

## **DEEDS IN LIEU OF FORECLOSURE - CURRENT DEVELOPMENTS**

**By John C. Murray  
Vice President - Special Counsel  
First American Title Insurance Company**

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### **Lender Conditions for Acceptance of Deed-in-Lieu**

Deeds-in-lieu are often taken by lenders in connection with loan workouts of residential, agricultural and commercial properties, and are often done as part of bankruptcy workouts and “prepackaged” bankruptcy plans. Deletion of the creditors’ rights exclusion in the title policy insuring the deed-in-lieu transaction is crucial; otherwise, a sophisticated lender usually won’t take a deed-in-lieu because of the risk of a fraudulent transfer or preferential transfer claim in a subsequent bankruptcy proceeding by or against the debtor, and because of the risk of a subsequent claim by the borrower or creditors of the borrower that the transaction constitutes an equitable mortgage and should be set aside or subordinated to the claims of other creditors.

Most lenders won’t accept a deed-in-lieu unless there are no other mortgage liens on the property and an appraisal (which, depending on the lender’s and/or title insurer’s requirements, may be either internal or external) has established that there is no equity in the property (i.e., that the amount of the outstanding indebtedness exceeds the current appraised value of the property). The title insurance company will usually want a copy of the appraisal or other evidence showing that the value of the property being transferred is less than the debt. (The title insurer will usually supply the lender with a confidentiality letter with respect to the appraisal at the lender’s request). *See Exhibit “A”* attached hereto for a checklist of typical lender requirements and concerns with respect to processing a deed in lieu of foreclosure.

### **Preservation of Mortgage Lien**

Most sophisticated lenders have a specific procedure for deeds-in-lieu, including a settlement agreement, deed with non-merger language, assignments, estoppels, etc. The title insurance company will want to review these documents prior to the closing. Many lenders will not cancel the note, but will instead give the borrower a covenant not to sue (in case the deed is later set aside for legal or equitable reasons or - God forbid! - the title company fails, and to avoid a subsequent argument that the mortgage should be deemed discharged or void because the underlying debt has been canceled) and will keep the mortgage of record and not discharge or release it until the property is subsequently resold.

The validity of attempting to preserve the mortgage lien may depend on whether other creditors would be prohibited from availing themselves of the normal methods of collection that they would otherwise have if the lien were extinguished. It may also depend, at least in part, on the intent of the parties as stated in the settlement agreement and the deed. Most states will enforce such a stated intention. In Illinois, for example, case law makes clear that a merger is not necessarily the result of the union of two estates in the same person; rather, the intention and interest of the party who unites the two estates will determine whether a merger occurs. See, e.g., *Hooper v. Goldstein*, 168 N.E.1 (Ill. 1929); *Biehl v. Atwood*, 502 N.E. 2d, 1234 (Ill. App. Ct. 1986); *Miller v. McDonough*, 141 N.E. 2d 749 (Ill. App. Ct. 1957); *Winters v. Polin*, 33 N.E. 2d 497 (Ill.App. Ct. 1938); *Chicago Title & Trust Co. v. Kesner*, 16 N.E. 2d 175 (Ill. App. Ct. 1941); John C. Murray, *Deeds in Lieu of Foreclosure: Practical and Legal Consequences*, 26 Real Prop. Prob. & Tr. J. 459, 516 n. 195. The consideration stated for a deed in lieu of foreclosure is normally forgiveness of the debt or an agreement not to sue on the debt, or, if the loan is nonrecourse, the agreement of the lender not to foreclose or exercise its rights and remedies under the loan documents for failure to pay the debt.

Lenders and title companies share the same concerns about deeds-in-lieu: re-characterization as an equitable mortgage, violation of the “clogging the equity” doctrine (i.e., the use of a deed-in-lieu as a means of preventing the borrower from exercising its statutory and/or equitable rights to redeem the property from a foreclosure sale), and setting aside of the transaction as a fraudulent conveyance or preferential transfer under federal bankruptcy or state fraudulent transfer laws.

Most lenders require a non-merger endorsement from the title company as well as deletion of the creditors’ rights exclusion (which will only occur if the title company is satisfied that there is no equity in the property). See **Exhibit “B”** attached hereto for a sample form of non-merger endorsement. Some title companies will stipulate, in writing, that if the lender’s standard procedures are followed (including evidence that no equity exists in the property), the creditors’ rights exclusion will be deleted and no other special exceptions will be raised regarding the transaction. The title insurer will usually require a copy of the lender’s standard documentation, an appraisal satisfactory to the title insurer, and disclosure of any deviation from the lender’s standard procedure.

### **Title Insurance Coverage**

Lenders will usually obtain a new owner’s title insurance policy (or an “open commitment”) upon completion of the transaction, rather than rely on continuation of the coverage under the mortgagee’s policy. This is so because the old policy only covers matters of record at the time of the original loan, does not insure the validity of the deed-in-lieu transaction or provide coverage for creditors’ rights issues, and provides less claim coverage than a new owner’s policy (i.e., unlike an owner’s title policy, which provides for payment upon proof of loss because of the diminution in value of the estate caused by the title defect, a lender insured under a loan policy must first establish that an actual impairment of its security has occurred as a result of the defect before it will be entitled to

recover under the policy). See Janice E. Carpi, *Title Insurance Following Foreclosure, Beyond the Workout: Risks for Lenders Taking Back and Owning Real Estate*, Third Annual Spring CLE and Committee Meeting, Real Property Law Programs, Section of Real Property, Probate and Trust Law, American Bar Association, May 7-9, 1992, p. A-3. Furthermore, the ALTA loan policy provides for continuation of coverage only if the insured acquires the land by “conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage.”

As stated above, the lender may want to keep the mortgage of record when obtaining a deed-in-lieu in connection with a workout of a defaulted mortgage loan, in order to maintain priority over subordinate liens and the ability to subsequently foreclose its mortgage to eliminate mechanic’s or other liens, to preserve its first lien interest in the event the deed-in-lieu transaction is subsequently set aside as the result of a fraudulent-conveyance or preferential-transfer action by a bankruptcy trustee or other creditors of the mortgagor, and to avoid a subsequent argument by the mortgagor or another creditor that the mortgage has in fact been discharged and is void because the note evidencing the underlying indebtedness has been canceled. The lender may, in addition to obtaining a new owner’s policy in connection with a deed-in-lieu transaction, request certain endorsements to the existing mortgagee’s policy such as a non-merger endorsement and an endorsement insuring the continuing validity, enforceability and priority of the mortgage lien upon consummation of the deed-in-lieu transaction. See **Exhibit “C”** attached hereto for sample provisions to be inserted in the deed-in-lieu settlement agreement with respect to title insurance.

