

Title And UCC Insurance for Mezzanine-Financing Transactions*

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I. Introduction

As a result of the increased securitization of real estate and the packaging of pools of loans for sale into the secondary market, as well as the reluctance of first mortgage lenders to allow subordinate mortgages on the secured properties, mezzanine financing has become very popular in recent years.¹ Mezzanine financing fills the gap between the first mortgage financing, which usually has a loan-to-value ratio of forty to seventy-five percent, and the equity participation of the principals of the borrower, which is usually no more than ten percent of the cost of the project. Mezzanine financing commonly supplies financing of ten percent to fifty percent of the project's capital structure cost. This type of financing can take several forms. Most commonly, it involves extending credit to the partners or other equity holders of the borrower and taking a pledge of such parties' equity interests (including the right to distributions of income), as well as the execution of an intercreditor agreement between the mortgage lender and the mezzanine lender.² Alternatively, the lender may take a preferred equity position, which is entitled to distributions of excess cash flow after debt service, ahead of the borrower's principals. A "combination" loan structure also may be used to combine a first mortgage loan with mezzanine financing at an aggregate loan-to-value ratio of ninety to ninety-five percent. This type of structure may contain a shared-appreciation or contingent feature, an exit fee paid by the borrower, or sometimes, both. In addition, the mezzanine lender could take collateral in the form

*Nothing contained in this Article is to be considered as the rendering of legal advice for specific situations or transactions, and readers are responsible for obtaining such advice from their own legal counsel. This Article and any forms and agreements herein are intended for educational and informational purposes only. The authors express their appreciation to James D. Prendergast, Senior Vice President and General Counsel, U.C.C. Division, The First American Corporation, for his invaluable assistance with this Article.

¹ On March 29, 2007, Moody's Investor Services ("Moody's," which is one of the major rating agencies), issued a report entitled *US CMBS and CRE CDO: Moody's Approach to Rating Commercial Real Estate Mezzanine Loans* (hereinafter the "Moody's Report"). The Moody's Report states, at Page 1, that "just in the last two years, mezzanine loan issuance included in commercial real estate CDOs (CRE CDOs) has skyrocketed from a few score million dollars annually to over \$3 billion per year." In financial markets, collateralized debt obligations (CDOs) are a type of asset-backed security and structured credit product. CDOs gain exposure to the credit of a portfolio of fixed income assets and divide the credit risk among different tranches: senior tranches (rated AAA), mezzanine tranches (AA to BB), and equity tranches (unrated). Losses are applied in reverse order of seniority and so junior tranches offer higher coupons (interest rates) to compensate for the added risk. CDOs serve as an important funding vehicle for portfolio investments in credit-risky fixed income assets. See John C. Kelly, *An Introduction to Commercial Real Estate CDOs (Part 1)*, 21 PROB. & PROP. 38 (2007). The Moody's Report summarizes the current status of mezzanine loans, including the significant rise of mezzanine loan financing; mezzanine loan structures (baseline expectations); and credit considerations and rating methodology. According to the Moody's Report, at Page 3, "mezzanine financing" means, for purposes of the Moody's Report, "lending to a borrowing entity or group of entities that directly or indirectly owns a real property-owning entity, which debt is secured by a perfected first security interest in the mezzanine borrower's pledged ownership interests in the property owner."

² See discussion of intercreditor agreements in Section VI. of this Article.

of both a pledge of equity interests and a second lien on the real estate, subject to an intercreditor agreement with the senior lender. Often, all or some combination of these types of financings will be used by a company if it seeks to gain funds to increase working capital, acquire assets, or refinance its current debt. A mezzanine lender's rate of return exceeds that on a first mortgage on the real estate because of the greater risk of an equity loan. The minimum deal size has historically been in the range of \$10 million to \$25 million, although the minimum amount has also dropped dramatically in recent years, as this type of financing gains in popularity and the overall cost of such transactions has decreased.

II. Title Endorsements for Mezzanine Lenders

Because the mezzanine lender does not possess a present ownership in the real property of the borrowing entity, it does not itself have an insurable interest in the land. Also, its interest cannot be insured under an ALTA Loan Policy, because it does not have a mortgage lien against the real property.

The borrower in a mezzanine loan is often a limited liability company ("LLC"), and the equity participant in the borrowing entity is frequently itself an LLC. In those situations where the mezzanine lender is taking a pledge of some or all of the equity interests in one or more of these entities in connection with the mezzanine loan, the lender may look to the title insurer for special forms of title-insurance coverage.

In October, 2003, the American Land Title Association ("ALTA") adopted ALTA Endorsement Form 16 (Mezzanine Financing). This endorsement, which is attached as **Appendix A**,³ is designed for use with new ALTA Owner's Policies where the equity interests (one-hundred percent or some lesser percentage) in the insured entity are being pledged as security for a mezzanine loan or as security for a guaranty by the equity holders of some other indebtedness (which may be a loan secured by a mortgage against the subject real estate owned by the vestee entity for which an ALTA Loan Policy may be issued to the "senior" mortgage lender). Since the real value of the equity holder's interest in the entity is based upon the ownership by that entity of the subject real estate (particularly in the context of so-called "single purpose" or "special purpose" entities so prevalent today in commercial real estate development and financing), the mezzanine lender wants to make sure there is an Owner's Policy in place (insuring the vestee entity's ownership of the title free of undisclosed liens and other defects) and that the mezzanine lender has rights under that Owner's Policy to any payments otherwise payable to the insured entity. This endorsement in effect provides non-imputation, additional insured, and "Fairway" coverage to the mezzanine lender (these coverages typically are not included in Owner's Policies). The Form 16 Endorsement (similar to the new Form 15-series non-imputation endorsements also adopted by the ALTA in 2003) protects the mezzanine lender with respect to (1) matters created, suffered, assumed or agreed to by the insured (Exclusion 3(a)), (2) matters known to the insured but not found in the public records and not known or disclosed to the title insurer (Exclusion 3(b)), and (3) loss the insured suffers because it has not

³All attached forms are for discussion purposes only and do not constitute legal advice. The utility and enforceability of the forms (especially the corporate documents) will depend on local law and specific fact situations.

paid value for the interest in the land covered by the policy (Exclusion 3(e)). The Form 16 Endorsement also assigns to the mezzanine lender the right to receive payments otherwise payable to the insured under the policy and, for that reason, the endorsement requires the signature of an authorized representative of the insured entity consenting to the assignment of benefits to the mezzanine lender of any loss payable under the Owner's Policy (to the extent of the mezzanine lender's interest). The ALTA 16 Endorsement can be issued when the loan is closed, or it can be issued to amend the borrower's existing Owner's Policy (but no coverage would be provided for any matters created subsequent to the original policy date). The endorsement also assures the mezzanine lender that no amendment of the policy can be made without its written consent, and includes a "standstill" provision with respect to the title insurer's right of subrogation against the insured, the borrower, or a guarantor of the mezzanine loan. The ALTA 16 Endorsement is not available in all states, and mezzanine lenders should consult with their title underwriters regarding availability (and pricing).

In addition to the Form 16 Endorsement, many mezzanine lenders obtain a Uniform Commercial Code ("UCC") insurance policy (offered by some of the largest title insurance companies) in connection with mezzanine financing transactions, with appropriate endorsements to insure the attachment, perfection and priority of the lender's secured interest in the pledged equity interests under the UCC as adopted in a particular state.⁴

III. UCC Issues in Mezzanine Financing Transactions

As noted above, mezzanine financing often involves extending credit to equity holders of an LLC, with the lender taking a pledge of the parties' equity interests in the LLC.⁵ Under § 9-102(a)(49) of the UCC, these types of assets can be either "investment property" or "general intangibles." Investment property is defined, under § 9-102(a)(49), as a security (whether certificated or uncertificated), security entitlement, securities account, and commodity account or commodity contract. A security interest in investment property may be perfected by control, by filing, or, if the investment property is a certificated security, by possession.⁶ The securing of obligations with equity collateral, such as LLC interests, involves both Article 8 and Article 9 of the UCC. A sample Pledge and Security Agreement ("Pledge Agreement") is attached hereto as **Appendix B**.⁷ The Pledge Agreement (or a separate Irrevocable Proxy Agreement) may grant the secured party the right to vote the pledged LLC equity interests with respect to any Article 8 matters. A sample Irrevocable Proxy Agreement granting this right is attached hereto as **Appendix C**, and a sample clause to insert in the Pledge Agreement, granting the secured party the right to vote the pledged LLC interests with respect to Article 8 matters, is attached hereto as **Appendix D**.

⁴ The Form 16 Endorsement does not provide this type of coverage for personal property interests. See Sections IV. and V., *infra*, for a more detailed discussion of the scope and benefits of UCC insurance policies.

⁵ See Fitch Ratings, *Evaluating Additional Debt in Commercial Mortgage Transactions*, COMMERCIAL MORTGAGE CRITERIA REPORT, February 22, 2006, at Page 2. ("[t]he only security for a mezzanine loan should be a pledge of the direct or indirect equity interests in the first mortgage borrowing entity").

⁶ See UCC § 8-301, and UCC §§ 9-313(a) and 9-328.

⁷ This form is for primary obligors and not secondary obligors, because it does not include waiver-of-surety defenses to avoid exoneration of the pledgor if the terms of the supported obligation are changed. Local law should be reviewed before use of this form or any of the other forms attached as appendixes to this Article.

Under § 9-102 (a)(42), general intangibles are defined as personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes a “payment intangible”⁸ and software. In essence, “general intangibles” is the residual category of personal property that is not included in the other defined types of collateral. A security interest in a general intangible is perfected by filing.⁹

In order to have a priority security interest in the pledged collateral that will prevail over purchasers, other lenders, and creditors using judicial process to obtain a lien on the collateral, the mezzanine lender must perfect its interest in the collateral under Article 9.¹⁰ As stated above, perfection of a security interest in a pledge of an interest in an LLC can be accomplished by (i) filing a UCC-1 financing statement in the appropriate jurisdiction (under § 9-310, if the security interest is deemed a general intangible or is investment property); (ii) taking possession of the collateral (under § 9-313(a), which also provides that a perfected security interest in certificated securities may be obtained by taking delivery of the certificated securities under § 8-301); or (iii) control (under § 9-314(c), if the security interest is deemed investment property).¹¹ While the general rule is that the earlier of the first to file or perfect has established priority, perfection by control will prime a security interest in the same property that is perfected by any other method of perfection, even if the control occurs after the time of first perfection.¹² Section 9-331(b) also makes explicit what was implied under former Article 9 and is explicit under Article 8, i.e., where investment property collateral is transferred to a person protected under Article 8, Article 9 defers to the rights of protected purchasers under Article 8, to the extent Article 8 provides rights to those protected persons.¹³ If the governing documents of an LLC provide that the membership interests are securities, then such interests will be treated as investment property instead of general intangibles. If an issuer thus opts into Article 8, the lender’s interest in the collateral is deemed investment property and the lender can obtain “Protected Purchaser Status” under Article 8.¹⁴

A lender has Protected Purchaser Status when it gives value for the interest without notice of any adverse claim and has control of the security. Protected Purchaser Status will enable the lender to defeat any adverse claim, including claims of third parties that treat their interests as general intangibles and who perfect by filing in the jurisdiction in which the debtor is located. An example of an amendment to an Operating Agreement for an LLC that contains the necessary language to opt into Article 8 is attached hereto as **Appendix E**. An example of an

⁸“Payment Intangible” is defined in UCC § 9-102(a)(61) as “a general intangible under which the account debtor’s principal obligation is a monetary obligation.”

⁹ See UCC § 9-310.

¹⁰ See UCC § 9-308(a).

¹¹ See James D. Prendergast and Keith Pearson, *How to Perfect Equity Collateral Under Article 8*, 20 PRAC. REAL EST. LAW. 33, 36 (2004) (“As investment property, a security interest perfected by control or possession would, in most cases, have priority over a competing security interest that had *previously* been perfected only by filing, even if the subsequent secured party had knowledge (as defined under Article 9 – actual knowledge) of the competing security interest” (emphasis in text)).

¹² See UCC § 9-328(1).

¹³ See UCC § 9-331.

¹⁴ See UCC § 8-303.

“acknowledgment and consent” from the issuer evidencing its intent to “opt in” to Article 8 is attached hereto as **Appendix F**.

