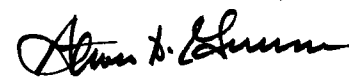


Michael F. Lynch
Nevada Bar No. 8555
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Telephone: 702-949-8200
Facsimile: 702-949-8398
mlynch@lrlaw.com

Attorney for Plaintiff

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. Bank National Association as Trustee For
The Registered Holders of ML-CFC Commercial
Mortgage Trust 2007-7 Commercial Mortgage
Pass-Through Certificates Series 2007-7, by and
through Midland Loan Services, Inc., as its
Special Servicer,

Plaintiff,

vs.

Palmilla Development Co., Inc., a Nevada
corporation; Hagai Rapaport, an individual; and
Does I to X; and Roe Corporations X to XX,

Defendants.

Case No.: 09-A-595321-C
Dept No.: 20

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND REQUEST FOR DEFICIENCY HEARING PURSUANT TO NRS 40.457

Date of Hearing (see below)

Time of Hearing (see below)

Plaintiff U.S. Bank National Association as Trustee for the Registered Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through Certificates Series 2007-7, by and through Midland Loan Services, Inc., as its Special Servicer ("Lender" or "Plaintiff") hereby moves this Court for an order granting summary judgment for Plaintiff on the issue of liability for the deficiency and breach of guaranty claims in the Second Amended Complaint and an order setting a deficiency hearing pursuant to NRS 40.457 and a prove up hearing for damages against Palmilla Development Co., Inc. ("Borrower") and against Defendant Hagai Rapaport ("Guarantor") on his guaranty.

This Motion is made and based upon all the pleadings and papers on file and the Memorandum of Points and Authorities.

1 DATED April 23, 2012.

2 LEWIS AND ROCA LLP

3 

4 Michael F. Lynch
5 Nevada Bar No. 8555
6 mlynch@lrlaw.com
7 3993 Howard Hughes Parkway
8 Suite 600
9 Las Vegas, Nevada 89169
10 (702) 949-8200
11 (702) 216-6191 (fax)

12 *Attorneys for Plaintiff*

13 **NOTICE OF MOTION**

14 PLEASE TAKE NOTICE that the undersigned will bring the foregoing MOTION FOR
15 SUMMARY JUDGMENT AND REQUEST FOR DEFICIENCY HEARING PURSUANT TO NRS 40.457 on for
16 hearing before the court on the 30 day of May, 2012, at the hour of
17 9 AM a.m. or as soon thereafter as counsel can be heard.

18 DATED April 23, 2012.

19 LEWIS AND ROCA LLP

20 

21 Michael F. Lynch
22 Nevada Bar No. 8555
23 mlynch@lrlaw.com
24 3993 Howard Hughes Parkway
25 Suite 600
26 Las Vegas, Nevada 89169
27 (702) 949-8200
28 (702) 216-6191 (fax)

Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF UNDISPUTED FACTS

1. Borrower borrowed \$20,150,000.00 with interest from Artesia Mortgage Capital Corporation, a Delaware corporation ("Original Lender") on or about March 28, 2007 (the "Loan").

2. The Loan is evidenced by, among other things, that certain Fixed Rate Note dated March 28, 2007, bearing an authorized signature on behalf of the Borrower (the "Promissory Note"). A true and correct copy of the Promissory Note is attached hereto as **Exhibit 1**.

3. The Loan was secured by that certain Commercial Deed of Trust, Security Agreement, Fixture Filing Financing Statement and Assignment of Leases, Rents, Income and Profits (as same may have been amended) recorded in the Clark County Recorders' Office as Document No. 20070330-0002946 ("Deed of Trust"). *See* Deed of Trust, a true and correct copy of which is attached and incorporated by this reference as **Exhibit "2"**.

4. The Loan was further secured by that certain Assignment of Leases, Rents, Income and Profits (as same may have been amended) recorded in the Clark County Recorders' Office as Document No. 20070330-0002947 ("Assignment of Rents"). *See* Assignment of Rents, a true and correct copy of which is attached and incorporated by this reference as **Exhibit "3"**.

5. Original Lender assigned all of its rights and interests in and to the Deed of Trust and the Assignment of Rents to LaSalle Bank National Association as Trustee For The Registered Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through Certificates Series 2007-7 pursuant to that certain Assignment of (a) Commercial Deed of Trust, Security Agreement, Fixture Filing Financing Statement and (b) Assignment Of Leases, Rents, Income and Profits And Assignment of Assignment of Leases, Rents, Income and Profits recorded in the Clark County Recorders' Office as Document No. 20080103-0000543 (the "Assignment of Deed of Trust"). *See* Assignment of Deed of Trust, a true and correct copy of which is attached and incorporated by this reference as **Exhibit "4"**.

6. LaSalle Bank resigned its position as trustee on or about June 30, 2008, and Wells Fargo Bank, N.A., was appointed as successor trustee. A true and correct copy of the Resignation

1 of Trustee and Notice of Appointment of Successor Trustee are collectively attached hereto and
2 incorporated herein by this reference as **Exhibit "5"**.

3 7. Wells Fargo Bank, N.A., then resigned its position as trustee on or about December
4 30, 2008, and U.S. Bank National Association was appointed as successor trustee. A true and
5 correct copy of the Resignation of Trustee and Notice of Appointment of Successor Trustee are
6 collectively attached hereto and incorporated herein by this reference as **Exhibit "6"**.

7 8. Pursuant to the Assignment of Deed of Trust, Plaintiff holds all beneficial interest
8 under the Deed of Trust and the Assignment of Rents, and is thereby authorized and empowered to
9 bring this action.

10 9. On Plaintiff's Application, this Court appointed a Receiver in this action on
11 September 3, 2009, to take possession, custody, and control of the real property secured by the
12 Deed of Trust (the "Property"), as said order was amended on May 19, 2010 (the "Order
13 Appointing Receiver"). A true and correct copy of the Order Appointing Receiver is attached
14 hereto and incorporated herein by this reference as **Exhibit "7"**.

15 10. Upon the unopposed Motion to Approve Sale, the proposed sale of the Property for
16 \$9,500,000.00 was approved, and the Court entered the following findings:

- 17 a. The Lender has provided sufficient notice of the proposed sale and PSA to all
18 necessary parties to this action;
- 19 b. The PSA is hereby approved as a full and final disposition of the Property;
- 20 c. The purchase price contained within the PSA is in the range of fair market value for
21 the Property, is commercially reasonable, and is an arms' length transaction; and
- 22 d. The Receiver is hereby authorized to sell and to fully convey all of the interest of
23 Palmilla Development Co., Inc., a Nevada corporation ("Borrower"), in the
24 Property, to Buyer, and is hereby authorized to execute and deliver all documents,
25 including without limitation a deed to convey title to the Property of Borrower, in
26 order to consummate the sale and fully and finally convey ownership of the
27 Property in its entirety.

28 See Order Granting Motion to Approve Sale of Receivership Property, on file herein and attached

1 for ease of reference as **Exhibit "8"**.

2 11. The amount realized from the receiver's sale is substantially less than the amount
3 owing under the Loan, leaving a deficiency in an amount to be proven.

4 12. The Guaranty provides:

5 (b) Guarantor shall be and remain personally liable without exculpation or limitation of
6 liability whatsoever for the entire amount of the indebtedness evidenced by the Note
7 (including all principal, interest, and other charges) and all other sums due or to become
8 due under the other Loan Documents, whether at maturity or by acceleration or otherwise,
9 in the following instances:

10 ***

11 (iv) the Property or any part thereof becomes an asset in: (1) a voluntary bankruptcy or
12 insolvency proceeding commenced by Borrower; or (2) an involuntary bankruptcy or
13 insolvency proceeding in which: (A) such proceeding was commenced by any entity
controlling, controlled by or under common control with Borrower (individually or
collectively, "Affiliate"), including but not limited to any creditor or claimant acting in
concert with Borrower or any Affiliate; or (B) any Affiliate objects to a motion by Lender
for relief from any stay or injunction from the foreclosure of the Security Instrument or any
other remedial action permitted under the Note, Security Instrument or other Loan
Documents.

14 See Limited Recourse Obligations Guarantee, a true and correct copy of which is attached and
15 incorporated by this reference as **Exhibit "9"**.

16 13. The above-referenced instance was triggered, making the guaranty a full recourse
17 guaranty, when Borrower filed its involuntary bankruptcy petition and thereby made the Property
18 an asset of Borrower's bankruptcy filing. See Schedules filed in Borrower's bankruptcy case
19 1:09-bk-11504-MT, a true and correct excerpt of which is attached and incorporated by this
20 reference as **Exhibit "10"**.

21 14. No discharge was granted, however, because Borrower's bankruptcy was later
22 dismissed. See Notice of Dismissal entered in Borrower's bankruptcy case 1:09-bk-11504-MT, a
23 true and correct excerpt of which is attached and incorporated by this reference as **Exhibit "11"**.

24 15. Borrower and Guarantor are equally and unconditionally liable for the full amount
25 of Borrower's indebtedness.
26
27
28

II. LEGAL ARGUMENT

A. Summary Judgment - Legal Standard¹

There can be no genuine issue of material fact to dispute that:

- (a) That Borrower failed to pay the due and owing under the Loan Documents, and is thereby in breach of the same.
- (b) That Guarantor's guaranty became full recourse when Borrower filed bankruptcy.
- (c) That Guarantor failed to cure Borrower's defaults, and is thereby in breach of the Guaranty.
- (d) That the proceeds realized from the sale of the Property is less than the amount owing by Borrower and Guarantor under the Loan Documents.
- (e) That Plaintiff is entitled to judgment finding liability for the deficiency against both Borrower and Rapaport, subject to proof of the amount of the deficiency.

B. Deficiency Judgments

The law applicable to this dispute, which is the law prior to the enactment of AB 273, provides that a deficiency award for this loan secured by real property under NRS 40.459 is determined as follows:

After the hearing, the court shall award a money judgment against the debtor, guarantor or surety who is personally liable for the debt. The court shall not render judgment for more than:

1. The amount by which the amount of the indebtedness which was secured exceeds the fair market value of the property sold at the time of the sale, with interest from the date of the sale; or

2. The amount which is the difference between the amount for which the property was actually sold and the amount of the indebtedness which was secured, with interest from the date of sale,

→ whichever is the lesser amount.

¹ NRCP 56(c) provides that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A genuine issue of material fact is one where the evidence is such that a rational trier of fact could return a verdict for the non-moving party. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026, 1031 (2005). To avoid summary judgment, a nonmoving party must provide specific facts which demonstrate the existence of a genuine issue for trial. *Id.*

1 AB 273 added a third factor,² but these changes became effective on June 20, 2011, years
2 after the transaction at bar, and are inapplicable to the case at bar.

3 Despite this, it is expected that Borrower/Guarantor will argue that AB 273 applies to this
4 loan. Such arguments must fail because as the transaction at issue occurred well before June 20,
5 2011, the changes implemented by AB 273 are not retroactive, and therefore do not apply to this
6 action.

7 **C. Nevada Statutes are Presumed to Operate Prospectively.**

8 "In Nevada, as in other jurisdictions, statutes operate prospectively, unless the Legislature
9 clearly manifests an intent to apply the statute retroactively, or 'it clearly, strongly, and
10 imperatively appears from the act itself that the Legislature's intent cannot be implemented in any
11 other fashion [Further, w]hen the Legislature intends retroactive application, it is capable of
12 stating so clearly." *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't.*, 124 Nev.
13 138, 154-55, 179 P.3d 542, 553 (2008) (citing *In re Estate of Thomas*, 116 Nev. 492, 495, 998
14 P.2d 560, 562 (2000)). "In the absence of clear legislative intent to make a statute retroactive, it
15 will be interpreted to have only a prospective effect." *See Nev. Power Co. v. Metro. Dev. Co.*, 104
16 Nev. 684, 686, 765 P.2d 1162, 1163 (1988).

17 "Generally, as recognized by the U.S. Supreme Court, courts must take a 'commonsense,
18 functional' approach in determining if a new statute operates retroactively because it imposes new
19 legal consequences on events completed before its enactment ... In deciding whether a statute has
20 retroactive application, courts are guided by fundamental notions of fair notice, reasonable
21 reliance, and settled expectations.'" *Pub. Employees'*, 124 Nev. at 155, 179 P.3d at 553-54
22 (citations omitted).

23
24
25
26 ² AB 273 added third section, which provides "(c) If the person seeking the judgment acquired the
27 right to obtain the judgment from a person who previously held that right, the amount by which
28 the amount of the consideration paid for that right exceeds the fair market value of the property
sold at the time of sale or the amount for which the property was actually sold, whichever is
greater, with interest from the date of sale and reasonable costs..."

1 **D. The Legislative History of AB 273 Provides it is not Meant to Apply**
2 **Retroactively.**

3 If the Legislature intended AB 273 to apply retroactively, it would have expressly and
4 clearly stated that in either the statute or the assembly bill. *See id.* at 154 (finding that “[i]n
5 Nevada, as in other jurisdictions, statutes operate prospectively, unless the Legislature clearly
6 manifests an intent to apply the statute retroactively, or “it clearly, strongly, and imperatively
7 appears from the act itself” that the Legislature's intent cannot be implemented in any other
8 fashion”).

9 However, there is no indication in this assembly bill that the Nevada Legislature intended
10 it to apply retroactively. Instead, Section 7 of AB 273 simply states that the amendments to NRS
11 40.459 become "effective upon passage and approval." This does not rise to the level of a clear,
12 strong, and imperative directive from the Legislature

13 Further, on multiple occasions, Assemblyman Conklin, and others, addressed the
14 retroactivity of this assembly bill throughout the passage of said bill. For example, on March 23,
15 2011, the issue was raised and resolved as follows:

16 Assemblyman Serberblom:

17 Is this bill retroactive?

18 Assemblyman Conklin:

19 **No, it is not. You would be reaching back into contracts that**
20 **were made under certain circumstances.** If that were done, who
21 would ever want to sign a contract or do business in a state that
22 would nullify contracts? Our laws should have been better, but we
23 have also never been in the situation we are in today. We never
24 envisioned a bubble so massive that literally 20 percent of the homes
25 in the state would be delinquent at one time, that 5 out of every 100
26 people would be foreclosed, and 80 percent of the homeowners in
27 Las Vegas would owe more than their homes are worth. We did not
28 craft our laws in anticipation of this scenario, and we should not. **To**
 retroactively pass laws would set a remarkably dangerous
 precedent for individuals and businesses that enter into
 contracts because you win wonder how it can be enforced or
 how it can change.

26 Assembly Committee on Commerce and Labor Minutes from March 23, 2011, at 415 (emphasis
27 added), attached hereto as **Exhibit "12"**.

28 Additionally, Bill Uffelman, President and CEO of the Nevada Bankers Association noted
that:

1 This bill amends a law passed last session. **Because it applies the**
2 **same principles and is not retroactive**, the Nevada Bankers
3 Association supports the initial piece of the bill. I have talked to
4 Assemblyman Conklin about his amendment on the commercial side
and will reserve judgment on it.

5 *Id.* at 419 (emphasis added).

6 Thereafter, on March 28, 2011, Chairman Atkinson and Assemblyman Conklin discussed
7 the retroactivity of AB 273 as follows:

8 **Chair Atkinson:**

9 So there is no retroactivity?

10 **Assemblyman Conklin:**

11 **There is no retroactivity in this bill. It is simply all future action.**

12 We could debate this, but the retroactivity issue is a matter of
13 contract. If Ms. Bustamante Adams and I enter into a contract, we
do so under the environment of laws that we have at that time.
Those laws are part of the contract because they dictate how we
draft the contract. Business does not want to operate in an
14 environment in which laws are changed to favor one or the other
party after they enter into a contract. While on one hand it may be
15 nice to retroactivate a law, the precedent it sets is enormous and
probably highly detrimental to the business environment of Nevada.

16 **Chair Atkinson:**

17 **I agree with that assessment. I wanted to ensure we had that on**
18 **the record because I know it came up. I think it would be a**
nightmare to go backwards. I appreciate that and your work.

19 Assembly Committee on Commerce and Labor Minutes from March 28, 2011, at 488-89
20 (emphasis added), attached hereto as **Exhibit "13"**.

21 As such, the legislative history of AB 273 specifically noted multiple times that this
22 assembly bill was not meant to apply retroactively.

23 **E. AB 273 Cannot be Retroactive Because Retroactive Application**
24 **Would Violate the Contracts Clause of the U.S. Constitution.**

25 "[T]he Contracts Clause of the United States Constitution ... provides that 'no State shall ...
26 pass any ... Law impairing the Obligation of Contracts.'" *Matsuda v. City and County of Honolulu*,
27 512 F.3d 1148, 1152 (9th Cir. 2008) (citing U.S. Const. art. I, §10); *see also Robertson v.*
28 *Kulongoski*, 466 F.3d 1114, 1117 (9th Cir. 2006). As such, the Contracts Clause provides that
states may not pass any law that substantially alters the rights and obligations previously created

1 by private parties to contracts. *See Afatsuda*, 512 F.3d at 1152; *see also In re Seltzer*, 104 F.3d
2 234,235-36 (9th Cir. 1996). Any party seeking relief under the Contracts Clause must demonstrate
3 three things: (1) there has been a substantial impairment of a contractual relationship; (2) that this
4 impairment does not have a significant and legitimate public purpose; and (3) that the impairment
5 is not reasonable and necessary to fulfill a public purpose. *See RUI One Corp. v. City of Berkeley*,
6 371 F.3d 1137, 1147 (9th Cir. 2004); *see also Matsuda*, 512 F.3d at 1152. In the case at hand, all
7 three elements are evident.

8 The first element, and "[t]he threshold inquiry-whether the state law has operated as a
9 substantial impairment of a contractual relationship - itself has 'three components: whether there is
10 a contractual relationship, whether a change in law impairs that contractual relationship, and
11 whether the impairment is substantial." *RUI*, 371 F.3d at 1147 (*citing Gen. Motors Cop. v.*
12 *Romein*, 503 U.S. 181, 186 (1992)).

13 Here, if NRS Chapter 40 applies to situation in which Defendants are allowed to challenge
14 the rights of the current holder and owner of the Note from the original creditor, this would
15 substantially impair the contractual relationship between the Parties hereto. First, there is a
16 contractual relationship between Plaintiff and Defendant in this matter in which Plaintiff, through
17 assignments, purchased the Loan. Second, under the law in existence at the time of the transaction,
18 Plaintiff could have recovered the full value of the Loan through the Nevada deficiency process
19 (through the Nevada statutes). However, NRS 40 changes some aspects of the deficiency process
20 and limits the amount that one can recover under a deficiency judgment. As such, this change in
21 law would impair the contractual relationship between Plaintiff and Defendants that was entered
22 into by an arms length negotiation for the Loan at issue; with the passage of AB 273, this
23 negotiation would have played out differently since the contract was not entered into upon
24 anticipation of the Legislature's change regarding deficiency judgments. Third, Plaintiff's rights, if
25 AB 273 applied retroactively, would be substantially impaired because the value of the Loan
26 would be severely diminished by this statute. In other words, Plaintiffs right to recover on the
27 deficiency amount, that the two parties contracted for at arms length, would be substantially
28

1 impaired. As such, the first element is met, because the retroactive application of AB 273 would
2 constitute a substantial impairment to contract between Plaintiff and Defendant.

3 The retroactive application of AB 273 also fails because Nevada cannot demonstrate that
4 the impairment to the contractual rights of parties, such as the Parties to this action, has a
5 significant and legitimate public purpose. *See Matsuda*, 512 F.3d at 1152; *see also RUI*, 371 F.3d
6 at 1147. The subsequent impairment of creditors from collecting on their rights under contracts
7 entered into before this statute was enacted is not a significant and legitimate purpose.

8 In fact, as stated by Assemblyman Sergerbloom "[i]f that were done, who would ever want
9 to sign a contract or do business in a state that would nullify contracts?"³ and Chairman Atkinson
10 stated "I think it would be a nightmare to go backwards."⁴

11 If AB 273 applied to these Loan Documents, Borrower and Guarantors would be able to
12 escape many millions of dollars in debt, escape their obligations resulting from contracts
13 negotiated at arms' length, simply because the Legislature decided to enact a new statute *after* the
14 contracts were entered into. The Nevada Legislature had no intention of limiting the rights of
15 parties who entered into contracts before AB 273 was enacted. As such, there is no significant and
16 legitimate public purpose that could justify the substantial impairment of Plaintiff's rights.

17 Third, if both the state law substantially impairs existing contractual rights and serves a
18 legitimate public purpose, then a court must determine whether the impairment is both reasonable
19 and necessary to fulfill a public purpose. *See RUI*, 371 F.3d at 1147; *see also Matsuda*, 512 F.3d at
20 1152. In other words, the third step is to determine whether "the rights and responsibilities of
21 contracting parties is based upon reasonable conditions and is of a character appropriate to the
22 public purpose justifying the legislation's adoption." *Energy Reserves Group, Inc. v. Kan. Power*
23 *and Light Co.*, 459 U.S. 400, 412 (1983) (citations omitted). Even though the "courts properly
24 defer to legislative judgment as to the necessity and reasonableness of a particular measure",
25 applying AB 273 retroactively would be unreasonable given the purposes behind its passing.

26 ³ Assembly Committee on Commerce and Labor Minutes from March 23, 2011, at 415, Exhibit
27 12.

28 ⁴ Assembly Committee on Commerce and Labor Minutes from March 28, 2011 at 489 (emphasis
added), Exhibit 13.

1 *Energy*, 459 U.S. at 413 (citations omitted). AB 273 applies where a bank voluntarily sells a right
2 to a deficiency judgment, and when this deficiency judgment is against a homeowner, and where
3 the bank sells said right to a collection agency. This not the case here at all. Applying NRS
4 40.459(1)(c) to all transfers of secured loans from one bank or institution to another is overbroad
5 and not tailored to a legitimate public purpose. Moreover, not only is the impairment not
6 reasonable to fulfill a public purpose, it actually detracts from a fundamental public purpose of
7 upholding the rights of parties under contracts.

8 As is evident above, if the changes in AB 273 were applied retroactively: (1) substantially
9 impairs a contract relationship; (2) this impairment does not have a significant and legitimate
10 public purpose; and (3) this impairment is not reasonable and necessary to fulfill a public purpose.
11 Thus, retroactive application of the changes in AB 273 would violate the Contracts Clause of the
12 United States Constitution.

13 **F. Judge Gonzales Found that AB 273 Applies only to Contracts Entered into**
14 **After June 20, 2011.**

15 While not binding precedent on this Court, Judge Gonzales recently found that the changes
16 to NRS 40.459 as set forth in AB 273 only apply to contracts entered into after June 10, 2011. *See*
17 *Order Denying Defendant's Motion For Partial Summary Judgment And Granting Plaintiff's*
18 *Countermotion For Partial Summary Judgment* entered in A-11-644055-B, a true and correct copy
19 of which is attached hereto as **Exhibit "14"**.

20 Here, the contracts at issue were entered into in 2007, more than 4 years prior to the
21 changes to NRS 40.

22 **G. Under Chapter 40, Plaintiff is entitled to Summary Judgment on Liability for**
23 **the Deficiency Against Borrower and Guarantor.**

24 NRS 40.455 provides that the court, after hearing, "shall award a deficiency judgment ... if
25 it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is
26 a deficiency of the proceeds of the sale and a balance remaining due to the judgment creditor or
27 the beneficiary of the deed of trust, respectively." The hearing is governed by NRS 40.457. It
28 requires the court to "hold a hearing and shall take evidence ... concerning the fair market value of
the property sold as of the date of foreclosure sale or trustee's sale."

000697

List of Exhibits

1. Promissory Note
2. Deed of Trust
3. Assignment of Rents
4. Assignment of Deed of Trust
5. LaSalle's Resignation of Trustee and Notice of Appointment of Successor Trustee
6. Wells Fargo's Resignation of Trustee and Notice of Appointment of Successor Trustee
7. Order Appointing Receiver
8. Order Granting Motion to Approve Sale of Receivership Property
9. Limited Recourse Obligations Guarantee
10. Schedules filed in Borrower's bankruptcy case 1:09-bk-11504-MT
11. Notice of Dismissal entered in Borrower's bankruptcy case 1:09-bk-11504-MT
12. Assembly Committee on Commerce and Labor Minutes from March 23, 2011
13. Assembly Committee on Commerce and Labor Minutes from March 28, 2011
14. Judge Gonzales' Order dated October 24, 2011, entered in *CML-NV Sandpointe, LLC vs. Sandpointe Apartments, LLC*, A-11-644055-B

RECEIPT OF COPY

Receipt of Plaintiff's Motion for Partial Summary Judgment and Request for Deficiency
Hearing Pursuant to NRS 40.457 is hereby acknowledged on April 24, 2012, by:

DEANER, DEANER, SCANN, MALAN & LARSEN

By: Janyne Larsen - Janyne Larsen
An employee of Deaner Deaner Scann Malan & Larsen

Exhibit 1

Exhibit 1

LOAN NO.: 010-00001885

FIXED RATE NOTE
[Defeasance]

\$20,150,000.00

March 28, 2007

1. BORROWER'S PROMISE TO PAY.

FOR VALUE RECEIVED, the undersigned, PALMILLA DEVELOPMENT CO., INC., a(n) Nevada corporation, having an office at 235 West Brooks Avenue, 2nd Floor, North Las Vegas, Nevada 89030 ("Borrower"), hereby unconditionally promises to pay to the order of ARTESIA MORTGAGE CAPITAL CORPORATION, a Delaware corporation (together with its successors and assigns, "Lender"), the principal sum of Twenty Million One Hundred and Fifty Thousand and 00/100 Dollars (\$20,150,000.00), in lawful money of the United States of America with interest thereon to be computed from the date of disbursement under this Note at the Applicable Interest Rate (defined below), and to be paid in installments as provided herein. Any initially capitalized terms which are not specifically defined in this Note shall have the same meanings given to them in the Security Instrument (defined below).

2. INTEREST.

Interest on the principal sum of this Note shall be calculated on the basis of a 360-day year and will be payable on the basis of the actual number of days elapsed. Borrower shall pay interest at the rate of Five and Seventy-Five Hundredths percent (5.75%) per annum (the "Applicable Interest Rate"), if Borrower fails to pay any amount when due under this Note, in addition to any other rights possessed by the Lender, any accrued but unpaid interest may be added to the unpaid principal and accrue interest at the Default Rate (defined below). The first interest accrual period under this Note shall commence on and include the date that principal is advanced under this Note and shall end on and include the next tenth (10th) day of a calendar month, unless principal is advanced on the tenth (10th) day of a calendar month, in which case the first interest accrual period shall consist of only such tenth (10th) day. Each interest accrual period thereafter shall commence on the eleventh (11th) day of each calendar month during the term of this Note and shall end on and include the tenth (10th) day of the next occurring calendar month.