### **Residual Rights Granted to Mortgagor**

Recharacterization and “clogging” issues may occur in connection with a deed-in-lieu transaction when the mortgagor retains a residual right with respect to the property after the conveyance, such as an option to repurchase the property or a right of first refusal, or retains possession of the property under a lease or occupancy agreement from the mortgagee. Mortgagees (and title companies) will usually not permit an option or right of first refusal to repurchase the property (or other continuing rights) by the mortgagor. In the event the mortgagee grants such a continuing right to the mortgagor, a court might conclude that a deed was not intended and that the conveyance actually constituted an equitable mortgage. If so, the court may void the deed.

Before granting any such rights to the mortgagor, the mortgagee should consult with the title insurer to determine if it will agree to insure title without raising an exception for a possible equitable mortgage claim by the mortgagor. If any such rights are granted, the deed-in-lieu documents should specifically state that the continuing interest does not transform the deed obtained by the mortgagee into a mortgage and that an absolute conveyance is intended by the parties. In addition, the documentation should provide that the mortgagor will not be entitled to equitable or injunctive relief and that the mortgagor will be limited to an action for damages for breach of contract. The mortgagee should also require the mortgagor to waive any right to control the manner of use,

development, operation, or subsequent disposition of the property by the mortgagee after the conveyance to the mortgagee. If the mortgagee leases the property the mortgagor, the rental should be set at or near, but not in excess of, the market rate and the term of the lease should be relatively short, i.e., one or two years.

Title insurers are likely to make a decision whether to insure these types of transactions on a case-by-case basis. *See, e.g., Beeler v. American Trust Co.*, 24 Cal. 2d 1, 23, 147 P.2d 583, 595 (1944) (holding that a purported deed in lieu of foreclosure would be treated as a mortgage where the borrower leased the property back and retained an option to purchase for the amount of the debt, notwithstanding that the debtor had executed an affidavit contemporaneously with the deed declaring that the transaction was an absolute conveyance and was not intended as a mortgage); *Strike v. Trans-West Discount Corp.*, 92 Cal. App. 3d 735, 742-743, 155 Cal. Rptr. 132, 137 (1979) (holding that notwithstanding the delivery of a “grant deed” to the lender, the borrowers’ retention of possession of the property, their payment of all taxes and assessments, and their payment of all insurance, maintenance and utility expenses, evidenced the parties’ intention to treat the deed as a security device). *But see Blick v. Nickel Savings, Investment and Building Assoc.*, 216 S.W. 2d 509, 512-513 (1948) (ruling that where deeds to two properties owned by the mortgagor were conveyed to the mortgagee and the mortgages were simultaneously released of record, and the deeds of conveyance contained no mention of any present or continuing indebtedness, the transaction did not constitute an equitable mortgage even though the intention of the parties was to grant the mortgagor a right or option to repurchase the property within a reasonable time; the court noted that the proof necessary to recharacterize a deed as a mortgage must be “clear, satisfactory and convincing”). *See also* John C. Murray, *Deeds in Lieu of Foreclosure: Practical and Legal Considerations*, 26 Real Prop. Prob. and Tr. J. 459, 467-472 (Fall 1991).

### **Deeds in Escrow**

Deeds in escrow are sometimes obtained from borrowers by institutional lenders, usually in connection with mortgagor bankruptcies and loan workouts. The documentation usually provides that the deed will be delivered out of escrow to the mortgagee in the event of a future default or other specified event. *See Exhibit “D”* attached hereto for a sample form of deed-in escrow agreement. Title companies are often asked to hold the deed in escrow and issue title insurance for the transaction. Title insurance coverage should be available, and the title policy issued, only *after* the deed comes out of escrow (unless the title company is stupid, as happened in one instance where a title company gave the lender full extended coverage when the deed was *initially* placed in escrow) because no delivery of the deed has occurred and a bankruptcy may be subsequently filed by or against the mortgagor (unless the deed-in-lieu transaction is part of an approved bankruptcy plan), in which event the property would likely be determined by a bankruptcy court to remain part of the debtor’s estate because the escrow arrangement constitutes an executory contract and no actual delivery had occurred.

The mortgagor, as debtor in possession, or a trustee appointed for the bankruptcy estate may also argue that the automatic stay that applies as of the filing date of the bankruptcy petition prohibits the delivery of the deed and any other escrowed documents. Furthermore, other creditors may challenge such escrows as fraudulent conveyances or preferential transfers. Even if the escrowed documents have been delivered out of escrow to the mortgagee prior to the mortgagor's bankruptcy, the mortgagor or the bankruptcy trustee may seek to subsequently avoid the transfer as a fraudulent conveyance, a preference, or an unperfected lien subject to the "strong arm" powers of the trustee under § 544 of the Bankruptcy Code ("Code"). (Section 544 vests a bankruptcy trustee with the rights of a hypothetical lien creditor whose lien was perfected at the time of the filing of the bankruptcy petition; if another creditor who claims a lien against the applicable property has not properly perfected its lien as of such date, the trustee or the debtor in possession can avoid such other creditor's lien and such other creditor then becomes merely a general creditor of the estate).

For purposes of determining the preference limitation period (90 days, or, in the case of a transfer to an "insider," one year, under § 547 of the Code) or the fraudulent conveyance limitation period (one year under § 548 of the Code) for bringing an avoidance action (which periods, it should be noted, are usually significant longer under similar state fraudulent conveyance and fraudulent transfer laws), the courts have issued conflicting opinions as to whether the transfer period commences when the deed is placed in escrow or when the deed is subsequently conveyed or released out of escrow. It is therefore important that the title company handling the escrow arrangement and being asked to insure title upon delivery or release of the deed ascertain, both when the deed is placed in escrow and again when it is released and the title company is asked to provide the policy, that there is fair and adequate consideration for the transaction (i.e., extinguishment or reduction of the underlying indebtedness and waiver, forbearance or relinquishment of the rights and remedies of the mortgagee otherwise available for non-payment of the debt) and that the value of the property is less than the outstanding debt. The title insurance company will also want to review and approve all the underlying documents and agreements, and will also likely require that the escrow agreement contain provisions absolving it from all liability except for its gross negligence and permitting it to bring an interpleader action in the event of a dispute among any of the parties to the agreement. *See* Patrick E. Mears, *Can Bankruptcy Trump an Escrow?*, Business Law Today, Business Law Section, American Bar Association, September/October 1996, p.40.