The issuer’s counsel should be cognizant of the effect of opting into Article 8 and be careful to follow the mandates required within Article 8. For example: (i) § 8-202 requires the issuer to set forth the terms of the security on the certificate or to incorporate them by reference; (ii) § 8-204 requires the issuer to conspicuously note restrictions on transfer on the security certificate or, if uncertificated, to notify the registered owner; (iii) § 8-205 provides, under certain circumstances, for the effectiveness of unauthorized signatures; (iv) § 8209 provides that a lien in favor of an issuer is effective against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate; (v) § 8401 sets forth the requirements under which an issuer shall register a requested transfer of a certificated or uncertificated security; and (vi) § 8404 provides criteria for holding the issuer liable for wrongful registration. However, none of the foregoing provisions are of issue in a closely held entity. Furthermore, most corporate lawyers like the applicability of Article 8 because it brings certainty to these issues, which usually are not covered by LLC and partnership statutes but are covered by applicable corporate law. An example of a Form of Certificate for Limited Liability Company Interest of an LLC is attached hereto as **Appendix G**.

UCC § 9-106, by reference to § 8-106, provides that a secured party takes control of an uncertificated security, such as a pledge of an uncertificated LLC membership interest, “if either it is delivered to the purchaser or the issuer agrees in a written agreement to follow the written instructions of the purchaser without further consent by the registered owner.” Delivery will occur, under § 8-103, when the issuer registers the purchaser (i.e., the lender), or a third party not closely related to or controlled by the debtor -- other than a securities intermediary -- who holds on behalf of the lender, as the registered owner. An example of a control agreement entered into by the borrower, the lender and the pledgor, acknowledging an uncertificated pledge of the pledgor’s LLC membership interest to the lender, is attached hereto as **Appendix H**.

Control of a certificated security occurs when the lender or a third person not closely connected to or controlled by the debtor has possession of the certificate, and when the certificate is (i) issued in bearer form, (ii) is issued to the debtor as owner with an endorsement in blank, or (iii) the lender has an assignment separate from the certificate signed in blank by the debtor.¹⁵

According to one commentator, “A lender requiring an opt-in should take steps to prevent the issuer from opting out of Article 8 at a later time [by entering into an agreement with the issuer that it will not opt out and requiring that the LLC operating agreement provide that the language opting in to Article 8 cannot be amended without the lender’s consent]. A lender that does not require an opt-in should take steps to prevent an opt-in [by entering into an agreement with the issuer that it will not opt in under Article 8 or amend the LLC operating agreement to permit an opt-in without the lender’s consent].”¹⁶

¹⁵ See UCC § 9-106 and UCC § 8-106. See also Steven O. Weise, Philip Ebeling, Dena M. Cruz, Theodore H. Sprink, and Randall L. Scott, *It’s Time to Take a Close Look at UCC Article 9*, 19 CAL. REAL PROP. J. 3, 7-8 (2001); James D. Prendergast, *Secured Real Estate Mezzanine Lending (With Form)*, 23 PRAC. REAL EST. LAW. 35 (2007).

¹⁶ Lynn A. Soukup, “*Opting In*” to Article 8 – LLC, GP & LP Interests as Collateral, Commercial Law Newsletter, American Bar Association Section of Business Law (July 2002), at Page 1.

IV. Moody's Analysis of Title and UCC Issues in Mezzanine Financing

The "Mezzanine Loan Structures – Baseline Expectations" section of the Moody's Report, which contains a subsection entitled "Title Insurance,"¹⁷ states that "Mezzanine lenders' title policies differ from mortgage lenders' title coverage, because they are derivative of the property owner's coverage; in essence, they are meant merely to 'cut through' to the owner's existing coverage."¹⁸ The Moody's Report notes that there was some doubt initially regarding the cost-benefit utility of such insurance, i.e., was it really worth the cost? But the Moody's Report states that "Recently . . . the mezzanine lending community has coalesced about a package of coverage that mezzanine borrowers have accepted as appropriate. Moody's acknowledges the intelligence of independently arrived-at market standards, and agrees with the market that mezzanine title policies add value; we embrace them as a baseline for mezzanine lending."¹⁹ Therefore, according to Moody's, it "generally expects that mezzanine loans presented for rating will have the benefit of an ALTA 16 'mezzanine financing endorsement' -- or its equivalent -- where available and reasonably priced representing access to an owner's policy in an amount at least equal to the combined value of the senior and mezzanine loans, as well as in all cases the benefit of a 'UCC insurance policy' where available."²⁰

The Moody's Report also notes²¹ that one commentator has suggested that the ALTA Form 16 endorsement, by providing that the real property owner agrees to assign its rights to proceeds under the Owner's Policy of title insurance to the mezzanine lender to the extent of the mezzanine debt, could cause the real property owner to be in violation of special-purpose bankruptcy-remoteness requirements because it would result in "suretyship" debt to the mezzanine lender.²² But the Moody's Report reasons that because the series of events that would have to occur to bring about such a result are so remote, there would be "minimal impact on the balancing tests that nonconsolidation opinions apply."²³ But the Moody's Report does note that the issue should nonetheless be disclosed and addressed in the nonconsolidation opinion of the property owner.

The Moody's Report further specifically addresses UCC issues and insurance in the section entitled "Mezzanine Loan Structures – Baseline Expectations." In the subsection entitled "Pledge of 100% of the Ownership Interests,"²⁴ Moody's states that it "expects that 100% of the beneficial owner's interest in the property-owning entity will be pledged as collateral, so that any foreclosure of the mezzanine loan will produce a transfer of all the equity interests in the property owner, leaving behind no minority interests." In another subsection entitled "Certificated Entities Under the UCC,"²⁵ Moody's states that although equity interests in limited liability companies, general partnerships, and limited partnerships usually are deemed "general

¹⁷ See Moody's Report, at Page 5.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Moody's Report, at Page 5 footnote 13.

²² See Dennis B. Arnold, "Enforcing Security Interests in Membership Interests and Partnership Interests," COMMERCIAL REAL ESTATE FINANCE 2007, Practising Law Institute, at p. 717.

²³ See Moody's Report, at Page 5.

²⁴ *Id.*, at Page 4.

²⁵ *Id.*, at Page 5.

intangibles” [see discussion above] and are perfected by filing UCC-1 forms in the appropriate jurisdiction, “there are great benefits to the secured lender if a mortgage borrower must ‘opt in’ to Article 8 of the UCC, and must ‘certify’ its ownership interest as ‘securities’ under Article 8.” Moody’s notes that the mezzanine lender can then obtain priority and perfection of its security interest merely by taking control or physical delivery of the LLC or partnership interests, and thereby take advantage of the “Protected Purchaser Status” provided under UCC § 8-303.²⁶ Moody’s summarizes by stating that it “expects that mortgage loan borrowers will irrevocably ‘opt-in’ to Article 8 of the UCC and will certify the partnership or LLC membership interests that will be pledged to the mezzanine lender. UCC-1 financing statements should additionally be filed, as ‘fail-safe’ protection.”²⁷ Also, the subsection of the Moody’s Report entitled “Title Insurance” requires “in all cases the benefit of a ‘UCC insurance policy’ where available.”²⁸

V. UCC Insurance for Mezzanine Lenders

All the major land-title insurance companies offer UCC insurance in one form or another. But there is no “standard” form of a lender’s policy of UCC insurance, as there are standard American Land Title Association (ALTA) forms of land title insurance. All of the UCC insurance lender-policy forms have similarities, but they are also different in certain respects. The authors’ employer, First American Title Insurance Company (“First American”), offers the EAGLE 9™ UCC Insurance Policy (“EAGLE 9 Policy”).²⁹ First American has also promulgated, in connection with the EAGLE 9 Policy, a specialized endorsement for use in connection with mezzanine loans.³⁰ Remarkably, if the governing documents of an LLC provide that the membership interests are securities and the lender has taken the proper steps to achieve Protected Purchaser status (as described above), the UCC Policy when coupled with this endorsement insures not only perfection by possession or control, but also that the pledgor effectively owns the interests being pledged as collateral and that the lender has Protected Purchaser status under Article 8. A copy of the endorsement is attached hereto as **Appendix I**.³¹

The Protected Purchaser status of a second mezzanine lender could, under certain circumstances (notably the failure of the first mezzanine lender to require that the borrower opt-in to Article 8 and certify its membership interests), result in the security interest of the second mezzanine lender being senior to the security interest of the first mezzanine lender. If the first mezzanine lender had obtained an EAGLE 9 Policy (or a similar policy from another

²⁶ See discussion above, noting that Protected Purchaser Status will enable the lender to defeat any adverse claim, including claims of third parties that treat their interests as general intangibles and who perfect by filing in the jurisdiction in which the debtor is located.

²⁷ See Moody’s Report, at Page 5.

²⁸ *Id.*

²⁹ The basic EAGLE 9 Policy insures the proper creation, attachment, perfection (whether by filing, possession, or control), priority and effectiveness of UCC security interests. As noted, similar products are also offered by other major title insurers.

³⁰ Other major title insurers also offer forms of UCC mezzanine-financing endorsements in connection with their UCC Policies.

³¹ With respect to the discussions of the UCC Policies in this Article, there are exceptions, exclusions and conditions to coverage contained in the Policy. Some coverages may not be available in certain jurisdictions, or for specific transactions, due to legal, regulatory, or underwriting considerations.

insurer) together with the mezzanine endorsement, First American (or another insurer issuing a similar endorsement) would be obligated to defend any challenge to the priority of the insured's security interest, regardless of the actual merits of the claim or whether the insured had yet suffered an actual loss.³²

There may be a "hidden" legal malpractice risk to real estate attorneys who only occasionally deal with UCC issues in their practice (especially with respect to mezzanine financing), because of the complicated nature of the applicable provisions of Article 8 and Article 9.³³ Further, Article 9 (and the UCC in general) has no relationship to whether the equity interest in an LLC is a security for purposes of federal or state securities laws, which may have an effect on (among other things) the manner of foreclosure of such interests.

VI. Intercreditor Agreements

The "Mezzanine Loan Structures – Baseline Expectations" section of the Moody's Report contains a subsection entitled "Intercreditor Agreements,"³⁴ which states that "The relationship of the mezzanine lender to the mortgage lender and the rights the mezzanine lender can extract through the intercreditor agreement are keystones to the potential success or failure of a mezzanine loan." Moody's then poses the question: What is a "credit-neutral" intercreditor agreement? With respect to intercreditor and "standstill" agreements between first mortgage lenders and mezzanine lenders, in 2002 a standard form of intercreditor agreement was promulgated, with input from rating agencies, mezzanine lenders and first mortgage lenders. This standard form has been approved by the Commercial Mortgage Securities Association ("CMSA").³⁵ Moody's acknowledges that the CMSA form is now the "standard" or "blacklining" base for almost all capital-markets mezzanine-loan intercreditor agreements.³⁶ Moody's considers the CMSA form to be the "credit neutral" norm against which modifications will result in either positive or negative effects on the rating.³⁷ But caution must be exercised with respect to the enforceability of intercreditor agreements in bankruptcy. As Moody's notes in the "Intercreditor Agreements" section of the Moody's Report, "An intercreditor agreement usually is not a win-win arrangement, but is something that that memorializes the zero-sum accommodations lenders forge with each other."³⁸ Although in general intercreditor agreements are enforceable in bankruptcy, agreements that transfer a subordinate lender's (including a mezzanine lender's) rights to a senior lender can be problematic. Recent bankruptcy case

³² See Moody's Report, at Pages 5-6.

³³ See *The Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions – Revised Article 9*, 58 BUS. LAW. 1449, 1454 (2003) ("opinion preparers who do not regularly work with Article 9 should consider whether to involve a lawyer familiar with Article 9 in the preparation of a U.C.C. security interest opinion.").

³⁴ See Moody's Report, at Page 5.

³⁵ The standard form of intercreditor agreement is available on the CMSA website, at [http://www.cmbms.org/standards/Intercreditor Agreement.pdf](http://www.cmbms.org/standards/Intercreditor%20Agreement.pdf).

³⁶ Standard & Poor's and Fitch, the other two major rating agencies, also have indicated that this form generally will be acceptable for most securitized mortgage loan transactions.

³⁷ See Moody's Report, at Page 6.

