

Enforceability of Pre-Workout Agreements

By John C. Murray

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Introduction

Both federal and state courts have upheld the validity and enforceability of a carefully drafted pre-workout agreement (also often referred to as a pre-negotiation agreement; the document will hereafter be referred to as a “pre-workout agreement” in this article) that explicitly disclaims any modification or amendment of the existing mortgage loan documents (or any intention to modify or amend any such loan documents absent a final written agreement executed by the parties). Such agreements generally protect the lender from any claims by the borrower based on equitable theories such as reliance, waiver, estoppel, oral modification, or breach of the duty of “good faith and fair dealing.”

The *Corporex* Decision

There are only a relative handful of court decisions that have dealt with the issue of the enforceability of a pre-workout agreement, most likely because the chances of successfully challenging a well-drafted pre-workout agreement signed by the borrower are slim or none. For example, in *Travelers Ins. Co. v. Corporex Properties, Inc.*, 798 F. Supp. 423 (E.D. Ky. 1992), the court, in a case of first impression, expressly upheld a pre-workout agreement entered into between The Travelers Insurance Company (“Travelers”) and the borrower in connection with a proposed negotiated workout of a \$6.4 million nonrecourse commercial mortgage loan on an office building in Covington, Kentucky. The borrower stopped making payments on the loan on October 1, 1990, and the parties executed a pre-workout agreement (which was prepared by the author of this article, who was then employed by Travelers) on January 10, 1991. The pre-workout agreement specifically stated, among other things, that Travelers' agreement to enter into negotiations for a workout of the loan was without waiver of any of its rights under the loan documents.

The negotiations subsequently failed, and Travelers filed a foreclosure action on July 12, 1991. The borrower claimed that Travelers had waived its right to foreclose because of its acceptance of partial payments of interest after the borrower's default, and argued that Travelers “was under an obligation to reach an agreement on the terms of a workout” (although the borrower cited no case authority for such an obligation). The borrower also argued the equitable theories of “waiver,” “estoppel,” and “inequitable conduct” regarding Travelers' actions in connection with the workout discussions.

The court held in favor of Travelers and stated that the cases cited by the borrower were inapplicable because of the existence of the pre-workout agreement signed by the parties (which the court quoted verbatim in its opinion), which provided that Travelers was not waiving any of its legal rights by agreeing to attempt to negotiate a workout.

The court also noted that Travelers had sent a letter from its regional counsel (the author of this article) to the borrower after the receipt of each partial payment, acknowledging such receipt but expressly reserving all of its legal rights and remedies; the borrower's attorney had even expressly acknowledged Travelers' non-waiver in a letter accompanying one of the partial payments from the borrower. The court also was impressed by the fact that, at a meeting of the parties on July 18, 1991, the borrower executed a letter reaffirming that the pre-workout agreement executed by the parties on January 10, 1991 would continue to apply to all subsequent discussions between the parties. *See* Jeffrey B. Steiner and Zachary E. Samton, *Pre-Workout Agreements – Providing Additional Protection for Lenders*, 7/16/2008 N.Y.L.J. 5, (col. 2) (“When receiving interest payments from a defaulting borrower, lender’s counsel should prepare an acknowledgment unequivocally stating that the lender’s acceptance of the payment neither cures any existing default under the loan documents nor constitutes waiver of any of the lender’s rights or remedies”). An example of a partial-payment acknowledgment letter is attached as **Appendix A**.

Because the borrower in *Corporex* had conveyed the mortgaged property during the negotiation discussions to a corporation controlled by the borrower in violation of the due-on-sale clause in the mortgage, to better position the borrower for a "new debtor" bankruptcy, to avoid negative publicity, and to put the borrower -- in its own words -- "in a better position to negotiate on an even basis," the court, in an unusual form of relief awarded to Travelers, ordered a reconveyance of the property to the borrower. The borrower appealed the court's decision to the U.S. Sixth Circuit Court of Appeals based solely on the court's order of reconveyance, but Travelers and the borrower subsequently reached a settlement providing for conveyance of the property to Travelers by a deed in lieu of foreclosure, and the appeal was dismissed with prejudice.

