

**RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:**

Wells Fargo Bank, National Association
PO Box 45490
MAC U1228-063
Salt Lake City, UT 84145-0490
Attn: Jessica Perez
Loan No. 1017984
PARCEL ID: 57-097-0018

ENT 107030:2018 PG 1 of 24
Jeffery Smith
Utah County Recorder
2018 Nov 07 03:31 PM FEE 56.00 BY MG
RECORDED FOR Cottonwood Title Insurance Agency, Inc.
ELECTRONICALLY RECORDED

(Space Above For Recorder's Use)

**CONSTRUCTION DEED OF TRUST
WITH ABSOLUTE ASSIGNMENT OF LEASES AND RENTS,
SECURITY AGREEMENT AND FIXTURE FILING**

NAME AND ADDRESS OF BORROWER/TRUSTOR:	Woodtusk Devon L.L.C. 2733 East Parleys Way, Suite 300 Salt Lake City, Utah 84109
NAME AND ADDRESS OF LENDER/BENEFICIARY:	Wells Fargo Bank, National Association 299 South Main Street, 6 th Floor Salt Lake City, Utah 84111
NAME AND ADDRESS OF TRUSTEE:	Wells Fargo Bank Northwest, National Association 1512 Eureka Road, Suite 350 Roseville, California 95661 (w/ reference to Loan No. 1017984)
	Legal description on <u>Exhibit A</u> of this document.

THIS INSTRUMENT COVERS GOODS THAT ARE OR WILL BECOME FIXTURES ON THE DESCRIBED REAL PROPERTY AND SHOULD BE FILED FOR RECORD IN THE REAL PROPERTY RECORDS WHERE MORTGAGES AND DEEDS OF TRUST ON REAL ESTATE ARE RECORDED. THIS INSTRUMENT SHOULD ALSO BE INDEXED AS A UNIFORM COMMERCIAL CODE FINANCING STATEMENT COVERING GOODS THAT ARE OR WILL BECOME FIXTURES ON THE DESCRIBED REAL PROPERTY, THE MAILING ADDRESSES OF THE SECURED PARTY AND THE DEBTOR ARE WITHIN.

THIS INSTRUMENT SECURES FUTURE ADVANCES.

THIS DEED OF TRUST SECURES A NOTE WHICH PROVIDES FOR A VARIABLE INTEREST RATE

**CONSTRUCTION DEED OF TRUST
WITH ABSOLUTE ASSIGNMENT OF LEASES AND RENTS,
SECURITY AGREEMENT AND FIXTURE FILING**

THIS CONSTRUCTION DEED OF TRUST WITH ABSOLUTE ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING ("**Security Instrument**"), made as of October 29, 2018, is granted by WOODTUSK DEVON L.L.C., a Utah limited liability company ("**Trustor**"), to WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION ("**Trustee**"), for the benefit of WELLS FARGO BANK, NATIONAL ASSOCIATION (collectively with its successors or assigns, "**Beneficiary**") (hereinafter referred to as "**Lender**"). Lender and Trustee are the grantees hereunder for indexing purposes.

ARTICLE 1. GRANT IN TRUST

- 1.1 **GRANT.** For the purposes of and upon the terms and conditions in this Security Instrument, Trustor irrevocably does hereby grant, bargain, warrant, convey, sell, mortgage, transfer, set over, pledge, hypothecate, and assign to Trustee, in trust for the benefit of Lender, its successors and assigns, with power of sale and right of entry and possession, all of that real property located in the City of Orem, County of Utah, Utah, described on Exhibit A attached hereto and made a part hereof, together with the Collateral (as defined herein), all buildings and other improvements, fixtures and equipment now or hereafter located on the real property and all right, title, interest, and privileges of Trustor now owned or hereafter acquired in and to all streets, ways, roads, and alleys used in connection with or pertaining to such real property, all development rights or credits, licenses and permits, air rights, water, water rights and water stock related to the real property, and all minerals, oil and gas, and other hydrocarbon substances in, on or under the real property, and all appurtenances, easements, estates, tenements, hereditaments, privileges, rights and rights of way appurtenant or related thereto; declarant's rights under any declarations of easements, covenants, conditions, and/or restrictions pertaining to the real property described on Exhibit A, hereto, provided, however, that Lender shall have no liability under such declarant's rights unless and until Lender forecloses on the real property; all buildings and other improvements and fixtures now or hereafter located on the real property, including, but not limited to, all apparatus, equipment and appliances used in the operation or occupancy of the real property, it being intended by the parties that all such items shall be conclusively considered to be a part of the real property, whether or not attached or affixed to the real property ("**Improvements**"); all interest or estate which Trustor may hereafter acquire in the property described above, and all additions and accretions thereto, and the proceeds of any of the foregoing; (all of the foregoing being collectively referred to as the "**Property**"). The listing of specific rights or property shall not be interpreted as a limit of general terms.
- 1.2 **ADDRESS.** Neither the failure to designate an address nor any inaccuracy in the address designated shall affect the validity or priority of the lien of this Security Instrument on the Property as described on Exhibit A.
- 1.3 **WARRANTY OF TITLE; USE OF PROPERTY.** Trustor represents and warrants that Trustor lawfully holds and possesses fee simple title absolute to the Property without limitation on the right to convey and encumber, and that this Security Instrument is a first and prior lien on the Property subject only to those exceptions approved by Lender in writing. Trustor further warrants that the Property is not used principally for agricultural or farming purposes, and that the Property is not homestead and that all of the Property is a single tax parcel, and there are no properties included in such tax parcel other than the Property. Trustor further covenants and agrees that it shall not cause all or any portion of the Property to be replatted or for any lots or boundary lines to be adjusted, changed or altered for either ad valorem tax purposes or otherwise, and shall not consent to the assessment of the Property in more than one tax parcel or in conjunction with any property other than the Property.
- 1.4 **USE OF PROCEEDS.** Trustor represents and warrants to Lender that the proceeds of the obligations secured hereby shall be used solely for business purposes and in furtherance of the regular business affairs of Trustor, and the entire principal obligations secured by this Security Instrument constitute a business loan.

ARTICLE 2. OBLIGATIONS SECURED

- 2.1 **OBLIGATIONS SECURED.** Trustor makes this Security Instrument for the purpose of securing the payment and performance of the following obligations (collectively "**Secured Obligations**"):
- (a) Payment to Lender of all sums at any time owing with interest thereon, according to the terms of that certain Promissory Note Secured by Deed of Trust of even date herewith, in the principal amount of TWENTY MILLION FIVE HUNDRED THOUSAND AND NO/100THS DOLLARS (\$20,500,000.00), executed by Trustor, as "**Borrower**", and payable to the order of Lender (as the same may be amended, modified, supplemented or replaced from time to time, the "**Note**"); and
 - (b) Payment and performance of all covenants and obligations of Trustor under this Security Instrument; and
 - (c) Payment and performance of all covenants and obligations on the part of Borrower under that certain Construction Loan Agreement of even date herewith by and between Borrower and Lender (as the same may be amended, modified, supplemented or replaced from time to time, the "**Loan Agreement**"), which Loan Agreement provides for the construction of the Improvements on the Property; and
 - (d) Payment and performance of all covenants and obligations, if any, of any rider attached as an Exhibit to this Security Instrument; and
 - (e) Payment and performance of all future advances and other obligations that the then record owner of all or part of the Property may agree to pay and/or perform (whether as principal, surety or guarantor) for the benefit of Lender, when such future advance or obligation is evidenced by an instrument in writing, which recites that it is secured by this Security Instrument including any and all advances or disbursements of Lender with respect to the Property for the payment of taxes, assessments, insurance premiums or costs incurred for the protection of the Property; and
 - (f) Payment and performance of all obligations of Borrower under or in connection with any "Swap Agreement", as defined in the Loan Agreement, at any time entered into between Borrower and Lender, together with all modifications, extensions, renewals and replacements thereof; and
 - (g) Payment of all interest and fees and the reimbursement for any drafts made under any irrevocable letter(s) of credit issued for the account of Trustor; and
 - (h) All modifications, extensions, novations and renewals of any of the obligations secured hereby, however evidenced, including, without limitation: (i) modifications of the required principal payment dates or interest payment dates or both, as the case may be, deferring or accelerating payment dates wholly or partly; or (ii) modifications, extensions or renewals at a different rate of interest whether or not in the case of a note, the modification, extension or renewal is evidenced by a new or additional promissory note or notes.
- 2.2 **OBLIGATIONS.** The term "obligations" is used herein in its broadest and most comprehensive sense and shall be deemed to include, without limitation, all interest and charges, prepayment charges (if any), late charges and loan fees at any time accruing or assessed on any of the Secured Obligations together with all costs of collecting the Secured Obligations.
- 2.3 **INCORPORATION.** All terms of the Secured Obligations and the documents evidencing such obligations are incorporated herein by this reference. All persons who may have or acquire an interest in the Property shall be deemed to have notice of the terms of the Secured Obligations and

to have notice, if provided therein, that: (a) the Note or the Loan Agreement may permit borrowing, repayment and re-borrowing so that repayments shall not reduce the amounts of the Secured Obligations; and (b) the rate of interest on one or more Secured Obligations may vary from time to time.