³⁸ *Id.*

decisions, which are not consistent, affect intercreditor agreements, the scope and extent of lien subordination generally, and the enforceability of assignments of voting rights.³⁹

VII. Conclusion

Mezzanine lending, as noted earlier in this Article, is used to describe financing that fills the gap between the loan-to-value coverage of the mortgage financing and the cost of the subject project. It has become one of the major sources of financing for lenders who want to stay on the cutting edge of creative commercial lending. First-mortgage lending has become more of a commodity since the revitalization of the capital markets in the mid-1990s. Prior to this time, the mezzanine lender would provide conventional subordinate real-estate financing to the borrower, secured by a second mortgage on the property. When a loan workout, foreclosure or bankruptcy ensued, disputes often resulted regarding the respective rights and obligations of the first and second lienholders. Wearying of such battles, first-mortgage lenders severely restricted the right of borrowers to permit subordinate financing secured by the mortgaged property. The major rating agencies (Fitch, Moody's, and Standard & Poor's), equally concerned about these issues, also severely restricted the ability of a borrowing entity to place subordinate financing on a property that was to be part of a securitization. Mezzanine financing, which arose to address these concerns, effectively transforms a second mortgage into a senior equity security interest, with a fixed or floating interest rate similar to a mortgage, and an amortization schedule. If the borrower defaults, the mezzanine lender has the right to succeed to the ownership and control of the equity interest of the borrower. This enables the mezzanine lender to (at least theoretically) prevent a bankruptcy filing by the borrower and enables it to immediately collect and possess the cash flow without having to foreclose on the property. But there is very little case law to provide guidance in this area. Counsel for mezzanine lenders should closely monitor developing case and statutory law with respect to mezzanine financing. They should also work closely with title insurers, who may be able to offer special title and UCC insurance coverages or endorsements for mezzanine-financing transactions and alleviate some of the lenders' concerns in connection with these types of transactions.

³⁹ See John C. Murray, *Are Intercreditor Agreements Enforceable in Bankruptcy?* 23 PRAC. REAL EST. LAW. 41 (2007).

APPENDIX A

ALTA ENDORSEMENT FORM 16 (MEZZANINE FINANCING)

Attached to Policy No.

Issued by

_____ Title Insurance Company

1. The Mezzanine Lender is:
and each successor in ownership of its loan (“Mezzanine Loan”) reserving, however, all rights and defenses as to any successor that the Company would have had against the Mezzanine Lender, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land.
2. The insured:
 - (a) assigns to the Mezzanine Lender the right to receive amounts otherwise payable to the insured under this policy, not to exceed the outstanding indebtedness under the Mezzanine Loan; and
 - (b) agrees that no amendment of or endorsement to this policy can be made without the written consent of the Mezzanine Lender except as provided in Section 12(a) of the Conditions and Stipulations.
3. The Company does not waive any defenses that it may have against the insured, except as expressly stated in this endorsement.
4. In the event of a loss under the policy, the Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b) or (e) to refuse payment to the Mezzanine Lender solely by reason of the action or inaction or knowledge, as of Date of Policy, of the insured, provided:
 - (a) the Mezzanine Lender had no knowledge of the defect, lien, encumbrance or other matter creating or causing loss on Date of Policy.
 - (b) this limitation on the application of Exclusions from Coverage 3(a), (b) and (e) shall:
 - (1) apply whether or not the Mezzanine Lender has acquired an interest (direct or indirect) in the insured either on or after Date of Policy, and
 - (2) benefit the Mezzanine Lender only without benefiting any other individual or entity that holds an interest (direct or indirect) in the insured or the land.
5. In the event of a loss under the Policy, the Company also agrees that it will not deny liability to the Mezzanine Lender on the ground that any or all of the ownership interests (direct or indirect) in the insured have been transferred to or acquired by the Mezzanine Lender, either on or after the Date of Policy.
6. The Mezzanine Lender acknowledges:

- (a) that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy; and
- (b) that the Company shall have the right to insure mortgages or other conveyances of an interest in the land, without the consent of the Mezzanine Lender.

- 7. If the insured, the Mezzanine Lender or others have conflicting claims to all or part of the loss payable under the Policy, the Company may interplead the amount of the loss into Court. The insured and the Mezzanine Lender shall be jointly and severally liable for the Company's reasonable cost for the interpleader and subsequent proceedings, including attorneys' fees. The Company shall be entitled to payment of the sums for which the insured and Mezzanine Lender are liable under the preceding sentence from the funds deposited into Court, and it may apply to the Court for their payment.
- 8. Whenever the Company has settled a claim and paid the Mezzanine Lender pursuant to this endorsement, the Company shall be subrogated and entitled to all rights and remedies that the Mezzanine Lender may have against any person or property arising from the Mezzanine Loan. However, the Company agrees with the Mezzanine Lender that it shall only exercise these rights, or any right of the Company to indemnification, against the insured, the Mezzanine Loan borrower, or any guarantors of the Mezzanine Loan after the Mezzanine Lender has recovered its principal, interest, and costs of collection. If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal, interest, and costs of collection.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

AGREED AND CONSENTED TO:

(Insert name of Insured)

(Insert name of Mezzanine Lender)

By: _____

By: _____

_____ Title Insurance Company
By: _____

APPENDIX B

MEZZANINE PLEDGE AND SECURITY AGREEMENT

This MEZZANINE PLEDGE AND SECURITY AGREEMENT (“**Pledge Agreement**”) dated as of _____ is from _____, a _____ [limited partnership/limited liability company/corporation], having its principal place of business at _____ (“**Mezzanine Borrower**”) to _____, a _____, having an address at _____ (together with its successors and assigns, “**Mezzanine Lender**”).

RECITALS:

A. Pursuant to that certain Mezzanine Loan Agreement of even date herewith between Mezzanine Lender and Mezzanine Borrower (“**Mezzanine Loan Agreement**”), Mezzanine Lender agreed to make a mezzanine loan in the amount of \$ _____ (the “**Mezzanine Loan**”) to Mezzanine Borrower. Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Mezzanine Loan Agreement.

B. _____, a _____ (“**Mortgage Borrower**”) owns the Property, and is the borrower under the Mortgage Loan made by Mortgage Lender and secured by, among other things, the Security Instrument encumbering the Property.

[Alt #1 - Mortgage Borrower is Limited Partnership]

C. Mortgage Borrower is a _____ limited partnership. _____, a _____ (“**General Partner**,”) is the sole general partner of Mortgage Borrower and owns 100% of the general partnership interests in Mortgage Borrower (which 100% constitutes [1]% of the partnership interests in Mortgage Borrower). Mezzanine Borrower is the sole limited partner of Mortgage Borrower and owns 100% of the limited partnership interests in Mortgage Borrower (which 100% constitutes [99]% of the partnership interests in Mortgage Borrower). Mezzanine Borrower is also the [sole shareholder of]/[member of] General Partner and owns 100% of the Equity Interests therein.

[Alt #2 - Mortgage Borrower is a Delaware Single Member LLC]

C. Mortgage Borrower is a Delaware single member limited liability company. Mezzanine Borrower is the sole member of Mortgage Borrower and owns 100% of the Equity Interests therein.

[Alt #3 - Mortgage Borrower structure is other than Alt #1 or Alt #2 above. For example Mortgage Borrower may be a multi-member LLC or there may be sandwich entities between Mortgage Borrower and Mezz Borrower.]

D. Mortgage Borrower [**Alt #2 - is**][**Alt #1 - and General Partner** are collectively] referred to herein as the “**Pledged Entity**”, which term shall be construed in accordance with the definition of such term in the Mezzanine Loan Agreement.

E. To secure Mezzanine Borrower’s obligations under the Mezzanine Loan Documents and to ensure the timely payment of the Mezzanine Loan and the performance of Mezzanine Borrower’s other Obligations under and in accordance with the Mezzanine Loan Documents, Mezzanine Borrower is required, among other things, to pledge, and by this Pledge Agreement does pledge, among other things, all of its right, title and interest in, to and under: [**Alt #1 - (i) 100% of the limited partnership interests in Mortgage Borrower, and (ii) 100% of the [member interests in]/[capital stock of] General Partner ((i) and (ii), (collectively, the) [Alt #2 - 100% of the member interests in Mortgage Borrower (the) “Pledged Equity”**).

NOW, THEREFORE, in consideration of the foregoing and in order to induce Mezzanine Lender to make the Mezzanine Loan, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

1. GRANT OF SECURITY INTEREST

1.01. Pledged Collateral. As security for the full and punctual payment and performance of Mezzanine Borrower's Obligations under the Mezzanine Loan Documents, Mezzanine Borrower hereby grants, pledges, hypothecates, transfers and assigns to Mezzanine Lender a first priority and continuing lien on and first priority security interest in all of Mezzanine Borrower’s right, title, ownership, equity or other interests in and to the following, whether now owned or hereafter acquired, now existing or hereafter arising and wherever located (collectively, the “Pledged Collateral”): (a) Mezzanine Borrower's right, title and interest in and to the Pledged Equity, together with all Equity Interests related to the Pledged Equity which may be issued or granted by any Pledged Entity to Mezzanine Borrower while this Pledge Agreement is in effect, (b) all rights, privileges, general intangibles, payments intangibles, voting rights, authority and power arising from its interest in the Pledged Equity, (c) the capital of Mezzanine Borrower and any and all profits, losses, Distributions (defined herein), and allocations attributable to the Pledged Equity as well as the proceeds of any distribution thereof, whether arising under the terms of any Governing Documents of the Pledged Entity or otherwise, (d) all other payments, if any, due or to become due, to Mezzanine Borrower and all other present or future claims by Mezzanine Borrower against any Pledged Entity, or in respect of the Pledged Equity, under or arising out of (i) any Governing Document of any Pledged Entity, (ii) monies loaned or advanced, for services rendered or otherwise, (iii) any other contractual obligations, commercial tort claims, supporting obligations, damages, insurance proceeds, condemnation awards or other amounts due to Mezzanine Borrower from the Pledged Entity or with respect to the Pledged Equity, (e) Mezzanine Borrower's claims, rights, powers, privileges, authority, options, security interests, liens and remedies, if any, under or arising out of the ownership of the Pledged Equity, (f) to the extent permitted by applicable law, Mezzanine Borrower's rights, if any, in any Pledged Entity pursuant to any Governing Document of any Pledged Entity, or at law, to exercise and enforce every right, power, remedy, authority, option and privilege of Mezzanine Borrower relating to any Pledged Equity, including without limitation, the right to (i)

execute any instruments and to take any and all other action on behalf of and in the name of Mezzanine Borrower in respect of any Pledged Equity, (ii) exercise any and all voting, consent and management rights of Mezzanine Borrower in or with respect to any Pledged Entity, (iii) exercise any election (including, but not limited to, election of remedies) or option or to give or receive any notice, consent, amendment, waiver or approval with respect to any Pledged Entity, (iv) enforce or execute any checks, or other instruments or orders of any Pledged Entity, and (v) file any claims and to take any action in connection with any of the foregoing, together with full power and authority to demand, receive, enforce or collect any of the foregoing or any property of any Pledged Entity, (g) all Investment Property (as such term is defined in Section 9-102 of the Uniform Commercial Code in effect in the [State of New York], as amended, modified, revised or restated from time to time, the “UCC”) issued by or relating to any Pledged Entity, or otherwise relating to the Pledged Equity, (h) all Equity Interests or other property now or hereafter acquired by Mezzanine Borrower as a result of any mergers, acquisitions, exchange offers, recapitalizations of any type, contributions to capital, or the exercise of options or other rights relating to the Pledged Equity, and (i) to the extent not otherwise included: (i) all assets and personal property of Mezzanine Borrower in any way arising from, related to, or pertaining to Mezzanine Borrower’s right, title and interest in and to the Pledged Entity or any Pledged Equity; and (ii) all proceeds of any or all of the foregoing (including, without limitation, insurance proceeds and distributions on the Pledged Equity), as applicable.

1.02. Investment Property. It is the intention of Mezzanine Borrower and Mezzanine Lender that at all times while the Mezzanine Loan remains outstanding, the Pledged Equity shall constitute Investment Property, and to that end, Mezzanine Borrower shall take, and shall cause each Pledged Entity to take, all necessary action to obtain such classification pursuant to the UCC.

1.03. Perfection of Security Interest. On or before the Closing Date, Mezzanine Borrower will (a) execute and deliver to Mezzanine Lender for filing one or more financing statements in connection with the Pledged Collateral in the form required to properly perfect Mezzanine Lender’s security interest in the Pledged Collateral in all jurisdictions deemed appropriate by Mezzanine Lender, to the full extent that such security interest in the Pledged Collateral may be perfected by such a filing, (b) with respect to any Equity Interest in a Pledged Entity that is represented by a partnership certificate, member certificate or stock certificate, or any other instrument, note, chattel paper or certificate qualifying as Investment Property (“Certificated Securities”), deliver to Mezzanine Lender such Certificated Securities in each Pledged Entity, duly endorsed or subscribed in blank, or accompanied by appropriate stock powers or other instruments of transfer, pledge or assignment, or enter into such other arrangement, as necessary to give control of any Investment Property to Mezzanine Lender within the meaning of Section 8-106 of the UCC, (c) with respect to any Equity Interest not represented by a Certificated Security, enter into such control agreements or other arrangements with Mezzanine Lender and with any Pledged Entity, as necessary to give control of any Investment Property to Mezzanine Lender within the meaning of Section 8-106 of the UCC, and (d) promptly take all other actions required to perfect the security interest of Mezzanine Lender in the Pledged Collateral under applicable law.