Lenders may try to "bankruptcy proof" a deed-in-lieu transaction (e.g., by the use of third party indemnifications or "springing" or "exploding" guaranties, the required establishment by the borrower of a "bankruptcy remote entity," to hold title to the property, etc.). If a deed is placed in escrow as part of an approved bankruptcy plan, the plan and confirmation order should include specific findings of fact and conclusions of law that the conveyance of the property constitutes an absolute transfer of the property and is not intended by the parties as an equitable mortgage. The escrow instructions should state that, in the event of a subsequent default under the plan or the loan documents (as same may have been revised or restated pursuant to the plan), the title

company, as escrow agent, will release the deed and other escrowed documents and deliver them to the designated party. Because this type of arrangement has been specifically approved by the bankruptcy court it should be enforced even if the mortgagee later is the subject of a second bankruptcy case, based on collateral estoppel, *res judicata* principles, and equitable grounds; i.e., the mortgagee should be entitled to relief from the automatic stay in the subsequent bankruptcy proceeding and to specific enforcement of the escrow arrangement. See *In re Howe*, 913 F. 2d 1138, 1149 (5<sup>th</sup> Cir. 1990), in which the Fifth Circuit Court of Appeals upheld the decision of the bankruptcy court that the debtor/mortgagor was precluded, under the principle of *res judicata*, from filing a lender liability claim against the mortgagee (who was the largest creditor of the bankrupt debtor/mortgagor) five years after the confirmation of the debtor/mortgagor's Chapter 11 bankruptcy reorganization plan. The plan contained a provision that if the debtor/mortgagor failed to comply with the plan, a deed in escrow to the debtor/mortgagor's property would be released to the mortgagee. Because the debtor/mortgagor had not performed under the bankruptcy plan, the bankruptcy court denied the debtor/mortgagor's motion to dismiss the Chapter 11 proceedings and granted the mortgagee's motion for release of the deed. The Fifth Circuit Court of Appeals agreed with the bankruptcy court's holding that because the plan contained "built-in provisions that eliminate default" -- i.e., if the debtor/mortgagor couldn't pay, the mortgaged property would be transferred to the mortgagee -- there was no material default under the plan that would necessitate the dismissal of the Chapter 11 proceedings or prevent the delivery of the deed to the mortgagee.

Recent case law has generally allowed a mortgagee to obtain a deed in escrow from the mortgagor as consideration for the forbearance or accommodation by the lender with respect to a workout of a delinquent mortgage loan, but has not permitted the lender to place a deed to the secured property in escrow as part of the original mortgage-loan transaction. A case in Florida, *Ringling Brothers Joint Venture v. Huntington Nat'l Bank*, 595 So. 2d 180 (Fla. App. 2d Dist. 1992), specifically held that a deed placed in escrow in connection with a mortgage loan workout was enforceable under state law and was not a clog on the equity of redemption. The deed in escrow was given to avoid foreclosure and therefore, the court held, the mortgagor received valuable new consideration to relinquish its right of redemption. A case in Michigan, *Oakland Hills v. Lueders Drain District*, 212 Mich. App. 284 (1995), disallowed a deed in escrow as a clog on the equity of redemption because it was part of the initial mortgage transaction, but the court, in *dicta*, seemed to indicate that it would not be a clog on the equity and would be valid and enforceable if entered into after a subsequent default and for separate consideration. See also *Russo v. Wolbers*, 116 Mich. App. 327, 336, 323 N.W. 2d 385 (1982) (holding that although the mortgagor, as part of the original mortgage transaction, may not barter away his or her equity of redemption, the mortgagor may, in the absence of fraud, undue influence, oppression or duress, convey his or her fee interest at a subsequent date for adequate consideration); *First Illinois National Bank v. Hans*, 493 N.E. 2d 1171 (Ill. App. Ct. 1986) (holding that although a separate agreement to execute a quit claim deed for the property to the lender in the event of a future default to avoid the expense of foreclosure may be enforceable in Illinois under certain circumstances, such an agreement, if

contained as a provision in the original mortgage, is unenforceable as an impermissible attempt to extinguish the borrower's equity of redemption); *Dawson v. Perry*, 1993 Va. Cir. LEXIS 68 (May 5, 1993) (ruling that where a recorded deed in lieu of foreclosure was part of the original mortgage transaction, the deed was not obtained for separate and adequate consideration and prevented the mortgagor from exercising her equity of redemption, thus violating the "clogging" prohibition); *In re O.P.M. Leasing Services, Inc.*, 46 B.R. 661 (Bankr. S.D.N.Y. 1985) (holding that, although under New York law legal title to property placed in escrow remains with the grantor until the occurrence of the condition specified in the escrow agreement, the grantee has an equitable interest in the property and a judgment lien creditor with notice of the escrow agreement is subject to the equity interest of the grantee); *Larson v. Hinds*, 155 Colo. 282, 287, 394 P. 2d 129, 132 (1964) (ruling that an arrangement whereby a deed to the property was placed in escrow in connection with a loan transaction, with the deed to be immediately delivered to the lender in the event of a subsequent loan default by the borrower, "comes as close to a formal security transaction as could have been accomplished without the execution of a mortgage or deed of trust," and constituted a security transaction as a matter of law because it deprived the borrower of any right to redeem the property in violation of the public policy of the State of Colorado); Minn. Stat. Ann. §559.18 (West 1990 - Supp.1996) (creating a statutory presumption that a deed in lieu of foreclosure, if absolute in form, is not given as further or new security for the debt). *See generally* Debra J. Stark, *Avoiding the Recharacterization of Certain Deed-in-Lieu-of-Foreclosure Transactions: Ensuring That What You Draft is What You Get*, *The Banking Law Journal*, July-August 1993, p. 330; John C. Murray, *Deeds in Lieu of Foreclosure: Practical and Legal Considerations*, 26 *Real Prop. Prob. and Tr. J.* 459, 464-468 (Fall 1991); Annotation, *Deed Placed in Escrow to be Delivered to Grantee Upon Failure to Pay Debt Due Him as a Mortgage*, 65 *A.L.R.* 120 (1930).