ARTICLE 3. ASSIGNMENT OF LEASES AND RENTS

- 3.1 **ASSIGNMENT.** Trustor hereby absolutely and irrevocably assigns and transfers to Lender all of Trustor's right, title and interest in, to and under: (a) all present and future leases, subleases, licenses or occupancy agreements of the Property or any portion thereof, and all other agreements of any kind relating to the management, leasing, operation, use or occupancy of the Property or any portion thereof, whether now existing or entered into after the date hereof ("**Leases**"); and (b) the rents, revenue, income, receipts, reserves, issues, deposits and profits of the Property, including, without limitation, all amounts payable and all rights and benefits accruing to Trustor under the Leases ("**Payments**"). The term "Leases", as referred to herein, shall also include all subleases and other agreements for the use or occupancy of the Property, options, rights of first refusal or guarantees of and security for the tenant's performance thereunder, the right to exercise any landlord's liens and other remedies to which the landlord is entitled, and all amendments, extensions, renewals or modifications thereto which are permitted hereunder. This assignment is intended to be and constitutes a present and absolute "assignment of rents," within the meaning of Utah Uniform Assignment of Rents Act (Utah Code § 57-26-101 et. seq.) and Lender's right to the Leases and Payments is not contingent upon, and may be exercised without possession of, the Property.
- 3.2 **GRANT OF LICENSE.** Lender confers upon Trustor a revocable license ("**License**") to collect and retain the Payments as they become due and payable, until the occurrence of a Default (as hereinafter defined). Upon a Default, the License shall be automatically revoked and Lender may collect and apply the Payments pursuant to that certain Section hereof entitled Application of Other Sums without notice and without taking possession of the Property. All payments thereafter collected by Trustor shall be held by Trustor as trustee under a constructive trust for the benefit of Lender. Trustor hereby irrevocably authorizes and directs the tenants under the Leases to rely upon and comply with any notice or demand by Lender for the payment to Lender of any rentals or other sums which may at any time become due under the Leases, or for the performance of any of the tenants' undertakings under the Leases, and the tenants shall have no right or duty to inquire as to whether any Default has actually occurred or is then existing hereunder. Trustor hereby relieves the tenants from any liability to Trustor by reason of relying upon and complying with any such notice or demand by Lender. Lender may apply, in its sole discretion, any Payments so collected by Lender against any Secured Obligation under the Loan Documents (as defined in the Loan Agreement), whether existing on the date hereof or hereafter arising. Collection of any Payments by Lender shall not cure or waive any Default or notice of Default or invalidate any acts done pursuant to such notice.
- 3.3 **EFFECT OF ASSIGNMENT.** The foregoing irrevocable assignment shall not cause Lender to be: (a) a mortgagee in possession; (b) responsible or liable for the control, care, management or repair of the Property or for performing any of the terms, agreements, undertakings, obligations, representations, warranties, covenants and conditions of the Leases; or (c) responsible or liable for any waste committed on the Property by the tenants under any of the Leases or any other parties; for any dangerous or defective condition of the Property; or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee, invitee or other person; or (d) responsible for or under any duty to produce rents or profits. Lender and Trustee shall not directly or indirectly be liable to Trustor or any other person as a consequence of: (i) the exercise or failure to exercise by Lender or Trustee, or any of their respective employees, agents, contractors or subcontractors, any of the rights, remedies or powers granted to Lender or Trustee hereunder; or (ii) the failure or refusal of Lender to perform or discharge any obligation, duty or liability of Trustor arising under the Leases.
- 3.4 **REPRESENTATIONS AND WARRANTIES.** Trustor represents and warrants that Trustor has delivered to Lender a true, accurate and complete list of all Leases, and that, except as disclosed to

Lender in writing prior to the date hereof, (a) all existing Leases are in full force and effect and are enforceable in accordance with their respective terms, and no breach or default, or event which would constitute a breach or default after notice or the passage of time, or both, exists under any existing Leases on the part of any party; (b) no rent or other payment under any existing Lease has been paid by any tenant for more than one (1) month in advance of its accrual, and payment thereof has not otherwise been forgiven, discounted or compromised; and (c) none of the landlord's interests under any of the Leases has been transferred or assigned.

- 3.5 **COVENANTS.** Trustor covenants and agrees, at Trustor's sole cost and expense, to: (a) perform all of the obligations of landlord contained in the Leases and enforce by all available and commercially reasonable remedies performance by the tenants of the obligations of the tenants contained in the Leases; (b) exercise Trustor's commercially reasonable efforts to keep all portions of the Property leased at all times at rentals not less than the fair market rental value; (c) deliver to Lender fully executed, counterpart original(s) of each and every Lease and any modifications or amendments thereto if requested to do so; and (c) execute and record such additional assignments of any Lease or specific subordinations (or subordination, attornment and non-disturbance agreements executed by the landlord and tenant) of any Lease to the Security Instrument, in form and substance acceptable to Lender, as Lender may request. Trustor shall not, without Lender's prior written consent or as otherwise permitted by any provision of the Loan Agreement: (i) enter into any Leases after the date hereof except in the ordinary course of operating a residential rental apartment project; (ii) execute any other assignment relating to any of the Leases; (iii) discount any rent or other sums due under the Leases or collect the same in advance, other than to collect rentals one (1) month in advance of the time when it becomes due under any of the Leases; (iv) terminate, modify or amend any of the terms of the Leases or in any manner release or discharge the tenants from any obligations thereunder except in the ordinary course of operating a residential rental apartment project; (v) consent to any assignment or subletting by any tenant under any Lease except in the ordinary course of operating a residential rental apartment project; or (vi) subordinate or agree to subordinate any of the Leases to any other deed of trust, mortgage, deed to secure debt or encumbrance. Any such attempted action in violation of the provisions of this Section without the prior written consent of Lender shall be null and void.
- 3.6 **LENDER RIGHT TO CURE.** Without regard to whether there exists a Default, if there exists a default under a Lease or any other contract collaterally assigned by Borrower to Lender in connection with the Loan, Trustor acknowledges and agrees (A) that Lender may, at its option, with no obligation to do so, take any actions necessary to cure such default including, without limitation, any actions that require Lender or its designee to enter onto the Property, (B) to indemnify, defend and hold Indemnitees (defined below) harmless in connection with any such action, and (C) any money advanced for any such purpose shall be secured hereby and payable by Trustor to Lender on demand, with interest thereon at the Default Rate from the date such amounts are advanced.

ARTICLE 4. SECURITY AGREEMENT AND FIXTURE FILING

- 4.1 **SECURITY INTEREST.** Trustor hereby grants and assigns to Lender as of the Effective Date (as defined in the Loan Agreement) a security interest, to secure payment and performance of all of the Secured Obligations, in all of the following in which Trustor now or at any time hereafter has any interest (collectively, the "**Collateral**"):

All goods, building and other materials, supplies, inventory, work in process, equipment, machinery, fixtures, furniture, furnishings, signs and other personal property and embedded software included therein and supporting information, wherever situated, which are or are to be incorporated into, used in connection with, or appropriated for use on the Property; together with all Payments and other rents and security deposits derived from the Property; all inventory, accounts, cash receipts, deposit accounts (including impound accounts, if any), accounts receivable, contract rights, licenses, agreements, general intangibles, payment intangibles, software, chattel paper (whether electronic or tangible), instruments, documents, promissory notes, drafts, letters of credit, letter of credit rights, supporting obligations,

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insurance policies, insurance and condemnation awards and proceeds, proceeds of the sale of promissory notes, any other rights to the payment of money, trade names, trademarks and service marks arising from or related to the ownership, management, leasing, operation, sale or disposition of the Property or any business now or hereafter conducted thereon by Trustor; all development rights and credits, and any and all permits, consents, approvals, licenses, authorizations and other rights granted by, given by or obtained from, any governmental entity with respect to the Property; all water and water rights, wells and well rights, canals and canal rights, ditches and ditch rights, springs and spring rights, and reservoirs and reservoir rights appurtenant to or associated with the Property, whether decreed or undecreed, tributary, non-tributary or not non-tributary, surface or underground or appropriated or unappropriated, and all shares of stock in water, ditch, lateral and canal companies, well permits and all other evidences of any of such rights; all deposits or other security now or hereafter made with or given to utility companies by Trustor with respect to the Property; all advance payments of insurance premiums made by Trustor with respect to the Property; all plans, drawings and specifications relating to the Property; all loan funds held by Lender, whether or not disbursed; all funds deposited with Lender pursuant to any loan agreement; all reserves, deferred payments, deposits, accounts, refunds, cost savings and payments of any kind related to the Property or any portion thereof; all of Trustor's right, title and interest, now or hereafter acquired, to the payment of money from Lender to Trustor under any Swap Agreement; together with all replacements and proceeds of, and additions and accessions to, any of the foregoing; together with all books, records and files relating to any of the foregoing.

As to all of the above described personal property which is or which hereafter becomes a "fixture" under applicable law, it is intended by Trustor and Lender that this Security Instrument constitutes a fixture filing filed with the real estate records of Utah County, Utah, under the Uniform Commercial Code, as amended or recodified from time to time, from the state wherein the Property is located ("UCC"), and is acknowledged and agreed to be a "construction mortgage" under the UCC.

For purposes of this fixture filing, the "Debtor" is the Trustor and the "Secured Party" is the Lender. A description of the land which relates to the fixtures is set forth in Exhibit A attached hereto. Trustor is the record owner of such land. The filing of a financing statement covering the Collateral shall not be construed to derogate from or impair the lien or provisions of this Security Instrument with respect to any property described herein which is real property or which the parties have agreed to treat as real property. Similarly, nothing in any financing statement shall be construed to alter any of the rights of Lender under this Security Instrument or the priority of Lender's lien created hereby, and such financing statement is declared to be for the protection of Lender in the event any court shall at any time hold that notice of Lender's priority interest in any property or interests described in this Security Instrument must, in order to be effective against a particular class of persons, including but not limited to the Federal government and any subdivision, agency or entity of the Federal government, be filed in the UCC records.