1.04. Registration of Pledge. Concurrently with the execution of this Pledge Agreement, Mezzanine Borrower shall deliver to each Pledged Entity written instructions

substantially in the form of Exhibit A-1 [and Exhibit A-2, respectively], and shall cause each Pledged Entity to deliver to Mezzanine Lender an Initial Transaction Statement in the form of Exhibit B-1 [and Exhibit B-2, respectively], confirming that such Pledged Entity has noted the pledge effected by this Pledge Agreement on its books.

1.05. Post-Closing Pledged Collateral. After the Closing date, Mezzanine Borrower will concurrently take the actions contemplated by clauses (a) through (d) of Section 1.03 with respect to any and all additional collateral acquired by Mezzanine Borrower (including, without limitation, any newly issued Equity Interests of a Pledged Entity, any conversion of a pre-existing Equity Interest, and any Non-Cash Distributions (defined herein), as applicable. Mezzanine Borrower will promptly thereafter deliver to Mezzanine Lender written instructions and Transaction Statements in substantially the same form as [Exhibits A-1 and B-1],[A-1, A-2, B-1 and B-2], and such additional certificates reasonably requested by Mezzanine Lender, describing such Equity Interests and certifying that the same have been pledged to Mezzanine Lender hereunder as additional Pledged Equity.

2. **POWERS OF MEZZANINE BORROWER PRIOR TO AN EVENT OF DEFAULT**

1.06. Pre-Default Powers. Unless an Event of Default has occurred, and subject to the terms of the Mezzanine Loan Documents, including, without limitation, the Mezzanine Lockbox Agreement, Mezzanine Borrower shall be entitled to (a) receive the profits, losses, income, surplus, return on capital and any other Distributions allocable to the Pledged Collateral, and (b) exercise (but only in a manner that will not (i) violate or be inconsistent with the terms hereof or of any other Mezzanine Loan Document, including, without limitation, the Mezzanine Lockbox Agreement, or (ii) have the effect of impairing the position or interests of Mezzanine Lender) the voting, consent, administration, management and all other powers, rights and remedies of Mezzanine Borrower with respect to the Pledged Collateral under the Governing Documents of any Pledged Entity (including all other rights and powers thereunder which are pledged hereunder).

1.07. Termination of Powers. Upon the occurrence of an Event of Default, all such powers, rights and remedies of Mezzanine Borrower, which are conditionally permitted pursuant to the preceding sentence, shall cease and the provisions of Article VII shall apply.

3. **REPRESENTATIONS, WARRANTIES AND COVENANTS OF MEZZANINE BORROWER**

Mezzanine Borrower hereby covenants with Mezzanine Lender, and represents and warrants to Mezzanine Lender, as of the Closing Date as follows:

- a. Percentage Ownership. Mezzanine Borrower owns: [Alt #1 - (a) one hundred percent (100%) of the limited partnership interests in Mortgage Borrower, and (b) one hundred percent (100%) of the [capital stock of]/[limited liability company interests in] General Partner][Alt #2 -one hundred percent (100%) of the limited liability company interests in the Pledged Entity]. Mezzanine Borrower does not have outstanding any options or rights or other

agreements to acquire or sell or otherwise transfer all or any portion of any Pledged Equity.

- b. Title to Pledged Collateral. Mezzanine Borrower validly acquired and is the legal and beneficial owner of the Pledged Collateral in which it has granted a security interest herein, free and clear of all Liens except such as are created pursuant to this Pledge Agreement. Mezzanine Borrower has the legal right to pledge and grant a security interest in the Pledged Collateral as herein provided without the consent of any other Person, other than any such consent that has been obtained. Mezzanine Borrower will have like title in, and the right to pledge, any other property at any time hereafter acquired by Mezzanine Borrower and pledged to Mezzanine Lender as Pledged Collateral hereunder.
- c. Defense of Title. Mezzanine Borrower will defend Mezzanine Lender's right, title and interest in and to the Pledged Collateral against the claims and demands of all other Persons.
- d. No Transfer. Except for the Transfer effected by this Pledge Agreement, Mezzanine Borrower will not Transfer the Pledged Collateral, or any portion thereof, or suffer or permit any Transfer thereof to occur, other than a Permitted Transfer, if any, made under and in accordance with the terms of the Mezzanine Loan Agreement. Any Transfer made in violation of the foregoing provisions shall be an immediate Event of Default hereunder without notice or opportunity to cure and shall be void and of no force and effect, and upon demand of Mezzanine Lender, shall forthwith be cancelled or satisfied by an appropriate instrument in writing.
- e. Perfected Security Interest. Giving effect to this Pledge Agreement, Mezzanine Lender has, with respect to all Pledged Collateral owned by Mezzanine Borrower on the Closing Date, and will have with respect to any other property at any time hereafter acquired by Mezzanine Borrower and pledged to Mezzanine Lender as Pledged Collateral hereunder, a valid, perfected and continuing first lien upon and security interest in the Pledged Collateral.
- f. No Financing Statements. Except for financing statements filed or to be filed in favor of Mezzanine Lender as secured party, or such other financing statements expressly permitted with Mezzanine Lender's prior written consent, which may be withheld in Mezzanine Lender's sole and absolute discretion, there are not now, and will not in the future be, and Mezzanine Borrower will not execute, any financing statements under the UCC covering any or all of the Pledged Collateral, and no such financing statements are, or will be, filed in any public office.
- g. [Alt #1 - If Certificated Securities - Certificated Securities. Mezzanine Borrower represents and warrants that all of the Equity Interests are issued in the form of Certificated Securities, and covenants and agrees that it shall not permit any Pledged Entity to convert existing Equity Interests, or issue new Equity

Interests, other than as Certificated Securities. Notwithstanding the foregoing, Mezzanine Borrower shall promptly notify Mezzanine Lender if any Equity Interest with respect to a Pledged Entity (whether now owned or hereafter acquired by Mezzanine Borrower) is not evidenced by a Certificated Security, and shall promptly thereafter take all actions required to perfect the security interest of Mezzanine Lender in such Equity Interest under applicable law as required under Section 1.03. Mezzanine Borrower further agrees to take such additional actions as Mezzanine Lender deems necessary or desirable to effect the foregoing and to permit Mezzanine Lender to exercise any of its rights and remedies hereunder, and agrees to provide an opinion of counsel satisfactory to Mezzanine Lender with respect to any such pledge of Equity Interests which are not Certificated Securities promptly upon request of Mezzanine Lender.]

Section 3.07) [Alt #2 - Uncertificated Pledged Equity - No Certificated Securities. Mezzanine Borrower represents and warrants that none of the Pledged Equity is issued in the form of a Certificated Security and covenants and agrees that it shall not permit any Pledged Entity to convert existing Pledged Equity, or issue new Equity Interests, in the form of Certificated Securities. Notwithstanding the foregoing, Mezzanine Borrower shall promptly notify Mezzanine Lender if any Equity Interests with respect to a Pledged Entity (whether now owned or hereafter acquired by Mezzanine Borrower) is or becomes evidenced by a Certificated Security, and shall promptly thereafter take all actions required to perfect the security interest of Mezzanine Lender in such Equity Interest under applicable law as required under Section 1.03). Mezzanine Borrower further agrees to take such actions as Mezzanine Lender deems necessary or desirable to effect the foregoing and to permit Mezzanine Lender to exercise any of its rights and remedies hereunder, and agrees to provide an opinion of counsel satisfactory to Mezzanine Lender with respect to any such pledge of Equity Interests which are Certificated Securities promptly upon request of Mezzanine Lender.]

- h. Fully Paid and Non-Assessable. All of the Pledged Equity has been duly authorized and validly issued and is fully paid and non-assessable, and is subject to no options to purchase or similar rights of any Person. Mezzanine Borrower is not, and will not become, a party to or otherwise be or become bound by any agreement, other than this Pledge Agreement, which restricts in any manner the rights of any present or future holder of any of the Pledged Equity with respect thereto.
- i. Amendments. Mezzanine Borrower shall not allow any Pledged Entity to (a) amend any provision of its Governing Documents, (b) dissolve, liquidate, wind-up, merge or consolidate with any other entity, or (c) Transfer any of its respective assets and properties to any Person except as permitted by the Mezzanine Loan Documents.

4. DISTRIBUTIONS

- a. Non-Cash Distributions. Mezzanine Lender shall be entitled to receive directly, and to retain as further Pledged Collateral, the following non-cash

distributions with respect to the Equity Interests of any Pledged Entity (“Non-Cash Distributions”):

- i. all Equity Interests, or other securities or property (other than cash) paid or distributed by way of dividend or distribution in respect of the Pledged Collateral;
 - ii. all other or additional Equity Interests or other securities or property (other than cash) paid or distributed in respect of the Pledged Collateral by way of split, spin-off, split-up, recapitalization, reclassification, combination of Equity Interests, or similar rearrangement; and
 - iii. all other or additional Equity Interests or other securities or property which may be paid in respect of the Pledged Collateral by reason of any consolidation, merger, exchange, exchange offers, conveyance of assets, exercise of options, contribution of capital, liquidation or similar reorganization.
- b. Non-Cash Distribution Held in Trust. If Mezzanine Borrower shall become entitled to receive or shall receive from any Pledged Entity, any Non-Cash Distribution as an addition to, on account of, in substitution of, or in exchange for the Pledged Collateral or any part thereof, Mezzanine Borrower shall hold the same as the agent and in trust for Mezzanine Lender, and shall immediately deliver it to Mezzanine Lender in the exact form received, with Mezzanine Borrower’s endorsement or assignment or other instrument as Mezzanine Lender may deem appropriate, to be held by Mezzanine Lender, subject to the terms hereof, as further Pledged Collateral.
- c. Cash Distributions Held in Trust. Upon the occurrence of any Event of Default, any cash distributions, dividends, interest and other cash payments payable to Mezzanine Borrower with respect to the Pledged Collateral then held or thereafter received by Mezzanine Borrower (“Cash Distributions”, and collectively with Non-Cash Distributions “Distributions”), shall immediately be remitted to Mezzanine Lender for application to the Obligations under the Mezzanine Loan Documents, and until so remitted shall be received and held by Mezzanine Borrower in trust for Mezzanine Lender.

5. APPLICATION OF PLEDGED COLLATERAL

- a. Application of Pledged Collateral. All proceeds from the sale of all or any portion of the Pledged Collateral, and all Distributions now or at any time hereafter received or retained by Mezzanine Lender pursuant to the provisions of this Pledge Agreement (including, without limitation, the provisions of Article VII) shall be applied by Mezzanine Lender to the satisfaction of Mezzanine Borrower’s Obligations under the Mezzanine Loan Documents in such order and priority as determined by Mezzanine Lender in its sole and absolute discretion.

6. EVENTS OF DEFAULT

- a. Events of Default. An event of default (“Event of Default”) shall occur under this Pledge Agreement if: (a) Mezzanine Borrower fails to fully and timely perform any obligation under this Pledge Agreement when due (and without reference to any notice or cure permitted under the Mezzanine Loan Agreement or any other Mezzanine Loan Document), or (b) an “Event of Default” as that term is defined under the Mezzanine Loan Agreement or any other Mezzanine Loan Document has occurred and remains uncured.

