CHOICE OF ENTITY: TAX AND OTHER CONSIDERATIONS

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  2. Disregarded Entity – not required to obtain FEIN; typically referring to a single member LLC, which uses the FEIN/SSN of the single member for tax reporting purposes.

IV. Sole Proprietorship: Property is owned by an individual, natural person.

A. No filing or organizational requirements

B. Full liability for all debts of the business venture – there is no liability protection, and all assets of proprietor are subject to being seized by creditors for satisfaction of any, even unrelated, liability of the proprietor

1. Insurance traditionally will be protection for many of the liabilities of property ownership (slips and falls, and other covered risks), but there seems to be little justification not to create an entity for property ownership for no reason other than liability protection

C. Cannot pay salary to themselves without paying tax (self-employment tax and other- there is no deduction for the salary expense, and all income is 1040 income)

D. Difficult if not impossible to raise capital

E. Complete managerial control

V. Corporations (Subchapter C) – the traditional liability "shield" offering asset protection to amounts invested or later contributed to the corporation.

A. Created by filing Articles of Incorporation with the Secretary of State, issuance of stock to subscribed shareholders, appointing the initial Board of Directors and electing officers.

1. C Corps can have an unlimited number of shareholders and many different classes of shares (i.e. voting, non-voting, convertible, preferred)

2. Management is ultimately controlled by the shareholders who appoint (elect) directors, but by bylaws and statutes, the Board of Directors has management control over the officers, that are elected by the Board. Officers have operational, day-to-day control, with the President having presumed authority

3. Shareholder agreements and voting proxies can be used to create centralization of management in some or a few of the shareholders, for matters such as electing directors, approving major transactions, restricting transfers of shares (indirectly, by way of required approvals and granting rights of first refusal to other shareholders and the corporation, as shares are otherwise freely transferable)

4. Corporate formalities are amongst the most rigorous of all entities. Annual minutes are required the appointment of directors and election of officers, as well as separate books and records. As with all entities, effort should be made to maintain separateness of existence to avoid "alter ego" arguments used to pierce the veil of liability protection

B. Corporations are subject to taxation on income, and as a result, there is "double taxation", in that income to the corporation is taxed at the corporate rate, and

dividends (i.e. distributions) and salary to the shareholders are taxed at the shareholders dividend or individual tax rate

C. IRC Section 351 allows tax-free contribution to a corporation only if the transferor maintains control of the corporation after the transfer (80% of total voting power and of all other classes of stock)

D. The "double taxation" aspect of C-Corps is usually sufficient to eliminate it as an entity of choice.

VI. Subchapter S Corporations – they are formed like C-Corps but make a special election to be treated as a Subchapter S corporation by filing IRS Form 2553 within specific time periods

A. Can have only 100 "natural" shareholders (exceptions made for various tax exempt organizations, estates and trusts)

B. Can have no nonresident aliens as shareholders

C. Can have only one class of stock (but voting/non-voting differences are permitted)

D. Provide for "pass-through" tax attributes, thereby eliminating the double taxation issue of C-Corps

E. Formation and management is otherwise the same as a C-Corp

F. Section 351 applies to contributions of property

G. Can elect to treat its stock as 1244 stock, thereby allowing capital losses to offset ordinary income for a three-year lookback period

VII. General Partnerships may be informally formed, without any filing with the Secretary of State, by express or verbal (See OCGA §14-8-1 et seq.). "A partnership is an association of two or more persons to carry on as co-owners a business for profit and includes, for all purposes of the laws of this state, a limited liability partnership." OCGA §14-8-6.

A. Due to the informality, OCGA §14-8-7 lists certain factors that are <u>not</u> determinative of a general partnership (TICs are not presumed partners, and sharing of profits does not create prima facie partnership)

B. Acquisition of property in the partnership name does imply ownership in a partnership

C. Key statutory provisions: There is presumed authority of any partner to act on the behalf of the partnership, in the usual course of business, including conveyances of property

D. Best to have a written partnership agreement and file a "statement of partnership" in the public records containing the name of the partnership, principal place of

business, names and residences of all partners, term of partnership, limitations on authority of partners, owned property, and other matters

E. General partnerships do not provide liability protection (unless the partners are limited liability entities). Each partner is jointly and severally liable for partnership liabilities

1. The introduction of limited liability partnerships (LLPs) has mitigated this risk but there may be no limited liability for the partners in an LLP who participate actively in management and take big business risks

F. General partnerships, like all partnerships, are pass-through vehicles

VIII. Limited partnerships are formed by the filing of a certificate of limited partnership with the Secretary of State

A. Management is generally vested in the General Partner, subject to limitations on authority that might be contained in the limited partnership agreement or otherwise.

