(xi) It will maintain its records, books of account, bank accounts, financial statements, accounting records and other entity documents separate and apart from those of any other Person and will not list its assets as assets on the financial statement of any other Person; provided, however, that Borrower's assets may be included in a consolidated financial statement of its Affiliate provided that (A) appropriate notation will be made on such consolidated financial statements to indicate the separateness of Borrower from such Affiliate and to indicate that Borrower's assets and credit are not available to satisfy the debts and other obligations of such Affiliate or any other Person and (B) such assets will also be listed on Borrower's own separate balance sheet.

(xii) Except for capital contributions or capital distributions permitted under the terms and conditions of its organizational documents, it will only enter into any contract or agreement with any general partner, member, shareholder, principal or Affiliate of Borrower or any Guarantor, or any general partner, member, principal or Affiliate thereof, upon terms and conditions that are commercially reasonable and substantially similar to those that would be available on an arm's-length basis with third parties.

(xiii) It will not maintain its assets in such a manner that will be costly or difficult to segregate, ascertain or identify its individual assets from those of any other Person.

(xiv) It will not assume or guaranty (excluding any guaranty that has been executed and delivered in connection with the Note) the debts or obligations of any other Person, hold itself out to be responsible for the debts of another Person, pledge its assets to secure the obligations of any other Person or otherwise pledge its assets for the benefit of any other Person, or hold out its credit as being available to satisfy the obligations of any other Person.

(xv) It will not make or permit to remain outstanding any loans or advances to any other Person except for those investments permitted under the Loan Documents and will not buy or hold evidence of indebtedness issued by any other Person (other than cash or investment-grade securities).

(xvi) It will file its own tax returns separate from those of any other Person, except to the extent that Borrower is treated as a “disregarded entity” for tax purposes and is not required to file tax returns under applicable law, and will pay any taxes required to be paid under applicable law.

(xvii) It will hold itself out to the public as a legal entity separate and distinct from any other Person and conduct its business solely in its own name, will correct any known misunderstanding regarding its separate identity and will not identify itself or any of its Affiliates as a division or department of any other Person.

(xviii) It will maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations and will pay its debts and liabilities from its own assets as the same become due.

(xix) It will allocate fairly and reasonably shared expenses with Affiliates (including shared office space) and use separate stationery, invoices and checks bearing its own name.

(xx) It will pay (or cause the Property Manager to pay on behalf of Borrower from Borrower’s funds) its own liabilities (including salaries of its own employees) from its own funds.

(xxi) It will not acquire obligations or securities of its partners, members, shareholders, or Affiliates, as applicable.

(xxii) Except as contemplated or permitted by the property management agreement with respect to the Property Manager, it will not permit any Affiliate or constituent party independent access to its bank accounts.

(xxiii) It will maintain a sufficient number of employees (if any) in light of its contemplated business operations and pay the salaries of its own employees, if any, only from its own funds.

(xxiv) If such entity is a single member limited liability company, such entity will satisfy each of the following conditions:

3. (A) Be formed and organized under Delaware law.

4. (B) Have either one springing member that is a corporation whose stock is 100% owned by the sole member of Borrower and that satisfies the requirements for a corporate springing member set forth below in this Section or two springing members who are natural persons.

5. (C) Otherwise comply with all Rating Agencies criteria for single member limited liability companies (including the delivery of Delaware single member limited liability company opinions acceptable in all respects to Lender and to the Rating Agencies). If the springing member is a corporation, such springing member will at all times comply, and will cause Borrower or SPE Equity Owner (as applicable) to comply,

with each of the representations, warranties and covenants contained in Section 6.13 as if such representation, warranty or covenant were made directly by such corporation. If there is more than one springing member, only one springing member will be the sole member of Borrower or SPE Equity Owner (as applicable) at any one time, and the second springing member will become the sole member only upon the first springing member ceasing to be a member.

6. (D) At all times Borrower or SPE Equity Owner (as applicable) will have one and only one member.

7. ...

(xxv) If such entity is a single member limited liability company that is board-managed, such entity will have a board of Managers separate from that of Guarantor and any other Person and will cause its board of Managers to keep minutes of board meetings and actions and observe all other Delaware limited liability company required formalities.