- 4.2 **REPRESENTATIONS AND WARRANTIES**. Trustor represents and warrants that: (a) Trustor has, or will have, good title to the Collateral; (b) Trustor has not previously assigned or encumbered the Collateral, and no financing statement covering any of the Collateral has been delivered to any other person or entity; and (c) Trustor's principal place of business is located at the address set forth on the cover page of this Security Instrument.
- 4.3 **COVENANTS**. Trustor agrees: (a) to execute and deliver such documents as Lender deems necessary to create, perfect and continue the security interests contemplated hereby; (b) not to change its name, and as applicable, its chief executive office, its principal residence or the jurisdiction in which it is organized and/or registered without giving Lender prior written notice thereof; (c) to cooperate with Lender in perfecting all security interests granted herein and in obtaining such agreements from third parties as Lender deems necessary, proper or convenient in connection with

the preservation, perfection or enforcement of any of its rights hereunder; and (d) that Lender is authorized to file financing statements in the name of Trustor to perfect Lender's security interest in the Collateral.

- 4.4 **RIGHTS OF LENDER.** In addition to Lender's rights as a "Secured Party" under the UCC, Lender may, but shall not be obligated to, at any time without notice and at the expense of Trustor: (a) give notice to any person of Lender's rights hereunder and enforce such rights at law or in equity; (b) insure, protect, defend and preserve the Collateral or any rights or interests of Lender therein; (c) inspect the Collateral; and (d) endorse, collect and receive any right to payment of money owing to Trustor under or from the Collateral.

Upon the occurrence of a Default (hereinafter defined) under this Security Instrument, then in addition to all of Lender's rights as a "Secured Party" under the UCC or otherwise at law and in addition to Lender's rights under the Loan Documents:

- (a) Lender may (i) upon written notice, require Trustor to assemble any or all of the Collateral and make it available to Lender at a place designated by Lender; (ii) without prior notice, enter upon the Property or other place where any of the Collateral may be located and take possession of, collect, sell, lease, license or otherwise dispose of any or all of the Collateral, and store the same at locations acceptable to Lender at Trustor's expense; (iii) sell, assign and deliver at any place or in any lawful manner all or any part of the Collateral and bid and become the purchaser at any such sales; and
- (b) Lender may, for the account of Trustor and at Trustor's expense: (i) operate, use, consume, sell, lease, license or otherwise dispose of the Collateral as Lender deems appropriate for the purpose of performing any or all of the Secured Obligations; (ii) enter into any agreement, compromise, or settlement, including insurance claims, which Lender may deem desirable or proper with respect to any of the Collateral; and (iii) endorse and deliver evidences of title for, and receive, enforce and collect by legal action or otherwise, all indebtedness and obligations now or hereafter owing to Trustor in connection with or on account of any or all of the Collateral; and
- (c) Any proceeds of any disposition of any Collateral may be applied by Lender to the payment of expenses incurred by Lender in connection with the foregoing, including reasonable attorneys' fees, and the balance of such proceeds may be applied by Lender toward the payment of the Secured Obligations in such order of application as Lender may from time to time elect.

Notwithstanding any other provision hereof, Lender shall not be deemed to have accepted any property other than cash in satisfaction of any obligation of Trustor to Lender unless Trustor shall make an express written election of said remedy under the UCC or other applicable law. Trustor agrees that Lender shall have no obligation to process or prepare any Collateral for sale or other disposition. Trustor acknowledges and agrees that a disposition of the Collateral in accordance with Lender's rights and remedies as heretofore provided is a disposition thereof in a commercially reasonable manner and that ten (10) days prior notice of such disposition is commercially reasonable notice.

- 4.5 **POWER OF ATTORNEY.** Trustor hereby irrevocably appoints Lender as Trustor's attorney-in-fact (such agency being coupled with an interest), and as such attorney-in-fact Lender may, without the obligation to do so, in Lender's name, or in the name of Trustor, prepare, execute and file or record financing statements, continuation statements, applications for registration and like papers necessary to create, perfect or preserve any of Lender's security interests and rights in or to any of the Collateral, and, upon a Default hereunder, take any other action required of Trustor; provided, however, that Lender as such attorney-in-fact shall be accountable only for such funds as are actually received by Lender.

ARTICLE 5. RIGHTS AND DUTIES OF THE PARTIES

- 5.1 **PERFORMANCE OF SECURED OBLIGATIONS.** Trustor shall promptly pay and perform each Secured Obligation for which it is responsible hereunder or under the Loan Agreement when due. If Trustor fails to timely pay or perform any portion of the Secured Obligations (including taxes, assessments and insurance premiums), or if a legal proceeding is commenced that may adversely affect Lender's rights in the Property, then Lender may (but is not obligated to), at Trustor's expense, take such action as it considers to be necessary to protect the value of the Property and Lender's rights in the Property, including the retaining of counsel, and any amount so expended by Lender will be added to the Secured Obligations and will be payable by Trustor to Lender on demand, together with interest thereon from the date of advance until paid at the default rate provided in the Note.
- 5.2 **TAXES AND ASSESSMENTS.** Subject to Trustor's rights to contest payment of taxes or assessments as may be provided in the Loan Agreement, Trustor shall pay prior to delinquency all taxes, assessments, levies and charges imposed by any public or quasi-public authority or utility company which are or which may become a lien upon or cause a loss in value of the Property or any interest therein. Trustor shall also pay prior to delinquency all taxes, assessments, levies and charges imposed by any public authority upon Lender by reason of its interest in any Secured Obligation or in the Property, or by reason of any payment made to Lender pursuant to any Secured Obligation; provided, however, Trustor shall have no obligation to pay taxes which may be imposed from time to time upon Lender and which are measured by and imposed upon Lender's net income.
- 5.3 **LIENS, ENCUMBRANCES AND CHARGES.** Trustor shall immediately discharge all liens, claims and encumbrances not approved by Lender in writing that has or may attain priority over this Security Instrument. Subject to the section of the Loan Agreement entitled "Right of Contest", Trustor shall pay when due all obligations secured by, or which may become, liens and encumbrances which shall now or hereafter encumber or appear to encumber all or any part of the Property or Collateral, or any interest therein, whether senior or subordinate hereto.
- 5.4 **DAMAGES; INSURANCE AND CONDEMNATION PROCEEDS.**
- (a) The following (whether now existing or hereafter arising) are all absolutely and irrevocably assigned by Trustor to Lender and, at the request of Lender, shall be paid directly to Lender: (i) all awards of damages and all other compensation payable directly or indirectly by reason of a condemnation or proposed condemnation for public or private use affecting all or any part of, or any interest in, the Property or Collateral; (ii) all other claims and awards for damages to, or decrease in value of, all or any part of, or any interest in, the Property or Collateral; (iii) all proceeds of any insurance policies (whether or not expressly required by Lender to be maintained by Trustor, including, but not limited to, earthquake insurance and terrorism insurance, if any) payable by reason of loss sustained to all or any part of the Property or Collateral; and (iv) all interest which may accrue on any of the foregoing. Subject to applicable law, and without regard to any requirement contained in this Security Instrument, Lender may at its discretion apply all or any of the proceeds it receives to its expenses in settling, prosecuting or defending any claim and may apply the balance to the Secured Obligations in such order and amounts as Lender in its sole discretion may choose, and/or Lender may release all or any part of the proceeds to Trustor upon any conditions Lender may impose. Lender may commence, appear in, defend or prosecute any assigned claim or action and may adjust, compromise, settle and collect all claims and awards assigned to Lender; provided, however, in no event shall Lender be responsible for any failure to collect any claim or award, regardless of the cause of the failure, including, without limitation, any malfeasance or nonfeasance by Lender or its employees or agents.
- (b) Notwithstanding the foregoing, so long as no Default, or event or condition which with the giving of notice or the passage of time or both would become a Default, has occurred and is continuing, Lender will permit insurance or condemnation proceeds held by Lender to be used for repair or restoration but may condition such application upon reasonable conditions,

including, without limitation: (i) the deposit with Lender of such additional funds which Lender determines are needed to pay all costs of the repair or restoration, (including, without limitation, taxes, financing charges, insurance and rent during the repair period); (ii) the establishment of an arrangement for lien releases and disbursement of funds acceptable to Lender (the arrangement contained in the Loan Agreement for obtaining lien releases and disbursing loan funds shall be deemed reasonable with respect to disbursement of insurance or condemnation proceeds); (iii) the delivery to Lender of plans and specifications for the work, a contract for the work signed by a contractor acceptable to Lender, a cost breakdown for the work and a payment and performance bond for the work, all of which shall be acceptable to Lender; and (iv) the delivery to Lender of evidence acceptable to Lender (aa) that after completion of the work the income from the Property will be sufficient to pay all expenses and debt service for the Property; (bb) of the continuation of Leases acceptable to and required by Lender; (cc) that upon completion of the work, the size, capacity and total value of the Property will be at least as great as it was before the damage or condemnation occurred; (dd) that there has been no material adverse change in the financial condition or credit of Trustor and Borrower and any guarantors since the date of this Security Instrument; (ee) that the repair or restoration is reasonably projected to be completed before the maturity date of the Note; and (ff) of the satisfaction of any additional conditions that Lender may reasonably establish to protect its security. Trustor hereby acknowledges that the conditions described above are reasonable, and, if such conditions have not been satisfied within thirty (30) days of receipt by Lender of such insurance or condemnation proceeds, then Lender may apply such insurance or condemnation proceeds to pay the Secured Obligations in such order and amounts as Lender in its sole discretion may choose.