Other Court Decisions Upholding Pre-Workout Agreements

For other court decisions upholding the validity and enforceability of pre-workout agreements, *see Federal Home Loan Mortgage Corp. v. Drofan Realty Corp.*, 1996 WL 15680 (S.D.N.Y.) (not reported in F.Supp.), at *3 (refusing to consider borrower’s claim of alleged oral agreements by lender, relying instead on preclusive nature of language in pre-workout agreement entered into by the parties, and stating that “[i]n view of the clear language of the pre-negotiation letter executed by [the borrower] . . . no reasonable jury could find that a waiver of [the lender’s] rights occurred”); *Crossland Fed. Sav. Bank by FDIC v. 114 E. Realty Co.*, 1994 WL 30460 (S.D.N.Y.) (not reported in F.Supp.), at *5 (holding that existence of pre-workout agreement precluded borrower from claiming that partial payment of borrower’s obligations constituted evidence that new agreement was in effect).

See also Steiner and Samton, *supra*, *Pre-Workout Agreements – Providing Additional Protection for Lenders*, (col. 2) (“With a carefully drafted pre-workout agreement that explicitly disclaims all agreements outside the final written instrument, a lender is well protected from claims based on the equitable theories of reliance, waiver, and verbal modification”); Stuart M. Saft, *Liability Arising from a Preworkout Agreement*, COMMERCIAL REAL ESTATE WORKOUTS § 13:11 (updated October 2008) (discussing the *Corporex* decision, *supra*, and advising that the lender should require that the borrower sign either a pre-workout letter or a pre-workout

agreement before the commencement of any discussions regarding the workout of a problem mortgage loan). An example of a comprehensive pre-workout agreement is attached as **Appendix B**.

Credit Agreement Statutes

In response to the surge in lender liability claims against lenders commencing in the mid-1980s (especially in connection with affirmative claims or defenses of borrowers based on breach of an alleged oral agreement to lend, to extend, modify or refinance an existing loan, or to forbear from exercising contractual remedies), many states enacted laws specifically requiring a written agreement between the lender and borrower as a prerequisite for any legal action against the lender.

These statutes typically apply to any “credit agreement,” which the Illinois Credit Agreement Act defines (as an example) as “an agreement or commitment by a creditor to lend money or extend credit or delay or forbear repayment of money.” Some state credit agreement statutes go even further by including within their scope agreements covering any other financial accommodation, while other state statutes apply only to a loan of money or the loan of money and an extension of credit. Minnesota was the first state to enact such a statute, in 1985, and at least 36 other states have since enacted similar laws. A list of these statutes (current to the best of the author’s knowledge) is attached as **Appendix C**.

These statutes were intended to prevent misunderstandings between parties to credit agreements and to introduce certainty into what is too often an informal process. However, there is no “uniform” credit agreement statute, and the provisions of these laws vary from state to state. These statutes either expressly incorporate and include credit and loan agreements within the respective existing statutes of frauds of the state, or else they contain separate provisions requiring those agreements to be in writing.

Some credit agreement statutes provide further protection to the lender by expressly prohibiting the use by borrowers of alternative theories of recovery, including actions based on torts such as breach of fiduciary duty, fraud, and misrepresentation (which actions would normally constitute exceptions to statutes of fraud), if those other theories would require proof of the same facts necessary to prove the oral agreement.

Other state statutes (and courts interpreting such statutes) are more solicitous of the borrower's interests, particularly for non-commercial transactions. For example, Nebraska's credit agreement statute requires the lender to give express notice to the borrower of the existence of the statute, either by bold writing on the note or by a separate signed writing; Arizona's credit agreement statute only applies if the amount involved equals or exceeds \$250,000; and Delaware's and Illinois' statutes exempt transactions for personal, family, or household purposes.

In those states having statutes that do not expressly prohibit the borrower from raising traditional equitable defenses, courts interpreting those statutes have not been uniform in their decisions on whether defenses such as equitable estoppel, waiver, partial performance, or bad

faith, which have traditionally constituted valid defenses to state statutes of frauds, are still available to borrowers. Depending on the applicable state statute, a state's credit agreement statute may only prohibit a borrower from maintaining an action on an oral credit agreement and not necessarily bar equitable defenses in an action by the lender, while other states' credit agreement statutes (or cases construing such statutes) may provide (or conclude) that equitable defenses are unavailable to a borrower because (for example), although such defenses may constitute an exception to the statute of frauds, by enacting an entirely separate credit agreement statute rather than amending the existing statute of frauds, the state intended for the credit agreement statute to extend beyond the statute of frauds and the traditional defenses to that statute.