7. REMEDIES

If an Event of Default shall occur:

- a. Transfer Rights. Mezzanine Lender shall have the right, at any time and from time to time, effect the Transfer of any or all of the Pledged Collateral, subject only to the provisions of the UCC and any other applicable statute which, in accordance with such statute, cannot be waived, in any one or more of the following ways:
- i. Register in the name of, or transfer to, Mezzanine Lender, a nominee or nominees, or designee or designees, of Mezzanine Lender; provided that the provisions of Section 8.06 are complied with; and
 - ii. Sell, resell, assign and deliver, in Mezzanine Lender’s sole and absolute discretion, any or all of the Pledged Collateral or any other security for Mezzanine Borrower’s obligations under the Mezzanine Loan Documents (whether in whole or in part and at the same or different times) and all right, title and interest, claim and demand therein and right of redemption thereof, at public or private sale, for cash or upon credit (by Mezzanine Lender only), in accordance with the applicable procedures specified in Article VIII.
 - iii. Proceed by a suit or suits at law or in equity to foreclose all or any part of the security interests in the Pledged Collateral and sell the Pledged Collateral or any portion thereof, under a judgment or decree of a court of competent jurisdiction, retaining during the duration of such judicial enforcement all other rights with respect to the Pledged Collateral, including specifically the rights specified hereafter in this Article VII with respect to the Pledged Entity.
- b. Voting Rights. Mezzanine Lender may exercise, either by itself or by its nominee or designee, in the name of Mezzanine Borrower, the rights, powers and remedies granted to Mezzanine Lender hereunder and under the other Mezzanine Loan Documents in respect of the Pledged Collateral at any time prior to effecting the Transfer of such Pledged Collateral to Mezzanine Lender or its nominee or designee, or any third party purchasers, as contemplated in Subsections 7.01(a)

and (b) above, and whether or not any judicial action as contemplated in Subsection 7.01(c) above has been commenced or is continuing prior to a final unappealable judgment. Such rights and remedies shall include, without limitation, and Mezzanine Borrower hereby grants to Mezzanine Lender, the right to exercise, by delivering notice to Mezzanine Borrower and any Pledged Entity, (a) all voting, consent, managerial and other rights relating to the Pledged Equity, whether in Mezzanine Borrower's name or otherwise, and (b) the right to exercise Mezzanine Borrower's rights, if any, of conversion, exchange, or subscription, or any other rights, privileges or options pertaining to any of the Pledged Equity, including, without limitation, the right to exchange, at Mezzanine Lender's sole and absolute discretion, any and all of the Pledged Equity upon the merger, consolidation, reorganization, recapitalization or other readjustment of any Pledged Entity, all without liability, except to account for property actually received by Mezzanine Lender. Mezzanine Borrower hereby irrevocably authorizes and directs any Pledged Entity, on receipt of any such notice (i) to deem and treat Mezzanine Lender or its nominee in all respects as a member, partner or shareholder, as applicable, (and not merely an assignee of a member, partner or shareholder) of the such Pledged Entity, entitled to exercise all the rights, powers and privileges (including, without limitation, the right to vote on or take any action with respect to any Pledged Entity matters pursuant to the Governing Documents thereof) to receive all distributions, to be credited with the capital account and to have all other rights, powers and privileges pertaining to such member, partner or shareholder interest, as applicable, to which Mezzanine Borrower would have been entitled had Mezzanine Borrower not executed this Pledge Agreement, and (ii) to file an amendment to the Governing Documents of any Pledged Entity admitting Mezzanine Lender or such nominee(s) as a member, partner or shareholder in place of Mezzanine Borrower.

c. Power of Attorney.

i. Mezzanine Borrower hereby irrevocably authorizes and empowers Mezzanine Lender, and assigns and transfers to Mezzanine Lender, and constitutes and appoints Mezzanine Lender and any of its assigns, its true and lawful attorney-in-fact and as its agent with full power of substitution for Mezzanine Borrower to proceed from time to time in Mezzanine Borrower's name, in order to more fully vest in Mezzanine Lender the rights and remedies provided for herein, in any statutory or non-statutory legal or other proceeding, without limitation, any bankruptcy proceeding, affecting Mezzanine Borrower, any Pledged Entity or the Pledged Collateral.

ii. Mezzanine Lender and any of its assigns, or their respective nominees, may, to the extent permitted by applicable law, either pursuant to such power-of-attorney or otherwise, take any action and exercise and execute any instrument which Mezzanine Lender determines necessary or advisable to accomplish the purposes of this Pledge Agreement, including without limitation: (i) execute and file proof of claim with respect to any

or all of the Pledged Collateral against any Pledged Entity and vote such claims with respect to all or any portion of such Pledged Collateral (A) for or against any proposal or resolution, (B) for a trustee or trustees or for a receiver or receivers or for a committee of creditors, and/or (C) for the acceptance or rejection of any proposed arrangement, plan of reorganization, composition or extension; (ii) receive, endorse and collect all drafts, checks and other instruments for the payment of money made payable to Mezzanine Borrower representing any interest, payment of principal or other distribution payable in respect of the Pledged Collateral; (iii) execute endorsements, assignments or other instruments of conveyance or transfer in respect of any other property which is or may become a part of the Pledged Collateral hereunder; and (iv) execute releases and negotiate settlements as appropriate, including on account of, or in exchange for any or all of the Pledged Collateral, or any payment or distribution received by Mezzanine Borrower, or Mezzanine Lender on Mezzanine Borrower's behalf;

iii. The foregoing power-of-attorney is irrevocable and coupled with an interest, and any similar or dissimilar powers previously given by Mezzanine Borrower in respect of the Pledged Collateral or any Pledged Entity to any Person other than Mezzanine Lender are hereby revoked. The power-of-attorney granted herein shall terminate automatically upon the termination of this Pledge Agreement in accordance with the terms hereof.

d. Management Rights. Mezzanine Lender may at such time and from time to time thereafter, without notice to, or consent of, Mezzanine Borrower or any other Person (to the extent permitted by law), but without affecting any of Mezzanine Borrower's obligations under the Mezzanine Loan Documents, in the name of Mezzanine Borrower or in the name of Mezzanine Lender: (a) notify any other party to make payment and performance directly to Mezzanine Lender, (b) extend the time of payment and performance of, compromise or settle for cash, credit or otherwise, and upon any terms and conditions, any obligations owing to Mezzanine Borrower, or claims of Mezzanine Borrower under any Governing Documents of any Pledged Entity, as applicable, (c) file any claims, commence, maintain or discontinue any actions, suits or other proceedings deemed by Mezzanine Lender reasonably necessary or advisable for the purpose of collecting upon or enforcing any Governing Documents of any Pledged Entity, and (d) execute any instrument and do all other things deemed reasonably necessary and proper by Mezzanine Lender to protect and preserve and realize upon the Pledged Collateral or any portion thereof and the other rights contemplated hereby.

e. Right of Substitution. Mezzanine Lender shall have the right, without notice to or consent of Mezzanine Borrower, to become, or to designate its nominee, designee, agent or assignee to become, a partner, member, officer or

director, as applicable, of any Pledged Entity, in substitution of any existing Person serving in such capacity.

f. UCC Rights. Mezzanine Lender may exercise all of the rights and remedies of a secured party under the UCC.

g. Mezzanine Lender Self-Help Rights.

i. Mezzanine Lender shall have the right, but not the obligation, take any appropriate action as it, in its reasonable judgment, may deem necessary to (i) cure any Event of Default, (ii) cause any term, covenant, condition or obligation required under this Pledge Agreement or other Mezzanine Loan Document to be promptly performed or observed on behalf of Mezzanine Borrower, or (iii) protect the Pledged Collateral and any other security obtained pursuant to the other Mezzanine Loan Documents. All reasonable amounts advanced by, or on behalf of, Mezzanine Lender in exercising its rights under this Article VII (including, without limitation, reasonable legal expenses and disbursements incurred in connection therewith), together with interest thereon at the Default Rate from the date of any such advance, shall be payable by Mezzanine Borrower, to Mezzanine Lender upon demand therefor and shall be secured by the Pledged Collateral.

ii. Mezzanine Lender shall not be obligated to perform or discharge any obligation of Mezzanine Borrower or any Pledged Entity as a result of this Pledge Agreement. The acceptance by Mezzanine Lender of this Pledge Agreement shall not at any time or in any event obligate Mezzanine Lender to (i) appear in or defend any action or proceeding relating to the Pledged Collateral to which it is not a party, or (ii) take any action hereunder or thereunder, or expend any money or incur any expenses or perform or discharge any obligation, duty or liability under the Pledged Collateral.

8. **SALES OF THE PLEDGED COLLATERAL**

a. Right to Conduct Partial Sale of Collateral. In connection with any sale of the Pledged Collateral, Mezzanine Lender may grant options and may impose reasonable conditions such as requiring any purchaser to represent that any “securities” constituting any part of the Pledged Collateral are being purchased for investment only. If all or any of the Pledged Collateral is sold at any such sale by Mezzanine Lender to a third party upon credit, Mezzanine Lender shall not be liable for the failure of the purchaser to purchase or pay for the same and, in the event of any such failure, Mezzanine Lender may resell such Pledged Collateral. It is expressly agreed that Mezzanine Lender may exercise its rights with respect to less than all of the Pledged Collateral, leaving unexercised its rights with respect to the remainder of the Pledged Collateral; provided, however, that such partial exercise shall in no way restrict or jeopardize Mezzanine Lender’s right to

exercise its rights with respect to the remaining Pledged Collateral at a later time or times. Mezzanine Borrower hereby waives and releases any and all rights of redemption with respect to the sale of any Pledged Collateral.

- b. Sale Procedures. No demand, advertisement or notice, all of which are hereby expressly waived by Mezzanine Borrower, shall be required in connection with any sale or other disposition of all or any part of the Pledged Collateral, except that Mezzanine Lender shall give Mezzanine Borrower at least ten (10) days' prior notice of the time and place of any public sale or of the time and the place at which any private sale or other disposition is to be made, which notice Mezzanine Borrower hereby agrees is reasonable. All other demands, advertisements and notices are hereby irrevocably waived by Mezzanine Borrower. The notice of such sale shall (a) in case of a public sale, state the time and place fixed for such sale, (b) in case of a sale at a broker's board or on a securities exchange, state the board or exchange at which such sale is to be made and the day on which the Pledged Collateral, or the portion thereof so being sold, first will be offered for sale at such board or exchange, and (c) in the case of a private sale, state the date after which such sale may be consummated. Any such public sale shall be held at such time or times within ordinary business hours and at such place or places as Mezzanine Lender may fix in the notice of such sale.
- c. Adjournment; Credit Sale. Mezzanine Lender shall not be obligated to make any sale of the Pledged Collateral if it shall determine, in its sole and absolute discretion, not to do so, regardless of the fact that notice of sale may have been given, and Mezzanine Lender may without notice or publication adjourn any public or private sale, and such sale may, without further notice, be made at the time and place to which the same was so adjourned. Upon each public or private sale of all or any portion of the Pledged Collateral, unless prohibited by any applicable statute which cannot be waived, Mezzanine Lender (or its nominee or designee) may purchase all or any portion of the Pledged Collateral being sold, free and clear of, and discharged from, any trusts, claims, equity or right of redemption of Mezzanine Borrower, all of which are hereby waived and released to the extent permitted by law, and may make payment therefor by credit against any of Mezzanine Borrower's obligations under the Mezzanine Loan Documents in lieu of cash or any other obligations.
- d. Expenses of Sale. In the case of any sale, public or private, of any portion of or all of the Pledged Collateral, Mezzanine Borrower shall be responsible for the payment of all reasonable costs and expenses of every kind for the sale and delivery, including, without limitation, brokers' and reasonable attorneys' fees and disbursements and any tax imposed thereon. The proceeds of the sale of the Pledged Collateral shall be available to cover such costs and expenses, and, after deducting such costs and expenses from the proceeds of the sale, Mezzanine Lender shall apply any remaining amounts to the payment of Mezzanine Borrower's obligations under the Mezzanine Loan Documents in the order of priority as set forth in the Mezzanine Loan Agreement and other Mezzanine Loan Documents.

- e. No Public Registration of Sale. Mezzanine Borrower is aware that Section 9-610(c) of the UCC may restrict Mezzanine Lender's ability to purchase the Pledged Collateral at a private sale. Mezzanine Borrower is also aware that SEC staff personnel have, over a period of years, issued various No-Action Letters that describe procedures which, in the view of the SEC staff, permit a foreclosure sale of securities to occur in a manner that is public for purposes of Part 6 of Article 9 of the UCC, yet not public for purposes of Section 4(2) of the Securities Act. Mezzanine Borrower is also aware that Mezzanine Lender may wish to purchase certain interests that are sold at a foreclosure sale, and Mezzanine Borrower believes that such purchases would be appropriate in circumstances in which such interests are sold in conformity with the principles set forth in such No-Action Letters. Section 9-603 of the UCC permits Mezzanine Borrower to agree on the standards for determining whether Mezzanine Lender has complied with its obligations under Section 9-610. Pursuant to Section 9-603 of the UCC, Mezzanine Borrower specifically agrees that a foreclosure sale conducted in conformity with the principles set forth in such No-Action Letters (a) shall be considered to be a "public disposition" for purposes of Section 9-610(c) of the UCC; (b) will be considered commercially reasonable notwithstanding that Mezzanine Lender has not registered or sought to register the interests under the Securities Act, even if Mezzanine Borrower, or any Pledged Entity agree to pay all costs of the registration process; and (c) shall be considered to be commercially reasonable, notwithstanding that Mezzanine Lender purchases such interests at such a sale.
- f. Strict Foreclosure.
- i. Mezzanine Lender may, in its sole and absolute discretion, either negotiate an agreement ("Strict Foreclosure Agreement") with Mezzanine Borrower, or make a written proposal ("Strict Foreclosure Proposal") to Mezzanine Borrower, to retain the Pledged Collateral in full or partial satisfaction of the Obligations in accordance with the procedures specified in Section 9-620 of the UCC.
- ii. In the case of a Strict Foreclosure Proposal, Mezzanine Borrower shall, within two (2) Business Days of Mezzanine Borrower's receipt of the Strict Foreclosure Proposal, indicate Mezzanine Borrower's (i) acceptance or rejection of such Strict Foreclosure Proposal and (ii) waiver of any right to redeem the Pledged Collateral pursuant to Section 9-624(c) of the UCC ("UCC Waiver"). Mezzanine Borrower's indication of acceptance of a Strict Foreclosure Proposal shall be made by delivering a notice in a form substantially identical to the form attached hereto as Exhibit C).
- iii. Mezzanine Lender shall notify any Guarantor, any other creditor with perfected lien rights in the Pledged Collateral, and any other Person entitled to notice under Section 9-621 of the UCC ("Interested Parties") of any Strict Foreclosure Agreement or Strict Foreclosure Proposal. Such

Interested Party shall, within two (2) Business Days of receipt of notice thereof, indicate its (i) acceptance or rejection of the Strict Foreclosure Agreement or the Strict Foreclosure Proposal, and (ii) UCC Waiver.