3. PAYMENTS.

(a) **Time and Amounts of Payments.** Borrower shall pay principal and interest by making payments as follows:

(i) Accrued interest only at the Applicable Interest Rate shall be due and payable (aa) on the date that principal is advanced under this Note for the period from the date of disbursement hereunder through and including the tenth (10th) day of the current calendar month (if the date of disbursement hereunder is on or after the first (1st) day of a calendar month and prior to the eleventh (11th) day of a calendar month) or the tenth (10th) day of the next succeeding calendar month (if the date of disbursement hereunder is on or after the eleventh (11th) day of the current calendar month), and (bb) on May 11, 2007, and on the eleventh (11th) day of each calendar month thereafter up to and including April 11, 2008;

(ii) A constant payment in the amount of U.S. \$111,530.40 (the "Constant Payment"), on May 11, 2008, and on the eleventh (11th) day of each calendar month thereafter up to and including March 11, 2018; each of such payments to be applied to the payment of interest computed at the Applicable Interest Rate, and the balance applied toward the reduction of the principal sum; and

(iii) A payment of the entire unpaid principal balance of this Note and all accrued and unpaid interest thereon due and payable on April 11, 2018 (the "Maturity Date").

(b) **Place of Payments.** The payments referred to in Section 3(a) (i) and (ii) above are hereinafter referred to individually as a "Monthly Payment", and collectively as "Monthly Payments". Borrower shall make its Monthly Payments and any other payments due under this Note, including, without limitation, the entire unpaid principal balance of this Note plus all accrued but unpaid interest thereon due and payable on the Maturity Date, at Structured Products Servicing, Wachovia Wholesale Lockbox, P.O. Box 80263, Charlotte, North Carolina 28280-0263 or at a different place (including, without limitation, to Lender's Representative) if required by the Lender. As used in this Note, the term "Lender's Representative" shall mean Lender or Lender's loan servicer or agent, in each case as designated by Lender from time to time.

(c) **Application of Payments.** In the absence of a specific determination by Lender to the contrary, all payments paid by Borrower to Lender in connection with the obligations of Borrower under this Note and under the other Loan Documents shall be applied in the following order of priority: (i) to amounts, other than principal and interest, due to Lender pursuant to this Note or the other Loan Documents; (ii) to the portion of accrued but unpaid interest accruing at the Applicable Interest Rate on this Note; and (iii) to the unpaid principal balance of this Note. Borrower irrevocably waives the right to direct the application of any and all payments at any time hereafter received by Lender from or on behalf of Borrower, and Borrower irrevocably agrees that Lender shall have the continuing exclusive right to apply any and all such payments against the then due and owing obligations of Borrower in such order of priority as Lender may deem advisable.

4. PREPAYMENT; DEFEASANCE.

(a) Subject to the provisions of Section 4(h) below, Borrower shall not have the right or privilege to prepay all or any portion of the unpaid principal balance of this Note, except in connection with the application of Net Proceeds by Lender pursuant to Section 1.09 of the Security Instrument (which application shall not be subject to any Prepayment Charge (defined below)).

(b) On or after the earlier of (i) three (3) years from the due date of the first Monthly Payment or (ii) the date which is two (2) years and one (1) day after the "startup day" of any "real estate mortgage investment conduit" or "REMIC" (as such terms are defined in Sections 860G(a)(9) and 860D, respectively, of the United States Internal Revenue Code, as amended, and any related United States Treasury Department regulations) which may acquire the Loan, as the case may be (the "Lockout Expiration Date"), and provided that no Event of Default exists, Borrower may obtain a release (the "Release") of the Property from the lien of the Security Instrument and the other Loan Documents provided that the following conditions have been satisfied (a "Defeasance"):

- (1) Borrower shall have provided Lender with not less than thirty (30) days and not more than sixty (60) days prior written notice (the "Defeasance Notice") specifying the Monthly Payment date (the "Release Date") on which the Defeasance Deposit (defined below) is to be paid or the Government Securities (defined below) are to be delivered, in each case in the manner hereinafter provided;
- (2) Borrower shall have paid to Lender all interest accrued and unpaid on the principal balance of this Note to and including the Release Date;
- (3) Borrower shall have paid to Lender all other sums due and payable under this Note, the Security Instrument and the other Loan Documents to and including the Release Date, including, without limitation, any Monthly Payment (which may be due and payable on the Release Date;

- (4) Borrower shall have paid to Lender's Representative a \$5,000.00 non-refundable processing fee (the "Defeasance Processing Fee"), which must be paid at the same time the Defeasance Notice is provided to Lender;
- (5) Borrower shall have either paid to Lender's Representative the Defeasance Deposit or delivered to Lender's Representative the Government Securities, whichever Lender requires at Lender's option;
- (6) All payments by Borrower to Lender's Representative under this Section 4 shall have been made in immediately available funds, except for the Defeasance Processing Fee, which may be paid by check or draft;
- (7) The proposed Defeasance and Release shall not cause the Loan to lose its status as a "qualified mortgage" within the meaning of Sections 860D and 860G(a)(3) of the United States Internal Revenue Code, as amended, and any related United States Treasury Department regulations, including without limitation United States Treasury Department Regulation 1.860(G)-2(a);
- (8) The Successor Borrower (defined below) shall have been established and shall have been approved by Lender's Representative;
- (9) Borrower shall have delivered to Lender the following items at least fifteen (15) days prior to the Release Date:
 - (A) the Defeasance Security Agreement (defined below);
 - (B) a release of the Property from the lien of the Security Instrument (for execution by Lender) in form and substance appropriate for the jurisdiction in which the Property is located and satisfactory to Lender's Representative;
 - (C) a certificate of Borrower, in form and substance satisfactory to Lender's Representative, certifying that all of the conditions and requirements set forth in this Section 4 have been satisfied;
 - (D) a certificate, in form and substance satisfactory to Lender's Representative, from an independent certified public accountant approved by Lender's Representative, certifying that the Government Securities will generate monthly amounts and cash flow that are sufficient, without reinvestment, to timely pay all Scheduled Defeasance Payments (defined below);
 - (E) the Defeasance Opinion (defined below);
 - (F) written confirmation from the applicable Rating Agency(ies) to the effect that such Release and substitution of Defeasance Collateral (defined below) will not result in a downgrade, withdrawal or qualification of any rating in effect immediately prior to Defeasance for any Securities;
 - (G) If Lender's Representative requires Borrower to establish the Successor Borrower pursuant to Section 4(f)(vii) below, evidence satisfactory to Lender's Representative of the establishment of Successor Borrower, including without limitation, the Successor Borrower's original organizational documents;

(H) the Transfer and Assignment Agreement (defined below); and

(I) such other certificates, documents or instruments as Lender's Representative may reasonably request.

(c) Borrower shall have paid to Lender's Representative all costs and expenses (including, without limitation, Rating Agency(ies)', consultants', accountants' and attorneys' fees, costs and expenses) incurred by Lender's Representative in connection with the matters referred to in this Section 4, including, without limitation, all costs and expenses incurred in connection with the review of the proposed Defeasance Collateral, the preparation of the Defeasance Security Agreement (and any related documentation) and the establishment and maintenance of the Successor Borrower, and any administrative expenses and applicable federal income taxes associated with or incurred by the Successor Borrower.

(d) The Defeasance Deposit (if required by Lender pursuant to Section 4(b)(5) above) shall be used by Lender's Representative to purchase the Government Securities. In connection therewith, Borrower hereby irrevocably appoints Lender's Representative as Borrower's agent and attorney-in-fact, which appointment is coupled with an interest, for the purpose of using the Defeasance Deposit to purchase or cause to be purchased the Government Securities. Borrower, pursuant to the Defeasance Security Agreement or other appropriate documents, shall authorize and direct that the payments received from the Government Securities be made directly to Lender's Representative and applied to satisfy the obligations of the Borrower under this Note, including without limitation, this Section 4. Borrower specifically agrees that all power granted to Lender under this Section 4(d) may be assigned by Lender to its successors or assigns as holder of this Note.

(e) Upon satisfaction of all the terms and conditions of Sections 4(b) and (c) above, the Property shall be released from the lien of the Security Instrument and the other Loan Documents and the Defeasance Collateral shall constitute the sole collateral which shall secure this Note. Lender will, at Borrower's sole expense, execute and deliver any agreements reasonably requested by Borrower to release the Property from the lien of the Security Instrument and the other Loan Documents. After payment of the Defeasance Deposit or delivery of the Government Securities pursuant to Section 4(b)(5) above, notwithstanding any statement to the contrary contained in this Note or in any of the other Loan Documents, this Note cannot be prepaid in whole or in part or be the subject of any further Defeasance.

(f) For the purposes of this Section 4, the following terms shall have the following meanings:

(i) The term "Defeasance Collateral" shall mean, individually or collectively, as the case may be, the Defeasance Deposit and the Government Securities and the proceeds thereof.

(ii) The term "Defeasance Deposit" shall mean an amount equal to the sum of: (1) the amount which will be sufficient to purchase the Government Securities necessary to meet the Scheduled Defeasance Payments (including, without limitation, Lender's Representative's estimate of administrative expenses and applicable federal income taxes associated with or to be incurred by the Successor Borrower during the remaining term of, and applicable to, the Loan); (2) any revenue, documentary stamp or intangible taxes or any other tax or charge due in connection with the transfer of this Note or otherwise required to accomplish the agreements of this Section 4; and (3) all fees, costs and expenses incurred or to be incurred by Lender in the purchase and holding of the Government Securities;

(iii) The term "Defeasance Opinion" shall mean an opinion of counsel in form and substance satisfactory to Lender's Representative, from counsel approved by Lender's Representative, stating, among other things, (A) that the Defeasance Collateral has been duly and validly assigned and delivered to Lender's Representative and that Lender has a legal, valid, perfected, first priority lien on and security interest in the Defeasance Collateral, and (B) that if the

holder of this Note shall at the time of the Release be a REMIC, (1) the Defeasance Collateral has been validly assigned to the REMIC trust which holds this Note (the "REMIC Trust"), (2) the Defeasance has been effected in accordance with the requirements of United States Treasury Department Regulation 1.860(G)-2(a)(8), as such regulation may be amended or substituted from time to time, and will not be treated as an exchange pursuant to Section 1001 of the United States Internal Revenue Code and (3) the tax qualification and status of the REMIC Trust as a REMIC will not be adversely affected or impaired as a result of the Defeasance;

(iv) The term "Defeasance Security Agreement" shall mean a security agreement, in form and substance satisfactory to Lender's Representative, together with such other instruments, agreements and representations and warranties as may be required of Borrower by Lender's Representative in order to perfect upon the delivery of the Defeasance Security Agreement a first priority lien on and security interest in the Defeasance Collateral in favor of Lender in conformity with all applicable state and federal laws governing the granting of such security interests, which Defeasance Security Agreement shall provide, among other things, that any excess received by Lender from the Defeasance Collateral over the amount payable by Borrower hereunder shall on the Release Date be refunded to Borrower and shall thereafter, promptly following each Monthly Payment date and the Maturity Date, be refunded to Successor Borrower;

(v) The term "Government Securities" shall mean U.S. Treasury Obligations (defined below) or Non-U.S. Treasury Obligations (defined below) which (1) are duly endorsed by the holder thereof as directed by Lender's Representative or are accompanied by a valid written instrument of transfer in form and substance satisfactory to Lender's Representative (including, without limitation, such instruments, agreements and representations and warranties as may be required by Lender's Representative or by the depository holding the Government Securities or the issuer thereof, as the case may be, to effectuate book-entry transfers and pledges through the book-entry facilities of such depository) in order to perfect upon the delivery of the Defeasance Security Agreement the first priority security interest therein in favor of Lender in conformity with all applicable state and federal laws governing the granting of such security interests and (2) which provide payments which are (A) payable on or prior to, but as close as possible to, all successive Monthly Payment dates after the Release Date, and prior to but as close as possible to the Maturity Date and (B) in amounts equal to or greater than the amounts necessary to meet the scheduled payments of principal and interest due under this Note on such dates plus the Lender's Representative's estimate of administrative expenses and applicable federal income taxes associated with or to be incurred by the Successor Borrower during the term of the Loan (the "Scheduled Defeasance Payments");

(vi) The term "Non-U.S. Treasury Obligations" shall mean non-callable, fixed-rate obligations, other than U.S. Treasury Obligations, that are "government securities" within the meaning of Section 2(a)(16) of the Investment Company Act of 1940, as amended;

(vii) The term "Successor Borrower" shall mean an entity established by either Borrower or Lender's Representative, whichever Lender requires at Lender's option, which satisfies Lender's Representative's requirements (including, without limitation single purpose entity bankruptcy remoteness criteria) and which has been approved by Lender's Representative;

(viii) The term "Transfer and Assignment Agreement" shall mean an agreement in form and substance satisfactory to Lender's Representative, together with such other instruments, agreements and representations and warranties as may be required of Borrower by Lender's Representative, pursuant to which, among other things: (A) Borrower shall transfer and assign all obligations, rights and duties under and to this Note together with the pledged Defeasance Collateral to the Successor Borrower; (B) Successor Borrower shall assume the obligations of Borrower under this Note and the Defeasance Security Agreement and Borrower

shall be relieved of its obligations thereunder, except that Borrower shall be required to perform its obligations pursuant to this Section 4; and (C) Borrower shall pay \$1,000 to the Successor Borrower as consideration for Successor Borrower assuming the Borrower's obligations under this Note and the Defeasance Security Agreement. Notwithstanding anything to the contrary in the Security Instrument, except as provided in this Section 4, no other transfer/assumption fee or processing fee (including, without limitation, the transfer fee and processing fee referred to in Section 1.15 of the Security Instrument) shall be payable upon a transfer of the Note in accordance with the terms and conditions of this paragraph; and

(ix) The term "U.S. Treasury Obligations" shall mean direct, non-callable, fixed-rate obligations of the United States of America.

(g) Notwithstanding the fact that prepayments are prohibited except as expressly set forth in this Section 4, if this Note is prepaid (other than a prepayment pursuant to Section 4(h) below or in connection with the application of Net Proceeds as referred to in Section 4(e) above), in full or in part, by operation of law, Borrower's default or otherwise, or following an Event of Default and acceleration of this Note, if a tender of payment of the amount necessary to satisfy the indebtedness evidenced by this Note and secured by the Security Instrument is made at any time prior to foreclosure sale, or during any redemption period after foreclosure, there shall be payable to Lender, at the same time, (i) accrued and unpaid interest on the portion of the principal balance of this Note being prepaid to and including the date of prepayment, (ii) unless prepayment is tendered on the eleventh (11th) day of a calendar month, an amount equal to the interest that would have accrued on the amount being prepaid from the date of prepayment to and including the tenth (10th) day of the current calendar month (if prepayment is tendered on or after the first (1st) day of a calendar month and prior to the eleventh (11th) day of a calendar month) or the tenth (10th) day of the next succeeding calendar month (if the prepayment is tendered after the eleventh (11th) day of a calendar month) (which amount shall constitute additional consideration for the prepayment), (iii) all other sums then due under this Note, the Security Instrument and the other Loan Documents, (iv) to the maximum extent permitted by law, a Prepayment Charge, and (v) an additional prepayment consideration equal to five percent (5%) of the outstanding principal balance of this Note.

"Prepayment Charge" shall mean an amount determined as of the date of any prepayment or acceleration of this Note, which will be the greater of (a) 1% of the principal amount prepaid, or (b) the amount obtained by subtracting (i) the sum of (x) the unpaid principal amount being prepaid, plus (y) the amount of interest thereon accrued to the date of such prepayment or acceleration, as the case may be, from (ii) the sum of the Current Values (defined below) of all amounts of principal and interest on this Note being prepaid or accelerated that would otherwise have become due on and after the date of such determination if this Note was not being prepaid or accelerated. The "Current Value" of any amount payable means such amount discounted (on a semiannual basis) to its present value on the date of determination at the Treasury Yield (defined below) per annum in accordance with the following formula:

$$\text{Current Value} = \frac{\text{Amount Payable}}{(1+d/2)^n}$$

where "d" is the Treasury Yield per annum expressed as a decimal and "n" is an exponent (which need not be an integer) equal to the number of semiannual periods and portions thereof (any such portion of a period to be determined by dividing the number of days in such portion of such period by the total number of days in such period, both computed on the basis of a 30-day month and a 360-day year) between the date of such determination and the due date of the amount payable. For such purpose, the due date of any amount of principal of this Note being partially prepaid means the date or dates as of which such amount is to be credited first against the Borrower's obligation to make the scheduled payment of principal on the Maturity Date, then, to the extent of the principal being prepaid, to each preceding scheduled required installment of principal pursuant to this Note. The "Treasury Yield" shall be determined by reference to the most recent Federal Reserve Statistical Release H.15(519) which has become publicly available at least two (2) business days prior to the date fixed for prepayment or the acceleration date (or, if such Statistical Release is no longer published, any publicly available source of

similar market data) and shall be the most recent weekly average yield on actively traded U.S. Treasury securities adjusted to a constant maturity equal to the then remaining Weighted Average Life to the Maturity (defined below) of this Note (the "Remaining Life"). If the Remaining Life is not equal to the constant maturity of a U.S. Treasury security for which a weekly average yield is given, the Treasury Yield shall be obtained by linear interpolation (calculated to the nearest one-twelfth (1/12) of a year) from the weekly average yields of (a) the actively traded U.S. Treasury security with the constant maturity closest to and greater than the Remaining Life of this Note, and (b) the actively traded U.S. Treasury security with the constant maturity closest to and less than the Remaining Life of this Note, except that if the Remaining Life is less than one (1) year, the weekly average yield on actively traded U.S. Treasury securities adjusted to a constant maturity of one (1) year shall be used. "Weighted Average Life to Maturity" means, as applied to this Note at any date, the number of years obtained by dividing (x) the then outstanding principal amount of this Note into (y) the total of the products obtained by multiplying (A) the amount of each then remaining required principal payment (including payment at the Maturity Date, in respect thereof, by (B) the number of years (calculated to the nearest one-twelfth (1/12)) which will elapse between such date and the date on which such payment is to be made.

Borrower shall pay the Prepayment Charge as provided above whether or not prepayment is voluntary or involuntary, including, without limitation, any prepayment due to the acceleration of the outstanding principal balance of this Note as a result of the occurrence of an Event of Default.

(h) Notwithstanding anything to the contrary herein, provided no Event of Default exists and so long as no Defeasance has occurred, from and after the due date of the Monthly Payment that is two (2) months prior to the Maturity Date, Borrower may prepay the unpaid principal balance of this Note in whole, but not in part, provided that the following conditions have been satisfied: (i) Borrower shall have provided Lender with not less than thirty (30) or more than sixty (60) days prior written notice (the "Prepayment Notice") specifying the Monthly Payment date on which prepayment is to be made (the "Prepayment Date"); (ii) Borrower shall have paid to Lender all accrued and unpaid interest on the outstanding principal balance of this Note to and including the Prepayment Date; (iii) unless prepayment is tendered on the eleventh (11th) day of a calendar month, an amount equal to the interest that would have accrued on the amount being prepaid from the date of prepayment to and including the tenth (10th) day of the current calendar month (if prepayment is tendered on or after the first (1st) day of a calendar month and prior to the eleventh (11th) day of a calendar month) or the tenth (10th) day of the next succeeding calendar month (if the prepayment is tendered after the eleventh (11th) day of a calendar month) (which amount shall constitute additional consideration for the prepayment); and (iv) Borrower shall have paid to Lender all other sums then due under this Note, the Security Instrument and the other Loan Documents.

5. BORROWER'S FAILURE TO PAY AS REQUIRED.

(a) **Late Charges for Overdue Payments.** If Lender has not received the full amount of any Monthly Payment by the date it is due, Borrower shall pay a late charge to Lender. The amount of such late charge will be four percent (4%) of such overdue payment which shall be calculated as of the date such payment was originally due. Borrower will pay such late charge promptly but only once on each late payment. Such late charge represents the reasonable estimate of Lender and Borrower of a fair average compensation for the loss that may be sustained by Lender due to the failure of Borrower to make timely Monthly Payments. Such late charge shall be paid without prejudice to the right of Lender to collect any other amounts provided to be paid upon an Event of Default, including without limitation interest at the Default Rate, or to declare a default hereunder, under the Security Instrument or under any of the other Loan Documents. Borrower recognizes (i) that its default in making, when due, any payment under this Note or under any of the other Loan Documents, or the occurrence of any other Event of Default, will result in (x) Lender incurring additional expenses in servicing and administering the Loan, (y) in loss to the Lender of the use of the overdue payment and (z) frustration to Lender in meeting its other financial and loan commitments, and (ii) that the damages caused thereby would be extremely difficult and impractical to ascertain. Borrower agrees (as) that an amount equal to such late charge plus the accrual

of interest at the Default Rate pursuant to Section 5 below is a reasonable estimate of the damage to Lender in the event of an overdue payment and (bb) that the accrual of interest at the Default Rate following any other Event of Default is a reasonable estimate of the damage to Lender in the event of such other Event of Default, regardless of whether there has been an acceleration of this Note.

(b) **Default and Acceleration; Default Rate.** If any payment required in this Note (including, without limitation, any Monthly Payment) or any other payment under any of the Loan Documents is not paid on or prior to the date when due after the expiration of any applicable notice and grace periods expressly provided in the Loan Documents, or on the happening of any other Event of Default, then the whole of the principal sum of this Note, (i) interest, default interest, Prepayment Charge, late charges and other sums, as provided in this Note, the Security Instrument or the other Loan Documents, (ii) all other monies agreed or provided to be paid by Borrower in this Note, the Security Instrument or the other Loan Documents, (iii) all sums advanced pursuant to the Security Instrument to protect and preserve the Property and the lien and the security interest created thereby, and (iv) all sums advanced and costs and expenses incurred by Lender in connection with the indebtedness evidenced by the Loan Documents or any part thereof, any renewal, extension, or change of or substitution thereof, or the acquisition or perfection of the security therefor, whether made or incurred at the request of Borrower or Lender, shall without notice become immediately due and payable at the option of Lender, together with all the interest that Borrower owes on such amounts at the Default Rate. The "Default Rate" is equal to the Applicable Interest Rate plus four percent (4%), and shall accrue from and after the date any such payment was originally due (without taking into account any applicable notice or grace periods). This provision shall not be deemed to excuse a default hereunder or an Event of Default under the Security Instrument and shall not be deemed a waiver of any other rights Lender may have, including the right to declare the entire unpaid principal balance and accrued interest immediately due and payable.

(c) **No Waiver by Lender.**

(i) Lender shall not be deemed to have waived any of its rights or remedies under this Note unless such waiver is expressed in writing by Lender, and no delay or omission by Lender in exercising, or failure by Lender on any one or more occasions to exercise, any of Lender's rights hereunder or under the Loan Documents, or at law or in equity, including, without limitation, Lender's right, after the occurrence of any Event of Default, to declare the entire indebtedness evidenced hereby immediately due and payable, shall be construed as a novation of this Note or shall operate as a waiver or prevent the subsequent exercise of any or all such rights.

(ii) Acceptance by Lender of any portion or all of any sum payable hereunder, whether before, on or after the due date of such payment shall not be a waiver of Lender's right either to require prompt payment when due of all other sums payable hereunder or to exercise any of Lender's rights, powers and remedies hereunder or under the Loan Documents. A waiver of any right in writing on one occasion shall not be construed as a waiver of Lender's rights to insist thereafter upon strict compliance with the terms hereof without previous notice of such intention being given to Borrower, and no exercise of any right by Lender shall constitute or be deemed to constitute an election of remedies by Lender precluding the subsequent exercise by Lender of any or all of the rights, powers and remedies available to it hereunder or under the Loan Documents, or at law or in equity. Borrower hereby expressly waives the benefit of any statute or rule of law or of equity now provided, or which may hereafter be provided, which would produce a result contrary to, or in conflict with, the foregoing.

(iii) Even if, at a time when an Event of Default has occurred, Lender does not accelerate the amounts due under this Note and the other Loan Documents and require Borrower to pay all such amounts immediately in full as described above, Lender shall still have the right to do so at a later time if such Event of Default is continuing, or upon the occurrence of another Event of Default.

(d) **Payment of Lender's Costs and Expenses.** If Lender has required Borrower to pay immediately in full as described above, the Lender shall have the right to be reimbursed by Borrower for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, attorneys' fees, costs and expenses. As used in this Note, "attorneys' fees, costs and expenses" shall mean the reasonable attorneys' fees and the costs and expenses of counsel to Lender (including without limitation in-house counsel employed by Lender), which may include, without limitation, printing, duplicating, telephone, fax, air freight and other charges, and fees billed for law clerks, paralegals, librarians, expert witnesses and others not admitted to the bar but performing services under the supervision of an attorney and all such fees, costs and expenses incurred with respect to trial, appellate proceedings, arbitrations, out-of-court negotiations, workouts and settlements, and bankruptcy or insolvency proceedings (including, but not limited to, seeking relief from stay in bankruptcy proceedings), and whether or not any action or proceeding is brought or is concluded with respect to the matter for which such fees, costs and expenses were incurred. Lender shall also be entitled to its attorneys' fees, costs and expenses incurred in any post-judgment action or proceeding to enforce and collect the judgment. This Section 5(d) is separate and several, shall survive the discharge of this Note, and shall survive the merger of this Note into any judgment on this Note.

6. NOTICES.

All notices required or permitted hereunder shall be given and become effective as provided in the Security Instrument.

7. WAIVERS.

Borrower and all others who may become liable for the payment of all or any part of the indebtedness evidenced by this Note do hereby severally waive presentment and demand for payment, notice of dishonor, protest and notice of protest and non-payment and all other notices of any kind, except those notices for which the Loan Documents expressly provide. No release of any security for the Note or extension of time for payment of this Note or any installment hereof, and no alteration, amendment or waiver of any provision of this Note, the Security Instrument or the other Loan Documents made by agreement between Lender or any other person or party shall release, modify, amend, waive, extend, change, discharge, terminate or affect the liability of Borrower, and any other person or entity who may become liable for the payment of all or any part of the indebtedness evidenced by this Note, the Security Instrument or the other Loan Documents. No notice to or demand on Borrower shall be deemed to be a waiver of the obligation of Borrower or of the right of Lender to take further action without further notice or demand as provided for in this Note, the Security Instrument or the other Loan Documents.

8. SECURED NOTE.

The obligations of Borrower under this Note are secured by that certain Commercial Deed of Trust, Security Agreement, Fixture Filing Financing Statement and Assignment of Leases, Rentals, Income and Profits (the "Security Instrument"), of even date herewith, which contains provisions for acceleration of the entire indebtedness secured hereby upon the happening of certain events.