Recharacterization and "clogging" issues occur in connection with deeds in lieu of foreclosure (as discussed earlier in this article), and would also exist where there is an agreement to give a deed in lieu of foreclosure in the future if certain conditions arise, such as a default in the underlying mortgage loan obligation. An example of this type of arrangement is when a borrower places a deed in escrow with a third party such as a title insurance company. Courts might construe such an agreement as an equitable mortgage, and the borrower may claim that the lender must foreclose to enforce the provisions of the agreement. Courts of equity will closely scrutinize these types of transactions, because the borrower's right of redemption will be cut off by the deed in lieu of foreclosure. *See, e.g., Basil v. Erhal Holding Corp.*, 538 NY 2d 831 (1989), in which the mortgagor gave the mortgagee both a new mortgage and a deed in lieu of foreclosure. The deed was not to be recorded unless the mortgagor defaulted. The mortgagor subsequently defaulted and demanded a right of redemption. The court held that the deed was not intended as an absolute conveyance, but instead was designed as further security for the loan and was, therefore, a mortgage. The court granted redemption rights to the mortgagor. In *In re Sky Group International, Inc.*, 108 B.R. 86 (Bankr. W.D. Pa. 1989), the mortgagor placed a deed to the mortgagee in escrow prior to the filing of an involuntary bankruptcy petition against the mortgagor. The bankruptcy court held that under applicable state law the

mortgagor had not relinquished either its legal or equitable interests in the real property by executing the deed and placing it in escrow. The court also ruled that title to the real property would remain in the mortgagor until the performance of the condition or the happening of the event upon which the escrow would be satisfied and actual delivery of the deed by the escrow agent to the mortgagee had been made. Because delivery of the deed did not occur until after the involuntary petition had been filed, the mortgagor retained both legal and equitable title to the real property at the time of the filing and, consequently, the real property remained part of the bankruptcy estate. *See also Wallace v. McCabe*, 245 N.Y.S. 2d 854 (Sup. Ct. 1964) (the court declared deeds absolute on their face to be mortgages; the deeds delivered into escrow in settlement of the debt constituted mortgage security for monies borrowed because the agreement recited the existence of the debt, management of the properties remained in the mortgagor, and the mortgagor was entitled to recover the properties upon payment of the debt); *Coffin v. Green*, 185 P. 361 (Ariz. 1919) (the court held that delivery of a deed into escrow by the mortgagor, with the stipulation that it would be delivered to the mortgagee if the mortgagor should fail to pay the pre-existing mortgage on the property before a specified date or else be delivered to the mortgagor if the mortgagor satisfied the mortgage before such date, constituted the delivery of an instrument of additional security for the mortgage rather than a conditional sale of the mortgaged property); *McGuigan v. Millar*, 117 Cal. App. 739, 746-747, 4 P. 2d 607 (1931) (holding that the evidence indicated the intention of the parties to treat an agreement by the borrower to deliver a deed to the lender as a disguised security device designed to create an impermissible waiver of the right of redemption).

The documentation in connection with a deed-in-escrow transaction usually provides that the deed will be delivered out of escrow to the mortgagee in the event of a future default or other specified event. Title companies are often asked to hold the deed in escrow and issue title insurance for the transaction. As mentioned earlier, deeds in escrow are commonly obtained by institutional lenders in workout and bankruptcy situations, and many have in fact come out of escrow and have been insured by title insurance companies. The author is not aware of any reported court decisions dealing with claims against either the mortgagee or the title insurer as the result of the mortgagee receiving a deed to the mortgagor's property in connection with such a deed-in-escrow transaction. Title insurance coverage should be available, and the title policy issued, only *after* the deed comes out of escrow because no delivery of the deed has occurred and a bankruptcy may be subsequently filed by or against the mortgagor (unless the deed-in-lieu transaction is part of an approved bankruptcy plan), in which event the property would likely be determined by a bankruptcy court to remain part of the debtor's estate because the escrow arrangement constitutes an executory contract and no actual delivery had occurred. *See, e.g., In re Scanlan*, 80 B.R. 131, 134 (Bankr. S.D. Iowa 1989) (holding that delivery of a deed to an escrow agent, when the obligations of the other party have not been fulfilled, does not constitute full performance by the debtor and the deed may be rejected as an executory contract and the property ordered reconveyed to the debtor); *Shaw v. Dawson*, 48 B.R. 857, 861 (Bankr. D. N. M. 1985) (same); *But see In re Rehbein*,

60 B.R. 436, 441 (9<sup>th</sup> Cir. 1986) (ruling that where the deed has been placed in escrow and neither party has any material further obligations to perform, the contract is not executory and may not be rejected); *In re Leafers*, 101 B.R. 24, 28 (Bankr. C.D. Ill. 1989) (same).

The mortgagor, as debtor in possession, or a trustee appointed for the bankruptcy estate may also argue that the automatic stay that applies as of the filing date of the bankruptcy petition prohibits the delivery of the deed and any other escrowed documents. Furthermore, other creditors may challenge such escrows as fraudulent conveyances or preferential transfers. Even if the escrowed documents have been delivered out of escrow to the mortgagee prior to the mortgagor's bankruptcy, the mortgagor or the bankruptcy trustee may seek to subsequently avoid the transfer as a fraudulent conveyance, a preference, or an unperfected lien subject to the "strong arm" powers of the trustee under § 544 of the Bankruptcy Code. (Section 544 vests a bankruptcy trustee with the rights of a hypothetical lien creditor whose lien was perfected at the time of the filing of the bankruptcy petition; if another creditor who claims a lien against the applicable property has not properly perfected its lien as of such date, the trustee or the debtor in possession can avoid such other creditor's lien and such other creditor then becomes merely a general creditor of the estate).