The American Bar Association ("ABA") formulated a proposed uniform or "model" credit agreement statute (which has never been formally adopted), which contains a provision that specifically precludes an action or defense by the borrower based on traditional equitable theories because, as one of the drafters of the model statute has noted, "[w]ithout such a provision, experience tells us that borrowers will seek such relief, and that courts may sometimes afford such relief."

The ABA model provision provides, in pertinent part:

"Failure to comply with Section 1 shall preclude an action or defense based on any of the following legal or equitable theories:

- (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
- (b) promissory or equitable estoppel;
- (c) part performance, except to the extent that part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment or agreement; or
- (d) negligent misrepresentation."

APPENDIX A

Partial Payment Acknowledgment Letter

_____, 20__

RE: _____ (“Loan”)
_____ (“Borrower”)

Dear _____:

_____ (“Lender”) is in receipt of a [check] [wire transfer] from Borrower in the amount of \$_____, dated _____, 20__, pertaining to the above-referenced Loan. The Loan is in default as of _____, 20__, and interest accrues from the date of default on the total unpaid amount due under the Note evidencing the Loan at the default rate stated in the Note.

This letter shall serve to formally acknowledge Lender's receipt of the foregoing partial payment on the Loan and to notify you that, consistent with the Note, Mortgage, and other security instruments and documents evidencing and securing the Loan (collectively, “Loan Documents”), Lender reserves the right to refuse partial payment of all or any portion of the Loan in the future and Lender's acceptance of the aforementioned partial payment does not constitute and shall not be construed as any of:

- A waiver of any of Lender's rights and remedies as set forth in the Loan Documents and otherwise available at law or in equity;
- An agreement to modify or a modification of, or any extension of the maturity date or terms of payment of, the Loan;
- An accord or satisfaction for all or any portion of the Loan; or
- A rescission of any notice of default or acceleration with regard to the Loan heretofore or hereafter sent by Lender to Borrower or any other party.

Sincerely,

cc:

APPENDIX B

PRE-WORKOUT AGREEMENT

This PRE-WORKOUT AGREEMENT (“Agreement”), dated the ___ day of ___, 20___, is made by and between _____, a _____, with offices at _____ (“Lender”), and _____, a _____, with offices at _____ (“Borrower”). Lender and Borrower are sometimes referred to individually in this Agreement as a “Party” and collectively as “Parties.”

AGREEMENT

In consideration of the mutual promises and covenants contained in this Agreement and intending to be legally bound by this Agreement, and in consideration of Ten Dollars (\$10.00) in hand paid, the parties covenant and agree as follows:

1. *Negotiations.* At Borrower's request, Lender [is about to commence] [has commenced] discussions and negotiations with Borrower (“Negotiations”) concerning certain obligations (“Obligations”) by Borrower to Lender that are created, evidenced or secured by, set out or provided for in, or relate to the documents identified on **Exhibit A** attached to this Agreement (“Loan Documents”). Without liability for failing to do so, the Parties presently plan to discuss various courses of action that may be in their respective interests or their mutual interest, but either Party, in its sole and absolute discretion, may terminate the Negotiations at any time and for any reason, and upon such termination of the Negotiations, the Parties' respective obligations to one another shall be only as set forth in the Loan Documents and executed written agreements, if any, as described below [, and Lender's Obligations under Paragraph ___ below shall terminate]. The Parties agree that the Negotiations, or correspondence or drafts of documents relating to the Negotiations, [have been and] shall be made with a view to a compromise and settlement by the Parties. As such, both the content and existence of all such Negotiations shall be, and shall remain, protected accordingly and shall not be admissible as evidence or subject to discovery with respect to any issue that is or may be before any court or administrative body or the subject of any other proceeding, and any statements made in the course of the Negotiations shall not be used for any other purpose, including, without limitation, proof of admissions of liability.