9. TRANSFER.

Upon the transfer of this Note, Borrower hereby waiving notice of any such transfer, Lender may deliver all the collateral mortgaged, granted, pledged or assigned pursuant to the Security Instrument and the other Loan Documents, or any part thereof, to the transferee who shall thereupon become vested with all the rights herein or under applicable law given to Lender with respect thereto, and Lender shall thereafter forever be relieved and fully discharged from any liability or responsibility in the matter, but Lender shall retain all rights hereby given to it with respect to any liabilities and the collateral not so transferred.

10. EXCULPATION.

Except with respect to the matters set forth in subsections (a) and (b) below, Lender's source of satisfaction of the indebtedness evidenced by this Note and all other covenants and obligations under this Note and any other of the Loan Documents shall be limited to the Property, and Lender shall not seek to procure payment out of other assets of Borrower, or seek a judgment (except as hereinafter provided) for any sums which are or may be payable under this Note or any other of the Loan Documents, or claim or seek judgment for any deficiency remaining after foreclosure of the Security Instrument; provided, however, that the foregoing clause shall not prejudice the right of Lender to enforce the lien of the Security Instrument or other security given for the payment thereof or to exercise any of its remedies at law other than the entry of a personal money judgment against the Borrower. The foregoing notwithstanding:

(a) Borrower shall be and remain personally liable for all losses, costs, damages, or expenses incurred by Lender in the following instances:

(i) failure to pay or cause to be paid Taxes (except to the extent that Borrower has deposited funds with Lender pursuant to the Security Instrument for the purpose of paying such items) or to pay or cause to be paid charges for labor or materials, or other charges which can create liens on any portion of the Property;

(ii) as a result of waste (except ordinary wear and tear), arson committed or instigated by Borrower, any Guarantor or any partner, member or shareholder in Borrower, or a violation of the provisions in the Security Instrument regarding removal, demolition or structural alteration of any portion of the Property;

(iii) breach or failure to perform or comply with any of the insurance provisions of the Loan Documents;

(iv) all court costs and reasonable attorneys' fees, costs and expenses actually incurred by Lender pursuant to the Note or any other Loan Document;

(v) Borrower's breach or failure to perform or comply with Section 1.03 (captioned "Hazardous Waste") of the Security Instrument, or Borrower's or any Guarantor's breach or failure to perform or comply with the provisions of the Environmental Indemnification Agreement of even date herewith executed by Borrower for the benefit of Lender;

(vi) misapplication of or failure to deliver to Lender (in accordance with the terms of the Loan Documents) the following: (1) any insurance or condemnation proceeds; (2) rents, issues or profits received by Borrower/Guarantor or its agent after Lender makes written demand therefor pursuant to any Loan Document; or (3) prepaid rents or tenant security deposits; or

(vii) violation of any of the provisions of Sections 1.29 and 1.30 (captioned "Single Purpose Entity" and "ERISA", respectively) of the Security Instrument.

(b) Borrower shall be and remain personally liable without exculpation or limitation of liability whatsoever for the entire amount of the indebtedness evidenced by the Note (including all principal, interest, and other charges) and all other sums due or to become due under the other Loan Documents, whether at maturity or by acceleration or otherwise, in the following instances:

(i) violation of any of the provisions of Sections 1.15(c) and (d) of the Security Instrument (captioned, "No Sale/Encumbrance" and "Permitted Transfers", respectively);

(ii) fraud or intentional misrepresentation in connection with the Property, Loan Documents, or Loan Application;

(iii) the Stabilized Operating Threshold (as defined in the Reserve Agreement of even date herewith executed by Borrower in connection with the Loan) is not satisfied, provided there shall no liability under this Subsection 10(b)(iii) from and after the date such Stabilized Operating Threshold has first been satisfied; or

(iv) the Property or any part thereof becomes an asset in: (1) a voluntary bankruptcy or insolvency proceeding commenced by Borrower; or (2) an involuntary bankruptcy or insolvency proceeding in which: (A) such proceeding was commenced by any entity controlling, controlled by or under common control with Borrower (individually or collectively, "Affiliate"), including but not limited to any creditor or claimant acting in concert with Borrower or any Affiliate; or (B) any Affiliate objects to a motion by Lender for relief from any stay or injunction from the foreclosure of the Security Instrument or any other remedial action permitted under the Note, Security Instrument or other Loan Documents.

11. SAVINGS CLAUSE.

Notwithstanding any provisions in this Note or in the Security Instrument to the contrary, the total liability for payments in the nature of interest, including, without limitation, prepayment charges, default interest and late fees, shall not exceed the limits imposed by the laws of the State where the Property is located or the United States of America relating to maximum allowable charges of interest. Lender shall not be entitled to receive, collect or apply, as interest on the indebtedness evidenced by the Note, any amount in excess of the maximum lawful rate of interest permitted to be charged by applicable law. If Lender ever receives, collects or applies as interest such amount which would be excessive interest, such amount shall be applied to reduce the unpaid principal balance of this Note, and any remaining excess shall be paid over to person or persons legally entitled thereto.

12. JOINT AND SEVERAL OBLIGATIONS.

If this Note is signed by more than one party, all obligations herein contained shall be deemed to be the joint and several obligations of each party executing this Note. Any married person signing this Note agrees that recourse may be had against community assets and against his or her separate property for the satisfaction of all obligations contained herein.

13. WAIVER OF TRIAL BY JURY.

BORROWER AND LENDER HEREBY IRREVOCABLY WAIVE TO THE FULLEST EXTENT PERMITTED BY LAW, ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING, CLAIM, OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THE SECURITY INSTRUMENT, THIS NOTE AND/OR ANY OF THE OTHER LOAN DOCUMENTS OR ANY ACTS OR OMISSIONS OF LENDER IN CONNECTION THEREWITH.

14. OFFSETS.

No indebtedness evidenced by this Note shall be deemed to have been offset or to be offset or compensated by all or part of any claim, cause of action, counterclaim or cross claim, whether liquidated or unliquidated, which Borrower or any successor to Borrower now or hereafter may have or may claim to have against Lender; and, in respect to the indebtedness now or hereafter secured hereby, Borrower waives, to the fullest extent permitted by law, the benefits of any law which authorizes or permits such offsets.

15. MISCELLANEOUS.

(a) **Remedies Cumulative.** The remedies of Lender as provided herein and in any other Loan Document, or any one or more of them, or at law or in equity, shall be cumulative and concurrent, and may be pursued singly, successively, or together at the sole discretion of Lender, and may be exercised as often as occasion thereof shall occur.

(b) **Severability.** Every provision of this Note is intended to be severable. In the event any term or provision hereof is declared by a court of competent jurisdiction to be illegal or invalid for any reason whatsoever, such illegal or invalid term or provision shall not affect the balance of the terms and provisions hereof, which terms and provisions shall remain binding and enforceable.

(c) **Headings.** The headings and captions of various Sections of this Note are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof.

(d) **Governing Law.** This Note shall be governed by and construed and enforced in accordance with the laws of the State where the Property is located.

(e) **Amendments.** This Note, and any provisions hereof, may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of any party, but only by an instrument in writing signed by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.

(f) **Interpretation.** Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns and pronouns shall include the plural and vice versa.

(g) **Submission and Consent to Jurisdiction.** Borrower, in consideration of making the loan evidenced by this Note, agrees that all actions or proceedings arising directly, indirectly or otherwise in connection with this Note shall be litigated, at Lender's election, only in courts having a situs within the county and State where the Property is located, in any jurisdiction in which the Borrower (or any individual or entity comprising the Borrower) may reside or hold assets, or in any one or more of the foregoing jurisdictions and Borrower hereby consents and submits to the jurisdiction of any local, state or federal court located therein. Borrower irrevocably waives the defense of inconvenient forum to the maintenance of such action or proceeding. Borrower hereby consents to service of process by any means permitted by applicable law.

(h) **Clerical Error.** In the event Lender at any time discovers that this Note, the Security Instrument or any other Loan Document contains an error that was caused by a clerical mistake, calculation error, computer malfunction, printing error or similar error, Borrower agrees, upon notice from Lender, to re-execute any documents that are necessary to correct any such error(s). Borrower further agrees that Lender will not be liable to Borrower for any damages incurred by Borrower that are directly or indirectly caused by any such error(s).

(i) **Lost, Stolen, Destroyed or Mutilated Loan Documents.** In the event of the loss, theft or destruction of this Note, the Security Instrument, or any other Loan Document, or in the event of the mutilation of any of the Loan Documents, upon Lender's surrender to Borrower of the mutilated Loan Document, Borrower shall execute and deliver to Lender a Loan Document in form and content identical to, and to serve as a replacement of, the lost, stolen, destroyed, or mutilated Loan Document and such replacement shall have the same force and effect as the lost, stolen, destroyed, or mutilated Loan Document, and may be treated for all purposes as the original copy of such Loan Document.

(j) **Time is of the Essence.** TIME IS OF THE ESSENCE IN THE PERFORMANCE OF EACH PROVISION OF THIS NOTE.

(k) **Legislation Affecting Lender's Rights.** If enactment or expiration of applicable laws has the effect of rendering any material provision of this Note or the Security Instrument unenforceable according to its terms, Lender, at its option, may require immediately payment in full of all sums evidenced by this Note and may invoke any remedies permitted under the Loan Documents.

(l) **Disbursements.** Funds representing the proceeds of the indebtedness evidenced hereby which are disbursed by Lender by mail, wire transfer or other delivery to Borrower, to escrows or otherwise for the benefit of Borrower shall, for all purposes, be deemed outstanding hereunder and to have been received by Borrower as of the date of such mailing, wire transfer, or other delivery and until repaid, notwithstanding the fact that such funds may not at any time have been remitted by such escrows to Borrower or for Borrower's benefit.

(m) **Exempted Transaction.** Borrower agrees that (i) the payment obligations evidenced by this Note and the other instruments securing this Note are exempted transactions under the Truth in Lending Act 15 USC § 1601, et seq.; (ii) the proceeds of the indebtedness evidenced by this Note will not be used for the purchase of registered equity securities within the purview of Regulation "U" issued by the Board of Governors of the Federal Reserve System; and (iii) on the Maturity Date, Lender shall not have any obligation to refinance the indebtedness evidenced by this Note or to extend further credit to Borrower.

[SIGNATURE PAGE(S) ATTACHED]

IN WITNESS WHEREOF, Borrower has duly executed this Note as of the day and year first above written.

PALMILLA DEVELOPMENT CO., INC.,
a Nevada corporation

By: _____

Hagal Rapoport, President

Borrower Taxpayer ID/SSN: 20-0520310

016075/270010/521954_4

Exhibit 2

Exhibit 2

ARTS WASE
010-00001895

20070330-0002946

Fee: \$73.00
N/C Fee: \$0.00

03/30/2007 12:04:42
120070056264

Requestor:
EQUITY TITLE OF NEVADA

Debbie Conway SG1
Clark County Recorder Pgs: 60

60

24

APN: 124-30-311-031
124-30-312-014 and 015
124-30-312-017 and 018
124-30-312-025 through 169
124-30-312-171 and 172
124-30-312-177; and
124-30-312-180 through 182

Recording requested by
and when recorded mail to:

Name: Best & Flanagan LLP
Attention: Thomas G. Garry
Address: 225 South Sixth Street, Suite 4000
City/State/Zip: Minneapolis, Minnesota 55402

Commercial Deed of Trust, Security Agreement, Fixture
Filing Financing Statement and Assignment of Leases,
Rents, Income and Profits
(Title on Document)

This page added to provide additional information required by N.R.S. 111.312
Sections 1-2. (Additional recording fee applies)

This cover page must be typed or printed in black ink only.

APN: 124-30-312-014; 124-30-312-025 through 169, inclusive; 124-30-312-171 and 172; 124-30-312-177; 124-30-312-180 through 182, inclusive; 124-30-311-031; 124-30-312-017 and 018; 124-30-312-022; 124-30-312-015

PREPARED/DRAFTED BY AND
RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

BEST & FLANAGAN LLP
225 South Sixth Street, Suite 4000
Minneapolis, Minnesota 55402
Attn: Thomas G. Garry

Order/Escrow No.: 07450036
Loan No.: 010-00001895

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

**COMMERCIAL DEED OF TRUST, SECURITY AGREEMENT,
FIXTURE FILING FINANCING STATEMENT
AND
ASSIGNMENT OF LEASES, RENTS, INCOME AND PROFITS**

**THE PROMISSORY NOTE SECURED HEREBY PROVIDES FOR A:
FIXED INTEREST RATE**

THIS COMMERCIAL DEED OF TRUST, SECURITY AGREEMENT, FIXTURE FILING FINANCING STATEMENT AND ASSIGNMENT OF LEASES, RENTS, INCOME AND PROFITS (this "Security Instrument") is made and given as of March 28, 2007, by PALMILLA DEVELOPMENT CO., INC., a(n) Nevada corporation, whose address is 235 West Brooks Avenue, 2nd Floor, North Las Vegas, Nevada 89030 ("Borrower," and for purposes of Article 3 hereof, "Assignor"), to Equity Title, LLC, a Nevada limited liability company, and all successors and assigns, whose address is 7360 West Flamingo Road, Las Vegas, Nevada 89147 (herein called "Trustee"), for the benefit of ARTESIA MORTGAGE CAPITAL CORPORATION, a Delaware corporation, whose address is 1180 NW Maple Street, Suite 202, Issaquah, Washington 98027, and its successor and assigns (in each case, "Lender," and for purposes of Article 3 hereof, "Assignee").

WHEREAS, Borrower is justly indebted to Lender in the principal sum of Twenty Million One Hundred and Fifty Thousand and 00/100 Dollars (\$20,150,000.00), pursuant to a certain Fixed Rate Note of even date herewith, more particularly described below,

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, including the indebtedness herein recited and the trust herein created, the receipt of which is hereby acknowledged, Borrower hereby grants a first priority security interest in, and irrevocably gives, grants, transfers, aliens, enfeoffs, conveys, confirms, warrants, assigns, mortgages, bargains, sells and pledges to Trustee, IN

TRUST FOREVER, WITH ALL POWERS OF SALE AND STATUTORY RIGHTS, for the benefit and security of Lender, under and subject to the terms and conditions hereinafter set forth, the following property, rights, interests and estates now owned, or hereafter acquired, by Borrower (collectively, the "Property"):

(a) the real property described in Exhibit A attached hereto and made a part hereof (collectively, the "Land"), together with additional lands, estates and development rights hereafter acquired by Borrower for use in connection with the development, ownership or occupancy of such real property, and all additional lands and estates therein which may, from time to time, by supplemental mortgage or otherwise be expressly made subject to the lien of this Security Instrument;

(b) any and all buildings, structures and other improvements now or hereafter erected, constructed, placed or located on the Land including, without limitation, fixtures, tenements, attachments, appliances, equipment, building systems, machinery, and other articles now or hereafter attached to or used in connection with said buildings, structures and other improvements (collectively, the "Improvements"), and any and all additions to, substitutions for or replacements of such improvements and such Land and all interests, estates or other claims, both in law and equity, which Borrower now has or may hereafter acquire in the Land or the Improvements, including, without limitation, all right, title and interest now owned or hereafter acquired by Borrower in and to any greater estate in the Land or the Improvements;

(c) all easements, tenements, hereditaments, appurtenances, rights-of-way and rights now owned or hereafter acquired by Borrower used or useful in connection with, or located on, under or above all or any part of, the Land or as a means of access thereto, including, without limitation, all rights pursuant to any trackage agreement; all rights to the nonexclusive use of common drive entries; all oil and gas and other hydrocarbons; all minerals, crops, timber and other emblements; water, groundwater, water rights and shares of stock evidencing the same; any and all right, title and interest of Borrower, now owned or hereafter acquired, in and to any land lying within the right-of-way of any street, open or proposed, adjoining the Land; and any and all sidewalks, vaults, alleys and strips and gores of land adjacent to or used in connection with the Land (collectively, the "Appurtenances");

(d) all leasehold estate, right, title and interest of Borrower in and to all written and oral leases, subleases, subtenancies, licenses, franchises, usufructs, occupancy agreements and other agreements affecting all or any portion of the Property or the Improvements or the use or occupancy thereof, now or hereafter existing or entered into, whether before or after any proceeding is instituted by or against Borrower under 11 U.S.C. § 101 et seq., as amended (the "Bankruptcy Code"), including, without limitation, extensions, renewals and subleases (all of the foregoing, individually, a "Lease" and collectively, "Leases"), and all rights and claims of any kind that Borrower may have against any tenant under the Leases or in connection with the termination or rejection of the Leases in a bankruptcy or insolvency proceeding, and all right, title and interest of Borrower thereunder, including, without limitation, all cash or security deposits, prepaid or advance rentals, and deposits or payments of similar nature which are hereby specifically assigned, transferred and set over to Lender; including, without limitation, all rents, royalties, issues, revenues, profits, proceeds, income and other benefits, including, without limitation, accounts receivable, of, accruing to or derived from such Leases and from the renting, leasing or bailment of Improvements and equipment, including, without limitation, any payments made by tenants under Leases in connection with the termination of any Lease and all oil, gas and other mineral rights, royalties and profits, whether paid or accruing before or after any proceeding is instituted by or against Borrower under the Bankruptcy Code (all of the foregoing, collectively, "Rents"), and all proceeds from the sale or other disposition of the Leases and the right to receive and apply the Rents to the payment of the Secured Obligations (defined below) and all lease guarantees, letters of credit and any other supporting obligation for any of the Leases (collectively, "Lease Guaranties") given by any guarantor in connection with any of the Leases, and all rights, powers, privileges, options and other benefits of Borrower as lessor under the Leases and beneficiary under Lease Guaranties;

(e) all the estate, interest, right, title, other claim or demand, both in law and in equity, including, without limitation, claims or demands with respect to the proceeds of and any unearned premiums on insurance policies in effect with respect to the Property, which Borrower now has or may hereafter acquire in the Property, including, without limitation, the right to receive and apply the proceeds of any insurance, judgments or settlements made in lieu thereof, for damage to the Property, and any and all awards made for the taking by eminent domain, or by any proceeding of purchase in lieu thereof, of the whole or any part of the Property, including, without limitation, any awards resulting from a change of grade of streets and awards for severance damages;

(f) all goods, chattels, construction materials, furniture, furnishings, equipment, machinery, apparatus, appliances, and other items of personal property, whether tangible or intangible, of any kind, nature or description, whether now owned or hereafter acquired by Borrower, including, without limitation, improvements including, without limitation, furnaces, steam boilers, hot water boilers, oil burners, pipes, radiators, air conditioning and sprinkling systems, gas and electric fixtures, carpets, rugs, shades, awnings, screens, elevators, motors, dynamos, cabinets, and all other furnishings, tools, equipment and machinery, appliances, building supplies, materials, fittings and fixtures of every kind, which is, are or shall hereafter be located upon, attached, affixed to or used or useful, either directly or indirectly, in connection with the complete and comfortable use, occupancy and operation of the Property and improvements, whether or not any of such personal property is now or becomes a Fixture (defined below), including, without limitation, any and all licenses, permits or franchises used or required in connection with such use, occupancy or operation, together with any and all additions, replacements or substitutions thereto, thereof or therefor, as well as the proceeds thereof or therefrom regardless of form (hereinafter sometimes together referred to as the "Personal Property"; such Personal Property shall include, without limitation, all Accounts, Documents, Instruments, Chattel Paper, Goods, Equipment, General Intangibles, Fixtures and Inventory, as those terms are defined in the Uniform Commercial Code of the State where the Property is located);

(g) all plans and specifications, contracts and subcontracts for the construction of any improvements, density rights, bonds, permits and other development or use entitlements, licenses, guarantees, warranties, causes of action, claims, condemnation proceeds, profits, security deposits, utility deposits, governmental agency fees and deposits and refunds thereof, refunds of taxes or insurance premiums, policies, claims, and proceeds of insurance, claims and proceeds arising from condemnation, vehicles, together with all present and future attachments, accessions, replacements, additions, products and proceeds thereof;

(h) all monies deposited by Borrower, or deposited on behalf of Borrower, with any City, County, public body or agency, irrigation, sewer or water district or company, and any other body or agency, for the installation, or to secure the installation, of any utility pertaining to the Property;

(i) all refunds, rebates, reimbursements, reserves, deferred payments, deposits, cost savings, governmental subsidy payments, governmentally-registered credits (such as emissions reduction credits), other credits, waivers and payments, whether in cash or in kind, due from or payable by (i) any federal, state, municipal or other governmental or quasi-governmental agency, authority or district (each, a "Governmental Agency") or (ii) any insurance or utility company relating to any or all of the Property or arising out of the satisfaction of any conditions imposed upon or the obtaining of any approvals for the development or rehabilitation of the Property;

(j) all refunds, rebates, reimbursements, credits and payments of any kind due from or payable by any Governmental Agency for any taxes, special taxes, assessments, or similar governmental or quasi-governmental charges or levies imposed upon Borrower with respect to the Property or upon any or all of the Property or arising out of the satisfaction of any conditions imposed upon or the obtaining of any approvals for the development or rehabilitation of the Property;

(k) all monies deposited by Borrower with or for the benefit of Lender pursuant to any reserve, escrow or cash collateral agreements executed by Borrower in favor of Lender;

(l) contract rights, accounts receivable, management agreements, business records;

(m) all of the Borrower's rights and interests as the "Declarant" under the Declaration (defined below); and

(n) all additions, accessions, replacements, substitutions, proceeds and products of the real and personal property, tangible and intangible, described herein;

(The Property does not include any equipment, inventory, furniture, furnishings or trade fixtures owned and supplied by tenants of the Property, except to the extent of Borrower's landlord's lien (if any) therein, and except as same may become the property of Borrower as landlord under the terms of their respective Leases.)

FOR THE PURPOSE OF SECURING:

1. repayment of indebtedness in the total principal amount of Twenty Million One Hundred and Fifty Thousand and 00/100 Dollars (\$20,150,000.00) with interest, additional interest, default interest, late charges, prepayment charges and other sums and charges thereon (the "Loan"), evidenced by that certain Fixed Rate Note, of even date herewith, and all modifications, extensions, renewals and replacements thereof or judgments thereon (collectively, the "Note"), executed by Borrower in favor of Lender, and with a final maturity date of April 11, 2018, the terms of which are hereby incorporated herein by reference as though set forth in full;

2. the payment of any additional amounts, with interest thereon, that may be hereafter loaned by Lender to Borrower, which additional loans are evidenced by a promissory note or notes containing a recitation that this Security Instrument secures the payment of such note or notes.

3. payment of all sums advanced by Lender, its successors and assigns, or Trustees to protect, care for or maintain the Property, or any portion thereof, with interest thereon at the Default Rate (as defined in the Note) and all sums advanced by Lender or Trustees under the terms of or for the enforcement of the Loan Documents (defined below), with interest thereon at the Default Rate (as defined in the Note);

4. observance, performance and discharge of every obligation, covenant or agreement of Borrower contained herein or in the Note;

5. observance, performance and discharge of every obligation, covenant and agreement of Borrower contained in any document, instrument or agreement now or hereafter executed by Borrower which recites that the obligations thereunder are secured by this Security Instrument, including, without limitation, payment of all other sums, with interest thereon, which may hereafter be loaned to Borrower, or its successors or assigns, by Lender, or its successors or assigns, when evidenced by a promissory note or notes containing a recitation that they are secured by this Security Instrument;

6. compliance with and performance of each and every material provision of any declaration of covenants, conditions and restrictions pertaining to the Property or any portion thereof; and

7. payment and performance of all obligations of Borrower arising from any and all existing and future agreements with Lender which may afford interest rate protection to all or part of the Loan, when such agreement recites that the obligations thereunder are secured by this Security Instrument.

(The principal of and the interest on the indebtedness evidenced by the Note; all charges, fees and other sums as provided in the Loan Documents; and the principal of and interest on any other indebtedness secured by this Security Instrument and the performance of all of its obligations set forth in the Loan Documents are referred to herein, collectively, as the "Secured Obligations".)

PROVIDED, HOWEVER, that if the Secured Obligations shall have been paid in cash and performed in full, then, in such case the Trustee, at Lender's direction, shall, at the request and expense of Borrower, satisfy this instrument and the estate, right, title and interest of the Trustee and Lender in the Property shall cease, and upon payment to Lender of all costs and expenses incurred for the preparation of the release hereinafter referenced and all recording costs if allowed by law, the Trustee and Lender shall release this instrument and the lien, operation and effect hereof by proper instrument without recourse, covenant or warranty of any nature, express or implied.

The Note, this Security Instrument and any other document or instrument executed by Borrower in connection with the Loan shall be collectively referred to as the "Loan Documents." All initially capitalized terms used herein which are defined in the Note shall have the same meaning herein unless the context otherwise requires.

TO PROTECT THE SECURITY OF THIS SECURITY INSTRUMENT, BORROWER HEREBY COVENANTS AND AGREES AS FOLLOWS:

**ARTICLE 1.
COVENANTS AND AGREEMENTS OF BORROWER**

1.01 Payment of Secured Obligations. Borrower shall pay and perform as and when due the Secured Obligations.

1.02 Performance of Other Obligations; Preservation, Maintenance and Management of Property. Borrower shall perform, comply with and abide by each and every one of the covenants, agreements and conditions contained and set forth in the Note and this Security Instrument. Borrower:

- (a) shall keep the Property in good condition and repair;
- (b) shall not remove, demolish or structurally alter any of the improvements without the prior written consent of Lender; provided, however, Lender's consent shall not be required in connection with the making by Borrower of cosmetic and non-structural alterations;
- (c) shall complete promptly and in a good and workmanlike manner any improvement which may be now or hereafter constructed on the Property and promptly restore in like manner any portion of the improvements which may be damaged or destroyed from any cause whatsoever, and pay when due all claims for labor performed and materials furnished therefor;
- (d) shall comply with and abide by all laws, ordinances, rules, regulations and orders of governmental authorities now or hereafter affecting the Property or any part thereof or requiring any alterations or improvements to be made thereon, including without limitation, all Environmental Laws (as defined in Section 1.03 hereof), and the Americans with Disabilities Act;
- (e) shall comply with and abide by all of its obligations under any covenant, condition, restriction or agreement of record affecting the Property;
- (f) shall not commit or permit any waste or deterioration of the Property;
- (g) shall not allow changes in the use for which all or any part of the Property is intended;

(h) shall maintain all certificates, licenses and permits necessary to keep the Property operating in conformity with the use for which all or any part of the Property is intended;

(i) shall not initiate or acquiesce in a change in the zoning classification of the Property without Lender's prior written consent;

(j) shall insure that at all times the Land constitutes one or more separate legal lots complying with all subdivision or platting laws, ordinances, rules or regulations applicable to the Property, or other laws relating to the division or separation of real property;

(k) shall insure that at all times the Land is assessed for real estate tax purposes as one or more wholly independent tax lot or lots, separate from any adjoining land or improvements not constituting a part of such lot or lots, and no other land or improvements is assessed and taxed together with the Property or any portion thereof;

(l) shall not abandon the Property; and

(m) shall do any and all other acts which, from the character and use of the Property, may be reasonably necessary to maintain, protect and preserve the Property and protect the security of Lender.