**EXHIBIT "A"**

**CHECKLIST**

**Deed in Lieu of Foreclosure - Commercial Property  
[Common Address/Designation of Property]**

**I. Parties**

Lender:

\_\_\_\_\_, a \_\_\_\_\_  
corporation

\_\_\_\_\_  
Attention: \_\_\_\_\_

Telephone: (\_\_\_\_) \_\_\_\_\_

Telecopier: (\_\_\_\_) \_\_\_\_\_

Lender's Counsel:

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

Attention: \_\_\_\_\_

Telephone: (\_\_\_\_) \_\_\_\_\_

Telecopier: (\_\_\_\_) \_\_\_\_\_

Lender's [Local] Counsel:

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

Attention: \_\_\_\_\_

Telephone: (\_\_\_\_) \_\_\_\_\_

Telecopier: (\_\_\_\_) \_\_\_\_\_

Borrower:

\_\_\_\_\_, a \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

Telephone: (\_\_\_\_) \_\_\_\_\_

Telecopier: (\_\_\_\_) \_\_\_\_\_

Borrower's Counsel:

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

Attention: \_\_\_\_\_

Telephone: (\_\_\_\_) \_\_\_\_\_

Telecopier: (\_\_\_\_) \_\_\_\_\_

Borrower's [Local] Counsel:

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

Attention: \_\_\_\_\_

Telephone: (\_\_\_\_) \_\_\_\_\_

Telecopier: (\_\_\_\_) \_\_\_\_\_

Guarantor:

\_\_\_\_\_, a \_\_\_\_\_

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

Attention: \_\_\_\_\_

Telephone: (\_\_\_\_) \_\_\_\_\_

Telecopier: (\_\_\_\_) \_\_\_\_\_

Guarantor's Counsel:

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

Attention: \_\_\_\_\_

Telephone: (\_\_\_\_) \_\_\_\_\_

Telecopier: (\_\_\_\_) \_\_\_\_\_

Guarantor's [Local] Counsel:

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Attention: \_\_\_\_\_

Telephone: (\_\_\_\_) \_\_\_\_\_

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## **II. Showings, Deliveries and Documents**

### **A. Pre-Closing**

#### **1. Title Commitment**

- a. Obtain commitment of title insurance and add a non-merger endorsement.

#### **2. Pre-Closing Audit of Borrower's Books and Records**

#### **3. Obtain and Review Copies of All Leases, Licenses and Occupancy Agreements**

- a. Determine status of security deposits
- b. Determine transferability of non-cash security deposits (including letters of credit)
- c. Terminate Affiliate Agreements and Leases
- d. Obtain and review of "stacking plan"
- e. Obtain estoppel letters

4. Obtain and Review Copies of All Service and Maintenance Contracts and Equipment Leases
  - a. Determine which contracts and leases are to be assigned and which are to be terminated.
  - b. Obtain consents for assigned contracts and leases
5. Obtain and Review Copies of all Bank Records
6. Obtain and Review Copies of all Management and Leasing Agreements
  - a. Terminate Management and Leasing Agreements (where desirable)
7. Obtain list (and copies of) all brokerage commission liabilities
  - a. Obtain letters from brokers
8. Obtain and Review Copies of Licenses and Permits
  - a. Determine whether consents are required for assignment
  - b. Identify any other permits which require issuance
9. Personal Property Inventory
  - a. Identify exclusions and inclusions
  - b. Amendment, Continuation or Termination of UCC Statements
10. Review Recorded Documents
  - a. Determine if any consents or approvals are required for transfers
11. Engineering Report and ADA Compliance Report
12. Phase 1 (or Phase 2) Environmental Site Assessment Report(s)
13. Review collective bargaining and employment agreements
  - a. WARN Notices
  - b. Analyze pension plan liability, if any
  - c. Social security and employer tax liability and ratings transfers
14. Retain and contract with new manager and/or leasing agent
15. File Bulk Sales Notifications and Requests, as necessary
16. Transfer and Gains Tax Rulings, as applicable
17. Obtain list of outstanding accounts payable
  - a. Determine what items, if any, are lienable
  - b. Negotiate allocation of payment responsibilities

18. Determine if any personal property is registered under a certificate of title
  - a. Obtain and review copies
19. Obtain UCC, tax lien, litigation, trademark and judgment searches
20. Appraisal
21. Lender to Establish or Originate Entity to Acquire title and Open Bank Accounts
22. Obtain and Review Financial reports
23. Review senior lien documents (if applicable)
  - a. Determine if consent is required
  - b. Obtain estoppel letters
24. Review Borrower's Partnership or other Entity Documents with Reference to Determining Approval Process
25. Obtain and review utility plan and ascertain whether utilities are owned by Borrower and traverse (with benefit of appurtenant easement or public street) property of others
26. Obtain existing survey of property, if available (or order new survey).

B. Closing

1. Deed in Lieu of Foreclosure Agreement
2. Deed
3. Transfer Tax Declarations
4. Assignment of Leases and Occupancy Agreements
5. Bill of Sale
6. Assignment of Property
7. Covenant Not to Sue
8. Release of Lender
9. Legal Opinion
10. Escrow Agreement
11. Gap Undertaking
12. Owners Affidavit (ALTA Statement)
13. Letters to Tenants
14. Certificates of Title
15. Certificate
16. Financing Statement Certificate
17. Keys and Combinations
18. Leases
19. Contracts
20. Licenses and Permits

21. Plans and Specifications
22. Books and Records
23. Certified Copy of Organizational Documents (with Partner or other consents, as applicable)
24. Certified Resolutions of Directors and Shareholders
25. Incumbency Certificate
26. Owner's Title Policy
27. Date-Down Endorsement to Loan Policy
28. Terminations
  - a. Employees
  - b. Management, Leasing and Affiliate Agreements
29. Cash Payments and Receipts
30. Assignment of Contracts

**EXHIBIT "B"**

**NON-MERGER ENDORSEMENT**

**Attached to Policy No.** \_\_\_\_\_

**Issued by**

\_\_\_\_\_ **TITLE INSURANCE COMPANY**

The Company hereby insures the owner of the indebtedness secured by the mortgage referred to in Schedule A against loss or damage the Insured may sustain by reason of a final court judgment from a court of competent jurisdiction which holds that the lien of the insured mortgage is invalid and unenforceable by reason of a merger of the mortgage estate created by the insured mortgage with the fee estate acquired by \_\_\_\_\_ through the deed from \_\_\_\_\_, as grantor to \_\_\_\_\_, as grantee dated \_\_\_\_\_ and recorded \_\_\_\_\_ in book \_\_\_\_\_ page \_\_\_\_\_ of Official Records \_\_\_\_\_ County, \_\_\_\_\_.

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.