2. *Status of Obligations.* Attached as **Exhibit B** is a true and correct description of the current payment status of the Obligations as of ____, 20___. [Borrower acknowledges that it is in default in payment or performance of the Obligations as set forth on **Exhibit B**].

3. *Status of Ownership.* Borrower hereby represents that:

a. Borrower owns the [Mortgaged Premises] [Property] [Collateral] (as defined in the [Construction]Mortgage [, Assignment of Leases and Rents, Security Agreement and Fixture Filing] dated ____, 20__ [as amended,] described on **Exhibit A** (“Mortgage”) free and clear of all liens and encumbrances other than those existing as of the date of the Mortgage and approved by Lender; and

b. The [Mortgaged Premises] [Property] [Collateral] [is] [are] not encumbered by any mortgage lien other than the lien created by the Loan Documents.

4. [Forbearance. Lender agrees, during the pendency of the Negotiations, not to:

a. Commence a foreclosure proceeding against Borrower; or

b. If Lender has previously commenced foreclosure proceedings, move in any judicial proceeding for appointment of a receiver for the [Mortgaged Premises] [Property] [Collateral]].

5. *All Agreements and Waivers in Writing.* The Negotiations may be lengthy and complex. Notwithstanding that the Parties may reach one or more oral understandings or agreements on one or more issues that the Parties are discussing or trying to resolve, neither Party shall be bound by any agreement of any kind (including, without limitation, any waiver of any right or remedy), whether oral, or by fax, email or any other electronic or other means, and no rights, claims, obligations, or liabilities of any kind, either express or implied, shall arise or exist in favor of or be binding upon either Party, or any other person (including, without limitation, any guarantor of any of the Obligations), except to the extent (if any) expressly set out in a written agreement signed by the Party that is to be bound thereby.

6. *Amendments in Writing.* This Agreement may be amended only by a written agreement signed by the Parties.

7. *Approval Process.* The individuals who sign this Agreement on Lender's behalf and those who conduct the Negotiations on Lender's behalf do not have the authority to bind Lender to any amendment or modification of or changes in the Loan Documents or to any waiver or release of, or relief concerning, any provision of the Loan Documents or any default of or requirement applicable to Borrower under the Loan Documents or any right or remedy of Lender under the Loan Documents. If any of such individuals agrees (orally or otherwise), or concludes that it may be appropriate to agree, with Borrower concerning any proposed modification to or amendment of any of the Loan Documents or any modification of any of the Obligations, they will summarize that proposed agreement in a non-binding letter of intent ("Letter of Intent") which, when approved in writing by Borrower, will provide the basis for their recommendation to the appropriate senior management of Lender that such a loan modification be authorized by Lender. If that authorization is granted, Borrower will be notified in writing (that notice is referred to in this Agreement as an "Authorization Notice"), and only after that notification and full, strict, and timely compliance by Borrower with all of the requirements, terms, and conditions of the Letter of Intent and the Authorization Notice (including, without limitation, the execution and delivery by Borrower of a definitive, formal written agreement prepared and signed by Lender that expressly amends or modifies one or more Loan Documents or Obligations) will any modification of any of the Loan Documents or Obligations be binding on Lender.

8. *Loan Documents Remain in Force.* Notwithstanding any other provision of this Agreement or any claim of Borrower or any other person to the contrary, the Loan Documents are and remain in full force and effect, unmodified, and shall remain in full force and effect, unmodified, unless and until amended or modified by (and only to the extent provided in) a written agreement executed and delivered hereafter in accordance with the provisions of

Paragraphs ___ and ___ of this Agreement. SPECIFICALLY, BUT WITHOUT LIMITING IN ANY MANNER WHATSOEVER THE GENERALITY OF THE FOREGOING, NOTHING CONTAINED IN THIS AGREEMENT IS INTENDED TO NULLIFY OR OTHERWISE ALTER ANY AGREEMENT OR WAIVER SET FORTH IN THE LOAN DOCUMENTS REGARDING SUCH MATTERS AS WAIVER OF RIGHT TO JURY TRIAL, VENUE, OR JURISDICTION OF ANY LAWSUIT OR OTHER PROCEEDING OR ACTION PERTAINING TO THE LOAN DOCUMENTS OR OBLIGATIONS; PROVIDED, HOWEVER, THAT THIS SENTENCE SHALL NOT LIMIT THE EFFECTIVENESS OF PARAGRAPH ___ OF THIS AGREEMENT.