The Property shall be managed by either: (i) Borrower or a person/entity affiliated with Borrower approved by Lender for so long as Borrower or said affiliated person/entity is managing the Property in a commercially prudent and reasonable manner; or (ii) a professional property management company approved by Lender. Management by said affiliated person/entity or professional property management company (in either case, the "Property Manager") shall be pursuant to a written agreement approved in form and substance acceptable to Lender (the "Management Agreement"). In no event shall any manager be removed or replaced or the terms of any Management Agreement modified or amended without the prior written consent of Lender. Notwithstanding the provisions of any Management Agreement or any other agreement now or hereafter existing or entered into (together with any and all extensions, renewals, substitutions, replacements, amendments, modifications and/or restatements thereof, the "Management Agreements") to the contrary, Borrower shall not pay any Property Manager, nor shall any Property Manager accept, total management fees (i.e., on-site and off-site management fees or other compensation, whether monetary or nonmonetary) (collectively, "Management Fees") in excess of three percent (3.0%) of the effective gross income from the Property per year, nor shall such Management Fees be payable in advance of receipt of such income. The Management Agreements and all of the rights and interests thereunder including, without limitation, the rights to Management Fees are and at all times will be subject and subordinate to the Loan and the Loan Documents and to any renewals, extensions, modifications, assignments, replacements, or consolidations thereof, and the rights, privileges and powers of Lender hereunder and thereunder. Such subordination shall be self-operative and no further instrument shall be required to effect such subordination, but Borrower agrees to execute and deliver, and to cause any Property Manager to execute and deliver, any instrument which Lender may deem necessary or appropriate to confirm such subordination. Such subordination means, among other things, that Management Fees shall not be paid or accepted unless all current expenses attributable to the ownership and operation of the Property, including, without limitation, current expenses relating to Borrower's liabilities and obligations with respect to the Loan and the Loan Documents (collectively, "Operating Expenses"), have been paid. In the event (x) of any Event of Default (defined below) under the Loan Documents or under any Management Agreement then in effect, which default is not cured within any applicable grace or cure period, (y) the debt service coverage ratio applicable to the Property is less than 1.00 to 1.00 for the twelve (12) month period immediately preceding the calculation, or (z) of the bankruptcy or insolvency of the manager, or Borrower, if the Property Manager is affiliated with Borrower, Lender shall have the right to immediately terminate, or to direct Borrower to immediately terminate, such Management Agreement and to retain, or to direct Borrower to retain, a new management agent approved by Lender. All Rents generated by or derived from the Property shall first be utilized solely for Operating Expenses, and none of the Rents generated by or derived from the

Property shall be diverted by Borrower and utilized for any other purpose unless all such Operating Expenses have been fully paid and satisfied.

1.03 **Hazardous Waste.** Borrower at all times shall keep the Property and groundwater of the Property free of Hazardous Substances (defined below). Borrower shall not permit its tenants or any third party to enter the Property to use, generate, manufacture, store, release, threaten release, or dispose of Hazardous Substances in, on or about the Property; provided, however, that Borrower may permit reasonable incidental use and storage of Hazardous Substances on the Property provided that such use and storage complies with the following: (a) such use and storage shall be limited to customary supplies which are normal incidents of the ownership and management of real property which is similar to the Property ("Permitted Uses"); (b) no such products or supplies create any risk of harm to persons or property, including, without limitation, the Property; and (c) all such products and supplies are used and stored in strict compliance with all applicable Environmental Laws (defined below). Borrower shall give Lender prompt written notice of any claim by any person, entity, or governmental agency that a violation of Environmental Laws has occurred with respect to all or any portion of the Property, or that a release or disposal of Hazardous Substances has occurred on the Property (except Permitted Uses as may be permitted pursuant to the preceding sentence), or that Hazardous Substances are present at the Property or otherwise affect the Property (except Permitted Uses). Borrower, through its professional engineers and at its cost, shall promptly and thoroughly investigate suspected Hazardous Substances contamination of the Property and shall provide to Lender a detailed description of the investigation, and any copies of reports at Borrower's expense. Borrower shall forthwith remove, repair, clean up, and/or detoxify any Hazardous Substances from the Property, to the extent that the presence and/or maintenance of such Hazardous Substances in, on or about the Property constitutes a violation of any federal, state or local law, ordinance, order, decree or regulation now or hereafter in effect and applicable to Borrower or the Property, and whether or not Borrower was responsible for the existence of the Hazardous Substances in, on or about the Property. "Hazardous Substances" shall mean (i) any chemical, compound, material, mixture or substance that is now or hereafter defined or listed in, or otherwise classified pursuant to, any Environmental Laws as a "hazardous substance," "hazardous material," "hazardous waste," "extremely hazardous waste," "acutely hazardous waste," "radioactive waste," "infectious waste," "biohazardous waste," "toxic substance," "pollutant," "toxic pollutant," and "contaminant," as well as any formulation not mentioned herein intended to define, list, or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity, "EP toxicity," or "TCLP toxicity"; (ii) petroleum, natural gas, natural gas liquids, liquefied natural gas, synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas) and ash produced by a resource recovery facility utilizing a municipal solid waste stream, and drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas, or geothermal resources; (iii) asbestos in any form; (iv) urea formaldehyde foam insulation; (v) polychlorinated biphenyls (PCBs); (vi) radon; (vii) any other chemical, material, or substance which is (because of its quantity, concentration, or physical or chemical characteristics) limited or regulated for health and safety reasons by any governmental authority, or which poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace or the environment; (viii) any "Hazardous Substance" or terms of similar import as defined in the State where Property is located or substances otherwise regulated or controlled in such State because of concerns for health, safety and/or property, and (ix) lead-based paint. "Environmental Laws" means any and all requirements of courts (including, without limitation, state courts whose decisions may be based on the common law of the aforementioned State) or governmental authorities relating to health, safety, the environment or to any Hazardous Substances, including, without limitation, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Resource Conservation and Recovery Act ("RCRA"), the Hazardous Substances Transportation Act, the Toxic Substances Control Act, the Clean Water Act, the Endangered Species Act, the Clean Air Act, the Occupational Safety and Health Act and all similar federal, state and local environmental statutes, ordinances, and the rules, regulations, orders, decrees and guidance documents related thereto, whether any of the foregoing shall not exist or shall hereafter be enacted, decided, promulgated or published.

Borrower represents and warrants to Lender that to the best of Borrower's knowledge, except as set forth in that certain environmental site assessment delivered to Lender in connection with the Loan (the "Environmental Report"): (A) during the period of Borrower's ownership of the Property; (1) there has been no use, generation, manufacture, storage, treatment, disposal, discharge, release, or threatened release of any Hazardous Substances by any person on or around the Property except Permitted Uses; and (2) there have been no Hazardous Substances transported over or through the Property except in connection with Permitted Uses; (B) after diligent inquiry, Borrower has no knowledge of, or reason to believe that there has been: any use, generation, manufacture, storage, treatment, disposal, release, or threatened release of any Hazardous Substance, hazardous waste or other waste by any prior owners or prior occupants of the Property or by any third parties onto the Property; or any actual or threatened litigation or claims of any kind by any person relating to these matters; (C) no Hazardous Substances in excess of permitted levels or reportable quantities under applicable Environmental Laws are present in or about the Property or any nearby real property that could migrate to the Property; (D) no underground storage tanks of any kind are or have ever been located in or about the Property; (E) the Property and all operations and activities at, and the use and occupancy of, the Property, comply with all applicable Environmental Laws; (F) Borrower and every person currently having an interest in or conducting operations on the Property has complied with, and is now in strict compliance with, every permit, license, and approval required by all applicable Environmental Laws for all activities and operations at, and the use and occupancy of, the Property; and (G) there are no claims related to Hazardous Substances pending or threatened with regard to the Property or against Borrower or any Indemnitor other than Borrower (individually or collectively, "Indemnitor") under the Environmental Indemnity (as hereinafter defined). Borrower represents and warrants that, to the best of Borrower's knowledge, any written disclosure submitted by or on behalf of Borrower to Lender concerning any release or threatened release, past or present compliance by Borrower, or any other person of any Environmental Laws applicable to the Property, and any environmental concerns relating to the Property, was true and complete when submitted and continues to be true and complete as of the date of this Security Instrument.

Borrower (1) releases and waives any future claims against Lender for indemnity or contribution in the event Borrower becomes liable for cleanup or other costs under any Environmental Laws or under any Hazardous Substances-related claim; (2) shall reimburse Lender, on demand, for all costs and expenses incurred by Lender in connection with any review, approval, consent, or inspection relating to the environmental provisions in this Security Instrument together with interest, after demand, at the highest rate permitted under applicable law; and (3) shall indemnify, defend, and hold Lender and Trustee harmless from and against all losses, costs, claims, damages, penalties, liabilities, causes of action, judgments, court costs, attorneys' fees and other legal expenses, costs of evidence of title, cost of evidence of value, and other expenses (collectively, "Expenses"), including, without limitation, any Expenses incurred or accruing after the foreclosure of the lien of this Security Instrument, which either may suffer or incur and which directly or indirectly arise out of or are in any way connected with the breach of any environmental provision either in this Security Instrument or in any Loan Document or as a consequence of any release or threatened release or the presence, use, generation, manufacture, storage, disposal, transportation, release, or threatened release of any Hazardous Substances on or about the Property caused or permitted by Borrower, any prior owner or operator of the Property, any adjoining landowner or any other party, including, without limitation, the cost of any required or necessary monitoring, investigation, repair, cleanup, remedy, or detoxification of any Hazardous Substances and the preparation of any closure, remedial action, or other required plans, whether that action is required or necessary by reason of acts or omissions occurring prior to or following the recordation of this Security Instrument. Borrower's obligations will survive the satisfaction, release, or cancellation of the Loan, the release and reconveyance or partial release and reconveyance of this Security Instrument, and the foreclosure of the lien of this Security Instrument or deed in lieu thereof. Notwithstanding anything in this paragraph to the contrary, this paragraph shall not apply to the introduction and initial release of Hazardous Substances on the Property from and after the date that Lender acquires title to the Property through foreclosure or a deed in lieu of foreclosure (the "Transfer Date"); provided, however, Borrower shall bear the burden of proof that the introduction and initial release of such Hazardous Substances: (i) occurred subsequent to the Transfer Date, (ii) did not occur as the result of any act or omission of Borrower or its agents, and (iii) did not occur as a result of a continuing leaching, seeping, migration or

release of any Hazardous Substances introduced prior to the Transfer Date in, on, under or near the Property.

To the extent permitted by applicable law, Lender or its agents, representatives, and employees may waive its lien against the Property or any portion of it, including, without limitation, the improvements and the Personal Property, to the extent that the Property is found to be environmentally impaired and to exercise all rights and remedies of an unsecured creditor against Borrower and all of Borrower's assets and property for the recovery of any deficiency and environmental costs, including, without limitation, seeking an attachment order. Borrower will have the burden of proving that Borrower or any related party (or an affiliate or agent of Borrower or any related party) was not in any way negligent in permitting the release or threatened release of the Hazardous Substances.

Anything contained in this Security Instrument or in the Loan Documents to the contrary notwithstanding, the Expenses will be exceptions to any nonrecourse or exculpatory provision of the Loan Documents, and Borrower will be fully and personally liable for the Expenses. That liability will not be limited to the original principal amount of the obligations secured by this Security Instrument, and Borrower's obligations will survive the foreclosure, deed in lieu of foreclosure, release, reconveyance, or any other transfer of the Property or this Security Instrument. For the purposes of any action brought under this subsection, Borrower waives the defense of laches and any applicable statute of limitations.

Lender and any other person or entity designated by Lender, including, without limitation, any representative of a governmental entity, and any environmental consultant, and any receiver appointed by any court of competent jurisdiction, shall have the right, but not the obligation, to enter upon the Property at all reasonable times to assess any and all aspects of the environmental condition of the Property and its use, including, without limitation, conducting any environmental assessment or audit (the scope of which shall be determined by Lender) and taking samples of soil, groundwater or other water, air, or building materials, and conducting other invasive testing. Borrower shall cooperate with and provide access to Lender and any such person or entity designated by Lender.

If recommended by the Environmental Report or any other environmental assessment or audit of the Property, Borrower shall establish and comply with an operations and maintenance program with respect to the Property, in form and substance reasonably acceptable to Lender, prepared by an environmental consultant reasonably acceptable to Lender, which program shall address any asbestos containing material or lead based paint that may now or in the future be detected at or on the Property. Without limiting the generality of the preceding sentence, Lender may require (1) periodic notices or reports to Lender in form, substance and at such intervals as Lender may specify, (2) an amendment to such operations and maintenance program to address changing circumstances, laws or other matters, (3) at Borrower's sole expense, supplemental examination of the Property by consultants specified by Lender, (4) access to the Property by Lender, its agents or service, to review and assess the environmental condition of the Property and Borrower's compliance with any operations and maintenance program, and (5) variation of the operations and maintenance program in response to the reports provided by any such consultants.

1.04 Funds for Taxes, Insurance and Other Charges. Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender, on the day monthly installments of principal and interest are payable under the Note (or on another day designated in writing by Lender) until the Note is paid in full, a sum (herein "impounds") equal to one-twelfth (1/12) of: (a) all real property taxes and assessments (general and special), and all other taxes and assessments of any kind or nature whatsoever, including, without limitation, nongovernmental levies or assessments such as maintenance charges, levies or charges resulting from covenants, conditions and restrictions affecting the Property, which are assessed or imposed upon the Property or any portion of it, or become due and payable, and which create, may create or appear to create a lien upon the Property, or any part thereof, or upon any person, property, equipment or other facility used in the operation or maintenance thereof, or any tax or assessment on the Property, or any portion of it, in lieu thereof or in addition thereto, or any license fee,

tax or assessment imposed on Lender and measured by or based in whole or in part upon the amount of the outstanding Secured Obligations (collectively, "Taxes"); (b) the yearly premium installments for fire and other hazard insurance, rent loss insurance, commercial general liability insurance and such other insurance covering the Property as Lender may require pursuant to Section 1.07 hereof (collectively, "Insurance Premiums"); and (c) if this Security Instrument is on a leasehold, the yearly fixed ground rent, if any, under any ground lease affecting the Property or any portion thereof, all as reasonably estimated initially and from time to time by Lender on the basis of assessments and bills and reasonable estimates thereof. Lender may require Borrower to pay to Lender, in advance, such other Impounds for other taxes, charges, premiums, assessments and impositions in connection with Borrower or the Property which Lender shall reasonably deem necessary to protect Lender's interests (collectively "Other Impositions"). (The Taxes, Insurance Premiums, Other Impositions, and other items for which Lender is authorized to collect Impounds hereunder are referred to collectively as "Impositions".) Unless otherwise provided by applicable law, Lender may require Impounds for Other Impositions to be paid by Borrower in a lump sum or in periodic installments, at Lender's option. Any waiver by Lender of a requirement that Borrower pays such Impounds may be revoked by Lender at any time upon notice in writing to Borrower.

Lender shall apply the Impounds to pay such Impositions so long as Borrower is not in breach of such rates, ground rent, Taxes, assessments, Insurance Premiums and Other Impositions and so long as Borrower is not in breach of any covenant or agreement in this Security Instrument. Lender shall make no charge to Borrower for holding and applying the Impounds, annually analyzing such accounts, or for verifying and compiling said assessments and bills, unless Lender pays Borrower interest, earnings or profits on the Impounds and applicable law permits Lender to make such a charge. If requested by Lender, Borrower shall cause to be furnished to Lender a tax reporting service contract covering the Property of the type, duration and with a company satisfactory to Lender. Unless applicable law requires interest, earnings or profits to be paid, Lender shall not be required to pay Borrower any interest, earnings or profits on the Impounds. Lender shall give to Borrower, without charge, an annual accounting of the Impounds, showing credits and debits to the Impounds and the purpose for which each debit to the Impounds was made. The Impounds are pledged as additional security for all sums secured by this Security Instrument.

If the Impounds held by Lender at the time of the annual accounting thereof exceed the amounts deemed necessary by Lender to provide for the payment of such Impositions, as they fall due, or exceed the amounts permitted to be held by applicable law, if no Event of Default is in effect under any of the Loan Documents, Lender shall credit such excess Impounds on the next monthly installment or installments of Impounds due. If at any time the amount of the Impounds held by Lender shall be less than is sufficient to pay such Impositions as they fall due, Borrower shall pay to Lender the amount necessary to make up the deficiency within thirty (30) days after notice from Lender to Borrower requesting payment thereof.

Upon the occurrence of any Event of Default under any of the Loan Documents or Borrower's breach of any covenant or agreement of Borrower in this Security Instrument, Lender may apply, in any amount and in any order as Lender shall determine, any Impounds held by Lender at the time of application, (i) to pay Impositions which are now or will hereafter become due, or (ii) as a credit against the sums secured by this Security Instrument. Upon payment in full of all sums secured by this Security Instrument or upon Defeasance (as defined in the Note, if so defined), Lender shall promptly refund to Borrower any Impounds held by Lender.

1.05 Application of Payments. Unless applicable law provides otherwise, all payments received by Lender from Borrower under the Note or this Security Instrument shall be applied by Lender in the following order of priority: (i) to interest payable on the Note; (ii) to principal due on the Note; (iii) to interest payable on advances made pursuant to Section 1.14 hereof; (iv) to principal of advances made pursuant to Section 1.14 hereof; (v) to amounts payable to Lender by Borrower under Section 1.04 hereof; and (vi) any other sums secured by this Security Instrument in such order as Lender, at Lender's option, may determine; provided, however, that Lender may, at Lender's option, apply any sums payable

pursuant to Section 1.14 hereof prior to interest on and principal of the Note, but such application shall not otherwise affect the order of priority of application specified in this Section 1.05.

1.06 Charges; Liens. Unless Lender shall be collecting (and Borrower shall have paid as required) imponds pursuant to Section 1.04 above, Borrower shall pay, at Borrower's cost and expense, all impositions attributable to the Property, the Note, this Security Instrument, or any part thereof or interest therein by Borrower making or causing to be made payment, when due, directly to the payee thereof, or in such other manner as Lender may designate in writing. Borrower shall promptly furnish to Lender all notices of amounts due under this Section 1.06, and if Borrower shall make payment directly, Borrower shall promptly furnish to Lender receipts evidencing such payments. Borrower shall pay and promptly discharge, at Borrower's cost and expense, all liens, encumbrances and charges upon, and the claims of all persons supplying labor or materials to or in connection with, the Property, or any part thereof or interest therein, without regard to whether such lien, encumbrance, charge or claim (in each case a "Claim") is or may be senior and superior to, equal with or junior and inferior to the lien of this Security Instrument. If Borrower shall fail to pay, remove and discharge any such lien, encumbrance, charge or claim, then in addition to any other right or remedy of Lender, Lender may, but shall not be obligated to, discharge the same, either by paying the amount claimed to be due or by procuring the discharge of such lien, encumbrance, charge or claim by depositing in a court a bond of the amount claimed or otherwise giving security for such claim, or by procuring such discharge in such manner as is or may be prescribed by law. Borrower shall, immediately upon demand therefor by Lender, pay to Lender an amount equal to all costs and expenses incurred by Lender in connection with the exercise by Lender of the foregoing right to discharge any such lien, encumbrance, charge or claim, together with interest thereon from the date of such expenditure at the Default Rate. Notwithstanding the foregoing, Borrower may contest any Claim by appropriate proceedings duly instituted and diligently prosecuted at Borrower's expense. Borrower shall not be obligated to pay any Claim, and Lender shall not have the right to discharge any Claim pursuant to the provisions above, while such contest is pending if the Property is not thereby subjected to imminent loss or forfeiture and (if Borrower has not provided evidence that it has paid the amount of such Claim or by procuring the discharge of such Claim by depositing in a court a bond of the amount claimed or otherwise giving security for such Claim, or by procuring such discharge or bond in such manner as is or may be prescribed by law) it deposits one hundred fifty percent (150%) of the amount of such Claim with the Lender or provides other security satisfactory to the Lender in its sole discretion.

Borrower shall give Lender prompt written notice of (a) the proposed creation of any county, municipal, quasi-governmental or other improvement or special district of any nature or (b) any action in respect to such district, which may affect the Property, including, without limitation, any proposed service plan or modification of such plan, proposed organization of such district and election in regard to such organization, the proposed issuance of bonds by such district and election in regard to such issuance and the proposed inclusion of the Property in any such district, and Borrower shall not consent to the creation of any such district or any such action in respect to such district without the prior written consent of Lender, which consent shall not be unreasonably withheld.

1.07 Required Insurance; Delivery of Policies. Borrower shall at all times provide, maintain and keep in force or cause to be provided, maintained and kept in force, at no expense to Trustee or Lender, policies of insurance in form and amounts, covering such casualties, risks, perils, liabilities and other hazards as provided below. All such insurance policies shall be written by a company or companies authorized and admitted to issue insurance in the State where the Property is located and having a rating of A2 or better for ratings by Moody's Investors Service, Inc., or A or better for ratings by Fitch Investors Service, L.P. or Standard & Poor's Ratings Services.

(a) Borrower shall initially maintain, until Lender shall otherwise indicate in writing, the following insurance:

(1) **Property Insurance.** Borrower, at its sole cost and expense, shall keep all Improvements, boilers and machinery, and all other Personal Property of Borrower now or hereafter situated on the Property insured during the term of this Security Instrument against loss or damage by fire and against loss or damage by other risks now embraced by "Special Form" or "All Risk" coverage, so called, (including without limitation, riot and civil commotion, vandalism, malicious mischief, water, fire, burglary and theft) without any exclusion for terrorism, boiler and machinery coverage (if applicable), flood and/or earthquake insurance (if applicable) all as may be required by Lender, in amounts at all times sufficient to prevent Lender from becoming a co-insurer within the terms of the applicable policies and under applicable insurance law, providing for deductibles (not to exceed the lesser of 1% of the face amount of any such policy or \$10,000), maintained in an amount not less than 100% of the full replacement cost of the Improvements and betterments and Personal Property (equivalent to the insurable value of the Improvements and Personal Property as determined by an appraisal acceptable to Lender), on an agreed amount basis, without deduction for depreciation and without reference to co-insurance (an insurance to value provision is not permitted in the policy).

(2) **Liability Insurance.** Borrower shall also provide commercial general liability insurance, on the so-called "occurrence" form naming Lender as an additional insured, including personal injury, death and property damage liability, and against any and all claims, including all legal liability to the extent insurable and imposed upon Lender and all court costs and legal fees and expenses, in an amount not less than One Million Dollars (\$1,000,000), combined single limit policy, Two Million Dollars (\$2,000,000) in the aggregate, for personal injury and property damage, to be without a deductible.

(3) **Business Income Insurance.** "Business Income" and/or "rental income" insurance, each naming Lender as loss payee, in an amount sufficient to avoid any co insurance penalty and to provide proceeds which will cover a period of not less than twelve (12) months from the date of casualty or loss; the term "rental income" shall mean the sum of (A) the total then ascertainable Rents payable under the Leases (defined below) and (B) the total ascertainable amount of all other amounts to be received by Borrower from third parties which are the legal obligation of the tenants under such Leases, reduced to the extent such amounts would not be received because of operating expenses not incurred during a period of non occupancy of that portion of the Property then not being occupied.

(4) **Flood Insurance.** If the Property is now, or hereafter becomes, situated in a federally designated special flood hazard area, then Borrower shall obtain and maintain at all times thereafter, a policy of flood insurance in such amount as Lender may, from time to time require, and shall otherwise comply with the requirements of the National Flood Insurance Program. A Life of Loan Flood Hazard Certificate shall be provided to Lender identifying the Flood Hazard Zone in which the Property is situated.

(5) **Law and Ordinance Insurance.** If any of the Improvements or the use of the Property shall at any time constitute a legal non-conforming structure or use, Borrower shall obtain an "Ordinance or Law Coverage" or "Enforcement" endorsement, which shall include coverage for (A) loss of value (in an amount no less than 100% of the full replacement cost of the Improvements), (B) demolition and debris removal costs (in an amount not less than 15% of the policy limit or insured value), and (C) increased costs of construction (in an amount not less than 15% of the policy limit or insured value).

(6) **Builder's Risk Insurance.** At all times during which structural construction, repairs or alterations are being made with respect to the Improvements, Borrower shall also maintain (A) owner's contingent or protective liability insurance covering claims not covered by or under the terms or provisions of the above-mentioned commercial general liability insurance policy; and (B) the insurance provided for in subsection (1) above written in a so-called builder's risk completed value form (w) on a non-reporting basis, (x) against all risks insured against pursuant to the first sentence of this paragraph, (y) including permission to occupy the Property, and (z) with an Agreed Amount endorsement waiving co-insurance provisions.

(7) **Workers' Compensation Insurance.** If Borrower has employees, Borrower shall also maintain workers' compensation, subject to the statutory limits of the state where the Property is located, and employer's liability insurance with a limit of at least \$1,000,000 per accident and per disease per employee, with respect to any work or operations on or about the Property.

(b) The original policy or policies and renewals thereof (or, at the sole option of Lender, duplicate originals or certified copies thereof), together with receipts evidencing payment of the premium therefor, shall be deposited with Lender, and Borrower hereby assigns to Lender the proceeds of such policy or policies as additional security for the Secured Obligations. Not more than forty-five (45) days after closing the Loan, Borrower shall deliver to Lender the original policy or policies (or, at the sole option of Lender, duplicate originals or certified copies thereof). Such insurance may be provided in one policy or separate policies for hazard insurance, rental or business income insurance, general liability, earthquake, environmental or flood (or other special perils) insurance. Each such policy of insurance shall contain a non-contributing loss payable clause and a mortgagee clause in favor of and in form acceptable to Lender for policies referred to under subsections 1.07(a)(1), (3), (4), (5), and (6), and naming Lender as an additional insured for policies referred to under subsections 1.07(a)(2) and (7), and shall provide for not less than thirty (30) days prior written notice to Lender of any intent to modify, cancel, or terminate the policy or policies or the expiration of such policies of insurance, and must include a Lender's Loss Payable endorsement, and such other endorsements as required by Lender, including a replacement cost endorsement and agreed amount endorsement. If the insurance required under this Section 1.07 or any portion thereof is maintained pursuant to a blanket policy, Borrower shall furnish to Lender a certified copy of such policy, together with an original Evidence of Insurance (Aford Form 28) indicating that Lender (and its successors and/or assigns) is an insured under such policy in regard to the Property and showing the amount of coverage apportioned to the Property which coverage shall be in an amount sufficient to satisfy the requirements hereof. Not less than thirty (30) days prior to the expiration dates of each policy required of Borrower hereunder, Borrower will deliver to Lender a renewal policy or policies marked "premium paid" or accompanied by other evidence of payment and renewal satisfactory to Lender; and in the event of foreclosure of this Security Instrument, any purchaser or purchasers of the Property shall succeed to all rights of Borrower, including, without limitation, any rights to unearned premiums, in and to all insurance policies assigned and delivered to Lender pursuant to the provisions of this Section 1.07.