- iv. If Mezzanine Lender fails to receive (i) Mezzanine's Borrower's acceptance of a Strict Foreclosure Proposal and UCC Waiver, or (ii) acknowledgements from all Interested Parties of acceptance of the Strict Foreclosure Agreement or the Strict Foreclosure Proposal, as applicable) and their respective UCC Waivers, within two (2) Business Days of receipt of the notice periods specified in Subsections (b) and (c) above (collectively the "Notice Period"), then Mezzanine Borrower, or such other Interested Party, as applicable, shall be deemed to have objected to the Strict Foreclosure Agreement or the Strict Foreclosure Proposal, as applicable.
- v. Notwithstanding the acceptance of either a Strict Foreclosure Agreement or a Strict Foreclosure Proposal by Mezzanine and each Interested Party within the applicable Notice Period, Mezzanine Borrower and Mezzanine Lender shall not be required to consummate such transfer of the Pledged Collateral unless and until (i) twenty (20) days have elapsed after the delivery of such acceptance and, (ii) any Interested Party shall have not paid and satisfied the Obligations in full within such twenty (20) day period as contemplated under Section 9-623 of the UCC (a "Redemption"). If a Redemption is consummated, Mezzanine Borrower's acceptance shall be deemed to have been revoked with the consent of Mezzanine Lender.
- vi. If all the conditions specified in Subsections (a) through (f) of this Section 8.06 have been satisfied, Mezzanine Borrower, and each Pledged Entity, shall fully cooperate, at their sole expense, in all matters deemed reasonably necessary by Mezzanine Lender to effect such transfer of ownership on the records of the applicable Pledged Entity in accordance with any applicable requirements of the Governing Documents of such Pledged Entity and/or the Mortgage Loan Documents. Such cooperation shall include using Mezzanine Borrower's best efforts to assist Mezzanine Lender in obtaining any necessary review, approvals and other administrative action from such Pledged Entity, Mortgage Lender, any applicable Rating Agencies, and any master or special servicer of the Mortgage Loan. Such assistance shall include at Mezzanine Lender's request (i) attending all meetings with, and providing all related financial and operational documents and materials to, such third parties, and (ii) providing such assurances and executing such documentation as is required by such third parties or Mezzanine Lender to effect such transfer.

9. **SECURITIES ACT**

- a. **Securities Registration.** If an Event of Default shall have occurred and Mezzanine Borrower shall have received from Mezzanine Lender a written request that Mezzanine Borrower effect any registration, qualification or compliance under any federal or state securities law or laws with respect to all or any part of the Pledged Collateral, and such registration, qualification and/or compliance is required under applicable federal or state securities law or laws, Mezzanine Borrower as soon as practicable and at its sole expense, agrees to use its best efforts to effect (and keep effective) such registration, qualification and compliance as required under: (a) applicable federal or state securities law or laws and as would permit or facilitate the sale and distribution of such Pledged Collateral, including, without limitation, registration under the Securities Act, as then in effect (or any similar statute then in effect), (b) applicable blue sky or other state securities laws, and (c) other government requirements. Mezzanine Lender shall furnish to Mezzanine Borrower such information regarding Mezzanine Lender as Mezzanine Borrower may request in writing and as shall reasonably be required in connection with any such registration, qualification or compliance. Mezzanine Borrower will cause Mezzanine Lender to be kept reasonably advised in writing as to the progress of each such registration, qualification or compliance and as to the completion thereof, will furnish to Mezzanine Lender such number of prospectuses, offering circulars or other documents incident thereto as Mezzanine Lender from time to time may reasonably request, and will indemnify Mezzanine Lender and all others participating in the distribution of such Pledged Collateral against all losses, liabilities, claims or damages caused by any untrue statement (or alleged untrue statement) of a material fact contained therein (or in any related registration statement, notification or the like) or by any omission (or alleged omission) to state therein (or in any related registration statement, notification or the like) a material fact required to be stated therein or necessary to make the statements therein not misleading, except insofar as the same may have been caused by an untrue statement or omission based upon information furnished in writing to Mezzanine Borrower by Mezzanine Lender expressly for use therein.
- b. **Private Securities Sale.** If at any time when Mezzanine Lender shall determine to exercise its right to sell all or any part of the Pledged Collateral pursuant to Section 8, and such Pledged Collateral or the part thereof to be sold shall not, for any reason whatsoever, be effectively registered under the Securities Act, as then in effect, Mezzanine Lender may, in its sole and absolute discretion, sell such Pledged Collateral or part thereof by private sale (for securities law purposes) in such manner and under such circumstances as Mezzanine Lender may deem necessary or advisable in order that such sale may legally be effected without such registration, provided that at least ten (10) days' notice is given to Mezzanine Borrower in accordance with the private sale notice provisions of Article VIII. Without limiting the generality of the foregoing, in any such event Mezzanine Lender, in its sole and absolute discretion (a) may proceed to make such private sale notwithstanding that a registration statement for the purpose of

registering such Pledged Collateral or part thereof shall have been filed under such Securities Act, (b) may approach and negotiate with a single potential purchaser to effect such sale and (c) may restrict such sale to a purchaser who will represent and agree that such purchaser is purchasing for its own account, for investment, and not with a view to the distribution or sale of such Pledged Collateral or part thereof. In the event of any such sale, Mezzanine Lender shall incur no responsibility or liability for selling all or any part of the Pledged Collateral at a price which Mezzanine Lender may in good faith deem reasonable under the circumstances, notwithstanding the possibility that a substantially higher price might be realized if the sale were deferred until after registration under the Securities Act.

10. RECEIPT OF SALE PROCEEDS

- a. Receipt of Sale Proceeds. Upon any sale of the Pledged Collateral, or any portion thereof, by Mezzanine Lender hereunder (whether by virtue of the power of sale herein granted, pursuant to judicial process or otherwise), the receipt of the proceeds by Mezzanine Lender or the officer making the sale shall be a sufficient discharge to the purchaser or purchasers of the Pledged Collateral so sold, and such purchaser or purchasers shall not be obligated to see to the application of any part of the purchase money paid over to Mezzanine Lender or such officer or be answerable in any way for the misapplication or non-application thereof.

11. PREFERENCES

- a. Preferences. Mezzanine Lender shall have no obligation to marshal any assets in favor of Mezzanine Borrower or any other party or against, or in payment of, any or all of the obligations of Mezzanine Borrower pursuant to this Pledge Agreement, the Mezzanine Loan Agreement, the Mezzanine Note or any other Mezzanine Loan Document. To the extent Mezzanine Borrower makes a payment or payments to Mezzanine Lender for Mezzanine Borrower's benefit, which payment or proceeds or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside or required to be repaid to a trustee, receiver or any other party under any bankruptcy law, state or federal law, common law or equitable cause, then, to the extent of such payment or proceeds received, the obligations (or part thereof) of Mezzanine Borrower intended to be satisfied shall be revived and continue in full force and effect, as if such payment or proceeds had not been received by Mezzanine Lender.

12. REMEDIES CUMULATIVE.

- a. Mezzanine Lender Rights. The obligations of Mezzanine Borrower under this Pledge Agreement shall be absolute and unconditional and shall remain in full force and effect without regard to, and shall not be released, suspended, discharged, terminated or otherwise affected by, any circumstances or occurrence

except as specifically provided in this Pledge Agreement. The rights, powers and remedies of Mezzanine Lender under this Pledge Agreement shall be cumulative and not exclusive of any other right, power or remedy which Mezzanine Lender may have against Mezzanine Borrower or any other Person pledging collateral pursuant to the other Mezzanine Loan Documents or existing at law or in equity or otherwise. Mezzanine Lender's rights, powers and remedies may be pursued singly, concurrently or otherwise, at such time and in such order as Mezzanine Lender may determine in Mezzanine Lender's sole and absolute discretion. Mezzanine Lender shall have no duty to exercise any of the aforesaid rights, powers and remedies and shall not be responsible for any failure to do so or delay in so doing.

- b. No Release, Etc. No delay or omission to exercise any remedy, right or power accruing upon a default or an Event of Default shall impair any such remedy, right or power or shall be construed as a waiver thereof, but any such remedy, right or power may be exercised from time to time and as often as may be deemed expedient. A waiver of any default or Event of Default shall not be construed to be a waiver of any subsequent default or Event of Default or to impair any remedy, right or power of Mezzanine Lender. Any and all of Mezzanine Lender's rights with respect to any Pledged Collateral shall continue unimpaired, and Mezzanine Borrower shall be and remain obligated in accordance with the terms hereof, notwithstanding, among other things: (a) any renewal, extension, amendment or modification of, or addition or supplement to, or deletion from, this Pledge Agreement or any other Mezzanine Loan Document or any other instrument or agreement referred to therein, or any assignment or transfer of any thereof; (b) any waiver, consent, delay, extension of time, indulgence or other action or inaction under or in respect of this Pledge Agreement or any other Mezzanine Loan Document; (c) any exercise or non-exercise of any right, remedy, power or privilege under or in respect of this Pledge Agreement or any other Mezzanine Loan Document; (d) any sale, exchange, release, surrender, or substitution of, or realization upon, any Pledged Collateral (except to the extent otherwise specifically agreed to by Mezzanine Lender) or any other security held by Mezzanine Lender to secure the Obligations; (e) the furnishing to or acceptance by Mezzanine Lender of any additional security to secure the Obligations; or (f) any invalidity, irregularity or unenforceability of all or any part of Mezzanine Borrower's Obligations under the Mezzanine Loan Documents or of any security therefor.

13. ACTS OF MEZZANINE LENDER

- a. Acts of Mezzanine Lender. All of the Pledged Collateral at any time delivered to Mezzanine Lender pursuant to this Pledge Agreement shall be held by Mezzanine Lender subject to the terms, covenants and conditions set forth in the Mezzanine Loan Documents. Neither Mezzanine Lender nor any of Mezzanine Lender's directors, officers, agents, employees or counsel shall be liable for any action taken or omitted to be taken by such party or parties relative

to any of the Pledged Collateral, except for such party's or parties' own gross negligence or willful misconduct. Mezzanine Lender shall be entitled to rely in good faith upon any writing or other document (including, without limitation, any telegram or e-mail) or any telephone conversation reasonably believed by it to be genuine and correct and to have been signed, sent or made by the proper Person (but Mezzanine Lender shall be entitled to such additional evidence of authority or validity as it may, in its sole and absolute discretion request, but it shall have no obligation to make any such request), and with respect to any legal matter, Mezzanine Lender may rely in acting or in refraining from acting upon the advice of counsel selected by it concerning all matters hereunder.

14. CUSTODY OF PLEDGED COLLATERAL; NOTICE OF EXERCISE OF REMEDIES

- a. Custody; Notice. Mezzanine Lender shall not have any duty concerning the collection or protection of the Pledged Collateral or any income thereon or payments with respect thereto, or concerning the preservation of any rights pertaining thereto beyond exercising reasonable care with respect to the custody of any tangible evidence of the Pledged Collateral actually in its possession. Mezzanine Borrower hereby waives notice of acceptance hereof, and except as otherwise specifically provided herein or required by provision of law which may not be waived, hereby waives any and all notices or demands with respect to any exercise by Mezzanine Lender of any rights or powers which it may have or to which it may be entitled with respect to the Pledged Collateral.