9. *No Waiver of Rights Under Loan Documents.* This Agreement, the Negotiations, and any other actions taken or statements made after the date of this Agreement, shall not constitute or evidence any waiver, release, modification, or limitation of any Party's rights, remedies, or obligations, or of any default (whether or not known on the date of this Agreement or later known or arising), under or concerning the Loan Documents or of any notice given or action taken (including, without limitation, any notice of default given or any acceleration made) by Lender under the Loan Documents or concerning them, except to the extent (if any) expressly and specifically provided otherwise either in Paragraph 10 below or in a written agreement executed in accordance with the provisions of Paragraphs ___ and ___ of this Agreement.

10. *Waiver and Release of Certain Future Claims Related to the Negotiations.* Each Party to this Agreement hereby irrevocably waives and releases any and all claims, actions, causes of action, suits, and defenses that that Party might later have against the other Party for or by reason of any statement or utterance (whether oral or in writing) whatsoever that may be made during the course of the Negotiations; provided, however, that the waiver and release set forth in the preceding portion of this Paragraph 10 shall not:

a. Release any Party from any of its obligations under this Agreement, the Obligations, the Loan Documents, or any written agreement executed in accordance with Paragraphs ___ and ___; or

b. Waive, release, limit, restrict, or affect in any way:

i. Any rights or remedies of Lender under the Loan Documents or concerning any of the Obligations; or

ii. Any notices given or that may later be given, and any actions taken or that may later be taken, by Lender in connection with the assertion or enforcement of any such rights or remedies.

11. *Examination of Books and Records.* Borrower authorizes and allows Lender and its representatives, upon one day's prior notice and at any reasonable time during normal business hours, to examine and, at Lender's option, to conduct an audit of Borrower's financial books and records and all other records relating or pertaining to the operation of the [Mortgaged Premises] [Property] [Collateral], and Lender shall be permitted to photocopy any such books and records.

12. *Rents and Profits as Cash Collateral.* Borrower [and each of its general partners] agree(s) and acknowledge(s) that the rents, income, revenues, accounts, receipts, issues and profits, and other payments, whether now existing or later arising under or generated by the [Mortgaged Premises] [Property] [Collateral] ("Rents and Profits") are and shall be deemed to be "Cash Collateral" under section 363 of the U.S. Bankruptcy Code if Borrower files a voluntary petition in bankruptcy or is made subject to any involuntary Lender and/or an order of any bankruptcy court, under 11 U.S.C. 363(b)(2), and Borrower waives any right it may have to assert that Lender's security interest in the Rents and Profits does not constitute Cash Collateral. No consent by Lender to the use of Cash Collateral by Borrower shall be deemed to constitute Lender's approval of the purpose for which that Cash Collateral was expended. Borrower further agrees that if it is determined that any of the rights granted Lender under the Loan Documents constitute a security interest in or lien against the Rents and Profits, such shall be deemed perfected, "choate," and enforced, without the necessity of filing any documents or commencing any proceeding otherwise required under non-bankruptcy law for the perfection or enforcement of security interests, with that perfection and enforcement being binding on Borrower and any subsequently appointed trustee in any case under the U.S. Bankruptcy Code.

13. *Lender Not Liable or Responsible for Expenses.* Nothing in this Agreement shall be intended or construed to hold Lender liable or responsible for any expenses, disbursements, liabilities, or obligations of any kind or nature whatsoever, including, but not limited to, wages, salaries, payroll taxes, withholding benefits, or any other amounts payable to, by, or on behalf of Borrower [or Borrower's general partners, or any affiliates of the Borrower,] regardless of whether there are sufficient Rents [as defined in the Mortgage] [and Profits] from the [Mortgaged Premises] [Property] [Collateral] available to pay such expenses or costs and whether any present or future creditor attempts to assert a claim against Lender or the [Mortgaged Premises] [Property] [Collateral], including, but not limited to, any attempt in any bankruptcy proceeding to assert a claim under section 506(c) or any other provision of the U.S. Bankruptcy Code.