(c) Notwithstanding the foregoing, at any time while any amounts remain outstanding under the Loan, upon the written request of Lender, Borrower shall be required to maintain such insurance as may from time to time be required under Lender's then current underwriting guidelines.

1.08 **Payment of Premiums.** If Lender shall collect and Borrower shall pay in full impounds for premiums in accordance with the provisions of Section 1.04 above, Borrower shall be deemed to have "paid" the premiums for the purposes of this Section 1.08. In the event Borrower fails to provide, maintain, keep in force or deliver to Lender the policies of insurance required by this Security Instrument or by any Loan Document, Lender may (but shall have no obligation to) procure such insurance or single-interest insurance for such risks covering Lender's interest, and Borrower will pay all premiums thereon and reimburse Lender for all amounts paid or incurred by Lender in connection therewith promptly upon demand by Lender, and until such payment is made by Borrower, the amount of all such premiums shall be added to the principal amount of the Loan and shall bear interest at the Default Rate.

1.09 **Casualties; Insurance and Condemnation Proceeds.** In the event of a casualty or a taking by eminent domain, the following provisions shall apply in connection with the Restoration (defined below) of the Property:

(a) If the Property shall be damaged or destroyed, in whole or in part, by fire or other casualty, or if the Property or any portion thereof is taken in any condemnation or eminent domain proceeding, Borrower shall give prompt notice of such damage or taking to Lender and shall promptly commence and diligently prosecute the completion of the repair and restoration of the Property as nearly

as possible to the condition the Property was in immediately prior to such fire or other casualty or taking, with such alterations as may be approved by Lender (the "Restoration").

(b) The term "Net Proceeds" for purposes of this Section 1.09 shall mean: (i) the net amount of all insurance proceeds under the policies carried pursuant to Section 1.07 hereof as a result of such damage or destruction, after deduction of Lender's reasonable costs and expenses (including, without limitation, attorneys' fees), if any, in collecting the same, or (ii) the net amount of all awards and payments received by Lender with respect to a taking referenced in Section 1.17 hereof, after deduction of Lender's reasonable costs and expenses (including, without limitation, attorneys' fees), if any, in collecting the same, whichever the case may be. If (i) the Net Proceeds do not exceed \$500,000 (the "Net Proceeds Availability Threshold"); (ii) the costs of completing the Restoration as reasonably estimated by Borrower shall be less than or equal to the Net Proceeds; (iii) no Event of Default exists under the Note, this Security Instrument or any of the other Loan Documents; (iv) the Property and the use thereof after the Restoration will be in compliance with, and permitted under, all applicable zoning laws, ordinances rules and regulations (including, without limitation, laws relating to legal nonconforming structures or uses and all applicable Environmental Laws; (v) (A) if the Net Proceeds are insurance proceeds, less than twenty-five percent (25%) of the total floor area of the Improvements has been damaged or destroyed, or rendered unusable as a result of such fire or other casualty; or (B) if the Net Proceeds are condemnation awards; less than 25% of the Property is taken, such Property that is taken is located along the perimeter or periphery of the Property, no portion of the Improvements is located on such Property, and such taking does not materially impair access to the Property; and (vi) Lender shall be satisfied that any operating deficits, including, without limitation, all scheduled payments of principal and interest under the Note which will be incurred with respect to the Property as a result of the occurrence of any such fire or other casualty or taking, whichever the case may be, will be covered out of (1) the Net Proceeds, or (2) other funds of Borrower, then the Net Proceeds will be disbursed directly to Borrower for Restoration.

(c) If the Net Proceeds are greater than the Net Proceeds Availability Threshold, such Net Proceeds shall, subject to the provisions of the Leases that are superior to the lien of this Security Instrument or with respect to which subordination and non-disturbance agreements binding upon Lender have been entered into and such subordination and non-disturbance agreements apply to the deposits of Net Proceeds, be forthwith paid to Lender to be held by Lender in a segregated account to be made available to Borrower for the Restoration in accordance with the provisions of this Subsection 1.09(c).

The Net Proceeds held by Lender pursuant to Subsection 1.09(c) hereof shall be made available to Borrower for payment or reimbursement of Borrower's expenses in connection with the Restoration, subject to the following conditions:

- (1) no Event of Default exists under the Note, this Security Instrument or any of the other Loan Documents;
- (2) Lender shall, within a reasonable period of time prior to a request for an initial disbursement, be furnished with an estimate of the cost of the Restoration accompanied by an independent architect's opinion based on due professional investigation as to such costs and appropriate plans and specifications for the Restoration, such plans and specifications and cost estimates to be subject to Lender's approval, not to be unreasonably withheld or delayed;
- (3) the Net Proceeds, together with any cash or cash equivalent deposited by Borrower with Lender, are sufficient to cover the cost of the Restoration as such costs are certified by the independent architect;
- (4) Net Proceeds are less than the outstanding principal balance of the Note;
- (5) (A) if the Net Proceeds are insurance proceeds, less than sixty percent (60%) of the total floor area of the Improvements has been damaged or destroyed, or rendered unusable as a

result of such fire or other casualty; or (B) if the Net Proceeds are condemnation awards, less than 25% of the Property is taken, such Property that is taken is located along the perimeter or periphery of the Property, no portion of the improvements is located on such Property and such taking does not materially impair access to the Property;

(6) Lender shall be satisfied that any operating deficits, including, without limitation, all scheduled payments of principal and interest under the Note which will be incurred with respect to the Property as a result of the occurrence of any such fire or other casualty or taking, whichever the case may be, will be covered out of (1) the Net Proceeds, or (2) other funds of Borrower;

(7) Lender shall be satisfied that, upon completion of the Restoration, the gross cash flow and the net cash flow of the Property will be restored to a level sufficient to cover all carrying costs and operating expenses of the Property, including, without limitation, debt service on the Note at a coverage ratio (after deducting all required reserves as required by Lender from net operating income) of at least 1.20 to 1.0, which coverage ratio shall be determined by Lender on the basis of the Applicable Interest Rate (as defined in the Note);

(8) the Restoration can reasonably be completed on or before the earliest to occur of (A) six (6) months prior to the Maturity Date (defined in the Note), (B) the earliest date required for such completion under the terms of any Major Leases (defined below) and (C) such time as may be required under applicable zoning law, ordinance rule or regulation in order to repair and restore the Property to as nearly as possible the condition it was in immediately prior to such fire or other casualty or to such taking, as applicable;

(9) the Property and use thereof after the Restoration will be in compliance with, and permitted under, all applicable zoning laws, ordinances, rules and regulations including, without limitation, laws relating to legal nonconforming structures or uses and all applicable Environmental Laws; and

(10) each Major Lease in effect as of the date of the occurrence of such fire or other casualty shall remain in full force and effect during and after the completion of the Restoration without abatement of rent beyond the time required for Restoration.

For purposes hereof, the term "Major Lease" shall mean (i) any Lease which (A) provides for rental income representing ten percent (10%) or more of the total rental income for the Property, (B) covers ten percent (10%) or more of the total space at the Property, in the aggregate, or (C) provides for a lease term of more than ten (10) years including options to renew and (ii) any instrument guaranteeing or providing credit support for any Major Lease.

(d) The Net Proceeds held by Lender until disbursed in accordance with the provisions of this Section 1.09 shall constitute additional security for the Secured Obligations. If Borrower is entitled to Net Proceeds pursuant to the terms hereof, the Net Proceeds (other than the Net Proceeds paid under the policy described in Section 1.07(a)(3) hereof for loss of rents or business interruption) shall be disbursed by Lender to, or as directed by, Borrower, in an amount equal to the costs actually incurred from time to time for work in place as part of the Restoration less customary retainage from time to time during the course of the Restoration, not more frequently than once per month, upon receipt of evidence satisfactory to Lender that (A) all materials installed and work and labor performed (except to the extent that they are to be paid for out of the requested disbursement) in connection with the Restoration have been paid for in full, and (B) there exist no notices of pendency, stop orders, mechanic's or materialman's liens or notices of intention to file the same, or any other liens or encumbrances of any nature whatsoever on the Property arising out of the Restoration which have not either been fully bonded and discharged of record or in the alternative fully insured to the satisfaction of Lender by the title company insuring the lien of this Security Instrument. The Net Proceeds paid under the policy described in Section 1.07(a)(3) shall be disbursed by Lender to pay for debt service under the Loan, to pay other expenses incurred by Borrower in connection with the ownership and operation of the Property, and the remainder thereof, to,

or as directed by, Borrower to pay for the cost of the Restoration in accordance with this Section 1.09(d). Final payment shall be made after submission to Lender of all licenses, permits, certificates of occupancy and other required approvals of governmental authorization having jurisdiction and Casualty Consultant's (defined below) certification that the Restoration has been fully completed.

(e) Lender shall have the use of the plans and specifications and all permits, licenses and approvals required or obtained in connection with the Restoration. The identity of the contractors, subcontractors and materialmen engaged in the Restoration, as well as the contracts under which they have been engaged, shall be subject to prior review and acceptance by Lender and an independent consulting engineer selected by Lender (the "Casualty Consultant"), such acceptance not to be unreasonably withheld or delayed. All costs and expenses incurred by Lender in connection with making the Net Proceeds available for the Restoration, including, without limitation, attorneys' fees and disbursements and the Casualty Consultant's fees, shall be paid by Borrower.

(f) If at any time the Net Proceeds or the undisbursed balance thereof shall not, in the reasonable opinion of Lender, be sufficient to pay in full the balance of the costs which are estimated by the Casualty Consultant to be incurred in connection with the completion of the Restoration, Borrower shall deposit the deficiency in immediately available funds (the "Net Proceeds Deficiency") with Lender before any further disbursement of the Net Proceeds shall be made. The Net Proceeds Deficiency deposited with Lender shall be held by Lender and shall be disbursed for costs actually incurred in connection with the Restoration on the same conditions applicable to the disbursement of the Net Proceeds, and until so disbursed pursuant to this Section 1.09 shall constitute additional security for the Secured Obligations.

(g) Unless an Event of Default exists, Borrower shall settle any insurance claims with respect to the Net Proceeds which in the aggregate are less than the Net Proceeds Availability Threshold. Lender shall have the right to participate in and reasonably approve any settlement for insurance claims with respect to the Net Proceeds which in the aggregate are greater than the Net Proceeds Availability Threshold. If an Event of Default exists, Borrower hereby irrevocably empowers Lender, at Lender's sole election, in the name of Borrower as its true and lawful attorney-in-fact, to file and prosecute such claims and to collect and to make receipt for any such payment. Notwithstanding the foregoing, Lender's failure to file and prosecute any such claims shall not diminish or impair Lender's rights and remedies against Borrower under the Loan Documents. If the Net Proceeds are received by Borrower, such Net Proceeds shall, until the completion of the related work, be held in trust for Lender and shall be segregated from other funds of Borrower to be used to pay for the cost of the Restoration in accordance with the terms hereof.

(h) The excess, if any, of the Net Proceeds and the remaining balance, if any, of the Net Proceeds Deficiency deposited with Lender after (i) the Casualty Consultant certifies to Lender that the Restoration has been completed in accordance with the provisions of this Section 1.09, and (ii) the receipt by Lender of evidence satisfactory to Lender that all costs incurred in connection with the Restoration have been paid in full and all required permits, licenses, certificates of occupancy and other required approvals of governmental authorities having jurisdiction have been issued, shall be remitted by Lender to Borrower, provided no Event of Default shall have occurred and shall be continuing under the Note, this Security Instrument or any of the other Loan Documents.

(i) All Net Proceeds not required (i) to be made available for the Restoration or (ii) to be returned to Borrower as excess Net Proceeds pursuant to Subsection 1.09(h) hereof shall be retained and applied by Lender toward the payment of the Secured Obligations whether or not then due and payable in such order, priority and proportions as Lender shall determine, without Prepayment Charge, or, at Lender's sole election, the same shall be paid, either in whole or in part, to Borrower. If Lender shall receive and retain Net Proceeds, the lien of this Security Instrument shall be reduced only by the amount received and retained by Lender and actually applied by Lender in reduction of the Secured Obligations.

1.10 Assignment of Policies Upon Foreclosure. In the event of foreclosure of this Security Instrument or other transfer of title or assignment of the Property in extinguishment, in whole or in part, of the debt secured hereby, all right, title and interest of Borrower in and to all policies of insurance required by Section 1.07 hereof shall inure to the benefit of and pass to the successor in interest to Borrower or the purchaser or grantee of the Property.

1.11 Indemnification; Subrogation; Waiver of Offset.

(a) Notwithstanding any other provisions of this Security Instrument, Lender is not undertaking any obligations, nor shall Lender have any obligations, under the Leases; or with respect to agreements, contracts, certificates, instruments, franchises, permits, licenses and other items which are part of the Property. If Lender or Trustee is made a party to any litigation concerning the Note, this Security Instrument, any of the Loan Documents, the Property or any part thereof or interest therein, or the occupancy of the Property by Borrower, then Borrower shall indemnify, defend and hold Lender and Trustee harmless from all liability by reason of said litigation, including, without limitation, attorneys' fees and expenses incurred by Lender or Trustee as a result of any such litigation, whether or not any such litigation is prosecuted to judgment. Lender and Trustee may employ an attorney or attorneys selected by it to protect its rights hereunder, and Borrower shall pay to Lender and Trustee attorneys' fees and costs incurred by Lender and Trustee.

(b) Borrower waives any and all right to claim or recover against Lender, Trustee, or their respective officers, employees, agents and representatives, for loss of or damage to Borrower, the Property, Borrower's property or the property of others under Borrower's control from any cause insured against or required to be insured against by the provisions of this Security Instrument.

(c) All sums payable by Borrower pursuant to this Security Instrument or the Note shall be paid without notice, demand, counterclaim, setoff, deduction or defense and without abatement, suspension, deferment, diminution or reduction, and the obligations and liabilities of Borrower hereunder shall in no way be released, discharged or otherwise affected (except as expressly provided herein) by reason of: (i) any damage to or destruction of or any condemnation or similar taking of the Property or any part thereof; (ii) any restriction or prevention of or interference by any third party with any use of the Property or any part thereof; (iii) any title defect or encumbrance or any eviction from the Property, the improvements or any part thereof by title paramount or otherwise; (iv) any bankruptcy, insolvency, reorganization, composition, adjustment, dissolution, liquidation or other like proceeding relating to Lender, or any action taken with respect to this Security Instrument by any trustee or receiver of Lender, or by any court, in any such proceeding; (v) any claim which Borrower has or might have against Lender; (vi) any default or failure on the part of Lender to perform or comply with any of the terms hereof or of any other agreement with Borrower; or (vii) any other occurrence whatsoever, whether similar or dissimilar to the foregoing and whether or not Borrower shall have notice or knowledge of any of the foregoing. Except as expressly provided herein, Borrower waives all rights now or hereafter conferred by statute or otherwise to any abatement, suspension, deferment, diminution or reduction of any sum secured hereby and payable by Borrower.

1.12 Utilities. Borrower shall pay or shall cause to be paid when due all utility charges which are incurred by Borrower for the benefit of the Property and all other assessments or charges of a similar nature, whether or not such charges are or may become liens thereon.

1.13 Actions Affecting Property. Borrower shall promptly give Lender written notice of, and shall appear in and contest, any action or proceeding purporting to affect the Property or any portion thereof or interest therein, or the security of this Security Instrument or the rights or powers of Lender or Trustee; and shall pay all costs and expenses, including, without limitation, the cost of evidence of title and attorneys' fees, in any such action or proceeding in which Lender or Trustee may appear.

1.14 Actions by Trustee or Lender to Preserve Property. If Borrower fails to make any payment or to do any act as and in the manner provided in any of the Loan Documents, Lender and/or Trustee, each at its own election, without obligation so to do, without releasing Borrower from any obligation, and without notice to or demand upon Borrower, may make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof. In connection therewith (without limiting their general powers, whether conferred herein, in any other Loan Documents or by law), Lender and Trustee shall have and are hereby given the right, but not the obligation, (i) to enter upon and take possession of the Property; (ii) to make additions, alterations, repairs and improvements to the Property which they or either of them may consider necessary or proper to keep the Property in good condition and repair; (iii) to appear and participate in any action or proceeding affecting or which may affect the Property or any portion thereof or interest therein, the security of this Security Instrument or the rights or powers of Lender or Trustee; (iv) to pay, purchase, contest or compromise any encumbrance, claim, charge, lien or debt which in the judgment of either may affect or appears to affect the security of this Security Instrument or be prior or superior hereto; and (v) in exercising such powers, to pay necessary expenses, including, without limitation, attorneys' fees and costs or other necessary or desirable consultants. Borrower shall, immediately upon demand therefor by Lender and Trustee or either of them, pay to Lender and Trustee an amount equal to all respective costs and expenses incurred by such party in connection with the exercise of the foregoing rights, including, without limitation, costs of evidence of title, court costs, appraisals, surveys and receiver's, trustee's and attorneys' fees and costs and expenses, together with interest thereon from the date of such expenditure at the Default Rate.

1.15 Transfers; Due On Sale/Encumbrance.

(a) **Lender Reliance.** Borrower acknowledges that Lender has examined and relied on the experience of Borrower or its general partners, managing partners, managing members, principals or any direct or indirect legal or beneficial owner of Borrower in owning and operating properties such as the Property in agreeing to make the Loan, and will continue to rely on Borrower's ownership of the Property as a means of maintaining the value of the Property as security for payment and performance of the Secured Obligations. Borrower acknowledges that Lender has a valid interest in maintaining the value of the Property so as to ensure that, should Borrower default in the payment or the performance of the Secured Obligations, Lender can recover the Secured Obligations by a sale of the Property.

(b) **Transfer Definitions.** For purposes of this Section 1.15, an "Affiliated Manager" shall mean any Property Manager in which Borrower, any Guarantor (as hereinafter defined) or any Indemnitor has, directly or indirectly, any legal, beneficial or economic interest; a "Restricted Party" shall mean Borrower, any Guarantor, any Indemnitor, or any Affiliated Manager or any shareholder, partner, member or non-member manager, or any direct or indirect legal or beneficial owner of Borrower, any Guarantor, any Indemnitor, any Affiliated Manager or any non-member manager; a "Sale" shall mean a voluntary or involuntary sale, conveyance or transfer of a legal or beneficial interest; and a "Pledge" shall mean a pledge of or grant of a security interest in a legal or beneficial interest; the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of management, policies or activities of a person or entity, whether through ownership of voting securities, by contract, by operation of law, or otherwise.

(c) **No Sale/Encumbrance.**

(1) Except as is set forth below in Section 1.15(d) with respect to Permitted Transfers (as hereinafter defined), Borrower shall not sell, convey, mortgage, grant, bargain, encumber, pledge, assign, grant options with respect to, or otherwise transfer or dispose of (directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise, and whether or not for consideration or of record) the Property or any part thereof or any legal or beneficial interest therein or permit a Sale or Pledge of an interest in any Restricted Party (collectively a "Transfer"), without the prior written consent of Lender, which consent may be withheld at Lender's sole election, regardless of whether the conditions

set forth in Subsection 1.15(e) hereof have been satisfied. Without limiting the foregoing, there shall be no subordinate financing placed on any portion of the Property.

(2) A Transfer shall include, without limitation: (i) an installment sales agreement wherein Borrower agrees to sell the Property or any part thereof for a price to be paid in installments; (ii) an agreement by Borrower leasing all or a substantial part of the Property for other than actual occupancy by a space tenant thereunder or a sale, assignment or other transfer of, or the grant of a security interest in, Borrower's right, title and interest in and to any Leases or any Rents; (iii) if a Restricted Party is a corporation, any merger, consolidation, Sale or Pledge of such corporation's stock or the creation or issuance of new stock in such corporation; (iv) if a Restricted Party is a limited or general partnership or joint venture, any merger or consolidation or the change, removal, resignation or addition of any general partner or joint venturer, or the Sale or Pledge of the partnership interest of any limited partner, general partner or joint venturer, or the Sale or Pledge of any profits or proceeds relating to such partnership interest, or the creation or issuance of new partnership interests; (v) if a Restricted Party is a limited liability company, any merger or consolidation or the change, removal, resignation or addition of any managing member or non-member manager (or if no managing member or non-member manager, any member) or the Sale or Pledge of the membership interest of any member or any profits or proceeds relating to such membership interest, or the creation or issuance of new membership interests; (vi) if a Restricted Party is a trust or nominee trust, any merger or consolidation or the Sale or Pledge of the legal or beneficial interests in such Restricted Party or the creation or issuance of new legal or beneficial interests; (vii) the removal of the Property Manager (including, without limitation, an Affiliated Manager) other than in accordance with Section 1.02 hereof; and (viii) without limitation to the foregoing, any Sale or Pledge by any person or entity which directly or indirectly controls Borrower or its direct or indirect controlling interest in Borrower.

(d) Permitted Transfers.

(1) Notwithstanding the provisions of Sections 1.15(b) and (c) hereof, the following transfers shall not be deemed to be a Transfer: (i) transfers by devise or descent or by operation of law upon the death of a member, partner or shareholder of a Restricted Party ("Transfer Upon Death"); (ii) the Sale, in one or a series of transactions, of not more than forty-nine percent (49%) of the stock in a Restricted Party; (iii) the Sale, in one or a series of transactions, of not more than forty-nine percent (49%) of the limited partnership interests or non-managing membership interests, as the case may be, in a Restricted Party; (iv) inter vivos and testamentary transfers of the legal or beneficial interests (including, without limitation, stock, partnership interests and membership interests) in a Restricted Party (A) to an existing owner of a legal or beneficial interest (including, without limitation, a shareholder, limited partner, general partner, joint venturer or member) in such Restricted Party on the date hereof (an "Existing Owner"), (B) to a lineal descendant or spouse of an Existing Owner, (C) to a trust, the beneficiary of which is (and so long as any part of the Loan remains unpaid continues to be) an Existing Owner or a lineal descendant or spouse of an Existing Owner, or (D) to a corporation, limited or general partnership, limited liability company or other legal entity which is (and so long as any part of the Loan remains unpaid continues to be) wholly owned and controlled by an Existing Owner; and (v) pursuant to Leases for which Lender's consent is not required in accordance with the provisions of Section 1.28 (b) hereof. Notwithstanding the introductory clause of this paragraph, the transfers described in clauses (i) through (iv) inclusive of this paragraph (collectively, "Permitted Transfers") shall be subject to Lender's prior written consent, which consent Lender shall provide upon satisfaction of the conditions set forth in Subsection 1.15(e) hereof.

(e) Conditions Precedent. Lender's consent to any Transfer/Permitted Transfer, regardless of whether Lender has consented to any previous Transfer/Permitted Transfer, is subject to satisfaction of the following conditions precedent:

(1) Lender shall have received, in the case of a voluntary Transfer/Permitted Transfer, at least thirty (30) days prior written notice of the Transfer/Permitted Transfer, and, in the case

of Transfer(s) Upon Death, within thirty (30) days after such Permitted Transfer (collectively, the "Permitted Transfer Notice Deadline"), together with copies of such documents and information relating to the Transfer/Permitted Transfer as Lender may request, including, without limitation, the Sale documents (including, without limitation, purchase/sale agreement, if any), the terms and structure of the Sale and the nature and structure of the Sale (including, without limitation, debt/equity structure, if any);

(2) One of the following is satisfied: (i) the Transfer/Permitted Transfer shall not result in a change in the control of any Restricted Party or a change in the control or management of the Borrower and the Property; (ii), in the alternative, the person(s) or entity(ies) proposed to assume control of such Restricted Party and the person(s) or entity(ies) proposed to assume control and management of the Borrower and/or the Property shall be acceptable to Lender in all respects (including, without limitation, financial condition, credit history and management ability/experience and other relevant criteria, all as determined by Lender); or (iii) in the case of Transfer(s) Upon Death, the person(s) or entity(ies) to assume control of such Restricted Party and/or the person(s) or entity(ies) to assume control and management of the Borrower and the Property shall be acceptable to Lender in Lender's commercially reasonable discretion and in the event any of the foregoing proposed person(s) or entity(ies) described in this Subsection 1.15(e)(2)(iii) are not acceptable to Lender in the manner described herein, Lender shall provide a reasonable opportunity (not to exceed thirty (30) days from the expiration of the Permitted Transfer Notice Deadline in the case of Transfer(s) Upon Death) for substitute person(s) or entity(ies), acceptable to Lender in the manner described in this Subsection 1.15(e)(2)(iii), to be provided (such substitute person(s) or entity(ies) may include a third-party property manager to operate the Property if Lender requires in its commercially reasonable discretion);

(3) the Transfer/Permitted Transfer shall not release any Guarantor or Indemnitor or their respective estates from their respective obligations under the Loan Documents;

(4) the Transfer/Permitted Transfer shall not release the Borrower from its obligations under the Note, this Security Instrument, or any other Loan Documents;

(5) the Transfer/Permitted Transfer shall not have any adverse effect either on the Borrower's compliance with the provisions of this Security Instrument, including, without limitation, Section 1.29 (captioned "Single Purpose Entity") and Section 1.30 (captioned "ERISA") hereof, or on the Borrower's status as a continuing legal entity liable for the payment and performance of the Secured Obligations;

(6) Borrower shall pay all of Lender's costs and expenses, including, without limitation, attorneys' fees and costs, and title insurance costs (if any).