B. Limited partnerships provide liability protection to the limited partners, but the general partner is liable for the debts and liabilities of the limited partnership. For this reason, the general partner is usually a limited liability entity.

1. The introduction of limited liability limited partnerships (LLLPs) has mitigated this risk

C. The limited partnership is a pass-through vehicle

D. Limited partnerships are favored over LLCs for many foreign investors, whose home state tax laws allow certain deductions as "partners" in a limited partnership, which has not carried over to "members" in an LLC

E. Since the partnership interests are governed by a limited partnership agreement, transferability can be restricted (more like "hindered") by introducing onerous requirements such as consents and rights of first refusal, as described above for shareholder agreements

F. There is no limit or restriction on the number or type of partners

G. Limited partnership have therefore been favored as real estate investment vehicles, until the introduction of LLCs

IX. Limited liability companies combine the full shield of liability protection (like corporations) and the flexibility of partnerships (management, allocations of tax attributes, distributions of cash flow) and have therefor become somewhat of the preferred vehicle for real estate transactions.

A. Their administrative formalities are less onerous than corporations. Formation is done by filing the Articles of Organization with the Secretary of State. They may

state simply and only the name of the LLC, but may include other matters. No annual minutes are required.

B. LLCs are pass-through vehicles.

C. There is no need for the two-tiered structure found in limited partnership, since there is no general partner, and individual "managers" have the same liability protection as any other member.

D. Management is generally held by managers, whose authority can be limited or expanded as provided in the operating agreement.

1. Management can be "vested" in the manager, subject to certain major decisions requiring member consent, or power to manage may be more selectively given to managers, with the bulk being retained by the members.

a. It is important to have someone that the public can deal with, having presumed authority but it is possible for LLCs to be "member managed" as well

b. LLCs can also have officers, similar to corporations

2. Managers need not be members or residents of Georgia, and may be artificial entities

E. The "check the box" regulations allow the LLC to determine whether it would be taxed as a partnership, corporation or sole proprietorship, eliminating the uncertainty in how the IRS would tax LLCs, and simplifying the drafting process

1. Prior law required that the LLC not have a preponderance of the following corporate attributes (perpetuity, transferability of interest, limited liability protection, centralized management), otherwise the LLC would be taxed as a corporation

a. As a result under prior law, LLCs often had a limited duration

F. Due to the flexible structure, "percentage" of ownership may be avoided in favor of the "waterfall" distribution approach, with different types of members getting differently tiered distributions. Example:

1. Investor members may get a preferred return, followed by return of investment on capital sale

2. Developer members may get fees or distributions thereafter, to a limit, followed by additional divisions of remaining amounts, perhaps limited to IRR (internal rate of return), followed by percentage distribution amongst the groups based on negotiated percentages (i.e. 20% to investors members, 80% to developer members