14. *No Joint Venture or Partnership.* Nothing contained in this Agreement shall be deemed to contemplate or constitute a joint venture or partnership agreement of any kind between the Parties or otherwise create the relationship of joint venturers or partners between the Parties, or characterize Lender as a "mortgagee-in-possession," regardless of whether Lender activates and pursues or has activated and pursued, its rights and remedies for receipt of the Rents and Profits of the [Mortgaged Premises] [Property] [Collateral] under the Loan Documents.

15. *Borrower To Retain Possession of the [Mortgaged Premises] [Property] [Collateral].* Unless and until Lender obtains the appointment of a receiver or similar relief in a foreclosure action, forecloses on the [Mortgaged Premises] [Property] [Collateral], or obtains actual physical possession of the [Mortgaged Premises] [Property] [Collateral] by deed in lieu of foreclosure or otherwise, Borrower and Lender agree that:

- a. Borrower shall remain in possession of the [Mortgaged Premises] [Property] [Collateral] and, subject to the terms of the Loan Documents, shall continue to be responsible for any and all costs, expenses, disbursements, liabilities and obligations of any kind or nature whatsoever, and for all employment, financing, leasing,

management and operating decisions for the [Mortgaged Premises] [Property] [Collateral] and for Borrower;

- b. Borrower shall continue to remain solely in control of the business operations taking place at the [Mortgaged Premises] [Property] [Collateral]; and
- c. Borrower shall determine the business plan for, and employment, management, leasing and operating decisions for, the [Mortgaged Premises] [Property] [Collateral] and for Borrower.

16. *Future Negotiations.* Borrower acknowledges and agrees that, this Agreement notwithstanding, Lender has no obligation whatsoever to discuss, negotiate, or to agree to any restructuring of the Obligations, or any modification, amendment, restructuring, or reinstatement of the Loan Documents or this Agreement, or to forbear from exercising its rights and remedies under those documents.

17. *Fees and Expenses.* Borrower shall pay, as and when billed by Lender, all fees, costs, and expenses (including, without limitation, fees and expenses for Lender's attorneys, and for appraisers, engineering consultants and environmental and other consultants) paid or incurred by Lender in connection with the negotiation of this Agreement, or in connection with the Negotiations and other actions contemplated under this Agreement [; provided, however, that those fees, costs and expenses in connection with the Negotiations shall not exceed \$ _____ without the written consent of Borrower]. [As an advance deposit of Lender's attorneys' fees in connection with the Negotiations, Borrower shall, on or before _____, pay to _____, Lender's counsel, the sum of \$_____ [by wire transfer of Federal Funds to _____] [which deposit shall not limit Borrower's obligation to pay all of Lender's fees, costs and expenses.]]

18. *Voluntary Agreement.* Borrower represents and warrants to Lender that Borrower is represented by legal counsel of its choice, that it has consulted with such counsel regarding this Agreement, that it is fully aware of the terms and provisions contained in this Agreement and of their effect, and that it has voluntarily and without coercion or duress of any kind entered into this Agreement.

19. *Survival.* The provisions of this Agreement shall survive any termination of the Negotiations.

20. *Authorization of Discussions with Others.* Borrower may have engaged or may in the future engage other parties to assist it in connection with the management, leasing, operation and/or marketing of the [Mortgaged Premises] [Property] [Collateral]. Those parties may include, without limitation, appraisers, real estate agents, and consultants. Borrower authorizes Lender to contact these parties directly for information concerning the [Mortgaged Premises] [Property] [Collateral] and to discuss the status of the [Mortgaged Premises] [Property] [Collateral] directly with those parties so long as Lender does not divulge to those parties any confidential information regarding the financial condition of Borrower [or its general partners.]