\_\_\_\_\_ **TITLE INSURANCE COMPANY**

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

**Name:** \_\_\_\_\_

**Title:** \_\_\_\_\_

## EXHIBIT "C"

### TITLE INSURANCE PROVISIONS - SETTLEMENT AGREEMENT

\_\_\_\_\_. **Owner's Title Policy.** As a condition to Lender's obligation to close, Lender, or its designee, must obtain from \_\_\_\_\_ ("Title Company"), at Closing, an ALTA Form \_\_\_\_\_ Owner's Title Insurance Policy or equivalent acceptable to Lender ("Title Policy"), dated as of the Closing Date naming Lender, or its designee, as the insured, which Title Policy shall show fee simple title to the Real Estate vested in Lender, or its designee, subject only to the Permitted Exceptions. The Title Policy must (a) insure as separate parcels any easements appurtenant to the Real Property, (b) be in the amount of the indebtedness evidenced by the Note which is outstanding on the Closing Date (or such lesser amount as Lender shall accept), (c) contain full extended coverage insurance over all general exceptions set forth in such policy [**other than matters which would be deleted by delivery of a current plat of survey to the Title Company**], (d) delete any so-called "creditor's rights" exclusion or exception, and (e) include such reinsurance (with such reinsurers) as Lender may require, together with direct access agreements with such reinsurers.

\_\_\_\_\_. **Loan Title Policy.** As an additional condition to Lender's obligation to close, Lender shall receive, at Closing, the following endorsements to ALTA Loan Policy (\_\_\_\_ Form) issued by the Title Company as Policy No. \_\_\_\_\_ ("Loan Policy") (which endorsements shall be dated as of the Closing Date): (i) a date-down endorsement showing fee simple title in Lender, or its designee, and insuring the Mortgage as a [**first**] priority encumbrance on the Real Property, subject only to the Permitted Exceptions and (ii) a non-merger endorsement acceptable to Lender (collectively, the "Loan Policy Endorsements"). Such Loan Policy Endorsements must also be approved by all reinsurers of the Loan Policy.

\_\_\_\_\_. **Borrower Cooperation.** Borrower shall cooperate with Lender to permit Lender, or its designee, to obtain the Title Policy and the Loan Policy Endorsements.

## EXHIBIT "D"

### DEED IN ESCROW AGREEMENT

THIS DEED IN ESCROW AGREEMENT ("Agreement") is made as of \_\_\_\_\_, \_\_\_\_\_ by and among: \_\_\_\_\_, not personally but solely as Trustee pursuant to Trust Agreement dated \_\_\_\_\_, \_\_\_\_\_ and known as Trust No. \_\_\_\_\_ (the "Trust"), \_\_\_\_\_, an Illinois limited partnership (the "Beneficiary"); herein, the Trust and the Beneficiary are sometimes collectively referred to as the "Owner"), \_\_\_\_\_, one of two general partners, \_\_\_\_\_, one of two general partners (herein collectively referred to as the "General Partners"), \_\_\_\_\_, a \_\_\_\_\_ corporation (hereinafter referred to as "Lender"); and \_\_\_\_\_ (hereinafter referred to as "Escrow Agent").

#### RECITALS:

A. WHEREAS, Lender and Owner have heretofore entered into that certain Amendment to Loan Documents, Security Agreement and Agreement Concerning Mortgage Loan, dated as of even date herewith (herein, such instrument, as the same may hereafter be amended, modified or restated from time to time, together with any and all substitutions and replacements thereof, is called the "Amendment");

B. WHEREAS, Lender, the Owner and General Partners desire to enter into this Agreement in furtherance of certain undertakings set out in the Amendment;

C. WHEREAS, capitalized terms used herein but not defined herein shall have the meaning set forth in the Amendment.

#### AGREEMENT

NOW, THEREFORE, in consideration of the premises and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged by each party hereto, Owner, General Partners, Lender and Escrow Agent hereby covenant and agree as follows:

1. Affirmation of Recitals. The recitals set forth above are true and correct and are incorporated herein by reference.
2. Appointment of Escrow Agent. Lender, Owner and the General Partners hereby appoint the Escrow Agent to serve as escrow agent hereunder for the purposes, and on subject to the conditions set forth herein; and, the Escrow Agent accepts such appointment.

3. Transfer Documents. Concurrently with the execution of this Agreement, Owner and Lender have delivered to and deposited with Escrow Agent, to be held by it in escrow hereunder pursuant to the provisions hereof, the fully executed documents and instruments identified on Exhibit A attached hereto (collectively, the “Transfer Documents”). Escrow Agent acknowledges receipt of the Transfer Documents and agrees to hold them in the escrow and to deal with them as provided in this Agreement.

4. Delivery of Transfer Documents to Lender. Within one (1) Business day after Escrow Agent’s receipt of a written notice from Lender certifying that a Monetary Default or a Non-Monetary Default has occurred under the Loan Documents (a “Transfer Direction”), Escrow Agent shall delivery the Transfer Documents to Lender or Lender’s designee identified as such in such Transfer Direction, at the delivery address set out in such Transfer Direction, by Federal Express or other reputable national overnight courier service. Not earlier than two business days after, or later than four business days after its delivery of the Transfer Documents to Lender or Lender’s designee, Escrow Agent shall notify Owner that it has made such delivery to Lender or its designee.

Upon receipt of notice of the delivery to Lender of the Transfer Documents, Owner shall immediately delivery possession of the real and personal property described in such Transfer Documents to Lender. At the time of delivery of possession to Lender, Owner shall cooperate with Lender to insure the orderly transfer of such property.

5. Completion of Transfer Documents. Upon receipt of the Transfer Documents by Lender or its designee, such recipient or its attorneys may complete the Transfer Documents in such manner as such person may consider necessary or appropriate to effect a complete and lawful conveyance and transfer to Lender (or its designee) of the Mortgaged Premises (defined for purposes hereof as defined in the Mortgage) pursuant to and as contemplated by the provisions of the Amendment. Owner and General Partners agree to cooperate fully with Lender, now and at all times in the future, to effect a prompt, complete and lawful conveyance and transfer to Lender or its designee of the Mortgaged Premises pursuant to and as contemplated by the provisions of the Amendment, and promptly to take all actions reasonably required by Lender (it being agreed that Owner and General Partners shall have no obligation to incur any cost or expense or any additional liability with respect to any such request) to effect any such conveyance and transfer, including (without limitation) supplying information regarding the Mortgaged Premises, completing and executing such further documentation as Lender may reasonably consider necessary or appropriate promptly to effect any such conveyance and transfer (it being agreed that Owner and General Partners shall have no obligation to incur any cost or expense or any additional liability in connection therewith). The authorization and power of attorney granted to Lender pursuant to this paragraph shall be deemed coupled with an interest and shall be irrevocable.

6. Reconveyance. In the event that for any reason, following the delivery of the Transfer Documents to Lender and the recording or filing of the same in the public records as appropriate, and the bringing down of title to the property described therein, if Lender is not satisfied with the status of title to any of such property, Lender may quitclaim, in whole or in part, any such property back to Owner, in which event Owner shall be re-vested with title to all such property so reconveyed with the same force and effect as though such property has remained the property of Owner and had never been transferred to Lender.