(xxvi) If an SPE Equity Owner is required pursuant to this Loan Agreement, if Borrower is (A) a limited liability company with more than one member, then Borrower has and will have at least one member that is an SPE Equity Owner that has satisfied and will satisfy the requirements of Section 6.13(b) and such member is its managing member, or (B) a limited partnership, then all of its general partners are SPE Equity Owners that have satisfied and will satisfy the requirements set forth in Section 6.13(b).

(b) SPE Equity Owner Requirements. The SPE Equity Owner, if applicable, will at all times since its formation and thereafter comply in its own right (subject to the modifications set forth below), and will cause Borrower to comply, with each of the requirements of a Single Purpose Entity. Upon the withdrawal or the disassociation of an SPE Equity Owner from Borrower, Borrower will immediately appoint a new SPE Equity Owner, whose organizational documents are substantially similar to those of the withdrawn or disassociated SPE Equity Owner, and deliver a new nonconsolidation opinion to the Rating Agencies and Lender in form and substance satisfactory to Lender and to the Rating Agencies (unless the opinion is waived by the Rating Agencies), with regard to nonconsolidation by a bankruptcy court of the assets of each of Borrower and SPE Equity Owner with those of its Affiliates.

(i) With respect to Section 6.13(a)(i), the SPE Equity Owner will not engage in any business or activity other than being the sole managing member or general partner, as the case may be, of Borrower and owning at least 0.5% equity interest in Borrower.

(ii) With respect to Section 6.13(a)(ii), the SPE Equity Owner has not and will not acquire or own any assets other than its equity interest in Borrower and personal property related thereto.

(iii) With respect to Section 6.13(a)(viii), the SPE Equity Owner will not own any subsidiary or make any investment in any other Person, except for Borrower.

(iv) With respect to Section 6.13(a)(x), the SPE Equity Owner has not and will not incur any debt, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than (A) customary unsecured payables incurred in the ordinary course of owning Borrower provided the same are not evidenced by a promissory note, do not exceed, in the aggregate, at any time a maximum amount of \$10,000 and

are paid within 60 days of the date incurred and (B) in its capacity as general partner of Borrower (if applicable).

(v) With respect to Section 6.13(a)(xiv), the SPE Equity Owner will not assume or guaranty the debts or obligations of any other Person, hold itself out to be responsible for the debts of another Person, pledge its assets to secure the obligations of any other Person or otherwise pledge its assets for the benefit of any other Person, or hold out its credit as being available to satisfy the obligations of any other Person, except for in its capacity as general partner of Borrower (if applicable).

(c) Effect of Transfer on Special Purpose Entity Requirements. Notwithstanding anything to the contrary in this Loan Agreement, no Transfer will be permitted under Article VII unless the provisions of this Section 6.13 are satisfied at all times.

Exhibit E
Non-CMBS Nonrecourse Carve out Language
(Post *Cherryland* and Post-Negotiations)

Operative Guaranty Language

* * *

1. Guaranty. Guarantor hereby: (a) guarantees unto Lender the full and timely payment of the amounts due, or to become due, to Lender under the Recourse Obligations; and (b) agrees with Lender to pay to Lender (i) the amounts due under the Recourse Obligations within five (5) days from the date Lender notifies Guarantor of Borrower's failure to pay the same, if and when the same becomes due, and at the place specified in the Note for payment and (ii) Lender's reasonable attorneys' fees and all court costs incurred by Lender in enforcing or protecting any of Lender's rights, remedies or recourses hereunder.

* * *

Note Provisions

* * *

19. Limitation on Liability. The obligations and liability of Maker pursuant to the following subsections (a) and (b) are collectively referred to as "Recourse Obligations."