SECTION 1031 LIKE KIND EXCHANGES

I. Abbreviated relevant portions of Section 1031:

> **(a) NONRECOGNITION OF GAIN OR LOSS FROM EXCHANGES SOLELY IN KIND**
> **(1) IN GENERAL**
> *No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment.*
>
> **(2) EXCEPTION**
> This subsection shall not apply to any exchange of—
>
> **(A)** stock in trade or other property held primarily for sale,
> **(B)** stocks, bonds, or notes,
> **(C)** other securities or evidences of indebtedness or interest,
> **(D)** *interests in a partnership*,
> **(E)** certificates of trust or beneficial interests, or
> **(F)** choses in action.
>
> **(3) REQUIREMENT THAT PROPERTY BE IDENTIFIED AND THAT EXCHANGE BE COMPLETED NOT MORE THAN 180 DAYS AFTER TRANSFER OF EXCHANGED PROPERTY**
> For purposes of this subsection, any property received by the taxpayer shall be treated as property which is not like-kind property if—
>
> **(A)** such property is not identified as property to be received in the exchange on or before the day which is 45 days after the date on which the taxpayer transfers the property relinquished in the exchange, or
> **(B)** such property is received after the earlier of—
> **(i)** the day which is 180 days after the date on which the taxpayer transfers the property relinquished in the exchange, or
> **(ii)** the due date (determined with regard to extension) for the transferor's return of the tax imposed by this chapter for the taxable year in which the transfer of the relinquished property occurs.
>
> **(f) SPECIAL RULES FOR EXCHANGES BETWEEN RELATED PERSONS**
> **(1) IN GENERAL**
> If—
> **(A)** a taxpayer exchanges property with a related person,
> **(B)** there is nonrecognition of gain or loss to the taxpayer under this section with respect to the exchange of such property (determined without regard to this subsection), and
> **(C)** before the date 2 years after the date of the last transfer which was part of such exchange—
> **(i)** the related person disposes of such property, or
> **(ii)** the taxpayer disposes of the property received in the exchange from the related person which was of like kind to the property transferred by the taxpayer,
>
> there shall be **no nonrecognition** of gain or loss under this section to the taxpayer with respect to such exchange…..

II. Overview – The basic principal is that real property can be exchanged for other real property without paying tax on the gain arrising from the first sale.

A. Prior to the enactment of the safe harbor rules, property was actually exchanged for property in a simultaneous transaction, but today safe harbor regulations have resulted in an almost universal use of the "qualified intermediary," which is an unrelated party serving as an official escrow agent, holding sale proceeds until the target exchange property is selected and closed upon.

B. The exchange results in deferring tax liability for the gain by transferring the basis of the sold property to the new property (so the new property has a reduced basis, thereby preserving the taxable gain which will be due on sale of the new property (unless a 1031 exchange is utilized at that time).

C. Cash or property received is taxable "boot".

D. All real estate is "like kind" so raw land could be exchanged for income producing property or for a ground lease interest.

E. There is no "holding" period requirement. Property relinquished immediately after its purchase would likely not survive the held "for investment" test, but contrary to general thought, there is no litmus test holding period, although long term capital gains holding periods would nevertheless apply.

III. Interests in partnership or LLCs are not subject to nonrecognition treatment.

IV. Deferred Exchanges under the Regulations, through a Qualified Intermediary

A. Time periods are absolute – no wiggle room: 45 days, counting from the date following the sale date, to identify new property and 180 days to close.

1. 180 period is shortened to date tax return is due (i.e. April 15) although extensions can be filed to extend the date.

2. Taxpayer must provide written designation before end of 45 day period (email is likely sufficient). Description of the property need not be a metes and bounds, but must be unambiguous and distinguishable.

3. Taxpayers may designate up to 3 possible target properties without regard to value, and taxpayers may designate more properties, but only if the aggregate target property values does not exceed 200% of the sale price of the relinquished property. This prevents the taxpayer from creating a laundry list of "wishful thinking" properties rather than true possible "target" properties.

B. The Qualified Intermediary("QI") is *deemed* not an agent of the taxpayer, but only if the exchange agreement expressly limits the taxpayers right to receive, pledge, borrower or otherwise obtain benefits from the sales proceeds. Basic requirements of the Qualified Intermediary are only:

1. QI enters into an exchange agreement containing the required language with taxpayer;

2. QI is assigned the transfer / sales agreements, with written notice to (and generally acknowledgments from) all parties; and

3. QI holds the sales proceeds in its account.

4. If taxpayer does not designate replacement property during the 45 day period, it may receive the funds and move on. However, once property is designated, the funds are restricted for the entire 180 period even if the taxpayer wants to back out.

5. "Disqualified" persons cannot be a QI. Related parties cannot e a QI, nor any other agent of the taxpayer. For our purposes, the following regulation is relevant:

> (2) The person is the agent of the taxpayer at the time of the transaction. For this purpose, ***a person who has acted as the taxpayer's employee, attorney, accountant, investment banker or broker, or real estate agent or broker within the 2-year period ending on the date of the transfer of the first of the relinquished properties is treated as an agent of the taxpayer at the time of the transaction***. Solely for purposes of this paragraph (k)(2), performance of the following services will ***not be taken into account***— (i) Services for the taxpayer with respect to exchanges of property intended to qualify for nonrecognition of gain or loss under section 1031; and (ii) ***Routine financial, title insurance, escrow, or trust services for the taxpayer by a financial institution, title insurance company, or escrow company***.