(7) **Lender's Rights.** Lender reserves the right to condition any consent required hereunder upon a modification of the terms hereof (excluding a modification of the interest rate, amortization term, maturity date, or payment schedule) and on an assumption of the Note, this Security Instrument and the other Loan Documents as so modified in connection with the proposed Transfer, payment of an assumption fee (except with respect to Permitted Transfers) of one percent (1%) of the principal balance of the Note (the "Assumption Fee"), payment of a \$2,000.00 processing fee (the "Processing Fee"), payment of expenses incurred by Lender (including attorneys' fees) in connection with any proposed Transfer (the "Transfer Expenses"), the approval by a Rating Agency (defined below) of the proposed transferee, and such other conditions and legal opinions as Lender shall determine to be in the interest of Lender. If the holder of the Note shall be a "real estate mortgage investment conduit" or "REMIC" (as such terms are defined in Section 860D of the United States Internal Revenue Code, as amended, and any related United States Treasury Department regulations) (the "REMIC Trust"), such opinions shall include, without limitation, an opinion of counsel in form and substance satisfactory to Lender, from counsel approved by Lender, stating that the tax qualification and status of the REMIC Trust as a REMIC will not be adversely affected or impaired as a result of such modification or assumption. The Transfer Expenses and the Processing Fee shall be payable by Borrower whether or not Lender consents to the

Transfer. Lender shall not be required to demonstrate any actual impairment of its security or any increased risk of default hereunder in order to declare the Secured Obligations immediately due and payable upon a Transfer without Lender's consent. Any Transfer made in contravention of this Section 1.15 shall be null and void and of no force and effect. The provisions of this Section 1.15 shall apply to every Transfer regardless of whether voluntary or not, or whether or not Lender has consented to any previous Transfer.

(g) **Assumption and Release.** Provided that no Event of Default shall have occurred and shall be continuing, Lender shall consent to a sale of the Property and assumption of the Loan by the purchaser (transferee) and the release of Borrower from liability under the Loan, except for any liability arising or accruing prior to the closing of said assumption, upon (1) Borrower's completion of an assumption application in such form as Lender may require from time to time, (2) Lender's review and approval, which approval shall not be unreasonably withheld, of the creditworthiness and other qualifications of the proposed transferee (including, without limitation, the development, business or management expertise of the proposed transferee, if deemed relevant under the circumstances by Lender in its good faith judgment) under Lender's underwriting criteria at the time of said assumption, (3) the execution by the transferee of an assumption agreement in such form as Lender may require from time to time, and (4) payment to Lender of the Assumption Fee, the Processing Fee and the Transfer Expenses. In addition, in connection with said assumption, but subject to all of the conditions referred to above in this Subsection 1.15(g), Lender shall consent to the release of the Guarantor and Indemnitor, except for any liability arising or accruing prior to the closing of said assumption, provided that Lender approves in writing substitute guarantor(s)/indemnitor(s) acceptable to Lender in its sole discretion in terms of creditworthiness and other qualifications under Lender's underwriting criteria at the time of said assumption, and further provided that such substitute guarantor(s)/indemnitor(s) execute warranties and/or indemnities in form and content acceptable to Lender.

1.16 **Survival of Warranties.** Notwithstanding any investigation of the Property, Borrower, Guarantor or Indemnitor by Lender, Borrower acknowledges: (a) that in accepting the Note, this Security Instrument and the other Loan Documents, Lender is expressly and primarily relying on the truth and accuracy of the representations, warranties and covenants of Borrower, Guarantor and Indemnitor contained in any loan application (a "Loan Application") or made to Lender in connection with the Loan or contained in the Loan Documents or incorporated by reference therein (the "Warranties"); (b) that such reliance existed on the part of Lender prior to the date hereof; (c) that the Warranties are a material inducement to Lender in making the Loan; and (d) that Lender would not make the Loan in the absence of the Warranties. All Warranties shall survive the execution and delivery of this Security Instrument and shall remain continuing obligations, representations, warranties and covenants of Borrower so long as any portion of the Secured Obligations remain outstanding.

1.17 **Eminent Domain; Condemnation.** Borrower shall promptly give Lender notice of the actual or threatened commencement of any condemnation or eminent domain proceeding and shall deliver to Lender copies of any and all papers served in connection with such proceedings. Notwithstanding any taking by any public or quasi-public authority through eminent domain or otherwise (including, without limitation, any transfer made in lieu of or in anticipation of the exercise of such taking), Borrower shall continue to pay and perform the Secured Obligations at the time and in the manner provided for its payment and performance in the Note and in this Security Instrument and the Secured Obligations shall not be reduced until any award or payment therefor shall have been actually received and applied by Lender, after the deduction of expenses of collection, to the reduction or discharge of the Secured Obligations. Lender shall not be limited to the interest paid on the award by the condemning authority but shall be entitled to receive out of the award interest at the rate or rates provided in the Note. Borrower shall cause the award or payment made in any condemnation or eminent domain proceeding, which is payable to Borrower, to be applied in accordance with Section 1.09 hereof. In the event Borrower is not entitled to any award or payment pursuant to Section 1.09 hereof, Borrower shall cause the award or payment to be paid directly to Lender. Lender may apply the award or payment to the reduction or discharge of the Secured Obligations whether or not then due and payable. If the Property is

sold, through foreclosure or otherwise, prior to the receipt by Lender of the award or payment, Lender shall have the right, whether or not a deficiency judgment on the Note (to the extent permitted in the Note or herein) shall have been sought, recovered or denied, to receive the award or payment, or a portion thereof sufficient to pay the Secured Obligations. If in the event of a total condemnation the award or payment is not sufficient to repay the Note in full, Borrower shall immediately pay any remaining balance, together with all accrued interest thereon. Nothing herein shall be construed to cure or waive any Event of Default or notice of default hereunder or under any other Loan Document or invalidate any act done pursuant to such notice.

1.18 Additional Security. No other security now existing, or hereafter taken, to secure the Secured Obligations shall be impaired or affected by the execution of this Security Instrument and all additional security shall be taken, considered and held as cumulative. The taking of additional security, execution of partial releases of the security, or any extension of the time of payment of the Secured Obligations shall not diminish the force, effect or lien of this Security Instrument and shall not affect or impair the liability of any maker, surety or endorser for the payment of the Secured Obligations. In the event Lender at any time holds additional security for any of the Secured Obligations, it may enforce the sale thereof or otherwise realize upon the same, at its option, either before, concurrently, or after a sale is made hereunder.

1.19 Property Use. The Property shall be used only for multi-family/apartment use and uses incidental thereto, and for no other use without the prior written consent of Lender.

1.20 Successors and Assigns. Without in any way limiting or affecting the provisions of Section 1.15 hereof, this Security Instrument applies to, inures to the benefit of and binds all parties hereto and their respective heirs, legatees, devisees, administrators, executors, successors and assigns. The term "Lender" shall mean the owner and holder of the Note, whether or not named as Lender herein. In exercising any rights hereunder or taking any actions provided for herein, Lender may act through its employees, agents, independent contractors or servicers authorized by Lender.

1.21 Inspections. Lender, or its agents, representatives or employees, are authorized to enter at any reasonable time (and with due regard for rights of tenants) upon or in any part of the Property for the purpose of inspecting the same and for the purpose of performing any of the acts Lender is authorized to perform hereunder or under the terms of any of the Loan Documents. Without limiting the generality of the foregoing, Lender shall have the same right, power and authority to enter and inspect the Property, and the right to appoint a receiver on an *ex parte* basis, to enforce this right to enter and inspect the Property.

1.22 [RESERVED].

1.23 Lender's Powers. Without affecting the liability of any other person liable for the payment of any obligations herein mentioned, and without affecting the lien or charge of this Security Instrument upon any portion of the Property not then or theretofore released as security for the full amount of all unpaid obligations, Lender may, from time to time and without notice (i) release any person so liable, (ii) extend the maturity or alter any of the terms of any such obligation, (iii) grant other indulgences, (iv) release or reconvey, or cause to be released or reconveyed at any time at Lender's option any parcel, portion or all of the Property, (v) take or release any other or additional security for any obligation herein mentioned, or (vi) make other arrangements with debtors in relation thereto.

1.24 Books and Records; Financial Statements.

(a) Borrower, any Guarantor and any Indemnitor shall keep (and Borrower shall cause any Guarantor and any Indemnitor to keep) adequate books and records of account in accordance with generally accepted accounting principles ("GAAP"), or in accordance with other methods acceptable to Lender, consistently applied and furnish to Lender:

(1) quarterly and annual (or, if requested by Lender and the Loan has not yet been securitized or sold as a whole loan, monthly) certified rent rolls signed and dated by Borrower accompanied by an officer's certificate, detailing the names of all tenants of the improvements, the portion of improvements occupied by each tenant, the base rent and any other charges payable under each Lease and the term of each Lease, including the expiration date, the extent to which any tenant is in default under any Lease, and any other information as is reasonably required by Lender, within twenty (20) days after the end of each calendar month, thirty (30) days after the end of each fiscal quarter or sixty (60) days after the close of each fiscal year of Borrower, as applicable;

(2) quarterly and annual (or if requested by Lender and the Loan has not yet been securitized or sold as a whole loan, monthly) operating statements of the Property, prepared and certified by Borrower in the form required by Lender or, if required by Lender after an Event of Default, an audited annual operating statement prepared and certified by an independent certified public accountant acceptable to Lender, detailing the revenues received, the expenses incurred and the net operating income before and after debt service (principal and interest) and major capital improvements for each month and containing appropriate year to date information, within twenty (20) days after the end of each calendar month, thirty (30) days after the end of each fiscal quarter or sixty (60) days after the close of each fiscal year of Borrower, as applicable;

(3) annual (or if requested by Lender and the Loan has not yet been securitized or sold as a whole loan, quarterly) balance sheets and profit and loss statements of Borrower, any Guarantor and any Indemnitor in the form required by Lender, prepared and certified by the respective Borrower, Guarantor and Indemnitor or, if required by Lender after an Event of Default, audited financial statements prepared by an independent certified public accountant acceptable to Lender within thirty (30) days after the end of each fiscal quarter or sixty (60) days after the close of each fiscal year of Borrower, Guarantor and Indemnitor, as the case may be; and

(4) an annual operating budget presented on a monthly basis consistent with the annual operating statement described above for the Property, including cash flow projections for the upcoming year, and all proposed capital replacements and improvements at least fifteen (15) days prior to the start of each fiscal year.

(5) INTENTIONALLY OMITTED.

(b) Upon request from Lender, Borrower, any Guarantor and any Indemnitor shall furnish (and Borrower shall cause any Guarantor and any Indemnitor to furnish) in a timely manner to Lender:

(1) If the Property is used for multi-family residential use, a property management report for the Property, showing the number of inquiries made and/or rental applications received from tenants or prospective tenants and deposits received from tenants and any other information requested by Lender, in reasonable detail and certified by Borrower (or an officer, general partner, member or principal of Borrower if Borrower is not an individual) to be true and complete, but no more frequently than quarterly; and

(2) an accounting of all security deposits held in connection with any Lease of any part of the Property, including the name and identification number of the accounts in which such security deposits are held, the name and address of the financial institutions in which such security deposits are held and the name of the person to contact at such financial institution, along with any authority or release necessary for Lender to obtain information regarding such accounts directly from such financial institutions.

(c) Borrower, any Guarantor and any Indemnitor shall furnish (and Borrower shall cause any Guarantor and any Indemnitor to furnish) Lender with such other additional financial or management

Information (including, without limitation, state and federal tax returns) as may, from time to time, be reasonably required by Lender in form and substance satisfactory to Lender.

(d) Borrower, any Guarantor and any Indemnitor shall furnish (and Borrower shall cause any Guarantor and any Indemnitor to furnish) to Lender and its agents convenient facilities for the examination and audit of any such books and records.

(e) Borrower shall pay a late fee of \$500 to Lender each time Borrower fails to deliver the required financial documents set forth above within the time set forth above. If such delivery delinquency continues for ten (10) days after written notice thereof.

1.25 Borrower Name(s); Matters Affecting Financing Statement Filings. At the request of Lender, Borrower shall execute a certificate in form satisfactory to Lender listing the trade names or fictitious business names under which Borrower intends to operate the Property or any business located thereon and representing and warranting that Borrower does business under no other trade names or fictitious business names with respect to the Property. Borrower will not change any of the following without notifying the Lender of such change in writing at least thirty (30) days prior to the effective date of such change and without first obtaining the prior written consent of the Lender:

- (a) Borrower's name or identity (including, without limitation, its trade name or names);
- (b) If Borrower is an individual, Borrower's principal residence;
- (c) If Borrower is an organization, Borrower's corporate, partnership or other structure;
- (d) If Borrower is an organization, Borrower's jurisdiction of organization (i.e., the jurisdiction, or State, under whose law the Borrower is organized); or
- (e) If Borrower is an organization, Borrower's place of business (if Borrower has only one place of business) or Borrower's chief executive office (if Borrower has more than one place of business).

Upon any change in the matters referred to above (if permitted hereunder), Borrower will, upon request of Lender, execute any financing statement amendments, additional financing statements and other documents required by Lender to reflect such change.

1.26 Leaseholds.

(a) Reserved.

(b) **Space Leases.** Borrower shall deliver to Lender a signed copy of all Leases (other than residential/apartment Leases) with respect to the Property or executed counterparts thereof, now existing or hereafter made from time to time, within thirty (30) days of signing, affecting all or any part of the Property, and except as is set forth herein, all Leases now or hereafter entered into with respect to the Property shall be in form and substance subject to the approval of Lender. Borrower shall not, without Lender's prior written consent, execute, modify, surrender or terminate any Lease now existing or hereafter made affecting all or any part of the Property; provided, however, that Borrower may enter into Leases affecting the Property without Lender's consent if such Leases (i) provide for a term of no less than three (3) years and no more than seven (7) years and at least a market rental rate for comparable properties in the geographic area of the Property (as determined by Lender); (ii) have been negotiated at arms length with a bona fide independent, third-party tenant; (iii) demise not more than fifteen (15%) percent of the lesser of gross square footage of, or total income generated by, the improvements; (iv) do not contain material modifications from the standard form of Lease previously approved by Lender; (v) do not change the use of the Property in effect at the time the Loan was made; (vi) do not have a material adverse effect on the value of the Property taken as a whole; and (vii) are subject and subordinate to this

Security Instrument and the lessees thereunder agree to attorn to Lender, and further provided the Lender's prior consent shall not be required in connection with the making, modification or termination (including, but not limited to, instituting proceedings for dispossession or eviction of any lessee under any Lease) of residential/apartment Leases in the ordinary course of business and consistent with prudent customary leasing and management practices for similar properties.

1.27 Indemnity. In addition to any other indemnities to Lender specifically provided for in this Security Instrument, Borrower hereby indemnifies and saves Lender and its authorized representatives harmless from and against any and all losses, liabilities, suits, obligations, fines, damages, penalties, claims, costs, charges and expenses, including, without limitation, architects', engineers' and attorneys' fees and all disbursements which may be imposed upon, incurred or asserted against Lender and its authorized representatives by reason of: (i) the construction of any improvements, (ii) any capital improvements, other work or things done in, on or about the Property or any part thereof, (iii) any use, nonuse, misuse, possession, occupation, alteration, operation, maintenance or management of the Property or any part thereof or any street, drive, sidewalk, curb, passageway or space comprising a part thereof or adjacent thereto, (iv) any negligence or willful act or omission on the part of Borrower and its agents, contractors, servants, employees, licensees or invitees, (v) any accident, injury (including, without limitation, death) or damage to any person or property occurring in, on or about the Property or any part thereof, (vi) any lien or claim which may be alleged to have arisen on or against the Property or any part thereof under the laws of the local or state government or any other governmental or quasi-governmental authority or any liability asserted against Lender with respect thereto, (vii) any tax attributable to the execution, delivery, filing or recording of this Security Instrument or the Note, (viii) any contest due to Borrower's actions or failure to act, permitted pursuant to the provisions of this Security Instrument, (ix) any default under the Note or this Security Instrument, (x) any claim by or liability to any contractor or subcontractor performing work or any party supplying materials in connection with the Property, (xi) any and all claims and demands whatsoever which may be asserted against Lender by reason of any alleged obligations or undertaking on its part to perform or discharge any of the terms, covenants, or agreements contained in any Lease; or (xii) the payment of any commission, charge or brokerage fee to anyone which may be payable in connection with the funding of the Loan.

1.28 Representations and Warranties. Borrower covenants, represents and warrants with and to Trustee and Lender that:

(a) Borrower Organization. Borrower is duly organized, validly existing and in good standing (if applicable) under the laws of the jurisdiction of its organization or formation, and Borrower is duly qualified to transact business and holds all licenses, registrations or other approvals (or is otherwise exempt), in each other jurisdiction in which the conduct of Borrower's business requires such qualification, licenses, registrations or other approvals. Borrower will continuously maintain its existence and good standing (if applicable) under the laws of the jurisdiction of its organization or formation, and Borrower will continuously maintain its qualification to transact business and all licenses, registrations or other approvals (unless otherwise exempt), in each other jurisdiction in which the conduct of Borrower's business requires such qualification, licenses, registrations or other approvals.

(b) Borrower Authority. Borrower has all requisite power and authority to enter into the Loan and to execute and deliver the Loan Documents, and to perform all of the obligations required of Borrower thereunder. Borrower is not required to make any filing with, or to obtain any permit, authorization, consent or approval of, any person or entity as a condition to Borrower's entering into the Loan, executing and delivering the Note, this Security Instrument, or any other Loan Documents, or performing all of the obligations required of Borrower thereunder, or if any such required permit, authorization, consent or approval is required, it has been obtained.

(c) Validity of Documents. The execution and delivery by Borrower of the Note, this Security Instrument and other Loan Documents, and the performance by Borrower of its obligations thereunder, do not violate any prohibition contained in, conflict with, result in a breach of, give rise to any

right of termination, cancellation or acceleration under, constitute a default under, or require any additional approval under (i) Borrower's partnership agreement or any other organizational or constituent document or instrument pursuant to which Borrower was formed or by which Borrower's operations are governed; (ii) any material instrument or agreement to which Borrower is a part or by which Borrower is bound or that affects the Property; or (iii) any law, rule, regulation, ordinance, order, injunction or decree application to Borrower or to the Property or any portion thereof.

(d) **Warranty of Title.** Borrower hereby fully warrants the title to the Property and will defend the same and the validity and priority of the lien and encumbrance of this Security Instrument against the lawful claims of all persons whomsoever. None of the Permitted Encumbrances (defined below), individually or in the aggregate, materially interfere with the benefits of the security intended to be provided by the Security Instrument and the Loan Documents, materially and adversely affect the value of the Property, impair the use or operations of the Property or impair Borrower's ability to pay its obligations in a timely manner.

(e) **No Liens or Transfers.** Borrower has not obtained, or agreed to obtain, any loan from any person which could result in the creation of a lien upon the Property, or any part thereof, to secure repayment thereof, except for the lien of the Loan. The Property is free and clear of all liens and encumbrances of any kind, nature or description, save and except only for those matters set forth in a schedule of exceptions to coverage in the title insurance policy approved by Lender and insuring Lender's interest in the Property (the "Permitted Encumbrances"). Further, Borrower has not made or permitted any transfer (including, without limitation, a Transfer) which will or could result in subordinate financing being placed on any portion of the Property, and there is no outstanding Sale or Pledge of an interest in a Restricted Party.

(f) **Litigation.** There is not pending against Borrower (or any partner of Borrower, if and to the extent applicable) any petition in bankruptcy, whether voluntary or otherwise, any assignment for the benefit of creditors, any petition seeking reorganization, liquidation or arrangement under the bankruptcy laws of the United States or of any State thereof, or any other action brought under the aforementioned bankruptcy laws; and there is no action, suit, proceeding or investigation pending or, to Borrower's knowledge, threatened, in any court or before any governmental agency (including, without limitation, condemnation proceedings) involving Borrower (or partner of Borrower, if and to the extent applicable) or the Property or any portion thereof, including, without limitation, any action which would draw into question the validity of the Loan or of Borrower's obligations under the terms of the Note, this Security Instrument or any other Loan Document.

(g) **Status of Property.**

(1) No portion of the Improvements is located in an area identified by the Secretary of Housing and Urban Development or any successor thereto as an area having special flood hazards pursuant to the Flood Insurance Acts or, if any portion of the Improvements is located within such area, Borrower has obtained and will maintain the flood insurance described in Section 1.07 hereof.

(2) The Property and the present and contemplated use and occupancy thereof are in substantial compliance with all applicable zoning ordinances, building codes, land use and Environmental Laws and other similar laws. Without limiting the foregoing, the Property is in substantial compliance with the Americans with Disabilities Act of 1990 (as amended from time to time and any successor statute) and all of the regulations promulgated thereunder. The Land constitutes one or more separate tax lots and one or more separate legal lots in compliance with all applicable subdivision regulations.

(3) All necessary certificates, licenses and other approvals, governmental and otherwise, necessary for the operation of the Property and the conduct of its business and all required

zoning, building code, land use, environmental and other similar permits or approvals, are in full force and effect as of the date hereof and not subject to revocation, suspension, forfeiture or modification.

(4) The Property is served by all utilities required for the current or contemplated use thereof, and all utility service is provided by public utilities and the Property has accepted or is equipped to accept such utility service.

(5) All public roads and streets necessary for service of and access to the Property for the current or contemplated use thereof have been completed, are serviceable and all-weather and are physically and legally open for use by the public.

(6) The Property is served by public water and sewer systems.

(7) The Property is free from material damage by any cause whatsoever, and any and all repairs required by Lender have been completed.

(8) All costs and expenses of any and all labor, materials, supplies and equipment used in the construction of the Improvements have been paid in full.

(9) Borrower has paid in full for, and is the owner of, all furnishings, fixtures and equipment (other than property owned by tenants) used in connection with the operation of the Property, free and clear of any and all security interests, liens or encumbrances, except the lien and security interest created hereby.

(10) All liquid and solid waste disposal, septic and sewer systems located on the Property are in a good and safe condition and repair and in compliance with all applicable laws.

(11) All the Improvements lie within the boundaries of the Land.

(h) **No Foreign Person.** Borrower is not a "foreign person", "foreign corporation", "foreign partnership", "foreign trust" or "foreign estate" or other foreign entity as those terms are defined in Section 1445 of the United States Internal Revenue Code, as amended, and the related United States Treasury Department regulations.

(i) **Separate Tax Lot.** The Land is assessed for real estate tax purposes as one or more wholly independent tax lot or lots, separate from any adjoining land or improvements not constituting a part of such lot or lots, and no other land or improvements are assessed and taxed together with the Land or any portion thereof.

(j) **Financial Condition.** Borrower is solvent, and no bankruptcy, reorganization, insolvency or similar proceeding under any state or federal law with respect to Borrower has been initiated. No petition in bankruptcy has ever been filed by or against Borrower, any Guarantor, or any related entity, or any principal, general partner or member thereof, in the last seven (7) years, and neither Borrower, any Guarantor nor any related entity, or any principal, general partner or member thereof, in the last seven (7) years has ever made any assignment for the benefit of creditors or taken advantage of any insolvency act or any act for the benefit of debtors. All information in all financial statements, rent rolls, reports, certificates and other documents submitted in connection with the Loan are accurate, complete and correct in all material respects. There has been no adverse change in any condition, fact, circumstance or event that would make any such information inaccurate, incomplete or otherwise misleading.

(k) **Business Purposes.** The Loan is solely for the business purpose of Borrower, and is not for personal, family, household, or agricultural purposes.

(l) **Taxes.** Borrower and any guarantor of the Loan have filed all federal, state, county, municipal, and city income and other tax returns required to have been filed by them and have paid all taxes and related liabilities which have become due pursuant to such returns or pursuant to any assessments received by them. Neither Borrower nor any guarantor of the Loan knows of any basis for any additional assessment in respect of any such taxes and related liabilities for prior years.

(m) **No Change in Facts or Circumstances.** All information in all financing statements, rent rolls, reports, certificates and other documents submitted in connection with the Loan are accurate, complete and correct in all respects. There has been no adverse change in any condition, fact, circumstance or event that would make any such information inaccurate, incomplete or otherwise misleading.

(n) **Disclosure.** Borrower has disclosed to Lender all material facts and has not failed to disclose any material fact that could cause any representation or warranty made herein to be materially misleading.

(o) **Illegal Activity.** No portion of the Property has been or will be purchased, improved, equipped or furnished with proceeds of any illegal activity, and, to the best of Borrower's knowledge, there are no illegal activities or activities relating to any controlled substance at the Property.

(p) **Contracts.** All contracts, agreements, consents, waivers, documents and writings of every kind or character at any time to which Borrower is a party to be delivered to Lender pursuant to any of the provisions of the Loan Documents are valid and enforceable against Borrower and, to the best knowledge of Borrower, are enforceable against all other parties thereto, and, to Borrower's actual knowledge, in all respects are what they purport to be and, to the best knowledge of Borrower, to the extent that any such writing shall impose any obligation or duty on the party thereto or constitute a waiver of any rights which any such party might otherwise have, said writing shall be valid and enforceable against said party in accordance with its terms, except as such enforcement may be limited by applicable bankruptcy, insolvency, reorganization or similar laws affecting the rights of creditors generally.

(q) **Transfer of Property.** To the best of Borrower's knowledge, there is no concurrent or subsequent escrow to be opened or closed upon the closing of the Loan which would have the effect of transferring all or any portion of the Property.