(a) Limited Recourse Obligations. Notwithstanding anything to the contrary contained herein, but subject to the obligations of Paragraph 45 of the Mortgage and subsection (b) below, any claim based on

or in respect of any liability of Maker under this Note, the Mortgage or any other Loan Document shall be enforced only against the Mortgaged Property (as such term is defined in the Mortgage) and any other collateral now or hereafter given to secure this Note and not against any other assets, properties or funds of Maker; provided, however, that Maker shall be personally liable for amounts under the Loan Documents to the extent of, but limited to the amount of any loss, costs or damage arising out of the matters described in the subsections below, which liability shall not be limited solely to the Mortgaged Property and other collateral now or hereafter given to secure this Note but shall include all of the assets, properties and funds of Maker: (i) fraud, misrepresentation and waste, (ii) any rents, issues or profits collected more than one (1) month in advance of their due dates, (iii) any misappropriation of rents, issues or profits, security deposits and any other payments from tenants or occupants (including, without limitation, lease termination fees), insurance proceeds, condemnation awards or other sums of a similar nature, (iv) liability under environmental covenants, conditions and indemnities contained in the Mortgage and in any separate environmental indemnity agreements, (v) personality or fixtures removed or allowed to be removed by or on behalf of Maker and not replaced by items of equal or greater value or functionality than the personality or fixtures so removed, (vi) failure to pay taxes, assessments or ground rents prior to delinquency, or to pay charges for labor, materials or other charges which can create liens on any portion of the Mortgaged Property and any sums expended by Payee in the performance of or compliance with the obligations of Maker under the Loan Documents, including, without limitation, sums expended to pay taxes or assessments or hazard insurance premiums or bills for utilities or other services or products for the benefit of the Mortgaged Property, (vii) the unauthorized sale, conveyance or transfer of title to the Mortgaged Property or interest in the Maker or encumbrance of the Mortgaged Property, voluntarily, by operation of law or otherwise, (viii) the failure of Maker to maintain its status as a single purpose, bankruptcy-remote entity pursuant to its organizational documents and the Loan Documents, (ix) a violation of the provisions of Paragraph 18(h) of the Mortgage [anti-money laundering provisions], and (x) attorneys' fees, court costs and other expenses incurred by Payee in connection with its enforcement of its remedies under the Loan Documents, including, but not limited to, in connection with any bankruptcy proceeding or reorganization brought by or against the Maker or any of its principals. Nothing herein shall be deemed (w) to be a waiver of any right which Payee may have under any bankruptcy law of the United States or the state where the Mortgaged Property is located including, but not limited to, Section 506(a), 506(b), 1111(b) or any other provisions of the U.S. Bankruptcy Code to file a claim for the full amount of the indebtedness secured by the Mortgage or to require that all collateral securing the indebtedness secured hereby shall continue to secure all of the indebtedness owing to Payee in accordance with this Note, the Mortgage and the other Loan Documents, (x) to impair the validity of the indebtedness secured by the Mortgage, (y) to impair the right of Payee as mortgagee or secured party to commence an action to foreclose any lien or security interest, or (z) to modify, diminish or discharge the liability of any guarantor under any guaranty or of any indemnitor under any indemnity agreement.

(b) Full Recourse Obligations. Notwithstanding anything to the contrary contained in this Note or the other Loan Documents, the exculpation provisions of subsection (a) above will BECOME NULL AND VOID and the Loan will be FULLY RECOURSE to Maker and any guarantor under any guaranty in the event that Maker, any guarantor under any guaranty or any indemnitor under any indemnity agreement (i) commences as debtor any case or proceeding under any bankruptcy, insolvency, reorganization, liquida-

tion, dissolution or similar law, (ii) has appointed for it or the whole or any substantial part of its property (other than upon the petition or filing of Payee) a receiver, conservator, trustee, custodian, manager, liquidator, or similar official by any governmental or judicial authority, (iii) makes a proposal or any assignment for the benefit of its creditors, or enters into an arrangement or composition or similar plan or scheme with or for the benefit of creditors generally occurring in circumstances in which such entity is unable to meet its obligations as they become due, (iv) has filed against it any case or proceeding under any bankruptcy, insolvency, reorganization, liquidation, dissolution or similar law which (a) is consented to or not timely contested by such entity or (b) is not dismissed within sixty (60) days, (v) by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, asserts or has filed against Maker or any guarantor a claim that the transaction creating the lien of the Mortgage is either (a) a fraudulent conveyance or fraudulent transfer, or (b) a preferential transfer.