C. Regulations only require that the QI own the funds, but a related party can act as a "manager" of the QI, as is typically done on reverse or improvement exchanges (taxpayer or related party manages construction of improvements).

D. Closing proceeds should be wired directly to QI. Taxpayer should not receive funds.

V. Reverse and Improvement Exchanges – Qualified Exchange Accommodation Arrangements (QEAA) – Buying the target property prior to the sale of the relinquished property.

A. An "Accommodation Party" acquires the replacement property and parks it for the benefit of the taxpayer until the sale of the relinquished property is completed pursuant to a written Qualified Exchange Accommodation Agreement entered into within five (5) days of its acquisition of title to the property.

B. The reverse exchange must be completed within 180 days of the Accommodation Party obtaining title.

C. The taxpayer must identify the property to be relinquished within 45 days.

D. The taxpayer can guarantee acquisition financing used to acquire the parked property.

E. The taxpayer can serve as manager / developer / tenant pending completion of the exchange.

a. This allows improvements to be constructed which increase the value of the property, avoiding "boot" that otherwise would be received on the taxpayer's sale of the other property.

F. The taxpayer can lease the parked property pending the exchange.

G. The taxpayer can loan funds, or guaranty funds loaned, to the Accommodation Party.

H. The taxpayer should require that the Accommodation Party be a single purpose entity, to insulate the taxpayer from other problems of principals of the party. It is not uncommon for the exchange company to take title in an SPE LLC, and to complete the exchange, have the taxpayer become the single member of that LLC.

1. This way loan documents do not need to be redone, or assigned or assumed. The loan documents can be initially drafted to permit such change in entity structure.

2. Transfer tax is also avoided.

F. Improvements in a Deferred Exchanged - increasing the basis in target property. Improvements may be cosmetic, interior or even construction of a new building on raw land.

1. Costs of improvements constructed after the taxpayer acquires the property do not qualify towards basis (and the improvements constructed after acquisition do not constitute "like kind" replacement property).

2. To qualify, the improvements should be made by the seller, a QI or an Accommodation Party.

a. The proposed improvements must be "identified" within 45 days.

3. In deferred exchanges (as distinguished from reverse exchange), the taxpayer will have constructive receipt of QI funds used towards construction if the taxpayer is leasing the target property.

VI. LLC/Partnership issues involved in exchanges.

A. It is well known that partnership or LLC interests are not considered real property for purposes of Section 1031.

B. Issue arises when partners/members disagree about participating in a 1031 exchange. If not all partners want to participate and there is dead-lock, then the exchange cannot occur.

C. The "drop and swap" technique involves "dropping" the LLC/partnership structure prior to closing, deeding out the underlying property to the partners/members as TICs and allowing each TIC to exchange or not exchange, as it sees fit.

D. This author is not aware of any convincing law permitting such activity. The reason is because of the "qualified use" requirement: the property held by the taxpayer must be "for productive use in a trade or business or *for investment*."

E. Property acquired by the TIC prior to a sale is held for sale, not for investment.

F. There may be some discussion of redemption of certain members interests in the LLC and continuation of the LLC as an entity and exchanger. This is an open issue, requiring additional tax advice.

VII. Related Party exchanges – 2 year holding period by taxpayer and exchanger.

A. "Related Person (IRC 267(b) or 707(b(1)):

1. Family members.

2. Controlled corporations or controlled partnerships (50% rule, but constructive ownership rules apply).

3. Two corporations/partnerships in the same controlled group.

4. Grantor and fiduciary of same trust.

5. Executor and beneficiaries of the same estate.

SALE – LEASEBACKS

I. Seller sells property and leases back from purchaser for a term of years, usually pursuant to a triple-net lease. Extension options can be included.

A. Rationale: Seller receives 100% of value, rather than the percentage allowed by lenders (70%-85% depending on credit and transaction). Seller frees up more capital for other business opportunities. Can have effective control of property without keeping the property on its balance sheet.

B. The Seller should weigh the amount of deductions allowable as depreciation/interest vs. rent tax expense write off.

C. Buyer's incentive is the cash stream, and capitalization value (if cap rates go down, value increases and buyer can profit on a sale and reposition equity).