- 5.5 **MAINTENANCE AND PRESERVATION OF THE PROPERTY.** Subject to the provisions of the Loan Agreement, Trustor covenants: (a) to insure the Property and Collateral against such risks as Lender may require as set forth in the Loan Agreement and any supplemental insurance provisions or requirements provided to Trustor by Lender, and, at Lender's request, to provide evidence of such insurance to Lender, and to comply with the requirements of any insurance companies providing such insurance; (b) to keep the Property and Collateral in good condition and repair; (c) not to remove or demolish the Property or Collateral or any part thereof, not to alter or add to the Property or Collateral; (d) to complete or restore promptly and in good and workmanlike manner the Property and Collateral, or any part thereof which may be damaged or destroyed, without regard to whether Lender elects to require that insurance proceeds be used to reduce the Secured Obligations as provided in that certain Section hereof entitled Damages; Insurance and Condemnation Proceeds; (e) to comply with all laws, ordinances, regulations and standards, and all covenants, conditions, restrictions and equitable servitudes, whether public or private, of every kind and character which affect the Property or Collateral and pertain to acts committed or conditions existing thereon, including, without limitation, any work, alteration, improvement or demolition mandated by such laws, covenants or requirements; (f) not to commit or permit waste of the Property or Collateral; and (g) to do all other acts which from the character or use of the Property or Collateral may be reasonably necessary to maintain and preserve its value.
- 5.6 **DEFENSE AND NOTICE OF LOSSES, CLAIMS AND ACTIONS.** At Trustor's sole expense, Trustor shall protect, preserve and defend the Property and Collateral and title to and right of possession of the Property and Collateral, the security hereof and the rights and powers of Lender and Trustee hereunder against all adverse claims. Trustor shall give Lender and Trustee prompt notice in writing of the assertion of any claim, of the filing of any action or proceeding, of the occurrence of any material damage to the Property or Collateral and of any condemnation offer or action with respect to the Property or Collateral.
- 5.7 **ACTIONS BY LENDER.** From time to time, without affecting the personal liability of any person for payment of any indebtedness or performance of any obligations secured hereby, Lender, without liability therefor and without notice, may: (a) release all or any part of the Property from this Security Instrument; (b) consent to the making of any map or plat thereof; and (c) join in any grant of easement

thereon, any declaration of covenants and restrictions, or any extension agreement or any agreement subordinating the lien or charge of this Security Instrument.

5.8 **ACCEPTANCE OF TRUST; POWERS AND DUTIES OF TRUSTEE.**

- (a) Trustee accepts this trust when this Security Instrument is recorded. Except as may be required by applicable law, Trustee or Lender may from time to time apply to any court of competent jurisdiction for aid and direction in the execution of the trust hereunder and the enforcement of the rights and remedies available hereunder, and may obtain orders or decrees directing or confirming or approving acts in the execution of said trust and the enforcement of said remedies.
- (b) Trustee shall not be required to take any action toward the execution and enforcement of the trust hereby created or to institute, appear in, or defend any action, suit, or other proceeding in connection therewith where, in Trustee's opinion, such action would be likely to involve him in expense or liability, unless requested so to do by a written instrument signed by Lender and, if Trustee so requests, unless Trustee is tendered security and indemnity satisfactory to Trustee against any and all cost, expense, and liability arising therefrom. Trustee shall not be responsible for the execution, acknowledgment, or validity of the Loan Documents, or for the proper authorization thereof, or for the sufficiency of the lien and security interest purported to be created hereby, and Trustee makes no representation in respect thereof or in respect of the rights, remedies, and recourses of Lender.
- (c) With the approval of Lender, Trustee shall have the right to take any and all of the following actions: (i) to select, employ, and advise with counsel (who may be, but need not be, counsel for Lender) upon any matters arising hereunder, including the preparation, execution, and interpretation of the Loan Documents, and shall be fully protected in relying as to legal matters on the advice of counsel, (ii) to execute any of the trusts and powers hereof and to perform any duty hereunder either directly or through his agents or attorneys, (iii) to select and employ, in and about the execution of his duties hereunder, suitable accountants, engineers and other experts, agents and attorneys-in-fact, either corporate or individual, not regularly in the employ of Trustee, and Trustee shall not be answerable for any act, default, negligence, or misconduct of any such accountant, engineer or other expert, agent or attorney-in-fact, if selected with reasonable care, or for any error of judgment or act done by Trustee in good faith, or be otherwise responsible or accountable under any circumstances whatsoever, except for Trustee's gross negligence or bad faith, and (iv) any and all other lawful action as Lender may instruct Trustee to take to protect or enforce Lender's rights hereunder. Trustee shall not be personally liable in case of entry by Trustee, or anyone entering by virtue of the powers herein granted to Trustee, upon the Property for debts contracted for or liability or damages incurred in the management or operation of the Property. Trustee shall have the right to rely on any instrument, document, or signature authorizing or supporting any action taken or proposed to be taken by Trustee hereunder, believed by Trustee in good faith to be genuine. Trustee shall be entitled to reimbursement for expenses incurred by Trustee in the performance of Trustee's duties hereunder and to reasonable compensation for such of Trustee's services hereunder as shall be rendered. **TRUSTOR WILL, FROM TIME TO TIME, PAY THE COMPENSATION DUE TO TRUSTEE HEREUNDER AND REIMBURSE TRUSTEE FOR, AND INDEMNIFY AND HOLD HARMLESS TRUSTEE AGAINST, ANY AND ALL LIABILITY AND EXPENSES WHICH MAY BE INCURRED BY TRUSTEE IN THE PERFORMANCE OF TRUSTEE'S DUTIES.**
- (d) All moneys received by Trustee shall, until used or applied as herein provided, be held in trust for the purposes for which they were received, but need not be segregated in any manner from any other moneys (except to the extent required by applicable law) and Trustee shall be under no liability for interest on any moneys received by Trustee hereunder.

- (e) Should any deed, conveyance, or instrument of any nature be required from Trustor by any Trustee or substitute Trustee to more fully and certainly vest in and confirm to the Trustee or substitute Trustee such estates, rights, powers, and duties, then, upon request by the Trustee or substitute Trustee, any and all such deeds, conveyances and instruments shall be made, executed, acknowledged, and delivered and shall be caused to be recorded and/or filed by Trustor.
- (f) By accepting or approving anything required to be observed, performed, or fulfilled or to be given to Trustee pursuant to the Loan Documents, including without limitation, any deed, conveyance, instrument, officer's certificate, balance sheet, statement of profit and loss or other financial statement, survey, appraisal, or insurance policy, Trustee shall not be deemed to have warranted, consented to, or affirmed the sufficiency, legality, effectiveness, or legal effect of the same, or of any term, provision, or condition thereof, and such acceptance or approval thereof shall not be or constitute any warranty or affirmation with respect thereto by Trustee.

5.9 **COMPENSATION; EXCULPATION; INDEMNIFICATION.**

- (a) Lender shall not directly or indirectly be liable to Trustor or any other person as a consequence of (i) the exercise of the rights, remedies or powers granted to Lender in this Security Instrument; (ii) the failure or refusal of Lender to perform or discharge any obligation or liability of Trustor under any agreement related to the Property or Collateral or under this Security Instrument; or (iii) any loss sustained by Trustor or any third party resulting from Lender's failure (whether by malfeasance, nonfeasance or refusal to act) to lease the Property after a Default (hereinafter defined) or from any other act or omission (regardless of whether same constitutes negligence) of Lender in managing the Property after a Default unless the loss is caused by the gross negligence or willful misconduct of Lender and no such liability shall be asserted against or imposed upon Lender, and all such liability is hereby expressly waived and released by Trustor.
- (b) **TRUSTOR AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS TRUSTEE AND INDEMNITEES (AS HEREINAFTER DEFINED) FOR, FROM AND AGAINST ALL LOSSES, DAMAGES, LIABILITIES, CLAIMS, ACTIONS, JUDGMENTS, COURT COSTS, AND LEGAL EXPENSES OR OTHER EXPENSES (INCLUDING WITHOUT LIMITATION, REASONABLE ATTORNEYS' FEES AND EXPENSES), COST OF EVIDENCE OF TITLE, COST OF EVIDENCE OF VALUE, AND OTHER EXPENSES WHICH ANY INDEMNITEE MAY INCUR AS A DIRECT OR INDIRECT CONSEQUENCE OF: (i) BY REASON OF THIS SECURITY INSTRUMENT; (ii) BY REASON OF THE EXECUTION OF THIS SECURITY INSTRUMENT OR IN PERFORMANCE OF ANY ACT REQUIRED OR PERMITTED HEREUNDER OR BY LAW; (iii) AS A RESULT OF ANY FAILURE OF TRUSTOR TO PERFORM TRUSTOR'S OBLIGATIONS; OR (iv) BY REASON OF ANY ALLEGED OBLIGATION OR UNDERTAKING ON ANY INDEMNITEE'S PART TO PERFORM OR DISCHARGE ANY OF THE REPRESENTATIONS, WARRANTIES, CONDITIONS, COVENANTS OR OTHER OBLIGATIONS CONTAINED IN ANY OTHER DOCUMENT RELATED TO THE PROPERTY. THE FOREGOING INDEMNITY SHALL NOT APPLY TO ANY LOSSES, DAMAGES, LIABILITIES, CLAIMS, ACTIONS, JUDGMENTS, OR OTHER EXPENSES DIRECTLY CAUSED BY LENDER'S OR ANY INDEMNITEE'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT AS DETERMINED BY A COURT OF COMPETENT JURISDICTION IN A FINAL NON-APPEALABLE JUDGMENT. THE ABOVE OBLIGATION OF TRUSTOR TO INDEMNIFY AND HOLD HARMLESS TRUSTEE AND INDEMNITEES SHALL SURVIVE THE CANCELLATION OF THE SECURED OBLIGATIONS AND THE RECONVEYANCE, RELEASE OR SATISFACTION OR PARTIAL RECONVEYANCE, RELEASE OR SATISFACTION OF THIS SECURITY INSTRUMENT. FOR THE PURPOSES HEREOF, "INDEMNITEES" SHALL MEAN LENDER, LENDER'S PARENTS, SUBSIDIARIES AND AFFILIATES, ANY HOLDER OF OR PARTICIPANT IN**