* * *

Mortgage Provisions

* * *

- 19. Single Purpose Entity/Separateness.** Mortgagor represents, warrants and covenants as follows:
- (a) The purpose for which the Mortgagor is organized shall be limited solely to (A) owning, holding, selling, leasing, transferring, exchanging, operating and managing the Mortgaged Property, (B) entering into the Loan with the Mortgagee, (C) refinancing the Mortgaged Property in connection with a permitted repayment of the Loan, and (D) transacting any and all lawful business for which a Mortgagor may be organized under its constitutive law that is incident, necessary and appropriate to accomplish the foregoing.
 - (b) Mortgagor does not own and will not own any asset or property other than (i) the Mortgaged Property, and (ii) incidental personal property necessary for and used in connection with the ownership or operation of the Mortgaged Property.
 - (c) Mortgagor will not engage in any business other than the ownership, management and operation of the Mortgaged Property.
 - (d) Mortgagor will not enter into any contract or agreement with any affiliate of Mortgagor, any constituent party of Mortgagor, any owner of the Mortgagor, the Guarantors (as hereinafter defined) or any affiliate or any constituent party of Guarantor, except upon terms and conditions that are intrinsically fair, commercially reasonable and substantially similar to those that would be available on an arms-length basis with third parties not affiliated with the Mortgagor or any constituent party of Mortgagor or any owner of Mortgagor.
 - (e) Mortgagor has not incurred and will not incur any indebtedness, secured or unsecured, other than the Loan and debt (i) incurred in the ordinary course of business to vendors and suppliers of services to the Mortgaged Property, (ii) not secured by the Mortgaged Property, or any portion thereof, or by interests in

the Mortgagor or any constituent entity thereof, and (iii) not accompanied by any rights to control or to obtain control of the Mortgagor or any constituent entity thereof. No indebtedness other than the Loan may be secured (subordinate or pari passu) by the Mortgaged Property, or any portion thereof, or by interests in the Mortgagor or any constituent entity thereof.

(f) Mortgagor has not made and will not make any loans or advances to any entity or person (including any affiliate or any constituent party of Mortgagor or any owner of Mortgagor, any Guarantor or any affiliate or any constituent party of Guarantor), and shall not acquire obligations or securities of its affiliates or any constituent party.

(g) Mortgagor is solvent as of the date of this Mortgage and will not affirmatively take any action to render itself insolvent, and Mortgagor will pay its debts and liabilities (including, as applicable, shared personnel and overhead expenses) from the income and proceeds of the Mortgaged Property.

(h) Mortgagor has done or caused to be done and will do all things necessary to observe organizational formalities and preserve its existence, and Mortgagor will not, nor will Mortgagor permit any member or manager of Mortgagor or any Guarantor to amend, modify or otherwise change the partnership certificate, partnership agreement, articles of incorporation and bylaws, operating agreement, trust or other organizational documents of Mortgagor or such Guarantor without the written consent of Mortgagee (except for amendments necessary to implement changes in ownership that are permitted without Mortgagee's consent under Paragraphs 9(g) and 9(i)).

(i) Mortgagor will maintain all of its books, records, financial statements and bank accounts separate from those of its affiliates and any constituent party. Mortgagor's assets will not be listed as assets on the financial statement of any other entity. Mortgagor shall have its own separate financial statement, provided, however, that Mortgagor's assets may be included in a consolidated financial statement of its parent companies if inclusion on such a consolidated statement is required to comply with the requirements of generally accepted accounting principles ("GAAP"), provided that such consolidated financial statement shall contain a footnote to the effect that Mortgagor's assets are owned by Mortgagor and that they are being included on the financial statement of its parent solely to comply with the requirements of GAAP, and further provided that such assets shall be listed on Mortgagor's own separate balance sheet. Mortgagor will file its own tax returns and will not file a consolidated federal income tax return with any other corporation. Mortgagor shall maintain its books, records, resolutions and agreements as official records.