D. The transaction may be a disguised "loan/mortgage" which could lead the IRS to recharacterize the transaction. As stated in *Frank Lyon Co. v. U.S.*, 435 U.S. 561 (1978), "[S]o long as the lessor retains significant and genuine attributes of

traditional lessor status, the form of the transaction adopted by the parties governs for tax purposes." Factors include:

1. Is there a repurchase option in favor of the tenant, at an attractive price?
2. Is the lease term as long as the useful life of the building?
3. Are the renewal options formalities rather than bargained for exchanges?
4. Is the rent during the renewal below market value, or even for nominal value?
5. Does rent bear a true relationship to the value of the property?

E. Other possible tax benefit: If the sales price is less than the tax basis, the seller (lessee) may be able to write off the full loss from its income.

F. Advantages to seller/lessee:

1. Immediate cash infusion.
2. Remove real estate and debt from balance sheet.
3. Rent can be deducted as a business expense (to be weighed against depreciation/interest deduction available to owner of property).

G. Disadvantages to seller/lessee:

1. Rent payments may be higher than the mortgage.
2. No property to appreciate in value.
3. When term of lease ends, seller needs to renegotiate or move.
4. May have taxable gain on the sale if the sales price exceeds the tax basis.

H. Advantages for buyer/lessor:

1. "Safe" return on investment, depending on credit of the seller/lessee.
2. Property may appreciate in value.
3. Buyer can leverage the purchase with debt.

I. Disadvantages for buyer/lessor:

1. Property value may decline, and tenant credit may change over time.
2. Management headaches associated with property ownership.
3. If transaction is recharacterized as a loan, the buyer would not be able to take advantage of tax depreciation.

OBTAINING ESTOPPELS AND SNDAs

I. Loan requirements for closing may include assurances from tenants, which ultimately are the mechanism for cash-flow from the property.

II. Estoppel certificates create a promissory estoppel argument for the lender/beneficiary as to the lease status, and typically include the following items:

   A. The attached lease is true, correct and complete, including all amendments (written or oral).

   B. Rent paid to date, and future amounts due.

   C. Other pass-throughs that may be due.

   D. Recitation of the lease term and any renewals or expansions.

   E. The status of any allowances or other tenant inducements.

   F. The existence of any purchase options.

   G. Tenant's knowledge of any defaults.

   H. Status of any bankruptcy contemplated or pending.

   I. Security deposit issues.

   J. Absence of any other agreements between landlord and tenant.

III. Most leases obligate a tenant to provide the estoppel certificate in a timely manner. Failure to do so may be a default (which is an illusory issue) or may authorize the landlord to sign it under a power of attorney (usually negotiated out by the tenant).

   A. In practice, it's hard to force the tenants hand and all available tools may have to be used, from cajoling to threatening.

IV. On most deals, the lender will not need 100% of tenant estoppels, but major tenants, and large percentages of the entire project may still be required. Borrowers should carefully consider a lender's needs when negotiating the purchase contract.

   A. Some contracts allow the seller to certify some of the leases if tenants will not provide the estoppel.

   B. The estoppel presents an opportunity for the tenant to raise plaguing issues, most likely related to repair. The list may be real and short, or long and threatening, depending on their appetite for "extortion."

   C. The form of the estoppel may be limited as provided in the lease. Many national tenants require that their own forms be used.

V. The SNDA presents challenges as well. If the "self-operative" language is missing from the lease, the lease will not be subordinate to the loan, and the lender will be at a disadvantage. This would cause the lease to control insurance proceeds, and could be modified without notice to the lender causing the lender to be stuck with a less than market lease upon foreclosure.

A. The biggest obstacle in getting an SNDA is language obligating the lender for landlord defaults. Lenders do not like to step into shoes they don't know fit, so to speak, and only want to be liable for continuing landlord defaults, the existence of which they had been notified of prior to taking control of the property.

The following form was provided to a national tenant, with some pre-negotiation by the local lender:

SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

This AGREEMENT is made as of this ___ day of _____, 201__, between _____ _____ (the "Tenant"), _____ ("Lender") and _____("Landlord").

Reference is made to the following facts:

A. Under the terms of a lease (the "Lease') dated March 8, 2002, between Tenant, as tenant, and Landlord, Tenant leases a portion of certain property, together with parking and cross-easement rights on other portions of such property, located in Alpharetta, Fulton County, Georgia, and being more particularly described in Exhibit A attached hereto and made a part hereof (such property being hereinafter referred to as the "Property" and the portion leased by Tenant is referred to as the "Leased Premises").