21. *Authorized Representatives.* Unless and until Lender is notified to the contrary in writing, Borrower's authorized representative shall be _____ [acting on behalf of _____, the sole general partner of Borrower], and Lender will assume that that authorized representative will keep other parties who are not directly involved in the Negotiations informed of the content of the Negotiations. Lender shall be represented by any officers, employees, representatives or attorneys that Lender may from time to time direct to negotiate with Borrower regarding the Obligations or the Loan Documents. Any representations made by any of those parties designated by Lender shall be of no force and effect unless and until such time as appropriate approvals have been obtained from the senior management of Lender and such approvals have been communicated to Borrower and set forth in a written agreement executed and delivered in accordance with Paragraphs __ and __.

22. *Effect of Acceptance by Lender of Partial Payment.* Any election by Lender to accept any partial payment of interest, principal, or other sums due in connection with the Obligations shall not prejudice, or constitute a waiver of, Lender's right to collect the remaining unpaid portions of such payment at a later date. Acceptance by Lender, or any of its attorneys or other agents or representatives, of any such partial payment may be applied by Lender to the Obligations in such order, proportions, and priority as Lender may determine in its sole discretion, without any liability or commitment to Borrower as a result of such application of such partial payments.

23. *Miscellaneous.* This Agreement constitutes the entire agreement concerning the subject matter of this Agreement, and it supersedes any prior or contemporaneous oral or written representations, statements, understandings, or agreements concerning the subject matter of this Agreement.

a. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns. This Agreement has been negotiated, executed and delivered in _____, and it is anticipated that all Negotiations will be conducted in _____. This Agreement shall be governed by and construed in accordance with the law of the State of _____, without giving effect to the principles of conflicts of law. In any dispute concerning this Agreement, the prevailing Party shall be entitled to recover all reasonable costs and attorneys' fees from the non-prevailing Party [or Parties] [if there is more than one non-prevailing party, they shall be jointly and severally liable, but with a right of contribution as between them].

b. Paragraph headings are for convenience only and shall not be used to interpret any term or provision of this Agreement. This Agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which taken together shall constitute one agreement. Each person executing this Agreement on behalf of any Party represents that that person has full authority and legal power to do so and binds the Party on whose behalf he or she has executed this Agreement. This letter shall not be construed more strictly against any signatory that caused this Agreement to be drafted.

24. *WAIVER OF JURY TRIAL.* EACH PARTY TO THIS AGREEMENT KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT THAT IT MAY HAVE

TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING TO ENFORCE OR DEFEND ANY RIGHTS UNDER OR RELATING TO THIS AGREEMENT, ANY LOAN DOCUMENT, OR ANY AMENDMENT, INSTRUMENT, DOCUMENT, OR AGREEMENT DELIVERED OR THAT MAY IN THE FUTURE BE DELIVERED IN CONNECTION WITH THIS AGREEMENT OR ARISING FROM ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN), ACTIONS OF ANY OF THE PARTIES TO THIS AGREEMENT, OR ANY OTHER RELATIONSHIP EXISTING IN CONNECTION WITH THIS AGREEMENT OR ANY LOAN DOCUMENT, AND AGREES THAT ANY SUCH ACTION OR PROCEEDING SHALL BE TRIED BEFORE A COURT AND NOT BEFORE A JURY. EACH PARTY TO THIS AGREEMENT ACKNOWLEDGES THAT IT HAS BEEN REPRESENTED IN THE SIGNING OF THIS AGREEMENT AND IN THE MAKING OF THIS WAIVER BY INDEPENDENT LEGAL COUNSEL SELECTED OF ITS OWN FREE WILL, AND THAT IT HAS DISCUSSED THIS WAIVER WITH THAT LEGAL COUNSEL. EACH PARTY TO THIS AGREEMENT FURTHER ACKNOWLEDGES THAT IT HAS READ AND UNDERSTANDS THE MEANING OF THIS WAIVER.