THE LOAN, AND EACH OF THEIR RESPECTIVE DIRECTORS OFFICERS, EMPLOYEES, AGENTS, SUCCESSORS AND ASSIGNS OF ANY OF THE FOREGOING.

- (c) Trustor shall pay all amounts and indebtedness arising under this Section immediately upon demand by Trustee or Lender together with interest thereon from the date the indebtedness arises at the rate of interest then applicable to the principal balance of the Note as specified therein.
- 5.10 **SUBSTITUTION OF TRUSTEE.** Trustee may resign at any time by giving notice thereof to Lender as provided by law. Lender may, from time to time, by instrument in writing, substitute a successor to any Trustee named herein or acting hereunder in the manner provided by law. Such writing, upon recordation, shall be conclusive proof of proper substitution of such successor Trustee, who shall, without conveyance from the predecessor Trustee, succeed to all its title.
- 5.11 **DUE ON SALE; ENCUMBRANCE.** If the Property or any interest therein or if any direct or indirect ownership interest in Trustor shall be sold, under contract to sell, transferred, mortgaged, assigned, further encumbered or leased, whether directly or indirectly, whether voluntarily, involuntarily or by operation of law, or if there shall be any change in the management of the Property or Trustor, in each case without the prior written consent of Lender or as expressly permitted by or in accordance with the Loan Agreement, THEN Lender, in its sole discretion, may at any time thereafter declare all Secured Obligations immediately due and payable.
- 5.12 **RELEASES, EXTENSIONS, MODIFICATIONS AND ADDITIONAL SECURITY.** Without notice to or the consent, approval or agreement of any persons or entities having any interest at any time in the Property and Collateral or in any manner obligated under the Secured Obligations ("**Interested Parties**"), Lender may, from time to time and without notice to Trustor or Borrower (i) release any person or entity from liability for the payment or performance of any Secured Obligation; (ii) take any action or make any agreement extending the maturity or otherwise altering the terms or increasing the amount of any Secured Obligation; or (iii) accept additional security or release all or a portion of the Property and Collateral and other security for the Secured Obligations. None of the foregoing actions shall release or reduce the personal liability of any of said Interested Parties, or release or impair the priority of the lien of and security interests created by this Security Instrument upon the Property, the Collateral or any other security provided herein or in the other Loan Documents.
- 5.13 **RECONVEYANCE.** Upon Lender's written request, and upon surrender to Trustee for cancellation, release or satisfaction of this Security Instrument or a certified copy thereof and any note, instrument, or instruments setting forth all obligations secured hereby, Trustee shall reconvey or release, without warranty, the Property or that portion thereof then held hereunder. To the extent permitted by law, the reconveyance, release or satisfaction may describe the grantee as "the person or persons legally entitled thereto" and the recitals of any matters or facts in any reconveyance, release or satisfaction executed hereunder shall be conclusive proof of the truthfulness thereof. Lender and Trustee shall not have any duty to determine the rights of persons claiming to be rightful grantees of any reconveyance, release or satisfaction. When the Property has been fully reconveyed, released or satisfied, the last such reconveyance, release or satisfaction shall operate as a reassignment of all future rents, issues and profits of the Property to the person or persons legally entitled thereto.
- 5.14 **SUBROGATION.** Lender shall be subrogated to the lien of all encumbrances, whether released of record or not, paid in whole or in part by Lender pursuant to the Loan Documents or by the proceeds of any loan secured by this Security Instrument.
- 5.15 **RIGHT OF INSPECTION.** Lender, its agents, representatives and employees, may enter any part of the Property at any reasonable time for the purpose of inspecting the Property and Collateral and ascertaining Trustor's compliance with the terms hereof and the other Loan Documents.

ARTICLE 6. DEFAULT PROVISIONS

- 6.1 **DEFAULT.** For all purposes hereof, the term "**Default**" shall mean (a) at Lender's option, the failure of Trustor or any other person liable to make any payment of principal or interest on the Note or to pay any other amount due hereunder or under the Note when the same is due and payable, whether at maturity, by acceleration or otherwise; or (b) the occurrence of any Default as defined in any one or more of the Loan Agreement, any other Loan Document or any Other Related Document, or an "Event of Default" under any Swap Agreement (as defined therein) between Borrower and Lender.
- 6.2 **RIGHTS AND REMEDIES.** At any time after Default, Lender and Trustee shall each have each and every one of the following rights and remedies in addition to Lender's rights under the other Loan Documents or under any Swap Agreement between Borrower and Lender:
- (a) With or without notice, to declare all Secured Obligations (other than Swap Agreements) immediately due and payable.
 - (b) Pursuant to the terms of a Swap Agreement between Borrower and Lender, terminate such Swap Agreement.
 - (c) With or without notice, and without releasing Trustor or Borrower from any Secured Obligation, and without becoming a mortgagee in possession, to cure any breach or Default of Trustor or Borrower and, in connection therewith, to enter upon the Property and do such acts and things as Lender or Trustee deems necessary or desirable to protect the security hereof, including, without limitation: (i) to appear in and defend any action or proceeding purporting to affect the security of this Security Instrument or the rights or powers of Lender or Trustee under this Security Instrument; (ii) to pay, purchase, contest or compromise any encumbrance, charge, lien or claim of lien which, in the sole judgment of either Lender or Trustee, is or may be senior in priority to this Security Instrument, the judgment of Lender or Trustee being conclusive as between the parties hereto; (iii) to obtain insurance and to pay any premiums or charges with respect to insurance required to be carried under this Security Instrument; or (iv) to employ counsel, accountants, contractors and other appropriate persons.
 - (d) To commence and maintain an action or actions in any court of competent jurisdiction to foreclose this instrument as a deed of trust or mortgage or to obtain specific enforcement of the covenants of Trustor hereunder, and Trustor agrees that such covenants shall be specifically enforceable by injunction or any other appropriate equitable remedy and that for the purposes of any suit brought under this subparagraph, Trustor waives the defense of laches and any applicable statute of limitations.
 - (e) To the extent this Security Instrument may encumber more than one property, the Lender at its sole option shall have the right to foreclose any one property or to foreclose en masse. In any suit to foreclose the lien hereof, there shall be allowed and included as additional indebtedness to the decree for sale all costs, fees and expenses described in that certain Section hereof entitled Payment of Costs, Expenses and Attorney's Fees which may be paid or incurred by or on behalf of Lender to prosecute such suit, and such other costs and fees including, but not limited to, appraisers' fees, outlays for documentary and expert evidence, stenographers' charges, publication costs, accounting fees, brokerage commissions, costs of whatever nature or kind to protect and avoid impairment of the Property, and other related costs and fees as shall be necessary.
 - (f) To apply to a court of competent jurisdiction for and obtain the ex parte appointment of a receiver of the Property as a matter of strict right and without regard to the adequacy of the security for the repayment of the Secured Obligations, the existence of a declaration that the Secured Obligations are immediately due and payable, or the filing of a notice of default, and Trustor hereby consents to such ex parte appointment of a receiver and waives notice of any hearing or proceeding for such appointment.

- (g) To enter upon, possess, control, lease, manage and operate the Property or any part thereof, to take and possess all documents, books, records, papers and accounts of Trustor or the then owner of the Property, to make, terminate, enforce or modify Leases of the Property upon such terms and conditions as Lender deems proper, to make repairs, alterations and improvements to the Property as necessary, in Trustee's or Lender's sole judgment, to protect or enhance the security hereof and to continue and complete construction of the Improvements of the Property as necessary in Lender's sole judgment.

To execute a written notice of such Default and of its election to cause the Property to be sold to satisfy the Secured Obligations. As a condition precedent to any such sale, Trustee shall give and record such notice as the law then requires. When the minimum period of time required by law after such notice has elapsed, Trustee, without notice to or demand upon Trustor except as required by law, shall sell the Property at the time and place of sale fixed by it in the notice of sale, at one or several sales, either as a whole or in separate parcels and in such manner and order, all as Lender in its sole discretion may determine, at public auction to the highest bidder for cash, in lawful money of the United States, payable at time of sale. Neither Trustor nor any other person or entity other than Lender shall have the right to direct the order in which the Property is sold. Subject to requirements and limits imposed by law, Trustee may from time to time postpone sale of all or any portion of the Property by public announcement at such time and place of sale. Trustee shall deliver to the purchaser at such sale a deed conveying the Property or portion thereof so sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Trustee, Trustor or Lender may purchase at the sale.