B. Lender has made or shall make a loan or loans (the "Loan") to Landlord to be secured by that certain Deed to Secure Debt and Security Agreement dated __, 2013 to be recorded in the public records of Fulton County, Georgia (the "Security Deed') encumbering the Property and Leased Premises and by certain Assignments of Leases and Rents recorded in the aforesaid public records (the "Assignment of Leases") assigning Landlord's interest in certain leases, including the Lease, to Lender.

C. Tenant has requested that Lender assure Tenant of continued and undisturbed occupancy of the Leased Premises under the terms of the Lease provided Tenant is not in default of the terms of the Lease beyond any applicable cure period, which Lender has agreed to do upon the terms and subject to the conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the sum of Ten and No/100 Dollars ($10.00), in hand paid by Tenant to Lender, the foregoing and the mutual agreements set forth below, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. The Lease and any extensions, renewals, replacements or modifications thereof, and all the right, title and interest of Tenant in and to the Leased Premises and the Property, are

now and shall at all times continue to be subordinate in every respect to the Security Deed, the Assignment of Leases, and all other loan documents evidencing and securing the Loan, and to any and all renewals, modifications, extensions, substitutions, replacements and/or consolidations thereof (the Security Deed, Assignment of Leases and such other loan documents being hereinafter collectively referred to as the "Loan Documents").

2. In the event of Lender (i) acquires the Property pursuant to a foreclosure under the Security Deed, (ii) acquires the Property by deed in lieu of such foreclosure, or (iii) dispossesses Landlord of the Property pursuant to the Security Deed (each of the foregoing being hereinafter referred to as a "Remedial Action"), and so long as no default by Tenant then exists under the beyond any applicable cure period and no other event shall have occurred which would have entitled Landlord to terminate the Lease or which without further action of Landlord or Lender would cause the termination of the Lease or would entitle Landlord or Lender to dispossess Tenant thereunder, then the Lease and Tenant's right to use, enjoyment and possession of the Leased Premises thereunder shall not be terminated nor shall any of Tenant's other rights under the Lease be affected or impaired on account of such Remedial Action. However, if any such default (which has not been cured within the applicable cure period) exists or any such event has occurred at the time of the Remedial Action as described in the preceding sentence, then Lender shall have the option either to (i) recognize the Lease and all of Tenant's rights thereunder, without waiving any remedies Lender may have as landlord on account of Tenant's default, or (ii) terminate the Lease effective as of the date Lender acquired the Property or took possession thereof. Lender agrees that, in the event of any Remedial Action, Tenant shall not be named or joined as a party defendant in any such Remedial Action.

3. In consideration of the foregoing covenants by Lender, Tenant agrees with Lender that in the event the interest of Landlord in the Property and the Lease shall be acquired by Lender by reason of any Remedial Action, Tenant shall attorn to and recognize Lender as its landlord for the remainder of the unexpired term of the Lease, and Tenant and Lender shall be bound under all of the terms, covenants and conditions of the Lease for the balance of the remaining term thereof and any extension thereof duly exercised by Tenant. Upon any such attornment, the Lease shall continue in full force and effect as a direct lease between Tenant and Lender and upon all terms, covenants, and conditions contained therein, except that notwithstanding anything contained in the Lease to the contrary Lender shall not be:

(a) liable for any breach, act or omission of any prior landlord (including Landlord), provided that the foregoing shall not be deemed to relieve Lender, its successors or assigns from the obligation to perform any non-monetary obligation of the landlord under the Lease which remains unperformed at the time such Lender , its successors or assigns, succeeds to the interest of the landlord under the Lease;

(b) subject to any offsets, claims or defenses which Tenant may have against any prior landlord, except for those express rights granted to Tenant by the terms of the Lease so long as Tenant furnishes to Lender Default Notice pursuant to Section 4 below prior to Lender's exercise of Remedial Action;

(c) bound by any rent or additional rent or advance payment or other payment in lieu of rent which Tenant might have paid to any prior landlord more than 30 days in

advance of its due date under the Lease, and all such rents shall remain due and owing notwithstanding any such advance payment, unless actually received by Lender, except for prepayments of Percentage Rent, real estate taxes and assessments, common area costs and utilities required by the terms of the Lease;