(j) Mortgagor will be, and at all times will hold itself out to the public as, a legal entity separate and distinct from any other entity (including any affiliate of Mortgagor, any constituent party of Mortgagor, any Guarantor or any affiliate or any constituent party of Guarantor), shall correct any known misunderstanding regarding its status as a separate entity, shall conduct business in its own name, shall not identify itself or any of its affiliates as a division or part of the other and shall maintain and utilize separate telephone numbers, stationery, invoices, and checks.

- (k) Mortgagor will maintain adequate capital out of the income and proceeds of the Mortgaged Property for the normal, reasonably foreseeable obligations of the Mortgaged Property.
- (l) Neither Mortgagor nor any constituent party will seek the dissolution, winding up, liquidation, consolidation or merger in whole or in part, or the sale of material assets of Mortgagor.
- (m) Mortgagor will not commingle the funds and other assets of Mortgagor with those of any affiliate or any constituent party of Mortgagor or any owner of Mortgagor, any Guarantor, or any affiliate or any constituent party of Guarantor, or any other person, and will not participate in a cash management system with any such party.
- (n) Mortgagor will not commingle its assets with those of any other person or entity and will hold all of its assets in its own name.
- (o) Mortgagor will not guarantee or become obligated for the debts of any other entity or person and does not and will not hold itself out as being responsible for the debts or obligations of any other person.
- (p) If Mortgagor is a limited partnership or a limited liability company, at least one general partner or member (an "SPC Party") shall be a corporation or limited liability company whose sole asset is its interest in Mortgagor, and each such SPC Party will at all times comply, and shall cause Mortgagor to comply, with each of the representations, warranties and covenants contained in this Paragraph 19 as if such representation, warranty or covenant was made directly by such SPC Party.
- (q) Intentionally Deleted.
- (r) Intentionally Deleted.
- (s) Intentionally Deleted.
- (t) Mortgagor shall allocate fairly and reasonably any overhead expenses that are shared with an affiliate, including paying for office space and services performed by any employee of an affiliate.
- (u) The stationery, invoices, and checks utilized by Mortgagor or utilized to collect its funds or pay its expenses shall bear its own name and shall not bear the name of any other entity unless such entity is clearly designated as being Mortgagor's agent.
- (v) Mortgagor shall not pledge its assets for the benefit of any other person or entity, and other than with respect to the Loan.
- (w) Mortgagor shall correct any known misunderstanding regarding its separate identity.
- (x) Mortgagor shall not identify itself as a division of any other person or entity.

* * *

45. Indemnification for Recourse Obligations. Mortgagor hereby covenants and agrees unconditionally and absolutely to indemnify and save harmless Mortgagee, its officers, directors, shareholders, employees, agents and attorneys (collectively, the “Indemnified Parties”) against all damages, losses, liabilities, obligation, claims, litigation, demands or defenses, judgments, suits, proceedings, fines, penalties, costs, disbursements and expenses of any kind or nature whatsoever (including without limitation attorneys’ fees reasonably incurred), which may at any time be imposed upon, incurred by or asserted or awarded against the Indemnified Parties and arising from the Recourse Obligations.

This indemnity shall survive any foreclosure of this Mortgage, the taking of a deed in lieu thereof, or any other discharge of the obligations of the Mortgagor hereunder or a transfer of the Mortgaged Property, even if the indebtedness secured hereby is satisfied in full. Mortgagor agrees that the indemnification granted herein may be enforced by Mortgagee without resorting to or exhausting any other security or collateral or without first having recourse to the Note or the Mortgaged Property covered by this Mortgage through foreclosure proceedings or otherwise; provided, however, that, subject to Paragraph 46 of this Mortgage, nothing herein contained shall prevent Mortgagee from suing on the Note or foreclosing this Mortgage or from exercising any other rights under the Loan Documents.

* * *

46. Exculpation and Recourse. The obligations and liability of Mortgagor pursuant to the following subparagraphs (a) and (b) are collectively referred to as “Recourse Obligations.”