15. MISCELLANEOUS PROVISIONS

- a. Further Assurances. Mezzanine Borrower agrees to do such further acts and things and to execute and deliver to Mezzanine Lender with respect to the Pledged Collateral such additional conveyances, assignments, agreements and instruments as Mezzanine Lender from time to time may reasonably require, or may deem reasonably advisable, to effect this Pledge Agreement or to further assure and confirm to Mezzanine Lender the rights, powers and remedies intended to be granted hereunder or under any other Mezzanine Loan Document. Mezzanine Borrower hereby agrees to sign and deliver to Mezzanine Lender financing statements, continuation statements and other documents, in form acceptable to Mezzanine Lender, as Mezzanine Lender may from time to time reasonably request or which are reasonably necessary or desirable in the opinion of Mezzanine Lender to establish and maintain a valid and perfected security interest in the Pledged Collateral, and to pay any filing fees relative thereto. Mezzanine Borrower also authorizes Mezzanine Lender, to the extent permitted by law, to file such financing statements and amendments thereto relating to all or any part of the Pledged Collateral without the consent of Mezzanine Borrower, and further authorizes Mezzanine Lender, to the extent permitted by law, to file a photographic or other reproduction of this Pledge Agreement or of a financing

statement in lieu of a financing statement. In addition, Mezzanine Borrower agrees at any time and from time to time upon not less than ten (10) days' prior notice by Mezzanine Lender to Mezzanine Borrower, to execute, acknowledge and deliver to Mezzanine Lender or any other party specified in such notice, a statement, in writing, certifying that this Pledge Agreement is unmodified and in full force and effect (or if there have been modifications, that the same, as modified, is in full force and effect and stating the modifications hereto) and stating whether or not any default or Event of Default has occurred, and, if so, specifying each such default or Event of Default.

- b. Remedies of Mezzanine Borrower. If a claim or adjudication is made that Mezzanine Lender, or its agents or nominees, has acted unreasonably, or has unreasonably delayed acting, in any case where by law or under this Pledge Agreement or the other Mezzanine Loan Documents, Mezzanine Lender or such agent or nominee, as the case may be, has an obligation to act reasonably or promptly, Mezzanine Borrower agrees that neither Mezzanine Lender nor its agents, shall be liable for any monetary damages, and Mezzanine Borrower's sole remedies shall be limited to commencing an action seeking injunctive relief or declaratory judgment. The parties hereto agree that any action or proceeding to determine whether Mezzanine Lender has acted reasonably shall be determined by an action seeking declaratory judgment.
- c. Headings; Exhibits. The Article and Section headings in this Pledge Agreement are included herein for convenience of reference only and shall not constitute a part of this Pledge Agreement for any other purpose. All exhibits are incorporated herein by reference. Any reference to the "Pledged Collateral" shall be deemed to refer to all or a portion of the Pledged Collateral, as applicable, now held, or hereafter received, by Mezzanine Lender.
- d. Governing Law. Except to the extent otherwise dictated by Section 1-105 of the UCC, this Pledge Agreement shall be interpreted and enforced according to the laws of the State of New York (excluding any choice of law rules that may direct the application of the laws of another jurisdiction). The parties hereto agree that the Mezzanine Loan transaction has a reasonable relation to the State of New York by virtue of Mezzanine Lender conducting a significant amount of lending business in and from the State of New York.
- e. Exculpation. Notwithstanding anything to the contrary contained herein or in any other Mezzanine Loan Documents, any agreement, obligation, representation, warranty or liability made, entered into or incurred by or on behalf of Mezzanine Borrower or any Guarantor binds only the property of Mezzanine Borrower or the Guarantor, as applicable, or the Pledged Collateral, and no member, shareholder, partner (unless such member, shareholder, partner has independent obligation under the Mezzanine Loan Documents), director, officer, employee or trustee assumes or shall be held to any liability therefor.

- f. Termination. Upon the indefeasible payment in full of the Mezzanine Loan and all other amounts due in connection therewith, if any, this Pledge Agreement shall terminate and upon Mezzanine Lender's execution and delivery to Mezzanine Borrower of documents prepared by Mezzanine Borrower, which shall, upon such execution and delivery, terminate Mezzanine Lender's lien on the Pledged Collateral and which shall be in form and substance reasonably acceptable to Mezzanine Lender. Upon such payment, Mezzanine Lender shall promptly execute and deliver to Mezzanine Borrower such termination documents. This Section 15.06 and any termination effected hereunder shall be subject to the provisions of Article XI above.
- g. Incorporation from Mezzanine Loan Agreement. All provisions of Articles 17 and 18, inclusive (other than Section 18.06 and 18.07), of the Mezzanine Loan Agreement are incorporated into this Pledge Agreement by this reference, as if fully reproduced herein.

[Mezzanine Borrower Signature Appears on Next Page]

IN WITNESS WHEREOF, the parties hereto have caused this Pledge Agreement to be executed and delivered by its duly authorized officer on the date first set forth above.

MEZZANINE BORROWER:

_____, a

By: _____
Name: _____
Its: _____

EXHIBIT A-1

Instructions to Mortgage Borrower

[Date]

TO: *[Name and Address of Mortgage Borrower]*

You are hereby instructed to make a notation of the pledge of the following equity interest as follows:

[Mezzanine Borrower] has pledged all of its *[partnership/member]* interests, now owned or hereafter acquired, to the undersigned as security.

The name and address of the pledgor is:

[Name and address of Mezzanine Borrower]

The name and address of the pledgee is:

Attn: _____

Very truly yours,

MEZZANINE BORROWER:

_____, a _____

By: _____

Name: _____

Its: _____

EXHIBIT A-2

Instructions to General Partner

[Date]

TO: *[Name and Address of General Partner]*

You are hereby instructed to make a notation of the pledge of the following equity interest as follows:

[General Partner] has pledged all of its member interests, now owned or hereafter acquired, to the undersigned as security.

The name and address of the pledgor is:

[Name and Address of General Partner]

The name and address of the pledgee is:

Attn: _____

Very truly yours,

GENERAL PARTNER:

_____, a _____

By: _____

Name: _____

Its: _____

EXHIBIT B-1

Initial Transaction Statement

____, 200__

TO: _____

Attn: _____

This statement is to advise you that a notation of the pledge of the following equity interest has been made in the name of as follows:

1. Equity Interest:
The equity interests now owned or hereafter acquired by *[Mezzanine Borrower]* in the undersigned *[limited partnership/limited liability company]*.
2. Registered Owner:
[Name and Address of Mezzanine Borrower]

Taxpayer Identification Number: _____

3. Registered Mezzanine Lender:

Taxpayer Identification Number: _____

4. There are no liens or restrictions of the undersigned entity and no adverse claims known to the undersigned entity to which such equity interest is or may be subject except for restrictions on transfer set forth in the formation documents of such entity.

5. The pledge was registered on _____, 20__.

[Remainder of Page Intentionally Left Blank]

THIS STATEMENT IS MERELY A RECORD OF THE RIGHTS OF THE ADDRESSEES AS OF THE TIME OF ITS ISSUANCE. DELIVERY OF THIS STATEMENT, OF ITSELF, CONFERS NO RIGHTS ON THE RECIPIENT. THIS STATEMENT IS NEITHER A NEGOTIABLE INSTRUMENT NOR A SECURITY.

Very truly yours,

[Mortgage Borrower], a _____

By: _____

Name: _____

Title: _____

EXHIBIT B-2

Initial Transaction Statement

____, 200__

TO: _____

Attn: _____

This statement is to advise you that a notation of the pledge of the following equity interest has been made in the name of as follows:

1. Equity Interest:

The equity interests now owned or hereafter acquired by *[Mezzanine Borrower]* in the undersigned *[limited liability company/corporation]*.

2. Registered Owner:

[Name and Address of Mezzanine Borrower]

Taxpayer Identification Number: _____

3. Registered Mezzanine Lender:

Taxpayer Identification Number: _____

4. There are no liens or restrictions of the undersigned entity and no adverse claims known to the undersigned entity to which such equity interest is or may be subject except for restrictions on transfer set forth in the formation documents of such entity.

5. The pledge was registered on _____, 20__.

[Remainder of Page Intentionally Left Blank]

THIS STATEMENT IS MERELY A RECORD OF THE RIGHTS OF THE ADDRESSEES AS OF THE TIME OF ITS ISSUANCE. DELIVERY OF THIS STATEMENT, OF ITSELF, CONFERS NO RIGHTS ON THE RECIPIENT. THIS STATEMENT IS NEITHER A NEGOTIABLE INSTRUMENT NOR A SECURITY.

Very truly yours,

By: [*General Partner*], a _____

By: _____
Name: _____
Title: _____

EXHIBIT C

Acceptance of Mezzanine Lender's Proposal under Section 8.06

[insert date]

[Address of _____ and specified Loan Servicer
(collectively, "Mezzanine Lender")

Gentlemen:

This letter agreement and waiver is being delivered by the undersigned, [_____]], ("Mezzanine Borrower") to Mezzanine Lender in connection with that certain Mezzanine Pledge and Security Agreement dated as of [____,____] by and between Mezzanine Lender and Mezzanine Borrower ("Pledge Agreement"). All capitalized terms used herein, unless otherwise defined herein, shall have the meanings specified in the Pledge Agreement.

1. As contemplated by Section 8.06 of the Pledge Agreement, Mezzanine Borrower hereby accepts Mezzanine Lender's Strict Foreclosure Proposal to retain all right, title and interest in and to the Pledged Collateral, and agrees to ratify such retention at the direction of Mezzanine Lender in accordance with such Section 8.06 and the other applicable provisions of the Mezzanine Loan Documents.
2. This acceptance is irrevocable and unconditional, subject, however, to the terms of Section 5 below.
3. All of the Interested Parties acknowledge and consent to the acceptance and agreements set forth in Section 1 and Section 2 hereof.
4. In accordance with Section 9-624(c) of the UCC, each Pledged Entity, and each Interested Party, hereby waives, effective as of the date hereof, all of its rights under the UCC with respect to the Mezzanine Loan, the Pledge Agreement and the Pledged Collateral, if any, including any rights described in Section 9-623 of the UCC, in each case to the fullest extent such rights may be waived in accordance with the UCC ("UCC Waiver").
5. Notwithstanding the acceptance and UCC Waiver, Mezzanine Borrower and Mezzanine Lender shall not be required to consummate such retention by Mezzanine Lender unless and until (a) twenty (20) days have elapsed after the delivery of such acceptance, and (b) none of the Interested Parties have caused the entire Obligations to be paid and satisfied in full within such twenty day period (a "Redemption"), and, if a Redemption is consummated pursuant to the terms of the Mezzanine Loan Documents

and in accordance with applicable law, Mezzanine Borrower's acceptance shall be deemed to have been revoked with the consent of Mezzanine Lender.

ACKNOWLEDGED AND AGREED:

[INSERT SIGNATURE BLOCKS OF EACH PLEDGED ENTITY]

[Mortgage Borrower], a_____

By:_____

Name:_____

Title:_____

[General Partner], a_____

By:_____

Name:_____

Title:_____

APPENDIX C

IRREVOCABLE PROXY AGREEMENT

This Irrevocable Proxy Agreement (this “**Agreement**”) is made as of _____, by and among [Insert name of PLEDGOR], a _____ (“**Pledgor**”), [Insert name of COMPANY], a Delaware limited liability company] (the “**Company**”), and [Insert name of SECURED PARTY], a _____ (“**Secured Party**”).

WHEREAS, the Pledgor is the beneficial and record holder of the [membership interests] in Company set forth on Exhibit A hereto (the “**Pledged Interests**”); and

WHEREAS, Pledgor desires to grant to Secured Party the proxy granted pursuant hereto; and

WHEREAS, Pledgor and Secured Party intend that the proxy granted pursuant hereto to be irrevocable during the term of this Agreement and that the powers and proxies granted pursuant to this Agreement are given to secure the obligations of Pledgor under that certain [Pledge Agreement, dated as of _____, between Pledgor and Secured Party];

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, and other consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto agree as follows:

Irrevocable Proxy. Pledgor hereby irrevocably constitutes and appoints Secured Party, from the date of this Agreement until the termination of this Agreement in accordance with its terms, as Pledgor’s true and lawful proxy, for and in Pledgor’s name, place and stead to vote the Pledged Interests and any and all other equity interests in Company by Pledgor whether directly or indirectly, beneficially or of record, now owned or hereafter acquired (the Pledged Interests together with all such other equity interests, the “Pledgor’s Interests”), with respect to any Article 8 Matter (as hereinafter defined). The foregoing proxy shall include the right to sign Pledgor’s name (as member of the Company) to any consent, certificate or other document relating to the Company that applicable law may permit or require, to cause the Pledgor’s Interests to be voted in accordance with the preceding sentence. Pledgor hereby revokes all other proxies and powers of attorney with respect to the Pledgor’s Interests that Pledgor may have appointed or granted, to the extent such proxies or powers extend to any Article 8 Matter. Pledgor will not give a subsequent proxy or power of attorney (and if given, will not be effective) or enter into any other voting agreement with respect to the Pledgor’s Interests with respect to any Article 8 Matter.