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

BORROWER:

a _____

By: _____

Its: _____

LENDER:

a _____

By: _____

Its: _____

EXHIBIT A

Loan Documents

1. [First Mortgage] [Promissory] Note [Secured] dated [as of] _____, 20__ ("Note") in the face principal amount of \$_____ made by Borrower payable to the order of Lender.
2. First [Construction] Mortgage [and, Assignment of Leases and Rents, Security Agreement and Fixture Filing] made by Borrower to Lender dated [as of] _____, 20__ and recorded on _____, 20____ [in Book __, Page __ of] [in] the Recorder's Office of _____ County, _____ [as Document Number _____].
3. [Collateral] Assignment of Rents and Leases made by Borrower to Lender dated [as of] _____, 20__ and recorded on _____, 20__ [in Book __, Page __ of] [in] the Recorder's Office of County, _____ [as Document Number _____].
4. UCC Financing Statements relating to the foregoing.
5. _____.
6. _____.
7. All other or additional contracts, instruments, agreements, and documents executed by Borrower that create, perfect, or otherwise relate in any way to the indebtedness evidenced by the Note or any lien or security interest created (or intended to be created) by any of the Loan Documents or the Obligations.

EXHIBIT B

Status of Obligations

Outstanding Principal Balance as of ____, 20__: \$____. [Principal and] Interest payment in the amount of \$____ received and applied.

APPENDIX C

CREDIT AGREEMENT STATUTES

Alabama: ALA. CODE §8-9-2(7) (1993)
Alaska: ALASKA STAT. §09.25.010(13) (1994)
Arizona: ARIZ. REV. STAT. §44-101(9) (1994)
Arkansas: ARK. CODE ANN. §4-59-101(d) (Michie 1996)
California: CAL. CIV. CODE §1624(g) (West Supp. 1996)
Colorado: COLO. REV. STAT. ANN. §38-10-124 (West 1990)
Connecticut: CONN. GEN. STAT. ANN. §52-550(a)(6), (West Supp. 1996)
Delaware: DEL. CODE ANN. tit. 6, §2714(b) (1996)
Florida: FLA. STAT. ANN. §687.0304 (West 1990)
Georgia: GA. CODE ANN. §13-5-30(7) (Michie 1996)
Hawaii: HAW. REV. STAT. §656-1(8) (1993)
Illinois: ILL. COMP. STAT. ANN. ch. 815, §§160/1 to 160/3 (Smith-Hard 1993)
Indiana: IND. CODE ANN. §§32-2-1.5-1 to 1.5-5 (Burns 1995)
Iowa: IOWA CODE ANN. §535.17 (West Supp. 1996)
Kansas: KAN. STAT. ANN. §§16-117 to 16-119 (1995)
Kentucky: KY. REV. STAT. ANN. §371.010(9) (Michie Supp. 1995)
Louisiana: LA. REV. STAT. ANN. §§6:1122,6:1123 (West Supp. 1996)
Maine: ME. REV. STAT. ANN. tit. 10, §1146 (West Supp. 1995)
Maryland: MD. CODE ANN. CTS. & JUD. PROC. §5-317 (1995)
Michigan: MICH. COMP. LAWS ANN. §566.132 (West 1996)
Minnesota: MINN. STAT. ANN. §513.33 (West 1990 -- Supp. 1996)
Missouri: MO. ANN. STAT. §432.045 (Vernon Supp. 1996)
Nebraska: NEB. REV. STAT. §§45-1, 112 to 451.115 (1993)
Nevada: NEV. REV. STAT. §111.220(4) (1995)
New Jersey: N.J. STAT. ANN. §25: 1-5(f), (g) (West Supp. 1996)
New Mexico: N.M. STAT. ANN. §58-6-5 (1991)
North Carolina: N.C. GEN. STAT. §22-5 (1995)
North Dakota: N.D. CENT. CODE §9-06-04(4)-5) (Supp. 1995)
Oklahoma: 15 OKL. ST. ANN. §140 (West Supp. 1996)
Oregon: OR. REV. STAT. §41.580(h) (1993)
South Dakota: S.D. CODIFIED LAWS ANN. §53-8-2(4) (1995)
Tennessee: TENN. CODE ANN. §29-2-101(b) (Supp. 1995)
Texas: TEX. BUS. & COM. CODE ANN. §26.02 (Supp. 1995)
Utah: U.C.A. 1953 §25-5-4(6) (Supp. 1995).
Virginia: VA. CODE ANN. §11-2(9) (Supp. 1995)
Washington: WEST'S RCWA §19.36.100-.140 (Supp. 1995)
West Virginia: W.VA. CODE §55-1-1(g) (Supp. 1995)