1.29 **Single Purpose Entity.** Borrower covenants, represents, warrants and agrees that it has not done any of the following and shall not do any of the following:

(a) engage in any business or activity other than the acquisition, development, ownership, operation, leasing and managing and maintenance of the Property, and entering into the Loan and activities incidental thereto, and serving as the "Declarant" under the Declaration;

(b) acquire or own any material assets other than (i) the Property, and (ii) such incidental Personal Property as may be necessary for the operation of the Property;

(c) merge into or consolidate with any person or entity or dissolve, terminate or liquidate in whole or in part, transfer or otherwise dispose of all or substantially all of its assets or change its legal structure, without in each case Lender's consent;

(d) (i) fail to observe its organizational formalities or preserve its existence as an entity duly organized, validly existing and in good standing (if applicable) under the laws of the jurisdiction of its organization or formation, and qualification to do business in the State where the Property is located, if applicable, or (ii) without the prior written consent of Lender, amend, modify, terminate or fail to comply with the provisions of Borrower's partnership agreement, articles or certificate of incorporation, articles of organization or similar organizational documents, as the case may be;

(e) own any subsidiary or make any investment in, any person or entity without the consent of Lender;

(f) commingle its assets with the assets of any of its members, general partners, affiliates, principals or of any other person or entity, participate in a cash management system with any other entity or person or fail to use its own separate stationery, invoices and checks;

(g) incur any debt, secured or unsecured, direct or contingent (including, without limitation, guaranteeing any obligation), other than the Loan, except for trade payables in the ordinary course of its business of owning and operating the Property, provided that such debt (i) is not evidenced by a note, (ii) is paid within sixty (60) days of the date incurred, (iii) does not exceed in the aggregate four percent (4%) of the outstanding principal balance of the Note, and (iv) is payable to trade creditors and in amounts as are normal and reasonable under the circumstances;

(h) fail to pay its debts and liabilities (including, without limitation, as applicable, shared personnel and overhead expenses) from its assets as the same shall become due;

(i) (i) fail to maintain its records (including, without limitation, financial statements), books of account and bank accounts separate and apart from those of the members, general partners, principals and affiliates of Borrower, the affiliates of a member, general partner or principal of Borrower, and any other person or entity, (ii) permit its assets or liabilities to be listed as assets or liabilities on the financial statement of any other entity or person, or (iii) include the assets or liabilities of any other person or entity on its financial statements;

(j) enter into any contract or agreement with any member, general partner, principal or affiliate of Borrower, any Guarantor, or any member, general partner, principal or affiliate thereof (other than a business management services agreement with an affiliate of Borrower, provided that (i) such agreement is acceptable to Lender, (ii) the manager, or equivalent thereof, under such agreement holds itself out as an agent of Borrower, and (iii) the agreement meets the standards set forth in this subsection (j) following this parenthetical), except upon terms and conditions that are commercially reasonable, intrinsically fair and substantially similar to those that would be available on an arm's-length basis with third parties other than any member, general partner, principal or affiliate of Borrower, any Guarantor, or any member, general partner, principal or affiliate thereof;

(k) fail to correct any known misunderstandings regarding the separate identity of Borrower or any member, general partner, principal or affiliate thereof or any other person;

(l) guarantee or become obligated for the debts of any other entity or person or hold itself out to be responsible for the debts of another person;

(m) make any loans or advances to any third party, including, without limitation, any member, general partner, principal or affiliate of Borrower, or any member, general partner, principal or affiliate thereof, and shall not acquire obligations or securities of any member, general partner, principal or affiliate of Borrower, or any member, general partner, or affiliate thereof;

(n) fail to file its own tax returns or, if part of a consolidated group, fail to be shown as a separate member of such group;

(o) fail either to hold itself out to the public as a legal entity separate and distinct from any other entity or person or to conduct its business solely in its own name in order not (i) to mislead others as to the identity with which such other party is transacting business, or (ii) to suggest that Borrower is responsible for the debts of any third party (including, without limitation, any member, general partner, principal or affiliate of Borrower, or any member, general partner, principal or affiliate thereof);

(p) fail to maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations;

(q) share any common logo with or hold itself out as or be considered as a department or division of (i) any general partner, principal, member or affiliate of Borrower, (ii) any affiliate of a general partner, principal or member of Borrower, or (iii) any other person or entity;

(r) fail to allocate fairly and reasonably any overhead expenses that are shared with an affiliate, including, without limitation, paying for office space and services performed by any employee of an affiliate;

(s) pledge its assets for the benefit of any other person or entity, other than with respect to the Loan;

(t) fail to maintain a sufficient number of employees in light of its contemplated business operations;

(u) fail to hold its assets in its own name;

(v) if Borrower is a corporation, fail to consider the interests of its creditors in connection with all corporate actions to the extent permitted by applicable law;

(w) have any of its obligations (other than the Loan) guaranteed by an affiliate except Guarantor; or

(x) fail to provide in its (i) articles of organization, certificate of formation and/or operating agreement, as applicable, if Borrower is a limited liability company, (ii) limited partnership agreement if Borrower is a limited partnership or (iii) certificate of incorporation, if Borrower is a corporation, that for so long as the Loan is outstanding pursuant to the Note and this Security Instrument, Borrower shall not file or consent to the filing of any petition, either voluntary or involuntary, to take advantage of any applicable insolvency, bankruptcy, liquidation or reorganization statute, or make an assignment for the benefit of creditors without the affirmative vote of all of the general partners/managing members/directors of Borrower.

1.30 ERISA.

(a) Borrower shall not engage in any transaction which would cause any obligation, or action taken or to be taken, hereunder (or the exercise by Lender of any of its rights under the Note, this Security Instrument and the other Loan Documents) to be a non-exempt (under a statutory or administrative class exemption) prohibited transaction under either the Employee Retirement Income Security Act of 1974, as amended ("ERISA") or the Internal Revenue Code.

(b) Borrower represents and warrants that, as of the date hereof and throughout the term of this Security Instrument (1) Borrower is not and will not be an "employee benefit plan" as defined in Section 3(3) of ERISA, which is subject to Title I of ERISA, (2) Borrower is not and will not be a "governmental plan" within the meaning of Section 3(32) of ERISA; (3) Borrower is not and will not be, and transactions by or with Borrower are not and will not be, subject to state statutes regulating investments and fiduciary obligations with respect to governmental plans; and (4) one or more of the following circumstances is and will be true:

(i) Equity interests (as defined in 29 C.F.R. §2510.3-101(b)(1)) in Borrower are publicly-offered securities within the meaning of 29 C.F.R. §2510.3-101(b)(2);

(ii) Less than twenty-five percent (25%) of each outstanding class of equity interests in Borrower are held by "benefit plan investors" within the meaning of 29 C.F.R. §2510.3-101(f)(2); or

(iii) Borrower qualifies as an "operating company" or a "real estate operating company" within the meaning of 29 C.F.R. §2510.3-101(c) or (e), or an investment company registered under The Investment Company Act of 1940.

At Lender's request from time to time throughout the term of this Security Instrument, Borrower shall deliver to Lender such certifications and other evidence acceptable to Lender of Borrower's compliance with the covenants, representations and warranties contained in this Section 1.30.

ARTICLE 2. DEFAULT

2.01 Events of Default. The occurrence of any of the following events shall be an Event of Default hereunder (an "Event of Default"):

(a) Borrower fails to pay any interest, principal or other monies due under the Note or other Loan Documents on the date any such amount is due;

(b) If any of the impositions or other charges referred to in Sections 1.04 or 1.06 hereof are not paid when the same is due and payable, except to the extent sums sufficient to pay such impositions or other charges have been deposited with Lender in accordance with the terms of this Security Instrument;

(c) If the insurance policies required by Section 1.07 hereof are not kept in full force and effect, or if such insurance policies are not delivered to Lender upon request;

(d) any representation or warranty made by Borrower, any indemnitor or any person guaranteeing payment or performance of the Secured Obligations or any portion thereof (whether one or more, a "Guarantor") in connection with the Property, the Loan, or the application for the Loan proves to have been materially false or materially misleading when made, or Borrower or any Guarantor fails to disclose any material fact respecting the Property, the Loan, or the application for the Loan;

(e) any governmental authority takes or institutes any action, which in the sole opinion of Lender, will adversely affect Borrower's condition, operations, or ability to repay the Loan, or will adversely affect any Guarantor's condition, operations, or ability to repay the Loan, if such action remains effective for more than thirty (30) days;

(f) If Borrower violates or does not comply with any of the provisions of special purpose entity requirements set forth in Section 1.29 (captioned "Single Purpose Entity") hereof;

(g) Lender fails to have a legal, valid, binding, and enforceable first priority lien acceptable to Lender on the Property;

(h) Borrower becomes insolvent or there is a material adverse change in the assets, liabilities or financial position of Borrower, any general partner, or any Guarantor;

(i) any action or proceeding is commenced by any partner, principal, or member in Borrower which seeks as one of its remedies the dissolution of Borrower or any partner, principal, or member (as applicable) in Borrower;

(j) any governmental authority, or any court at the instance thereof, assumes control over the affairs or operations of, or a receiver or trustee is appointed over, or garnishment shall be issued or made against any substantial part of, the property of Borrower or any guarantor of the Loan;

(k) Borrower or any Guarantor of the Loan admits in writing its inability to pay its debts when due, or makes an assignment for the benefit of creditors; or Borrower or any Guarantor of the Loan applies for or consents to the appointment of any receiver, trustee or similar officer of Borrower or any such Guarantor, as the case may be, or for all or any substantial part of their respective property; or Borrower or any such Guarantor institutes (by petition, application, answer, consent or otherwise) any bankruptcy, insolvency, reorganization, arrangement, readjustment of debts, dissolution, liquidation, or similar proceedings relating to Borrower or any such Guarantor, as the case may be, or under the laws of any jurisdiction;

(l) a receiver, trustee or similar officer is appointed for Borrower or any Guarantor of the Loan for all or any substantial part of their respective property without the application or consent of Borrower or any such Guarantor, as the case may be, and such appointment is not discharged within sixty (60) days (whether or not consecutive); or any bankruptcy, insolvency, reorganization, arrangements, readjustment of debt, dissolution, liquidation or similar proceedings is instituted (by petition, application or otherwise) against Borrower or any such Guarantor and shall not be dismissed within sixty (60) days;

(m) any Transfer or Permitted Transfer (as defined in Section 1.15 hereof) occurs without the prior written consent of Lender, including without limitation a Sale, Pledge or an encumbrance of the Property, voluntarily or involuntarily, by any lien or encumbrance other than this Security Instrument;

(n) the termination or dissolution of Borrower, any general partner in Borrower or any Guarantor; or any action or proceeding is commenced which seeks as one of its remedies the dissolution of Borrower or any general partner in Borrower or any Guarantor;

(o) If any default occurs under any guaranty or indemnity executed in connection herewith (including, without limitation, the Environmental Indemnification Agreement executed by Borrower and any other Indemntor in connection with the Loan (the "Environmental Indemnity")) and such default continues after the expiration of applicable grace periods, if any;

(p) If the Property becomes subject to any mechanic's, materialman's or other lien other than a lien for local real estate taxes and assessments not then due and payable and the lien shall remain undischarged of record (by payment, bonding or otherwise) for a period of thirty (30) days;

(q) If any federal tax lien is filed against Borrower, any member or general partner of Borrower, any Guarantor, or any portion of the Property and same is not discharged of record within thirty (30) days after same as filed; or

(r) If for more than thirty (30) days after notice from Lender, Borrower shall continue to be in default (other than the failure to pay monies due under the Note or the other Loan Documents) under any term, covenant or condition of the Note, this Security Instrument or the other Loan Documents not set forth in Subsections 2.01(a) through (q) above; provided that if such default cannot reasonably be cured within such thirty (30) day period and Borrower shall have commenced to cure such default within such thirty (30) day period and thereafter diligently and expeditiously proceeds to cure the same, such thirty (30) day period shall be extended for so long as it shall require Borrower in the exercise of due diligence to cure such default, it being agreed that no such extension shall be for a period in excess of sixty (60) days.

All notice and cure periods provided herein or in any other Loan Document shall run concurrently with any notice or cure periods provided by applicable laws. All notices and cure periods described herein or in

any other Loan Documents shall not be applicable to any event which with the giving of notice, the passage of time or both would constitute an Event of Default, if such event has occurred as of the date on which Lender commences a nonjudicial foreclosure proceeding (if such proceeding is allowed by law) with respect to another Event of Default. Such event shall constitute an independent Event of Default hereunder.

2.02 Acceleration Upon Default; Additional Remedies.

(a) **Remedies.** Upon the occurrence of any Event of Default, Lender may or acting by or through Trustee may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Borrower in and to the Property, including, without limitation, the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Lender or Trustee may determine, in their sole discretion, without impairing or otherwise affecting the other rights and remedies of Lender or Trustee:

- (1) declare all Secured Obligations to be immediately due and payable;
- (2) institute proceedings, judicial or otherwise, for the complete foreclosure of this Security Instrument under any applicable state or federal law in which case the Property or any interest therein may be sold for cash or upon credit in one or more parcels or in several interests or portions and in any order or manner;
- (3) with or without entry, to the extent permitted and pursuant to the procedures provided by applicable state or federal law, institute proceedings for the partial foreclosure of this Security Instrument for the portion of the Secured Obligations then due and payable, subject to the continuing lien and security interest of this Security Instrument for the balance of the Secured Obligations not then due, unimpaired and without loss of priority;
- (4) sell for cash or upon credit the Property or any part thereof and all estate, claim, demand, right, title and interest of Borrower therein and rights of redemption thereof, pursuant to power of sale or otherwise, at one or more sales, in one or more parcels, at such time and place, upon such terms and after such notice thereof as may be required or permitted by law;
- (5) subject to the provisions of Section 10 (captioned "Exculpation") of the Note, institute an action, suit or proceeding in equity for the specific performance of any covenant, condition or agreement contained herein, in the Note or in the other Loan Documents;
- (6) subject to the provisions of Section 10 (captioned "Exculpation") of the Note, recover judgment on the Note either before, during or after any proceedings for the enforcement of this Security Instrument or the other Loan Documents;
- (7) apply for the appointment of a receiver, trustee, liquidator or conservator of the Property, without notice and without regard for the adequacy of the security for the Secured Obligations and without regard for the solvency of Borrower, any Guarantor, any indemnitor or of any person, firm or other entity liable for the payment of the Secured Obligations;
- (8) subject to any applicable state or federal law, the license granted to Borrower under Section 3.02 hereof shall automatically be revoked and Lender may enter into or upon the Property, either personally or by its agents, nominees or attorneys and dispossess Borrower and its agents and servants therefrom, without liability for trespass, damages or otherwise and exclude Borrower and its agents or servants wholly therefrom, and take possession of all rent rolls, Leases (including, without limitation, the form Lease and amendments and exhibits), subleases (including, without limitation, the form sublease and amendments and exhibits) and rental and license agreements with the tenants, subtenants and licensees, in possession of the Property or any part or parts thereof; tenants', subtenants'

and licensees' money deposits or other property (including, without limitation, any letter of credit) given to secure tenants', subtenants' and licensees' obligations under Leases, subleases or licenses, together with a list of the foregoing; all lists pertaining to current rent and license fee arrears; any and all architects' plans and specifications, licenses and permits, documents, books, records, accounts, surveys and property which relate to the management, leasing, operation, occupancy, ownership, insurance, maintenance, or service of or construction upon the Property and Borrower shall surrender possession thereof and of the Property to Lender upon demand, and thereupon Lender may (i) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with all and every part of the Property and conduct the business thereof; (ii) complete any construction on the Property in such manner and form as Lender deems advisable; (iii) make alterations, additions, renewals, replacements and improvements to or on the Property; (iv) exercise all rights and powers of Borrower with respect to the Property, whether in the name of Borrower or otherwise, including, without limitation, the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents of the Property and every part thereof; (v) either require Borrower (A) to pay monthly in advance to Lender, or any receiver appointed to collect the Rents, the fair and reasonable rental value for the use and occupation of such part of the Property as may be occupied by Borrower, or (B) to vacate and surrender possession of the Property to Lender or to such receiver and, in default thereof, Borrower may be evicted by summary proceedings or otherwise; and (vi) apply the receipts from the Property to the payment of the Secured Obligations, in such order, priority and proportions as Lender shall determine after deducting therefrom all expenses (including, without limitation, attorneys' fees) incurred in connection with the aforesaid operations and all amounts necessary to pay the Taxes, Other Impositions, Insurance Premiums and other expenses in connection with the Property, as well as just and reasonable compensation for the services of Lender, its counsel, agents and employees;

(9) exercise any and all rights and remedies granted to a secured party upon default under the Uniform Commercial Code, including, without limitation: (i) the right to take possession of the Personal Property and other UCC collateral or any part thereof, and to take such other measures as Lender or Trustee may deem necessary for the care, protection and preservation of the Personal Property, and other UCC collateral, and (ii) request Borrower at its expense to assemble the Personal Property and other UCC collateral and make it available to Lender at a convenient place acceptable to Lender. Any notice of sale, disposition or other intended action by Lender or Trustee with respect to the Personal Property and other UCC collateral sent to Borrower in accordance with the provisions hereof at least ten (10) days prior to such action, shall constitute commercially reasonable notice to Borrower;

(10) apply any sums then deposited in the Impounds and any other sums held in escrow or otherwise by Lender in accordance with the terms of this Security Instrument or any other Loan Document to the payment of the following items in any order as determined by Lender:

- (i) Taxes and Other Impositions;
- (ii) Insurance Premiums;
- (iii) Interest on the unpaid principal balance of the Note;
- (iv) amortization of the unpaid principal balance of the Note; and
- (v) all other sums payable pursuant to the Note, this Security Instrument and

the other Loan Documents, including, without limitation, advances made by Lender pursuant to the terms of this Security Instrument;

(11) surrender the insurance policies maintained pursuant to Section 1.07 hereof, collect the unearned Insurance Premiums and apply such sums as a credit on the Secured Obligations in such priority and proportion as Lender shall determine, and in connection therewith, Borrower hereby appoints Lender as agent and attorney-in-fact (which is coupled with an interest and is therefore irrevocable) for Borrower to collect such unearned Insurance Premiums;

1 d. 124-30-312-025 – 169, inclusive;

2 e. 124-30-312-171 and 172;

3 f. 124-30-312-177; and

4 g. 124-30-312-180 – 182, inclusive,

5 more commonly referred to as the Palmilla Townhomes, generally located northeast of the
6 intersection of West Ann Road and North Decatur Boulevard in North Las Vegas, and more
7 specifically described in the Legal Description attached hereto as **Exhibit "6"**.

8 15. The Real Property is a development containing approximately 157 single-family
9 rental townhomes, each of which is currently generating, or capable of generating, rental income.
10 Occupancy is currently estimated at 80%.

11 16. As detailed more fully in the Promissory Note and Deed of Trust, the Borrower was
12 required to remit monthly payments which included, among other amounts, a constant
13 \$111,530.40 per month, with a final maturity date of April 11, 2018. (See e.g., Promissory Note, ¶
14 3(a); Deed of Trust, ¶¶ 1.04-06).

15 17. Borrower is not current on its payments to Plaintiff on the Loan, and currently owes
16 \$390,941.14 in past due interest, \$55,180.46 in past due principal, \$128,031.48 in past due
17 escrow/reserve, \$22,966.12 in past due late charges, \$33,033.66 in past due tax advance payments,
18 and as of January 31, 2009, an additional \$252,166.87 in default interest.

19 18. In sum, Borrower is currently over \$630,000 in arrears on interest and other monies
20 owed to Plaintiff, which will increase to an amount exceeding \$880,000 by January 31, 2009.

21 19. The Deed of Trust defines an "Event of Default" as including when "Borrower fails
22 to pay any interest, principal or other monies due under the Note or other Loan Documents on the
23 date any such amount is due." (See Deed of Trust, ¶ 2.01 Events of Default, p. 31).

24 20. Defendants' failure to make the past due payments referenced above constitute
25 "Events of Default" under the Loan, the Promissory Note, the Deed of Trust, and the Limited
26 Recourse Obligations Guarantee.

27 21. The Deed of Trust also provides that "[a]ll Rents generated by or derived from the
28 Property shall first be utilized solely for Operating Expenses, and none of the Rents generated by

1 or derived from the Property shall be diverted by Borrower and utilized for any other purpose
2 unless all such Operating Expenses have been fully paid and satisfied." (See Deed of Trust, ¶
3 1.02(m) Performance of Other Obligations, pp. 6-7).

4 22. On information, the Rents derived from the Property have exceeded, and continue
5 to exceed, the Operating Expenses, but Borrower has failed, and continues to fail, to provide such
6 excess Rents derived from the Property to Plaintiff as required by the Deed of Trust, ¶ 1.02(m).

7 23. For example, the most recent financial statements submitted by Borrower appear to
8 indicate that Borrower collected approximately \$238,462.97 in Rents exceeding Operating
9 Expenses, which should have been remitted to Plaintiff pursuant to ¶ 1.02(m) of the Deed of Trust.

10 24. Borrower agreed to comply with the provisions of the Deed of Trust, including ¶
11 1.02(m), and its failure to pay the Rents exceeding the Operating Expenses as detailed above is an
12 Event of Default.

13 25. The Deed of Trust further provides the Borrower will maintain books, records, and
14 financial statements, and provide the same to Plaintiff at regular intervals, including the following,
15 including quarterly and annual Rent Rolls, operating statements of the Property, an audited annual
16 operating statement prepared and certified by an independent certified public accountant, balance
17 sheets and profit and loss statements of Borrower, and an annual operating budget presented on a
18 monthly basis consistent with the annual operating statement described above for the Property.
19 (See Deed of Trust, ¶ 1.24(a) Books and Records; Financial Statements, pp. 22-24).

20 26. The Deed of Trust further provides the Borrower and Guarantor will maintain
21 books, records, and financial statements, and timely provide the same to Plaintiff upon request, a
22 property management report for the Property, an accounting of all security deposits held in
23 connection with any Lease of any part of the Property, and such other additional financial or
24 management information (including, without limitation, state and federal tax returns) as may, from
25 time to time, be reasonably required by Lender in form and substance satisfactory to Lender.
26 (See Deed of Trust, ¶ 1.24(b) Books and Records; Financial Statements, pp. 23-24).

27 27. Defendants have refused, and continue to refuse, to furnish the documents required
28 by the Loan Documents, violating, among other covenants, the provisions contained within the

1 Deed of Trust, ¶¶ 1.24(a), (b).

2 28. A representative sample of documents that Defendants are refusing to produce
3 include Borrower-certified copies of the Property's current financials and balance sheets, a
4 complete and current copy of the Rent Rolls, and a 2009 annual operating budget.

5 29. For the reasons set forth above, Plaintiff is entitled to exercise any and all of its
6 rights and remedies as provided for in the Loan, the Promissory Note, the Deed of Trust, and the
7 Limited Recourse Obligations Guarantee, including seeking and obtaining the appointment of a
8 receiver.

9 30. The Deed of Trust contemplates the appointment of a receiver of the Real Property
10 in the event of a default as follows:

11 (a) Remedies. Upon the occurrence of any Event of Default, lender
12 may or acting by or through Trustee may take such action, without
13 notice or demand, as it deems advisable to protect and enforce its
14 rights against Borrower in and to the Property, including, without
15 limitation, the following actions, each of which may be pursued
16 concurrently or otherwise, at such time and in such order as lender
17 or Trustee may determine, in their sole discretion, without impairing
18 or otherwise affecting the other rights and remedies of lender or
19 Trustee:

20 (7) apply for the appointment of a receiver, trustee, liquidator or
21 conservator of the Property, *without notice* and without regard for
22 the adequacy of the security for the Secured Obligations and without
23 regard for the solvency of Borrower, any Guarantor, any Indemnitor
24 or of any person, firm or other entity liable for the payment of the
25 Secured Obligations;

26 Deed of Trust ¶ 2.02, p. 33 (emphasis added).

27 31. The Deed of Trust further provides:

28 In furtherance of and not in limitation of any other provisions of this
Security Instrument, including without Limitation Section 2.02(a):

29 If an Event of Default shall occur, the Lender shall be entitled as a
30 matter of right and without notice to Borrower or anyone claiming
31 under Borrower and without giving bond and without regard to the
32 solvency or insolvency of the Borrower or any party bound for the
33 payment of the Secured Obligations, or waste of the Property or
34 adequacy of the security of the Property for the obligations then
35 secured hereby Or the then value of the Property, to **apply *ex parte***
36 **for the appointment of a receiver** in accordance with the statutes
and law made and provided for and such receiver shall have, in
addition to all rights and powers customarily given to and exercised
by such receivers and all rights and powers granted to such receiver
or Lender under this Security Instrument (to the extent allowed by

law), all the rights, powers and remedies as provided by law or as may be contained in any court order or decree applying such remedy. A court is authorized to appoint a receiver on request or petition of Lender, and Borrower irrevocably consents to the appointment of a receiver and waives any notice of application therefor. Such receiver shall collect the Rents as hereinafter defined, and all other income of any kind; manage the Property so to prevent waste; execute Leases (as hereinafter defined) within or beyond the period of receivership, pay all expenses for normal maintenance of the Property and perform the terms of this Security Instrument and apply the Rents to the costs and expenses of the receivership, including reasonable attorneys' fees, to the repayment of the Secured Obligations and to the operation, maintenance and upkeep and repair of the Property, including payment of taxes on the Property and payments of premiums of insurance on the Property and any other rights permitted by law, Borrower does hereby irrevocably consent to such appointment. Lender's right to appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the indebtedness secured hereby by a substantial amount and without any showing as required by N.R.S. 107.100. The receiver may, to the extent permitted under applicable law, without notice, enter upon and take possession of the Property, or any part thereof, by force, summary proceedings, ejectment or otherwise, and remove Borrower or any other person or entity and any personal property therefrom, and may hold, operate and manage the same, receive all Rents and do the things the receiver finds necessary to preserve and protect the Property, whether during pendency of foreclosure, during a redemption period, if any, or otherwise, and as further provided in any assignment of Rents and Leases executed by the Borrower to the Lender, whether contained in this Security Instrument or in a separate instrument. Borrower shall not contest the appointment of a receiver to operate the Property at any time from and after the occurrence of an Event of Default including, without limitation, during the institution of foreclosure proceedings. Upon an Event of Default, Borrower shall peaceably turn over possession of the Property to a receiver upon request of Lender.

Deed of Trust ¶ 6.03, pp. 41-42 (emphasis added).

32. Similarly, the Assignment of Rents provides:

If an Event of Default shall occur, the Lender shall be entitled as a matter of right without notice and without giving bond and without regard to the solvency or insolvency of the Borrower, or waste of the property or adequacy of the security of the Property, to apply *ex parte* for the appointment of a receiver who shall have all the rights, powers and remedies as provided by law or as may be contained in any court decree applying such remedy and who shall collect and apply the Rents in such order as Lender may require to all expenses for management, operation and maintenance of the Property and to the costs and expenses of the receivership, including, without limitation, reasonable attorneys' fees and the repayment of the indebtedness secured hereby. A court is authorized to appoint a receiver on request or petition of Lender, and Borrower irrevocably consents to the appointment

1 **of a receiver and waives any notice of application therefor.**
 2 **Borrower shall not contest the appointment of a receiver to**
 3 **operate the Property at any time from and after the occurrence**
 4 **of an Event of Default including, without limitation, during the**
 5 **institution of foreclosure proceedings and shall peaceably turn over**
 6 **possession of the Property to such receiver upon request of Lender.**

7 (See Assignment of Rents ¶ 4.3 Receiver, p. 7 (emphasis added)).

8 33. Borrower's right to collect Rents derived from the Property is limited to those
 9 rights granted to it by the following revocable license: "So long as an Event of Default shall not
 10 have occurred and be continuing, Lender hereby grants to Borrower a revocable license to enforce
 11 the Leases, to collect the Rents, to apply the Rents to the payment of the costs and expenses
 12 incurred in connection with the Property and to any indebtedness secured thereby." (See
 13 Assignment of Rents ¶ 2.1 Grant of Revocable License to Collect Rents, p. 4).

14 34. The revocable license is subject to the following limitation: "Upon the occurrence
 15 of an Event of Default and at any time thereafter during the continuance thereof, subject to
 16 applicable Laws, the license granted to Borrower pursuant to Section 2.1 shall automatically be
 17 revoked. Upon such revocation, Borrower shall promptly deliver to lender all Rents then held by
 18 or for the benefit of Borrower." (See Assignment of Rents, ¶ 2.2 Revocation of License; lender's
 19 Rights, pp. 3-4).