(d) bound by any amendment or modification of the Lease made without Lender's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed, except for an amendment or modification of the Lease that is entered into to document the exercise by Tenant of any rights granted to Tenant under the Lease;

(e) liable for any security deposit or other sums held by any prior landlord, unless actually received by Lender; or

(f) personally liable with respect to performance of the obligations of the landlord under the Lease, it being acknowledged that Tenant shall look solely to the estate and property of Lender in the Property (which shall include all rents and other income from the Property and any insurance proceeds, condemnation awards, or proceeds from the sale of the Property) for the enforcement of any judgment (or other judicial decree) requiring the payment of money by Lender to Tenant by reason of any default or breach by Lender in the performance of the landlord's obligations under the Lease. The limitations on Tenant's right of recovery against the Lender set forth in this Section 3(f) shall not limit or impair (i) Tenant's right to seek and obtain other equitable, declaratory, injunctive or other forms of relief against Lender, or (ii) any other remedy or action against Lender which does not involve the personal liability of Lender for monetary damages.

Subject to the provisions of Section 3 above, Tenant acknowledges that the assignment of the Lease to Lender pursuant to the Loan Documents does not impose on Lender any liability with respect to any of Landlord's obligations under the Lease accruing prior to the time Lender succeeds to the interest of Landlord under the Lease, and Tenant's sole recourse on account of any breach in such obligations shall be against Landlord. Neither Lender nor any other party who, from time to time, shall be included in the definition of Lender hereunder shall have any liability or responsibility under or pursuant to the terms of this Agreement for acts or events arising after it ceases to own a fee interest in or to the Property, provided Lender shall remain liable for those matters under the Lease with respect to the period of Lender's ownership and for those obligations under the Lease that are not assumed by its successor.

4. Tenant agrees to give written notice ("Default Notice") to Lender at the same time such notice is sent to Landlord of any default by Landlord of its obligations under the Lease which would entitle Tenant to terminate the Lease, reduce rents, or to credit or offset any amounts against rents or other payments, specifying the nature of the default. After receipt of a Default Notice, Lender shall have the right (but not the obligation) to correct or cure the default of Landlord. In the event Lender elects to cure any default of Landlord, it shall notify Tenant of such election within ten (10) days after Tenant provides Lender with the Default Notice, and upon such election, shall proceed to cure such default in good faith and with due diligence. Lender shall have thirty (30) days after receipt of such Default Notice to cure such default or cause it to be cured, if Lender elects to do so; provided, however, if the default is of such a nature that cannot be cured within

such 30-day period, provided Lender shall commence the curing of the default within such 30-day period, Tenant agrees that Lender shall be permitted such additional time as is reasonably necessary to complete curing such default; provided, however, that the continuation of the default in question neither unreasonably interferes with Tenant's use of the Leased Premises nor imposes any additional obligations on Tenant, and provided further, notwithstanding the foregoing to the contrary, in the event that the cure of such act or omission is an emergency (i. e., any work which must be performed promptly in order to avoid damage to the Leased Premises or to the merchandise or equipment in the Leased Premises, or any threat to human life, or the immediate imposition of a civil or criminal fine or penalty, as determined by Tenant in its sole discretion), Tenant shall be permitted to cure such act or omission without being required to provide Landlord or Lender with notice and a cure period. Subject to the foregoing, until the expiration of such period within which Lender may correct or cure the default, Tenant agrees to take no action to terminate the Lease or reduce rents or to credit or offset any amounts against rents or other payments due under the Lease due to any default by Landlord. Nothing in this paragraph shall be deemed to impose any obligation on Lender to correct or cure any such default by Landlord.

5. After receiving notice from Lender that the Property is subject to the ownership or control of Lender pursuant to rights granted to Lender in the Security Deed, or that Lender has exercised its right to receive rent pursuant to the Assignment of Leases, Tenant shall pay to Lender, or to such other person or entity as may be designated by Lender, all rent, additional rent, or other monies and payments due and to become due to Landlord under the Lease, and Landlord shall credit all such payments made by Tenant to Lender against rental due under the Lease. Landlord waives and releases any claim it may have against Tenant for any sum paid by Tenant to Lender, any party designated by Lender or any successor to Lender pursuant to such demand. Tenant may conclusively rely upon any written notice Tenant receives from Lender notwithstanding any claims by Landlord contesting the validity of any term or condition of such notice, including any default claimed by Lender, and Tenant shall have no duty to inquire into the validity or appropriateness of any such notice.