- (h) To resort to and realize upon the security hereunder and any other security now or later held by Lender concurrently or successively and in one or several consolidated or independent judicial actions or lawfully taken non-judicial proceedings, or both, and to apply the proceeds received upon the Secured Obligations all in such order and manner as Lender and Trustee, or either of them, determine in their sole discretion.
- (i) Upon sale of the Property at any foreclosure sale, Lender may credit bid (as determined by Lender in its sole and absolute discretion) all or any portion of the Secured Obligations. In determining such credit bid, to the extent permitted by law, Lender may, but is not obligated to, take into account all or any of the following: (i) appraisals of the Property as such appraisals may be discounted or adjusted by Lender in its sole and absolute underwriting discretion; (ii) expenses and costs incurred by Lender with respect to the Property prior to foreclosure; (iii) expenses and costs which Lender anticipates will be incurred with respect to the Property after foreclosure, but prior to resale, including, without limitation, costs of structural reports and other due diligence, costs to carry the Property prior to resale, costs of resale (e.g. commissions, reasonable attorneys' fees, and taxes), costs of any hazardous materials clean-up and monitoring, costs of deferred maintenance, repair, refurbishment and retrofit, costs of defending or settling litigation affecting the Property, and lost opportunity costs (if any), including the time value of money during any anticipated holding period by Lender; (iv) declining trends in real property values generally and with respect to properties similar to the Property; (v) anticipated discounts upon resale of the Property as a distressed or foreclosed property; (vi) the fact of additional collateral (if any), for the Secured Obligations; and (vii) such other factors or matters that Lender (in its sole and absolute discretion) deems appropriate. In regard to the above, Trustor acknowledges and agrees that: (w) Lender is not required to use any or all of the foregoing factors to determine the amount of its credit bid; (x) this Section does not impose upon Lender any additional obligations that are not imposed by law at the time the credit bid is made; (y) the amount of Lender's credit bid need not have any relation to any loan-to-value ratios specified in the Loan Documents or previously discussed between Trustor and Lender; and (z) Lender's credit bid may be (at Lender's sole and absolute discretion) higher or lower than any appraised value of the Property.

- (j) Upon the completion of any foreclosure of all or a portion of the Property, commence an action to recover any of the Secured Obligations that remains unpaid or unsatisfied.
- (k) Exercise any and all remedies at law, equity, or under the Note, Security Instrument or other Loan Documents for such Default.
- 6.3 **APPLICATION OF FORECLOSURE SALE PROCEEDS.** Except as may be otherwise required by applicable law, after deducting all costs, fees and expenses of Lender and Trustee, and of this trust, including, without limitation, cost of evidence of title and reasonable attorneys' fees in connection with sale and costs and expenses of sale and of any judicial proceeding wherein such sale may be made, all proceeds of any foreclosure sale shall be applied: (a) to payment of all sums expended by Lender under the terms hereof and not then repaid, with accrued interest at the rate of interest specified in the Note to be applicable on or after maturity or acceleration of the Note; (b) to payment of all other Secured Obligations; and (c) the remainder, if any, to the person or persons legally entitled thereto.
- 6.4 **APPLICATION OF OTHER SUMS.** All sums received by Lender under this Security Instrument other than those described in that certain Section hereof entitled Rights and Remedies or that certain Section hereof entitled Grant of License, less all costs and expenses incurred by Lender or any receiver, including, without limitation, reasonable attorneys' fees, shall be applied in payment of the Secured Obligations in such order as Lender shall determine in its sole discretion; provided, however, Lender shall have no liability for funds not actually received by Lender.
- 6.5 **NO CURE OR WAIVER.** Neither Lender's nor Trustee's nor any receiver's entry upon and taking possession of all or any part of the Property and Collateral, nor any collection of rents, issues, profits, insurance proceeds, condemnation proceeds or damages, other security or proceeds of other security, or other sums, nor the application of any collected sum to any Secured Obligation, nor the exercise or failure to exercise of any other right or remedy by Lender or Trustee or any receiver shall cure or waive any breach, Default or notice of default under this Security Instrument, or nullify the effect of any notice of default or sale (unless all Secured Obligations then due have been paid and performed and Trustor has cured all other defaults), or limit or impair the status of the security, or prejudice Lender or Trustee in the exercise of any right or remedy, or be construed as an affirmation by Lender of any tenancy, lease or option or a subordination of the lien of or security interests created by this Security Instrument.
- 6.6 **PAYMENT OF COSTS, EXPENSES AND ATTORNEYS' FEES.** Trustor agrees to pay to Lender immediately and without demand all costs and expenses of any kind incurred by Trustee and Lender pursuant to this Article (including, without limitation, court costs and reasonable attorneys' fees, whether incurred in litigation or not, including, without limitation, at trial, on appeal or in any bankruptcy or other proceeding, or not and the costs of any appraisals obtained in connection with a determination of the fair value of the Property) with interest from the date of expenditure until said sums have been paid at the rate of interest then applicable to the principal balance of the Note as specified therein or as allowed by applicable law. In addition, Trustor will pay the costs and fees for title searches, sale guarantees, publication costs, appraisal reports or environmental assessments made in preparation for and in the conduct of any such proceedings or suit, and Trustor shall pay to Trustee all Trustee's fees hereunder and shall reimburse Trustee for all expenses incurred in the administration of this trust, including, without limitation, any reasonable attorneys' fees. All of the foregoing amounts must be paid to Lender as part of any reinstatement tendered hereunder. In the event of any legal proceedings, court costs and reasonable attorneys' fees shall be set by the court and not by jury and shall be included in any judgment obtained by Lender.
- 6.7 **POWER TO FILE NOTICES AND CURE DEFAULTS.** Trustor hereby irrevocably appoints Lender and its successors and assigns, as its attorney-in-fact, which agency is coupled with an interest, (a) to execute and/or record any notices of cessation of labor, commencement or completion of construction of the Improvements or any other notices that Lender deems appropriate to protect Lender's interest, (b) upon the issuance of a deed pursuant to the foreclosure of the lien of this



Security Instrument or the delivery of a deed in lieu of foreclosure, to execute all instruments of assignment or further assurance with respect to the Property and Collateral, Leases and Payments in favor of the grantee of any such deed, as may be necessary or desirable for such purpose, (c) to prepare, execute and file or record financing statements, continuation statements, applications for registration and like papers necessary to create, perfect or preserve Lender's security interests and rights in or to any of the Property and Collateral, and (d) upon the occurrence of an event, act or omission which, with notice or passage of time or both, would constitute a Default, Lender may perform any obligation of Trustor hereunder; provided, however, that: (i) Lender as such attorney-in-fact shall only be accountable for such funds as are actually received by Lender; and (ii) Lender shall not be liable to Trustor or any other person or entity for any failure to act (whether such failure constitutes negligence) by Lender under this Section. Furthermore, the Trustor hereby authorizes Lender and/or the Trustee and their respective agents or counsel to file financing statements that indicate the collateral (i) as all assets of the Trustor or words of similar effect or (ii) as being of an equal, greater or lesser scope, or with greater or lesser detail, than as set forth in this Security Agreement and/or this Security Instrument, on behalf of the Trustor.

6.8 **REMEDIES CUMULATIVE.** All rights and remedies of Lender and Trustee provided hereunder are cumulative and are in addition to all rights and remedies provided by applicable law (including specifically that of foreclosure of this instrument as though it were a mortgage) or in any other agreements between Trustor and Lender. No failure on the part of Lender to exercise any of its rights hereunder arising upon any Default shall be construed to prejudice its rights upon the occurrence of any other or subsequent Default. No delay on the part of Lender in exercising any such rights shall be construed to preclude it from the exercise thereof at any time while that Default is continuing. Lender may enforce any one or more remedies or rights hereunder successively or concurrently. By accepting payment or performance of any of the Secured Obligations after its due date, Lender shall not waive the agreement contained herein that time is of the essence, nor shall Lender waive either its right to require prompt payment or performance when due of the remainder of the Secured Obligations or its right to consider the failure to so pay or perform a Default.