As used herein, “Article 8 Matter” means any action, decision, determination or election by the Company or its member(s) that its membership interests or other equity interests, or any of them, be, or cease to be, a “security” as defined in and governed by

Article 8 of the Uniform Commercial Code, and all other matters related to any such action, decision, determination or election.

THE PROXIES AND POWERS GRANTED BY PLEDGOR PURSUANT TO THIS AGREEMENT ARE COUPLED WITH AN INTEREST AND ARE GIVEN TO SECURE THE PERFORMANCE OF THE PLEDGOR'S OBLIGATIONS UNDER THE PLEDGE AGREEMENT AND UNDER THIS AGREEMENT.

Agreements of Company. Company shall give copies of any notices or other communications that it sends to Pledgor or to any other members of Company related to any Article 8 Matter to Secured Party at the same time as such notices or other communications are sent to Pledgor or any such other member of Company. Company acknowledges the powers and proxies granted herein and agrees that Secured Party shall have the sole right during the term of this Agreement to vote the Pledgor's Interests with respect to any Article 8 Matter.

Termination. This Agreement shall terminate at such time as all of Pledgor's obligations secured hereby have been indefeasibly paid and performed in full and Company shall have received written notice from Secured Party of the termination of this Agreement.

Restrictive Legend. Each certificate, if any, representing any of the Pledgor's Interests shall be marked by the Company with a legend reading as follows:

“THE MEMBERSHIP INTERESTS EVIDENCED HEREBY ARE SUBJECT TO AN IRREVOCABLE PROXY AGREEMENT (A COPY OF WHICH MAY BE OBTAINED FROM THE ISSUER) AND BY ACCEPTING ANY INTEREST IN SUCH MEMBERSHIP INTERESTS THE PERSON HOLDING SUCH INTEREST SHALL BE DEEMED TO AGREE TO AND SHALL BECOME BOUND BY ALL THE PROVISIONS OF SAID AGREEMENT.”

The Company agrees that, during the term of this Agreement, it will not remove, and will not permit to be removed (upon registration of transfer, reissuance or otherwise), the legend from any such certificate and will place or cause to be placed the legend on any new certificate issued to represent the Shares theretofore represented by a certificate carrying a legend.

Miscellaneous

Notices. All notices and other communications required or permitted hereunder shall be in writing and shall be mailed by registered or certified mail, postage prepaid, sent by facsimile or electronic mail or otherwise delivered by hand or by messenger addressed:

if to Pledgor: _____

if to Secured Party: _____

if to Company: _____

Governing Law. This Agreement and all acts and transactions pursuant hereto shall be governed, construed and interpreted in accordance with the laws of the State of [_____] as they apply to contracts entered into and wholly to be performed within such state by residents thereof.

Amendment. Except as expressly provided herein, neither this Agreement nor any term hereof may be amended, waived, discharged or terminated other than by a written instrument referencing this Agreement and signed by each of the parties to this Agreement.

Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be enforceable against the parties actually executing such counterparts, and all of which together shall constitute one instrument.

Jurisdiction; Venue. With respect to any disputes arising out of or related to this Agreement, the parties consent to the exclusive jurisdiction of, and venue in, the state or federal courts located within the State of [_____].

The parties have executed this Agreement as of the date first above written.

[COMPANY]

By:
Its:

[PLEDGOR]

By:
Its:

[SECURED PARTY]

By:
Its:

Exhibit A

Pledged Interests

APPENDIX D

IRREVOCABLE PROXY

Irrevocable Proxy. Solely with respect to Article 8 Matters, Pledgor hereby irrevocably grants and appoints Lender, from the date of this Agreement until the termination of this Agreement in accordance with its terms, as Pledgor's true and lawful proxy, for and in Pledgor's name, place and stead to vote the Pledged Interest in [ISSUER] by Pledgor, whether directly or indirectly, beneficially or of record, now owned or hereafter acquired, with respect to such Article 8 Matters. The proxy granted and appointed in this Section __ shall include the right to sign Pledgor's name (as a member of [ISSUER] to any consent, certificate or other document relating to an Article 8 Matter and the Pledged Interests that applicable law may permit or require, to cause the Pledged Interest to be voted in accordance with the preceding sentence. Pledgor hereby represents and warrants that there are no other proxies and powers of attorney with respect to an Article 8 Matter and the Pledged Interest that Pledgor may have granted or appointed. Pledgor will not give a subsequent proxy or power of attorney or enter into any other voting agreement with respect to the Pledged Interest with respect to any Article 8 Matter and any attempt to do so with respect to an Article 8 Matter shall be void and of no effect.

As used herein, "*Article 8 Matter*" means any action, decision, determination or election by [ISSUER] or its member(s) that its membership interests or other equity interests, or any of them, be, or cease to be, a "security" as defined in and governed by Article 8 of the Uniform Commercial Code, and all other matters related to any such action, decision, determination or election.

The proxies and powers granted by the Pledgor pursuant to this Agreement are coupled with an interest and are given to secure the performance of the Pledgor's obligations.

APPENDIX E
FIRST AMENDMENT TO
THE OPERATING AGREEMENT FOR [NAME OF LLC ISSUER]

The undersigned, being all of the Members of [NAME OF LLC ISSUER], a [STATE OF ORGANIZATION] limited liability company (the “Company”), hereby agree that a new Section [] is added to the Operating Agreement of the Company dated as of [], 200[], reading in its entirety as follows:

Section []. Units Deemed to be Securities.

Pursuant to [APPLICABLE] Code [REFERENCE TO APPLICABLE STATE UNIFORM COMMERCIAL CODE § 8103(C)], the Units of Company capital held by Members of the Company shall be considered to be securities governed by [ARTICLE 8 STATE REFERENCE] of the [APPLICABLE] Code.

This First Amendment to the Operating Agreement for [NAME OF LLC ISSUER] may be executed by the parties hereto by means of facsimile signatures and in multiple counterparts, each of which shall be deemed an original and all of which, taken together, shall constitute one and the same instrument.

EXECUTED AND EFFECTIVE as of the _____ day of _____, 200[]

[MEMBERS]

By: _____

[MEMBERS]

By: _____

APPENDIX F

ISSUER'S ACKNOWLEDGMENT AND CONSENT

To: [Proposed Insured]

Reference is made to that certain [Pledge and Security Agreement] dated as of [], 200[] (as amended, supplemented or otherwise modified from time to time, the "Pledge Agreement"), between [] (the "Mezzanine Lender") and [], a [] limited liability company, (the "Pledgor") and this acknowledgement relates to those membership interests (the "Pledged interests"), as further described on Schedule I to the Pledge Agreement.

[], the issuer of the Pledged Interests, acknowledges and agrees that the pledged interests are investment property subject to the provisions of Article 8 of the [applicable State] Uniform Commercial Code.

Dated: [], 200[]

Very truly yours,

ISSUER:

By: _____

Name: _____

Title: _____

ACKNOWLEDGED AND AGREED:

PLEDGOR:

By: _____

Name: _____

Title: _____

IN WITNESS WHEREOF, the Company has caused this Certificate to be executed as of the date set forth below.

[_____]

Dated: _____

By: _____

Name:

Title:

APPENDIX G (CONT'D)

(REVERSE SIDE OF CERTIFICATE)

FOR LIMITED LIABILITY COMPANY INTEREST OF

[_____]

Limited Liability Company Interest Power

FOR _____ VALUE
RECEIVED, _____

Please insert social security or other
Identifying Number of Assignee

hereby sells, assigns and transfers
unto

--

a ___ % limited liability company interest in [_____], a Delaware limited liability company, standing in our name in the Limited Liability Company Operating Agreement of said limited liability company and do hereby irrevocably constitute and appoint [_____] attorney to transfer the said limited liability company interest on the books of said limited liability company with full power of substitution in the premises.

Dated: _____

By: _____

Name:

Title:

In presence of

APPENDIX H

CONTROL AGREEMENT

This Control Agreement (“Agreement”) is made and entered into as of the ____ day of [] 200[], by and among [Name of Borrower], a [] corporation, (“Borrower”), [Name of Insured], a [] corporation (“Lender”), and [Name of pledging Debtor] (the “Pledgor”). **[Assumes that the Borrower is the issuer of the Pledged Collateral]**

RECITALS:

WHEREAS, Lender has agreed to loan the aggregate sum of [] Million Dollars (\$[],000,000.00) (the “Loan”) to Borrower, pursuant to a Secured Promissory Note of even date herewith in such original principal amount, executed by Borrower in favor of Lender (the “Note”) and a Loan Agreement of even date herewith between Borrower and Lender (the “Loan Agreement”); and

WHEREAS, the Pledgor has guaranteed the indebtedness of Borrower to Lender evidenced by the Note pursuant to a General Continuing Guaranty of even date executed by Pledgor in favor of Lender (the “Guaranty”); and

WHEREAS, the obligations of the Pledgor to the Lender under the Guaranty are secured, in part, by a pledge to Lender of Pledgor’s []% membership interest in Borrower (such interest being referred to herein as the (“Pledged Collateral”) pursuant to a Pledge and Security Agreement of even date herewith, executed by Pledgor in favor of Lender (the “Pledge Agreement”); and

WHEREAS, the parties hereto wish to acknowledge such security interest and pledge and Lender’s control over the Pledged Collateral for purposes of the provisions of Article 8 and Article 9 of the Uniform Commercial Code as enacted and in effect in the State of [] (the “UCC”).

AGREEMENT:

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Defined Terms. All capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed thereto in the Loan Agreement.

2. Acknowledgment of Security Interest. Borrower hereby acknowledges and agrees that, pursuant to the Pledge Agreement, Lender has been granted and continues to hold a security interest in and to the Pledged Collateral as collateral security for the obligations of Pledgor under the Guaranty.

3. Agreement to Follow Instructions; Agreement Not to Register Transfer. Borrower, as issuer of the Pledged Collateral, hereby agrees to comply with any “instructions” (as defined in Section 8102(a)(12) of the UCC) originated by Lender without further consent of the Pledgor, including, without limitation, instructions regarding the transfer, redemption or other disposition

of the Pledged Collateral or the proceeds thereof, including any distributions with respect thereto. Pledgor agrees that it shall not register any transfer of the Pledged Collateral to any person without the prior written consent of Lender.

4. Intent of the Parties. By executing and delivering this Agreement, the parties hereto intend to establish Lender's control over the Pledged Collateral for purposes of the provisions of Section 8106(c)(2) of the UCC.

5. Consent. Pledgor hereby consents to the execution and delivery of this Agreement by Borrower and Lender.

6. Choice of Law. This Agreement shall be construed and enforced under the laws of the State of [] without regard to the conflict of law principles thereof

7. Counterparts. This Agreement may be executed in any number of separate counterparts, each of which shall collectively and separately constitute one agreement.

8. Amendments. No amendment, waiver, termination or other modification to this Agreement shall be effective unless the same is in writing and is signed by each of the parties hereto.

[signature page follows]

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date first written above.

[BORROWER]

By: _____

Printed: _____

Title:

[INSURED]

By: _____

Printed: _____

Title:

[DEBTOR]

By: _____

Printed: _____

Title:

APPENDIX I

MEZZANINE FINANCING ENDORSEMENT (UCC)

ATTACHED TO EAGLE 9™ UCC INSURANCE POLICY NO.

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

The Company hereby confirms that the Certificates (the “Certificates”) representing the membership interests in ABC LLC, a _____ limited liability company, as described in the Mezzanine Loan Agreement dated as of _____, 2001 among DEF LLC, a _____ limited liability company, as Mezzanine Borrower, and XYZ BANK, NATIONAL ASSOCIATION, a national banking association, as Mezzanine Lender, is included within the Collateral that is covered by this policy.

The following Exclusions from Coverage do not apply to the Certificates:

- (a) Exclusion 1(a);
- (b) Exclusion 3(b);
- (c) Exclusion 4(b) and
- (d) Exclusion 5(h)

This endorsement does not insure against, and the Company will not pay loss or damage, costs, legal fees or expenses that arise by reason of any adverse claim affecting the Certificates not Known to the Company, but of which the Insured has Notice.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

BY: _____

AUTHORIZED SIGNATORY

EAGLE 9™ UCC Insurance Policy (3/01 Version) - Mezzanine Loan Endorsement
(Certificates Representing Membership Interests — “Opting In” to Article 8 of the
UCC)
(5-7-01)