6. Whenever any notice, demand or request is required or permitted hereunder, such notice, demand or request shall be sent by nationally recognized overnight/express mail courier service providing proof of delivery, to the addresses set forth below:

If to Lender:

_____
_____
_____

If to Landlord:

_____
_____
_____
_____
Attn:_____

If to Tenant:

_____
_____
_____
_____
Attn:_____

Any notice, demand or request which shall be served upon either of the parties in the manner aforesaid shall be deemed sufficiently given for all purposes hereunder on the day such notice is received or refused.

7. As used herein, the word "Lender" includes any persons claiming by, through or under Lender or the Security Deed, including but not limited to any purchaser at foreclosure sale, any grantee of the Property, or to such other successor to Landlord's estate, and the words "Tenant" and "Landlord" shall include their respective successors and assigns.

8. Tenant hereby acknowledges and agrees that notwithstanding anything to the contrary herein or in the Lease, any interest of Tenant in an option to purchase or a right of first refusal with respect to all or a part of the Property, shall not apply to, and may not be exercised or utilized in connection with (a) any sale or other conveyance of the Property in connection with an exercise by Lender of any Remedial Action, including by way of illustration but not limitation, a foreclosure or a deed or conveyance in lieu of foreclosure; and (b) any sale or other conveyance of the Property by Lender or any affiliate or subsidiary of Lender or other party related to Lender, which has taken title to the Property in connection with any action described in subsection 9(a) above, to a third-party.

9. This Agreement may not be modified orally or in any other manner than by an agreement in writing signed by the parties hereto and their respective successors in interest. This Agreement shall inure to the benefit of and be binding upon the parties hereto, their successors and assigns.

10. This Agreement may be executed in several counterparts, and all so executed shall constitute one agreement, binding on all parties hereto, notwithstanding that all parties are not signatories to the original or the same counterpart, provided that all parties are furnished an original copy thereof reflecting the signatures of all parties. Furthermore, delivery of an executed copy hereof by facsimile shall be binding upon the transmitting party, provided that all parties are furnished an original copy thereof reflecting the signatures of all parties.

11. Lender acknowledges and agrees that: (a) no proper exercise by Tenant of its rights under the Lease shall constitute a default under the Loan Documents or require the Lender's consent, and (b) Lender has no interest in, and waives any interest in, and the Loan Documents shall in no manner become a lien on any of Tenant's trade fixtures, satellite dish, business equipment, safety systems, signs, personal property, goodwill, or other improvements installed at or about the Leased Premises by Tenant or with Tenant's funds.

12. Lender agrees that so long as the Lease is in full force and effect, if the Leased Premises shall be damaged or destroyed by fire or other casualty, or taken by condemnation, and such event does not result in the termination of the Lease by Landlord or Tenant pursuant to any right reserved by either such party, then notwithstanding any contrary provision contained in the Loan Documents, Lender shall release its interest in such proceeds and shall make the proceeds of insurance or condemnation award available to Borrower pursuant to disbursement procedures used by Lender at such time for construction draws for the purpose of repairing and restoring the Leased Premises.

13. This Agreement and the rights and obligations of the parties hereunder shall be construed in accordance with the laws of the state in which the Property is located.

14. This Agreement, together with the relevant provisions of the Lease, constitutes the entire agreement between Lender, Tenant and Landlord regarding the subordination of the Lease to the Loan Documents and the rights and obligations of Landlord, Tenant and Lender as to the subject matter of this Agreement.

15. In the event that any party shall institute a suit against the other(s) for a declaration of rights hereunder, or should any party intervene in any suit in which the other(s) are a party, to enforce or protect its interest or rights hereunder, the prevailing party in any such suit shall be entitled to all of its costs, expenses and reasonable fees of its attorney(s) in connection therewith.

16. Each party executing this Agreement represents to the other parties that the person who executes this Agreement on behalf of such party is duly authorized to do so, and such party's execution and delivery of this Agreement has been duly authorized by all necessary actions..

EXECUTED UNDER SEAL on the day and year first above written.