ARTICLE 7. MISCELLANEOUS PROVISIONS

7.1 **NOTICES.** All notices, demands, or other communications under this Security Instrument and the other Loan Documents shall be in writing and shall be delivered to the appropriate party at the address set forth below (subject to change from time to time by written notice to all other parties to this Security Instrument). All notices, demands or other communications shall be considered as properly given if delivered personally or sent by first class United States Postal Service mail, postage prepaid, or by Overnight Express Mail or by overnight commercial courier service, charges prepaid, except that notice of Default may be sent by certified mail, return receipt requested, charges prepaid. Notices so sent shall be effective three (3) Business Days after mailing, if mailed by first class mail, and otherwise upon delivery or refusal; provided, however, that non-receipt of any communication as the result of any change of address of which the sending party was not notified or as the result of a refusal to accept delivery shall be deemed receipt of such communication. For purposes of notice, the address of the parties shall be:

Trustor:	Woodtusk Devonl L.L.C. 2733 East Parleys Way, Suite 300 Salt Lake City, Utah 84109 Attention: Scott Bishop
With copies to:	Office of General Counsel Woodbury Corporation 2733 East Parleys Way, Suite 300 Salt Lake City, Utah 84109

	ICO Multifamily Holdings, LLC 978 East Woodoak Lane Salt Lake City, Utah 84117 Attention James G. Seaberg Kirton McConkie, P.C. 50 East South Temple, Suite 400 Salt Lake City, Utah 84111 Attention: Ben Hathaway
Trustee:	Wells Fargo Bank Northwest, National Association 1512 Eureka Road, Suite 350 Roseville, California 95661 (w/ reference to Loan No. 1017984)
Lender:	Wells Fargo Bank, National Association (for overnight or hand delivery) 299 South Main Street, 6th Floor Salt Lake City, Utah 84111 (for U.S. Main) PO Box 45490 Salt Lake City, Utah 84145-0490 Attention: Erik W. Bengtzen Loan No. 1017984
With a copy to:	Wells Fargo Bank, National Association Minneapolis Loan Center 600 South 4 th Street, 9th Floor Minneapolis, Minnesota 55415 Attention: Kyle Schwanke Loan No. 1017984

Any party shall have the right to change its address for notice hereunder to any other location within the continental United States by the giving of thirty (30) days' notice to the other party in the manner set forth hereinabove. Trustor shall forward to Lender, without delay, any notices, letters or other communications delivered to the Property or to Trustor naming Lender or the "**Construction Lender**" or any similar designation as addressee, or which could reasonably be deemed to affect the construction of the Improvements or the ability of Trustor to perform its obligations to Lender under the Loan Documents.

- 7.2 **ATTORNEYS' FEES AND EXPENSES; ENFORCEMENT.** If the Note is placed with an attorney for collection or if an attorney is engaged by Lender to exercise rights or remedies or otherwise take actions to collect thereunder or under any other Loan Document, or if suit be instituted for collection, reinforcement of rights and remedies, then in all events, Trustor agrees to pay to Lender all reasonable costs of collection, exercise of remedies or rights or other assertion of claims, including, but not limited to, reasonable attorneys' fees, whether or not court proceedings are instituted, and, where instituted, whether in district court, appellate court, or bankruptcy court. In the event of any legal proceedings, court costs and reasonable attorneys' fees shall be set by the court and not by jury and shall be included in any judgment obtained by Lender.
- 7.3 **NO WAIVER.** No previous waiver and no failure or delay by Lender in acting with respect to the terms of the Note or this Security Instrument shall constitute a waiver of any breach, default, or failure of condition under the Note, this Security Instrument or the obligations secured thereby. A waiver of any term of the Note, this Security Instrument or of any of the obligations secured thereby must be made in writing and shall be limited to the express written terms of such waiver.

- 7.4 **SEVERABILITY**. If any provision or obligation under this Security Instrument shall be determined by a court of competent jurisdiction to be invalid, illegal or unenforceable, that provision shall be deemed severed from this Security Instrument and the validity, legality and enforceability of the remaining provisions or obligations shall remain in full force as though the invalid, illegal, or unenforceable provision had never been a part of this Security Instrument.
- 7.5 **HEIRS, SUCCESSORS AND ASSIGNS**. Except as otherwise expressly provided under the terms and conditions herein, the terms of this Security Instrument shall bind and inure to the benefit of the heirs, executors, administrators, nominees, successors and assigns of the parties hereto, including, without limitation, subsequent owners of the Property or any part thereof; provided, however, that this Section does not waive or modify the provisions of that certain Section entitled Due on Sale or Encumbrance.
- 7.6 **ATTORNEY-IN-FACT**. Trustor hereby irrevocably appoints and authorizes Lender as Trustor's attorney-in-fact, which agency is coupled with an interest, and as such attorney-in-fact Lender may, without the obligation to do so, execute and/or record in Lender's or Trustor's name any notices, instruments or documents (including, without limitation, preliminary notices, notices of commencement and notices of completion as provided in Title 38, Chapter 1a of the Utah Code) that Lender deems appropriate to protect Lender's interest under any of the Loan Documents.
- 7.7 **TIME**. Time is of the essence of each and every term herein.
- 7.8 **GOVERNING LAW AND CONSENT TO JURISDICTION**. With respect to matters relating to the creation, perfection and procedures relating to the enforcement of the liens created pursuant to this Security Instrument, this Security Instrument shall be governed by, and construed in accordance with, the laws of Utah, it being understood that, except as expressly set forth above in this paragraph and to the fullest extent permitted by the laws of Utah, the laws of Utah shall govern any and all matters, claims, controversies or disputes arising under or related to this Security Instrument, the relationship of the parties, and/or the interpretation and enforcement of the rights and duties of the parties relating to this Security Instrument, the Loan Agreement and the other Loan Documents and all of the indebtedness or obligations arising thereunder or hereunder. Trustor hereby consents to the jurisdiction of any federal or state court within Utah having proper venue and also consent to service of process by any means authorized by Utah or federal law.
- 7.9 **JOINT AND SEVERAL LIABILITY**. The liability of all persons and entities obligated in any manner hereunder and under any of the Loan Documents shall be joint and several.
- 7.10 **HEADINGS**. All article, section or other headings appearing in this Security Instrument are for convenience of reference only and shall be disregarded in construing this Security Instrument.
- 7.11 **COUNTERPARTS**. To facilitate execution, this document may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature of, or on behalf of, each party, or that the signature of all persons required to bind any party, appear on each counterpart. All counterparts shall collectively constitute a single document. It shall not be necessary in making proof of this document to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, each of the parties hereto. Any signature page to any counterpart may be detached from such counterpart without impairing the legal effect of the signatures thereon and thereafter attached to another counterpart identical thereto except having attached to it additional signature pages.
- 7.12 **POWERS OF ATTORNEY**. The powers of attorney granted by Trustor to Lender in this Security Instrument shall be unaffected by the disability of the principal so long as any portion of the Loan remains unpaid or unperformed or any obligation under or in connection with a Swap Agreement between Borrower and Lender remains unpaid or unperformed. Lender shall have no obligation to exercise any of the foregoing rights and powers in any event. Lender hereby discloses that it may

exercise the foregoing powers of attorney for Lender's benefit, and such authority need not be exercised for Borrower's best interest.

- 7.13 **DEFINED TERMS**. Unless otherwise defined herein, capitalized terms used in this Security Instrument shall have the meanings attributed to such terms in the Loan Agreement.
- 7.14 **LENDER'S CONSENT**. Wherever in this Security Instrument there is a requirement for Lender's consent and/or a document to be provided or an action taken "to the satisfaction of Lender", it is understood by such phrase that, except as expressly modified herein, Lender shall exercise its consent, right or judgment in a reasonable manner given the specific facts and circumstance applicable at the time.
- 7.15 **RULES OF CONSTRUCTION**. The word "**Borrower**" as used herein shall include both the named Borrower and any other person at any time assuming or otherwise becoming primarily liable for all or any part of the obligations of the named Borrower under the Note and the other Loan Documents. The term "person" as used herein shall include any individual, company, trust or other legal entity of any kind whatsoever. If this Security Instrument is executed by more than one person, the term "**Trustor**" shall include all such persons. The word "**Lender**" as used herein shall include Lender, its successors, assigns and affiliates. The term "**Property**" and "**Collateral**" means all and any part of the Property and Collateral, respectively, and any interest in the Property and Collateral, respectively.
- 7.16 **USE OF SINGULAR AND PLURAL; GENDER**. When the identity of the parties or other circumstances make it appropriate, the singular number includes the plural, and the masculine gender includes the feminine and/or neuter.
- 7.17 **EXHIBITS, SCHEDULES AND RIDERS**. All exhibits, schedules, riders and other items attached hereto are incorporated into this Security Instrument by such attachment for all purposes.
- 7.18 **INCONSISTENCIES**. In the event of any inconsistencies between the terms of this Security Instrument and the terms of the Loan Agreement or Note, including without limitation, provisions regarding collection and application of Property revenue, required insurance, tax impounds, and transfers of the Property, the terms of the Loan Agreement or Note, as applicable, shall prevail.
- 7.19 **MERGER**. No merger shall occur as a result of Lender's acquiring any other estate in, or any other lien on, the Property unless Lender consents to a merger in writing and in accordance with the terms of the Loan Agreement.
- 7.20 **RECOURSE TO SEPARATE PROPERTY**. Any married person who executes this Security Instrument as a Trustor agrees that any money judgment which Lender or Trustee obtains pursuant to the terms of this Security Instrument or any other obligation of that married person secured by this Security Instrument may be collected by execution upon that person's separate property, and any community property of which that person is a manager.
- 7.21 **WAIVER OF MARSHALLING RIGHTS**. Trustor, for itself and for all parties claiming through or under Trustor, and for all parties who may acquire a lien on or interest in the Property and Collateral, hereby waives all rights to have the Property and Collateral and/or any other property, which is now or later may be security for any Secured Obligation marshalled upon any foreclosure of the lien of this Security Instrument or on a foreclosure of any other lien or security interest against any security for any of the Secured Obligations. Lender shall have the right to sell, and any court in which foreclosure proceedings may be brought shall have the right to order a sale of, the Property and any or all of the Collateral or other property as a whole or in separate parcels, in any order that Lender may designate.