7. Absolute Conveyance; No Merger. It is understood and agreed by Owner and Lender that any delivery of the Transfer Documents to Lender from the escrow pursuant to the terms hereof will constitute an absolute conveyance of all of Owner's rights, title and interest in and to the property described in the Transfer Documents so delivered and is not intended as a mortgage, trust conveyance or security of any kind. Notwithstanding any delivery of the Transfer Documents to Lender from the escrow, the Loan Documents shall remain in full force and effect, now and hereafter, and the interest of Lender in the property conveyed by the Transfer Documents shall not merge with the interests of Lender in such property under the Loan Documents. The acceptance by Lender of the Transfer Documents shall not prejudice, limit, restrict or effect Lender's claim of priority under the Loan Documents over any other liens, claims, or encumbrances of any kind whatsoever. It is the express intention of Owner and Lender that Lender's interest in the property conveyed by the Transfer Documents shall not merge with the interest or rights of Lender under the Loan Documents, but will be and remain at all times separate and distinct, and Lender may thereafter sell or otherwise transfer the property conveyed to it pursuant to the Transfer Documents free and clear of all rights of Owner. It is further understood and agreed that following the delivery of the Transfer Documents to Lender, Lender shall have no obligation to account to Owner for the amount, if any, by which the value of the property transferred to Lender pursuant such Transfer Documents exceeds the amount of indebtedness secured by liens on such property.

8. Termination of Escrow. Escrow Agent shall terminate the escrow and deliver the Transfer Documents to Owner if Escrow Agent receives a written notification signed by all (and not less than all) of Lender, Owner and General Partners directing that the escrow be terminated and that the Transfer Documents be so delivered.

9. Certain Provisions Regarding Escrow Agent. (a) Escrow Agent shall have no duties or responsibilities other than those expressly set forth herein. Escrow Agent shall have no duty to enforce any obligation of any other person to make any delivery or to enforce any obligation of any other person to perform any other act. Escrow Agent shall have no liability to the other parties hereto or to anyone else by reason of any failure on the part of any other party hereto or any maker, guarantor, endorser or other signatory of any document or any other person to perform such other person's obligations under any such document. Except for amendments to this Agreement made as hereinafter provided, and except for joint instructions given to Escrow Agent by Owner, General Partners and Lender relating to the Transfer Documents, Escrow Agent shall not be obligated to recognize any agreement between any or all of the persons referred to herein, notwithstanding that references thereto may be made herein and whether or not it has knowledge thereof.

(b) In its capacity as escrow agent, Escrow Agent shall not be responsible for the genuineness or validity of any security, instrument, document or item deposited with it and shall have no responsibility other than to faithfully follow the instructions contained herein, and shall not be responsible for the validity or enforceability of any security interest of any party, and it shall be fully protected in acting in accordance with any written instrument given to it hereunder by any of the parties hereto and reasonably believed by Escrow Agent to have been signed by the proper person. Escrow Agent may assume that any person purporting to give any notice hereunder has been duly authorized to do so. In the event that for any reason there is any dispute, or Escrow Agent in good faith is uncertain, concerning any action to be taken hereunder, Escrow Agent shall have the right to take no action until it shall have received instructions in writing signed by all of (and not less than all of) Owner, General Partners and Lender or until directed by a judgment or decree of a court of competent jurisdiction in the State of Illinois or in a federal court in such State, whereupon Escrow Agent shall take such action in accordance with such instructions or such order.

(c) It is understood and agreed that the duties of Escrow Agent under this Agreement are purely custodial and ministerial in nature. Escrow Agent shall not be liable to the other parties hereto or to anyone else for any action taken or omitted by it, or any action suffered by it to be taken or omitted, in good faith and in the exercise of reasonable judgment, except for acts of willful misconduct or gross negligence. Escrow Agent may rely conclusively, and shall be protected in acting, upon (i) any written opinion or advice of its legal counsel or (ii) any written certificate, instrument, notice, report or other document (not only as to its due execution and the validity and effectiveness of its provisions, but also as to the trust and acceptability of any information therein contained) that is reasonably believed by Escrow Agent to be genuine and to be signed or presented by the proper person or persons. Except as set forth in Paragraph 4 or Paragraph 8 of this Agreement, Escrow Agent shall not be bound by any notice or demand, or by any purported waiver, modification, termination or rescission of this Agreement or any of the terms hereof, unless evidenced by a final judgment or decree of a court of competent jurisdiction in the State of Illinois or a federal court in such State, or in a writing delivered to Escrow Agent signed by the proper party or parties and, if the duties or rights of Escrow Agent are affected, unless it shall give its prior written consent thereto.

(d) Escrow Agent shall have the right to assume, in the absence of written notice to the contrary from the proper person or persons, that a fact or an event by reason of which an action would or might be taken by Escrow Agent does not exist or has not occurred, without incurring liability to the other parties hereto or to anyone else for any action taken or omitted, or any action suffered by it to be taken or omitted, in good faith and in the exercise of reasonable judgment, in reliance upon such assumption.

(e) Except for, or in connection with, Escrow Agent's willful misconduct or gross negligence, Escrow Agent shall be indemnified and held harmless jointly by the other parties hereto from and against any and all expenses or loss suffered by Escrow Agent, including reasonable attorneys' fees, in connection with any action, suit or other proceeding involving any claim which arises out of or relates to this Agreement, the services of Escrow Agent hereunder or

the documents and instruments held by it hereunder; but as among the parties hereto other than Escrow Agent, if any of them shall be primarily responsible for the bringing, assertion, prosecution or maintenance of any such action, suit, proceeding or claim, such party shall reimburse and indemnify all such other parties for any amounts such other parties may be required to pay or reimburse to Escrow Agent pursuant to this paragraph. Promptly after Escrow Agent's receipt of notice of any demand or claim or the commencement of any action, suit or proceeding as to which Escrow Agent may desire to assert a claim against any of the other parties hereto, Escrow Agent shall notify such other parties hereto in writing, and its failure to give such notice shall relieve any party not receiving such notice from liability to Escrow Agent hereunder with respect thereto.