(a) Limited Recourse Obligations. Subject to Paragraph 45 hereof and subparagraph (b) below, any claim based on or in respect of any liability of Mortgagor under the Note or under this Mortgage or any other Loan Document shall be enforced only against the Mortgaged Property and any other collateral now or hereafter given to secure the Loan and not against any other assets, properties or funds of Mortgagor; provided, however, that Mortgagor shall be personally liable for amounts under the Loan Documents to the extent of, but limited to the amount of, any loss, costs or damage arising out of the matters described below, which liability shall not be limited solely to the Mortgaged Property and other collateral now or hereafter given to secure the Loan but shall include all of the assets, properties and funds of Mortgagor: (i) fraud, misrepresentation and waste, (ii) any rents, issues or profits collected more than one (1) month in advance of their due dates, (iii) any misappropriation of rents, issues or profits, security deposits and any other payments from tenants or occupants (including, without limitation, lease termination fees) insurance proceeds, condemnation awards, or other sums of a similar nature, (iv) liability under environmental covenants, conditions and indemnities contained in the Mortgage and in any separate environmental indemnity agreements, (v) personality or fixtures removed or allowed to be removed by or on behalf of Mortgagor and not replaced by items of equal or greater value or functionality than the personality or fixtures so removed, (vi) failure to pay taxes, assessments or ground rents prior to delinquency, or to pay charges for labor, materials or other charges which can create liens on any portion of the Mortgaged Property and any sums expended by Mortgagee in the performance of or compliance with the obligations of Mortgagor under the Loan Documents, including, without limitation, sums expended to pay taxes or assessments or hazard insurance premiums or bills for utilities or other services or products for the benefit of the Mortgaged Property, (vii)

the unauthorized sale, conveyance or transfer of title to the Mortgaged Property or encumbrance of the Mortgaged Property, (viii) the failure of Mortgagor to maintain its status as a single purpose, bankruptcy-remote entity pursuant to its organizational documents and the Loan Documents, (ix) a violation of the provisions of Paragraph 18(h) of this Mortgage [anti-money laundering provisions], and (x) attorney's fees, court costs and other expenses incurred by Mortgagee in connection with its enforcement of its remedies under the Loan Documents, including, but not limited to, in connection with any bankruptcy proceeding or reorganization brought by or against the Mortgagor or any of its principals. Nothing herein shall be deemed (w) to be a waiver of any right which Mortgagee may have under any bankruptcy law of the United States or the State of Louisiana where the Mortgaged Property is located including, but not limited to, Section 506(a), 506(b), 1111(b) or any other provisions of the U.S. Bankruptcy Code, to file a claim for the full amount of the indebtedness secured by this Mortgage or to require that all of the collateral securing the indebtedness secured hereby shall continue to secure all of the indebtedness owing to Mortgagee under the Note, this Mortgage and the other Loan Documents; (x) to impair the validity of the indebtedness secured by this Mortgage; (y) to impair the right of Mortgagee as Mortgagee or secured party to commence an action to foreclose any lien or security interest; or (z) to modify, diminish or discharge the liability of any Guarantor under any Guaranty.

(b) Full Recourse Obligations. Notwithstanding anything to the contrary contained in this Mortgage or the other Loan Documents, the exculpation provisions of subparagraph (a) above will BECOME NULL AND VOID and the Loan will be FULLY RE COURSE to Mortgagor and any guarantor under any guaranty in the event that Mortgagor, any guarantor under any guaranty or any indemnitor under any indemnity agreement (i) commences as debtor any case or proceeding under any bankruptcy, insolvency, reorganization, liquidation, dissolution or similar law, (ii) has appointed for it or the whole or any substantial part of its property (other than upon the petition or filing of Mortgagee) a receiver, conservator, trustee, custodian, manager, liquidator, or similar official, by any governmental or judicial authority; (iii) makes a proposal or any assignment for the benefit of its creditors, or enters into an arrangement or composition or similar plan or scheme with or for the benefit of creditors generally occurring in circumstances in which such entity is unable to meet its obligations as they become due; (iv) has filed against it any case or proceeding under any bankruptcy, insolvency, reorganization, liquidation, dissolution or similar law which (a) is consented to or not timely contested by such entity or (b) is not dismissed within sixty (60) days, or (v) by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, asserts or has filed against Mortgagor or any guarantor a claim that the transaction creating the lien of this Mortgage is either (a) a fraudulent conveyance or fraudulent transfer, or (b) a preferential transfer.

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