- 7.22 **ADVERTISING.** In connection with the Loan, Trustor hereby agrees that Wells Fargo & Company and its subsidiaries ("**Wells Fargo**") may publicly identify details of the Loan in Wells Fargo advertising and public communications of all kinds, including, but not limited to, press releases, direct mail, newspapers, magazines, journals, e-mail, or internet advertising or communications. Such details may include the name of the Property, the address of the Property, the amount of the Loan, the date of the closing and a description of the size/location of the Property.
- 7.23 **SUBORDINATION OF PROPERTY MANAGER'S LIEN.** Any property management agreement for the Property entered into hereafter with a property manager shall contain a provision whereby the property manager agrees that any and all mechanics lien rights that the property manager or anyone claiming by, through or under the property manager may have in the Property shall be subject and subordinate to the lien of this Security Instrument and shall provide that Lender may terminate such agreement at any time after the occurrence of a Default hereunder. Such property management agreement or a short form thereof, at Lender's request, shall be recorded with the County Recorder of the county where the Property is located. In addition, if the property management agreement in existence as of the date hereof does not contain a subordination provision, Trustor shall cause the property manager under such agreement to enter into a subordination of the management agreement with Lender, in recordable form, whereby such property manager subordinates present and future lien rights and those of any party claiming by, through or under such property manager to the lien of this Security Instrument.
- 7.24 **INTEGRATION; INTERPRETATION.** The Loan Documents contain or expressly incorporate by reference the entire agreement of the parties with respect to the matters contemplated therein and supersede all prior negotiations or agreements, written or oral. The Loan Documents shall not be modified except by written instrument executed by all parties. Any reference to the Loan Documents includes any amendments, renewals or extensions now or hereafter approved by Lender in writing. The Loan Documents grant further rights to Lender and contain further agreements and affirmative and negative covenants by Trustor which apply to this Security Instrument and to the Property and Collateral and such further rights and agreements are incorporated herein by this reference. Where Trustor and Borrower are not the same, "**Trustor**" means the owner of the Property in any provision dealing with the Property, "**Borrower**" means the obligor in any provision dealing with the Secured Obligations.

[Signature Page Follows]

IN WITNESS WHEREOF, Trustor has duly executed and delivered this Security Instrument as of the date set forth above.

“TRUSTOR”

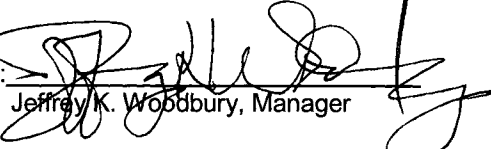
ENT **107030:2018** PG 21 of 24

WOODTUSK DEVON L.L.C.,
A Utah limited liability company

By: Woodbury Management Company, L.C.,
a Utah limited liability company

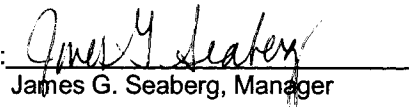
Its Manager

By: 
O. Randall Woodbury, Manager

By: 
Jeffrey K. Woodbury, Manager

By: ICO MULTIFAMILY HOLDINGS, LLC,
a Utah limited liability company

Its Manager

By: 
James G. Seaberg, Manager

[Acknowledgments Follow]

STATE OF Utah)
COUNTY OF Salt Lake)
SS.

ENT 107030:2018 PG 22 of 24

The foregoing instrument was acknowledged before me this 31st day of October, 2018, by D. Russell Woodbury, Manager of Woodbury Management Company, L.C., a Utah limited liability company, Manager of Woodtusk Devon L.L.C., a Utah limited liability company.



[Signature]
Notary Public
Residing at: Salt Lake County

My commission expires: 3/9/22

STATE OF Utah)
COUNTY OF Salt Lake)
SS.

The foregoing instrument was acknowledged before me this 1st day of November, 2018, by Jeffrey K. Woodbury, Senior Vice Pres. of Woodbury Management Company, L.C., a Utah limited liability company, Manager of Woodtusk Devon L.L.C., a Utah limited liability company.



[Signature]
Notary Public
Residing at: Salt Lake County

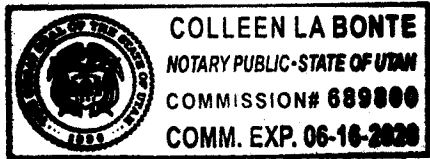
My commission expires: 3/9/22

STATE OF Utah)
COUNTY OF Utah)
SS.

The foregoing instrument was acknowledged before me this 30th day of October, 2018, by James G. Seaberg, Manager of ICO Multifamily Holdings, LLC., a Utah limited liability company, Manager of Woodtusk Devon, L.L.C., a Utah limited liability company.

Colleen La Bonte
Notary Public
Residing at: Utah

My commission expires: 6/16/2020



[Handwritten marks]

EXHIBIT A - DESCRIPTION OF PROPERTY

Exhibit A to Construction Deed of Trust with Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing, made by Woodtusk Devon L.L.C., a Utah limited liability company, as Trustor, to Wells Fargo Bank Northwest, National Association, as Trustee, for the benefit of Wells Fargo Bank, National Association, as Lender.

All that certain real property located in the County of Utah, State of Utah, described as follows:

PARCEL 1:

Lot 18A, UNIVERSITY PLACE SUBDIVISION ASTON NORTH LOTS 17A AND 18A, according to the official plat thereof on file and of record in the Utah County Recorder's office, recorded June 19, 2018 as Entry No. 57046:2018, Map Filing No. 16112.

PARCEL 1A:

Cross Access Easement and Utility Easement as shown on the plat of University Place Subdivision Aston North Lots 17A and 18A, recorded June 19, 2018 as Entry No. 57046:2018, Map Filing No. 16112.

PARCEL 1B:

A non-exclusive easement as disclosed in that certain Parking Easement dated October 11, 2018 and recorded October 15, 2018 as Entry No. 98940:2018.

PARCEL 1C:

Cross Access Easement as shown on the plat of University Mall UPlace Aston Court Subdivision, recorded September 15, 2014 and as Entry No. 65749:2014, Map Filing No. 14361.

Tax Id No.: 57-097-0018



EXHIBIT B - CROSS-DEFAULT/CROSS-COLLATERALIZATION RIDER

Exhibit B to Construction Deed of Trust with Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing ("Security Instrument") dated as of October 29, 2018, executed by Woodtusk Devon L.L.C. ("Trustor") to Wells Fargo Bank Northwest, National Association ("Trustee"), for the benefit of Wells Fargo Bank, National Association, as beneficiary (collectively with its successors or assigns, "Lender").

1. **ADDITIONAL SECURITY – OBLIGATIONS SECURED BY OTHER SECURITY INSTRUMENT.** In addition to the obligations secured by this Security Instrument and described as "Secured Obligations" herein, this Security Instrument shall also secure the payment and performance of all obligations secured by that certain Construction Deed of Trust with Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing, dated as of July 11, 2018, executed by Woodtusk III L.L.C., a Utah limited liability company, as the trustor, to Wells Fargo Bank Northwest, National Association, as the trustee, for the benefit of Lender, as the beneficiary, recorded on July 19, 2018 as Entry No. 67691:2018 in the official records of Utah County, Utah (Loan No. 1017983) (as the same may be amended, modified, supplemented or replaced from time to time, the "Other Security Instrument"). Any default under the Other Security Instrument shall, at Lender's option, constitute a default under this Security Instrument (Loan No. 1017984).
2. **ADDITIONAL SECURITY – OBLIGATIONS SECURED BY SECURITY INSTRUMENT.** In addition to the obligations secured by the Other Security Instrument, the Other Security Instrument shall also secure the payment and performance of all obligations secured by this Security Instrument.
3. **DEFAULT – OTHER SECURITY INSTRUMENT.** A Default under the Other Security Instrument, as defined therein, shall, at Lender's option, constitute a Default under this Security Instrument.
4. **DEFAULT – SECURITY INSTRUMENT.** A Default under this Security Instrument shall, at Lender's option, constitute a Default under the Other Security Instrument.
5. **WAIVER OF MARSHALLING RIGHTS.** Trustor waives all rights to have all or part of the Property and Collateral described in this Security Instrument and/or the Other Security Instrument marshalled upon any foreclosure of this Security Instrument or the Other Security Instrument. Lender shall have the right to sell, and any court in which foreclosure proceedings may be brought shall have the right to order a sale of the Property and Collateral described in either or both of said security instruments as a whole or in separate parcels, in any order that Lender may designate. Trustor makes this waiver for itself, for all persons and entities claiming through or under Trustor and for persons and entities who may acquire a lien or security interest on all or any part of the Property and Collateral described in either of said security instruments, or on any interest therein.
6. **WARRANTIES AND REPRESENTATIONS.** Trustor further warrants that Trustor has no legal or equitable claim against any trustor named in the Other Security Instrument which would be prior to the lien of the Other Security Instrument, or which would entitle Trustor to a judgment entitling Trustor to an equitable lien on all or any portion of that property prior in lien to the Other Security Instrument.
7. **NON-IMPAIRMENT.** Lender intends that, except as supplemented and/or modified by this Security Instrument, all of the terms, covenants and conditions of the Other Security Instrument and the other loan documents executed in connection therewith shall remain in full force and effect.
8. **LIEN OF SECURITY INSTRUMENT AND OTHER SECURITY INSTRUMENT.** Trustor and Lender acknowledge and agree that it is the intent of the parties hereto that this Security Instrument shall constitute a lien or charge upon only that property described herein as the "Property"; and the Other Security Instrument shall constitute a lien or charge upon only that property described therein as the "Property".