(f) From time to time on and after the date hereof, the other parties hereto shall deliver or cause to be delivered to Escrow Agent such further documents and instruments, and shall do and cause to be done such further acts, as Escrow Agent may reasonably request (it being understood that Escrow Agent shall have no obligation to make any such request and the parties hereto shall have no obligation to incur any cost or expense or any additional liability with respect to any such request) to carry out more effectively the provisions and purposes of this Agreement, to evidence compliance herewith or to assure itself that it is protected in acting hereunder.

(g) Escrow Agent may resign as Escrow Agent hereunder at any time upon giving not less than thirty days' prior written notice to that effect to each of the other parties to this Agreement. In such event, Lender may designate and appoint, by written notice of designation delivered to Owner, General Partners, and the resigning Escrow Agent, any nationally recognized title insurance company or trust company to serve as the successor Escrow Agent hereunder. Upon such designation by Lender, (i) the resigning Escrow Agent shall deliver to such successor Escrow Agent, against receipt, all Transfer Documents and other documents and instruments (if any) it then holds in the escrow, to be held by such successor and (ii) such successor Escrow Agent shall sign a counterpart of this Agreement and thereafter shall be deemed the Escrow Agent hereunder for all purposes. If Lender fails so to designate such a successor Escrow Agent, or if any person so designated declines to serve as Escrow Agent hereunder, the obligations as Escrow Agent hereunder of the person seeking to resign from that capacity shall continue until such successor is appointed; provided, however, that its sole obligation thereafter shall be to safely hold all documents and instruments then held by it in the escrow and to deliver the same to the person designated as its successor or until directed by a final order or judgment of a court of competent jurisdiction in the State of Illinois or a federal court in such State, whereupon the resigning Escrow Agent shall make disposition thereof in accordance with such order or judgment. If no successor Escrow Agent is designated and qualified within five days after Escrow Agent's resignation was intended to be effective, such resigning Escrow Agent may apply to any court of competent jurisdiction for the appointment of a successor Escrow Agent.

10. Miscellaneous Provisions. (a) No failure or delay on the part of a party to this Agreement in exercising any power or right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or power preclude any other or further exercise thereof or the exercise of any other right or power hereunder. No modification or waiver of any

provision of this Agreement and no consent to any departure by and party to this Agreement therefrom shall be effective unless the same shall be in writing and signed by the party against whom such modification, waiver or consent is sought to be enforced, and then such waiver, modification or consent shall be effective only in the specific instance and for the express purpose for which given. No notice to or demand on any party to this Agreement in any case shall, of itself, entitle such party to any other or further notice or demand in similar or other circumstances.

(b) Any notice, request, direction or demand given or made under this Agreement shall be in writing, shall be sent to the parties at their respective addresses set forth below and shall be delivered personally, by Federal Express or other reputable overnight national courier service, by electronic telefax transmission, or by certified U.S. Mail, return receipt requested, and shall be deemed given upon the earlier to occur of (i) actual receipt, (ii) the second business day after being deposited in the U.S. mail, (iii) the next business day after being deposited in federal express or another reputable overnight courier or (iv) the date sent, if sent by electronic telefax transmission:

If to Owner or General Partners, to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile: (\_\_\_\_) \_\_\_\_\_  
Telephone: (\_\_\_\_) \_\_\_\_\_

If to \_\_\_\_\_:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile: (\_\_\_\_) \_\_\_\_\_  
Telephone: (\_\_\_\_) \_\_\_\_\_

If to Escrow Agent:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile: (\_\_\_\_) \_\_\_\_\_  
Telephone: (\_\_\_\_) \_\_\_\_\_

Each party to this Agreement may designate a different address within the 48 contiguous United States of America as its address for receipt of notices hereunder, by notice given to all other parties not less than ten (10) days prior to the date such change of address is to become effective.

(c) If any term, covenant or provision of this Agreement is held to be invalid, illegal or unenforceable in any respect, this Agreement shall be construed without such term, covenant or provision and the remainder of this Agreement shall be enforced, it being the parties' intention that this Agreement be enforced to the fullest extent permitted by applicable law.

(d) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

(e) This Agreement sets forth the entire agreement and understanding of the parties hereto with respect to the specific matters agreed to herein, and the parties hereto acknowledge that no oral or other agreements, understandings, representations or warranties exist with respect to this Agreement or with respect to the obligations of the parties hereto under this Agreement, except those specifically set forth in this Agreement.

(f) **THE PARTIES TO THIS AGREEMENT HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVE ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT OR COUNTERCLAIM ARISING IN CONNECTION WITH, OUT OF OR OTHERWISE RELATING TO THIS AGREEMENT.**

(g) This Agreement has been executed, delivered and accepted by all parties hereto in the State of Illinois. This Agreement is, and shall be deemed to be, a contract entered into under and pursuant to the laws of the State of Illinois and shall in all respects be governed, construed, applied and enforced in accordance with the laws of the State of Illinois. No defense given or allowed by the laws of any other state or country shall be interposed in any action or proceeding hereon unless such defense is also given or allowed by the laws of the State of Illinois.

(h) The parties hereto agree to submit to personal jurisdiction in the State of Illinois in any action or proceeding arising out of this Agreement and, in furtherance of such agreement, the parties hereto hereby agree the consent that without limited other methods of obtaining jurisdiction, personal jurisdiction over any of the parties hereto in any such action or proceeding may be obtained within or without jurisdiction of any court located in the State of Illinois and

that any process or notice of motion or other application to any such court in connection with any such action or proceeding may be served upon the parties hereto by registered or certified mail or by personal service at the last known address of the parties hereto, whether such parties be within or without the jurisdiction of any such court.

(i) This Agreement may be executed in one or more counterparts by some or all of the parties hereto, each of which counterparts shall be an original and all of which together shall constitute a single agreement. This Agreement may be executed in any number of duplicate originals and each such duplicate original shall be deemed to constitute but one and the same instrument.

IN WITNESS WHEREOF, Owner, General Partners, Lender and Escrow Agent have duly executed this Agreement as of the day and year first above written.

*LENDER*

\_\_\_\_\_

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*TRUST*

\_\_\_\_\_,  
not personally but as Trustee under Trust Agreement  
dated \_\_\_\_\_, \_\_\_\_\_ and known as  
Trust No. \_\_\_\_\_

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*BENEFICIARY*

\_\_\_\_\_,  
an Illinois limited partnership

By: \_\_\_\_\_  
\_\_\_\_\_, one of two general partners

By: \_\_\_\_\_  
\_\_\_\_\_, one of two general partners

*ESCROW AGENT*

\_\_\_\_\_

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**EXHIBIT A**

Transfer Documents