20 35. Despite the occurrence of several Events of Default, and the automatic revocation
 21 of Borrower's right to collect and/or possess Rents pursuant to the Assignment of Rents, Borrower
 22 is still possessing and collecting the rent derived from the Real Property, in contravention of the
 23 provisions of the Assignment of Rents.

24 36. The Deed of Trust provides for recovery of attorneys' fees, costs and expenses
 25 from Borrower as follows:

26 Upon the occurrence of any Event of Default or if Borrower fails to
 27 make any payment or to do any act as herein provided, Lender may,
 28 but without any obligation to do so and without notice to or demand
 on Borrower and without releasing Borrower from any obligation
 hereunder, make or do the same in such manner and to such extent
 as Lender may deem necessary to protect the security hereof. lender
 or Trustee is authorized to enter upon the Property for such
 purposes, or appear in, defend, or bring any action or proceeding to
 protect its interest in the Property or to foreclose this Security
 Instrument or collect the Secured Obligations. **The cost and**

1 expense of any cure hereunder (including, without limitation,
 2 attorneys' fees to the extent permitted by law), with interest as
 3 provided in this Section 2.02(c) hereof, shall constitute a portion
 4 of the Secured Obligations and shall be due and payable to
 5 Lender upon demand. All such costs and expenses incurred by
 6 Lender or Trustee in remedying such Event of Default or such failed
 7 payment or act or in appearing in, defending, or bringing any such
 8 action or proceeding shall bear interest at the Default Rate (defined
 9 in the Note), for the period after notice from Lender that such cost or
 10 expense was incurred to the date of payment to Lender. All such
 11 costs and expenses incurred by Lender together with interest thereon
 12 calculated at the Default Rate shall be deemed to constitute a portion
 13 of the Secured Obligations and shall be immediately due and
 14 payable upon demand by Lender therefor.

15 (See Deed of Trust, ¶ 2.02(c), Right to Cure Defaults, p. 35 (emphasis added)).

16 37. The Guarantors have breached the Limited Recourse Obligations Guarantee
 17 (Exhibit "2"), by failing to cure the defaults upon demand, which provides each Guarantor shall
 18 "unconditionally, irrevocably, jointly and severally guarantee(s) to Lender and to its successors,
 19 endorsees and/or assigns the full and prompt payment when due, by acceleration or otherwise, of
 20 all amounts owing by Borrower to Lender under the Loan Documents..." (See Limited Recourse
 21 Obligations Guarantee ¶ 1, p. 1).

22 38. The Guarantors are also personally liable for Plaintiff's attorneys' fees, costs and
 23 expenses as follows:

24 Guarantor shall be and remain personally liable for ... all court costs
 25 and attorneys' fees, costs and expenses actually incurred by Lender
 26 pursuant to the Note or any other Loan Documents;

27 (See Limited Recourse Obligations Guarantee, ¶ 2(a)(iv), p. 1).

28 39. The Defendants are unable and/or unwilling to cure the Events of Default and/or
 other breaches, some of which have been summarized hereinabove.

40. The Defendants are unable and/or unwilling to cure the Events of Default and/or
 other breaches, some of which have been summarized hereinabove.

...

...

...

First Cause Of Action³**(Appointment of a Receiver – NRS § 107A.260)**

41. Borrower has irrevocably consented to the *ex parte* appointment of a receiver in any Event of a Default.

42. Borrower is in default of the Promissory Note, the Deed of Trust, and the Assignment of Rents, each of which constitute an Event of Default.

43. Borrower continues to possess and collect rents, despite the fact its license to collect rents has been automatically revoked due to the aforementioned Events of Default, as provided for in, among other places, the following provision: "upon the occurrence of an Event of Default and at any time thereafter during the continuance thereof, subject to applicable laws, the license [to collect rents] granted to [Borrower] hereunder shall automatically be revoked. Upon such revocation, [Borrower] shall promptly deliver to [Lender] all Rents then held by or for the benefit of [Lender]...." (See Assignment of Rents, ¶ 3.03).

44. As Borrower's license to collect rents has been revoked, Borrower is the licensee-in-default, and Lender is entitled to the appointment of a receiver.

45. NRS § 107A.260 provides that an assignee is entitled to the appointment of a receiver for the real property subject to the assignment of rents if the assignor is in default and:

- a. **The assignor has agreed in a signed document to the appointment of a receiver in the event of the assignor's default; or**
- b. It appears likely that the real property may not be sufficient to satisfy the secured obligation; or
- c. **The assignor has failed to turn over to the assignee proceeds that the assignee was entitled to collect; or**
- d. Other circumstances exist that would justify the appointment of a receiver under law of this State other than this chapter.

46. Lender is entitled to the appointment of a receiver under each of the above-listed subsections of NRS § 107A.260 (emphasis added).

³ The allegations of this Complaint are continuous, so that the prior allegations are part of allegations supporting each cause of action.

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1 distribute the proceeds thereof to the Lender in satisfaction of the Loan.

2 56. The Real Property is in danger of substantial waste and/or that the income
3 therefrom is in danger of being lost or that the property is or may become insufficient to discharge
4 the debt which it secures.

5 57. Based upon the foregoing, Lender is entitled to the appointment of a receiver under
6 NRS § 107.100: "A receiver shall be appointed where it appears that ... real property subject to
7 the deed of trust is in danger of substantial waste or that the income therefrom is in danger of
8 being lost, or that the property is or may become insufficient to discharge the debt which it
9 secures."

10 58. Unless a receiver is appointed immediately, the Real Property securing Defendants'
11 indebtedness to Lender is and will continue to be in danger of being lost, removed, or materially
12 injured.

13 59. Lender is also entitled to the appointment of a receiver under each of the following
14 subsections of NRS § 32.010:

15 a. NRS § 32.010(1), which provides that a receiver may be appointed "[i]n an
16 action by ... by a creditor to subject any property or fund to his claim ... on
17 application of the plaintiff, or of any party whose right to or interest in the property
18 or fund, or the proceeds thereof is probable, and where it is shown that the property
19 or fund is in danger of being lost, removed or materially injured."

20 b. NRS § 32.010(6), which provides that a receiver may be appointed "[i]n all
21 other cases where receivers have heretofore been appointed by the usages of the
22 courts of equity."

23 60. As a result of Defendants' actions, Plaintiff has been required to retain the services
24 of an attorney to prosecute this claim and is entitled to be compensated for any costs incurred in
25 the prosecution of this action, including without limitation, any and all costs and reasonable
26 attorney's fees.

27 ...

28 ...

1 Plaintiff requests the following relief:

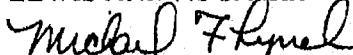
2 1. That a receiver be appointed, pursuant to NRS § 107A.260, NRS § 107.100, or
3 NRS § 32.010, to collect and take possession of the Real Property and to take all actions necessary
4 to collect rents, conserve, preserve, protect, manage, and administer the Real Property in which
5 Lender has an interest. Lender further requests that Defendants be ordered to provide an
6 accounting of all accounts and to fully cooperate with the receiver, pay the receiver all rents, rental
7 deposits, imposition deposits, proceeds, issues, and profits now held by Borrower or coming into
8 Defendants' possession during the pendency of the receivership, to surrender possession and
9 control of the Real Property and all books, records, documents, keys, and pass codes necessary for
10 the discharge of the receiver's responsibilities;

11 2. For attorneys' fees and costs incurred by Lender in enforcing its rights, including
12 but not limited to, attorneys' fees and costs incorrect by bringing this action; and

13 3. For such other and further relief as this Court deems proper under the
14 circumstances.

15 DATED this 30th day of January, 2009.

16 LEWIS AND ROCA LLP

17 

18 MICHAEL F. LYNCH, ESQ.

19 Nevada Bar No. 8555

20 mlynch@lrlaw.com

21 3993 Howard Hughes Parkway, Suite 600

22 Las Vegas, Nevada 89169

23 (702) 385-3373

24 (702) 385-9447 (fax)

25 *Attorneys for Plaintiff*

26
27
28
LEWIS
AND
ROCA
LLP
ATTORNEYS

EXHIBIT 2

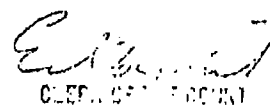
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EXHIBIT 2

ORIGINAL**FILED**

Jul 10 4 05 PM '09



 CLERK OF THE COURT

1 **NOTC**
 2 **MICHAEL F. LYNCH, ESQ.**
 3 Nevada Bar No. 8555
 4 MLynch@lrlaw.com
 5 **LEWIS AND ROCA LLP**
 3993 Howard Hughes Pkwy., Suite 600
 Las Vegas, Nevada 89169-5996
 Telephone: (702) 385-3373
 Facsimile: (702) 385-9447

6 *Attorneys for Plaintiff*

DISTRICT COURT**CLARK COUNTY, NEVADA**

9 LaSalle Bank National Association as Trustee
 10 For The Registered Holders of ML-CFC
 11 Commercial Mortgage Trust 2007-7
 12 Commercial Mortgage Pass-Through
 Certificates Series 2007-7, by and through
 Midland Loan Services, Inc., as its Special
 Servicer,

13 *Plaintiff,*

14 *vs.*

15 Palmilla Development Co., Inc., a Nevada
 16 corporation; Hagai Rapaport, an individual;
 and Does I to X; and Roe Corporations X to
 XX,

Defendants.

Case No. A581425

Dept. No. XX

**NOTICE OF DISMISSAL OF ACTION
 WITHOUT PREJUDICE**

09A581425
 243219



17 PLEASE TAKE NOTICE that, no Appearance, Answer, or Motion for Summary
 18 Judgment having been made or filed in this action, Plaintiff LaSalle Bank National Association as
 19 Trustee For The Registered Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial
 20 Mortgage Pass-Through Certificates Series 2007-7 by and thought Midland Loan Services, Inc. as
 21 its Special Servicer ("Plaintiff") hereby voluntarily dismisses this action without prejudice
 22 pursuant to NRCP 41 (a)(1)(i).

23 DATED this 10th day of July, 2009.

LEWIS AND ROCA LLP



MICHAEL F. LYNCH, ESQ.
 Nevada Bar No. 8555
 3993 Howard Hughes Pkwy., Suite 600
 Las Vegas, Nevada 89169-5996
 Telephone: (702) 385-3373
 Facsimile: (702) 385-9447
Attorneys for Plaintiff

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CLERK OF THE COURT

Lewis and Roca LLP
 393 Howard Hughes Pkwy., STE
 600
 Las Vegas, Nevada 89169

EXHIBIT 3

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EXHIBIT 3

1 RON BENDER (SBN 143364)
 2 TANIA S. MOYRON (SBN 235736)
 3 LEVENE, NEALE, BENDER, RANKIN & BRILL L.L.P.
 4 10250 Constellation Boulevard, Suite 1700
 Los Angeles, California 90067
 Telephone: (310) 229-1234
 Facsimile: (310) 229-1244

5 Proposed Bankruptcy Attorneys for
 6 Debtor and Debtor in Possession

70
 FILED

FEB 13 12 56 PM '09

CLERK OF THE COURT

7
 8 DISTRICT COURT
 9 CLARK COUNTY, NEVADA

10
 11 LaSalle Bank National Association as) Case No.: A581425
 12 Trustee For The Registered Holders of ML-)
 13 CFC Commercial Mortgage Trust 2007-7) Dept. No.: XX
 14 Commercial Mortgage Pass-Through)
 15 Certificates Series 2007-7, by and through)
 16 Midland Loan Services, Inc., as its Special)
 17 Servicer,)
 18 Plaintiff,)
 19 v.)

NOTICE OF FILING OF PETITION
 FOR RELIEF UNDER CHAPTER 11
 OF THE UNITED STATES
 BANKRUPTCY CODE, 11 U.S.C. § 101,
 ET. SEQ., AND AUTOMATIC STAY

20
 21 Palmilla Development Co., Inc., a Nevada)
 22 corporation; Hagai Rapaport, an individual;)
 23 and Does I to X; and Roe Corporations X to)
 24 XX,)
 25 Defendants.)

[No Hearing Required]

26 PLEASE TAKE NOTICE that a voluntary petition under Chapter 11 of Title 11,
 27 United States Code, 11 U.S.C. § 101, et seq. (the "Bankruptcy Code") was filed by Palmilla
 28 Development Company, Inc. (the "Debtor") on February 11, 2009 (the "Petition Date") in the
 United States Bankruptcy Court for the Central District of California, San Fernando Valley
 Division.

A true and correct copy of the face page of the Debtor's voluntary petition is attached
 hereto as Exhibit "1" and is incorporated herein by this reference.

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 CLERK OF THE COURT

1 The Debtor's bankruptcy case has been assigned to the Honorable Maureen A. Tighe,
2 United States Bankruptcy Judge. Your attention is directed to Bankruptcy Code § 362, which
3 provides for an automatic stay against:

4 (1) the commencement or continuation, including the issuance or employment of
5 process, of a judicial, administrative, or other action or proceeding against the Debtor that was
6 or could have been commenced before the commencement of the cases under Title 11; or to
7 recover a claim against the Debtor that arose before the commencement of the case under the
8 Bankruptcy Code;

9 (2) the enforcement, against the Debtor or against property of the Debtor's estate,
10 of a judgment obtained before the commencement of the cases under the Bankruptcy Code;

11 (3) any act to obtain possession of property of the Debtor's estate or of property
12 from the estate, or to exercise dominion or control over property of the estate;

13 (4) any act to create, perfect, or enforce any lien against property of the estate;

14 (5) any act to create, perfect, or enforce against property of the Debtor any lien to
15 the extent that such lien secures a claim that arose before the commencement of the cases
16 under Title 11;

17 (6) any act to collect, assess, or recover a claim against the Debtor that arose
18 before the commencement of the cases under Title 11;

19 (7) the setoff of any debt owing to the Debtor that arose before the commencement
20 of the cases under Title 11 against any claim against the Debtor; and

21 (8) the commencement or continuation of a proceeding before the United States
22 Tax Court concerning the Debtor.
23
24
25
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27
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1 The automatic injunction granted by Bankruptcy Code § 362(a) will remain in effect
2 until the bankruptcy case is dismissed or closed or until such earlier times as set forth in
3 Bankruptcy Code §§ 362(c), (d), (e) and (f).

4 In addition, please note that actions taken in violation of the stay are void ab initio and
5 of no effect. See In re Dunbar, 245 F.3d 1058 (9th Cir. 2001).

6 Levene, Neale, Bender, Rankin & Brill L.L.P. is the Debtor's proposed counsel of
7 record in the bankruptcy case, and is filing this Notice for information purposes only. The
8 filing of this Notice is not to be construed or deemed to be an appearance by Levene, Neale,
9 Bender, Rankin & Brill L.L.P. as counsel of record for any party to the instant action.

10 **NOTICE IS HEREBY GIVEN** that contempt proceedings may be initiated against
11 any party who participates in any violation of the automatic stay. In addition, the Bankruptcy
12 Court may award damages to compensate the Debtor for actual loss suffered arising out of a
13 violation of the automatic stay. See In re Computer Communications, Inc., 824 F.2d 725, 731
14 (9th Cir. 1987).

15 Dated: February 12, 2009

PALMILLA DEVELOPMENT COMPANY, INC.

16 By: 

17 RON BENDER

18 TANIA S. MOYRON

19 LEVENE, NEALE, BENDER, RANKIN

20 & BRILL L.L.P.

21 Proposed Bankruptcy Attorneys for Debtor
22 and Debtor in Possession
23
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25
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EXHIBIT 1

EXHIBIT "1"

E-FILED

B1 (Official Form 1) (1/08)

**United States Bankruptcy Court
Central District of California****Voluntary Petition**

| | | | |
|--|--|---|--|
| Name of Debtor (if individual, enter Last, First, Middle): Palmilla Development Company, Inc. | | Name of Joint Debtor (Spouse) (Last, First, Middle): | |
| All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names): DBA Executive Living | | All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names): | |
| Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all): 20-0520319 | | Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all): | |
| Street Address of Debtor (No. and Street, City, and State): 7116 Valjean Avenue Van Nuys, CA | | Street Address of Joint Debtor (No. and Street, City, and State): | |
| ZIP Code 91406 | | ZIP Code | |
| County of Residence or of the Principal Place of Business: Los Angeles | | County of Residence or of the Principal Place of Business: | |
| Mailing Address of Debtor (if different from street address): | | Mailing Address of Joint Debtor (if different from street address): | |
| ZIP Code | | ZIP Code | |
| Location of Principal Assets of Business Debtor (if different from street address above): | | | |

| | | | |
|---|--|--|---|
| Type of Debtor (Form of Organization) (Check one box) <input type="checkbox"/> Individual (includes Joint Debtors) <i>See Exhibit D on page 2 of this form.</i> <input checked="" type="checkbox"/> Corporation (includes LLC and LLP) <input type="checkbox"/> Partnership <input type="checkbox"/> Other (If debtor is not one of the above entities, check this box and state type of entity below.) | Nature of Business (Check one box) <input type="checkbox"/> Health Care Business <input type="checkbox"/> Single Asset Real Estate as defined in 11 U.S.C. § 101 (51B) <input type="checkbox"/> Railroad <input type="checkbox"/> Stockbroker <input type="checkbox"/> Commodity Broker <input type="checkbox"/> Clearing Bank <input checked="" type="checkbox"/> Other Tax-Exempt Entity (Check box, if applicable) <input type="checkbox"/> Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code). | Chapter of Bankruptcy Code Under Which the Petition is Filed (Check one box) <input type="checkbox"/> Chapter 7 <input type="checkbox"/> Chapter 9 <input checked="" type="checkbox"/> Chapter 11 <input type="checkbox"/> Chapter 12 <input type="checkbox"/> Chapter 13 <input type="checkbox"/> Chapter 15 Petition for Recognition of a Foreign Main Proceeding <input type="checkbox"/> Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding | |
| Filing Fee (Check one box) <input checked="" type="checkbox"/> Full Filing Fee attached <input type="checkbox"/> Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A. <input type="checkbox"/> Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B. | | | Nature of Debts (Check one box) <input type="checkbox"/> Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." <input checked="" type="checkbox"/> Debts are primarily business debts. |
| Check one box: <input type="checkbox"/> Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). <input checked="" type="checkbox"/> Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D). | | Check if: <input type="checkbox"/> Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$2,190,000. | |
| Check all applicable boxes: <input type="checkbox"/> A plan is being filed with this petition. <input type="checkbox"/> Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b). | | THIS SPACE IS FOR COURT USE ONLY | |

| | | | | | | | | | | |
|---|--|--|--|--|--|--|--|--|--|---|
| Statistical/Administrative Information <input checked="" type="checkbox"/> Debtor estimates that funds will be available for distribution to unsecured creditors. <input type="checkbox"/> Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors. | | | | | | | | | | THIS SPACE IS FOR COURT USE ONLY |
| Estimated Number of Creditors <input checked="" type="checkbox"/> 1-49 <input type="checkbox"/> 50-99 <input type="checkbox"/> 100-199 <input type="checkbox"/> 200-999 <input type="checkbox"/> 1,000-5,000 <input type="checkbox"/> 5,001-10,000 <input type="checkbox"/> 10,001-25,000 <input type="checkbox"/> 25,001-50,000 <input type="checkbox"/> 50,001-100,000 <input type="checkbox"/> OVER 100,000 | | | | | | | | | | |
| Estimated Assets <input type="checkbox"/> \$0 to \$50,000 <input type="checkbox"/> \$50,001 to \$100,000 <input type="checkbox"/> \$100,001 to \$500,000 <input type="checkbox"/> \$500,001 to \$1 million <input type="checkbox"/> \$1,000,001 to \$10 million <input checked="" type="checkbox"/> \$10,000,001 to \$50 million <input type="checkbox"/> \$50,000,001 to \$100 million <input type="checkbox"/> \$100,000,001 to \$500 million <input type="checkbox"/> \$500,000,001 to \$1 billion <input type="checkbox"/> More than \$1 billion | | | | | | | | | | |
| Estimated Liabilities <input type="checkbox"/> \$0 to \$50,000 <input type="checkbox"/> \$50,001 to \$100,000 <input type="checkbox"/> \$100,001 to \$500,000 <input type="checkbox"/> \$500,001 to \$1 million <input type="checkbox"/> \$1,000,001 to \$10 million <input checked="" type="checkbox"/> \$10,000,001 to \$50 million <input type="checkbox"/> \$50,000,001 to \$100 million <input type="checkbox"/> \$100,000,001 to \$500 million <input type="checkbox"/> \$500,000,001 to \$1 billion <input type="checkbox"/> More than \$1 billion | | | | | | | | | | |

BI (Official Form 1)(1/08)

Page 2

Voluntary Petition

Name of Debtor(s):

Palmilla Development Company, Inc.*(This page must be completed and filed in every case)***All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet)**

| | | |
|--|--------------|-------------|
| Location Where Filed: - None - | Case Number: | Date Filed: |
| Location Where Filed: | Case Number: | Date Filed: |

Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet)

| | | |
|--|---------------|-------------|
| Name of Debtor: See Attachment | Case Number: | Date Filed: |
| District: | Relationship: | Judge: |

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I delivered to the debtor the notice required by 11 U.S.C. §342(b).

X _____
Signature of Attorney for Debtor(s) (Date)

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

- ☐ Yes, and Exhibit C is attached and made a part of this petition.
☒ No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

- ☐ Exhibit D completed and signed by the debtor is attached and made a part of this petition.

If this is a joint petition:

- ☐ Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition.

Information Regarding the Debtor - Venue

(Check any applicable box)

- ☒ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.
☒ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.
☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Certification by a Debtor Who Resides as a Tenant of Residential Property

(Check all applicable boxes)

- ☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

(Name of landlord that obtained judgment)

(Address of landlord)

- ☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and
☐ Debtor has included in this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.
☐ Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(f)).

B1 (Official Form 1X1/08)

Page 3

Voluntary Petition

Name of Debtor(s):

Palmilla Development Company, Inc.

(This page must be completed and filed in every case)

Signatures**Signature(s) of Debtor(s) (Individual/Joint)**

I declare under penalty of perjury that the information provided in this petition is true and correct.
 [If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
 [If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. §342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X

Signature of Debtor

X

Signature of Joint Debtor

Telephone Number (If not represented by attorney)

Date

Signature of Attorney***X**

Signature of Attorney for Debtor(s)

Ron Bender 143364

Printed Name of Attorney for Debtor(s)

Levene, Neale, Bender, Rankin & Brill L.L.P.

Firm Name

10250 Constellation Boulevard**Suite 1700****Los Angeles, CA 90067**

Address

(310) 229-1234 Fax: (310) 229-1244

Telephone Number

143364

Date

*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X

Signature of Authorized Individual

Hagai Rapaport

Printed Name of Authorized Individual

President

Title of Authorized Individual

Date

2/11/09**Signature of a Foreign Representative**

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only one box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. §1515 are attached.

☐ Pursuant to 11 U.S.C. §1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X

Signature of Foreign Representative

Printed Name of Foreign Representative

Date

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

Printed Name and title, if any, of Bankruptcy Petition Preparer

Social Security number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

Address

X

Date

Signature of Bankruptcy Petition Preparer or officer, principal, responsible person, or partner whose Social Security number is provided above.

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. §110; 18 U.S.C. §156.

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CM/ECF - U.S. Bankruptcy Court (v3.1 - LIVE) - NoticeOfFiling

Page 1 of 1

United States Bankruptcy Court
Central District Of California

Notice of Bankruptcy Case Filing

A bankruptcy case concerning the debtor(s) listed below was filed under Chapter 11 of the United States Bankruptcy Code, entered on 02/11/2009 at 6:06 PM and filed on 02/11/2009.

Palmilla Development Company, Inc.

7116 Valjean Avenue

Van Nuys, CA 91406

Tax id: 20-0520319

dba

Executive Living



The case was filed by the debtor's attorney:

Ron Bender

10250 Constellation Blvd Ste 1700

Los Angeles, CA 90067

310-229-1234

The case was assigned case number 1:09-bk-11504-MT to Judge Maureen Tighe.

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

If you would like to view the bankruptcy petition and other documents filed by the debtor, they are available at our *Internet* home page www.cacb.uscourts.gov or at the Clerk's Office, 21041 Burbank Blvd., Woodland Hills, CA 91367-6603.

You may be a creditor of the debtor. If so, you will receive an additional notice from the court setting forth important deadlines.

Jon D. Ceretto
Clerk, U.S. Bankruptcy
Court

| PACER Service Center | | | |
|----------------------|------------------|------------------|------------------|
| Transaction Receipt | | | |
| 02/12/2009 15:51:01 | | | |
| PACER Login: | In0022 | Client Code: | 4336 |
| Description: | Notice of Filing | Search Criteria: | 1:09-bk-11504-MT |
| Billable Pages: | 1 | Cost: | 0.08 |

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am an employee in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is: 10250 Constellation Boulevard, Suite 1700, Los Angeles, California 90067.

On February 12, 2009, I served the foregoing document(s) described as:

NOTICE OF FILING OF PETITION FOR RELIEF UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE, 11 U.S.C. § 101, ET. SEQ., AND AUTOMATIC STAY

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

NOTC

Michael F. Lynch, Esq.
 Lewis and Roca LLP
 3993 Howard Hughes Parkway, Suite 600
 Las Vegas, Nevada 89169-5996

☒ (By Mail) I caused such envelope with postage thereon, fully prepaid to be placed in the United States mail. Executed on February 12, 2009 at Los Angeles, California.

☐ (By Federal Express/Overnight Mail) I caused such envelope to be delivered by Federal Express (or Express Mail), next business day delivery to the offices of those so designated on the attached list. Executed on February __, 2009, at Los Angeles, California.

☐ (By Facsimile) I caused said document to be sent via facsimile to the offices of the addressees so designated on the attached list. Executed on February __, 2009, at Los Angeles, California.

☒ (By E-mail) I caused such envelope to be delivered via email to the offices of those United States Trustee. Executed on February 11, 2009, at Los Angeles, California.

☐ (By Personal service) I caused such envelope to be delivered by hand to the offices of the addressee so designated on the attached list. Executed on February __, 2009 at Los Angeles, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct.


 John Berwick

EXHIBIT 4

EXHIBIT 4

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CLERK OF THE COURT

COMP

MICHAEL F. LYNCH, ESQ.
Nevada Bar No. 8555
MLynch@lrlaw.com
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
Telephone: (702) 385-3373
Facsimile: (702) 385-9447

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

LaSalle Bank National Association as
Trustee For The Registered Holders of
ML-CFC Commercial Mortgage Trust
2007-7 Commercial Mortgage Pass-
Through Certificates Series 2007-7, by and
through Midland Loan Services, Inc., as its
Special Servicer,

Plaintiff,

vs.

Hagai Rapaport, an individual; and Does I
to X; and Roe Corporations X to XX,

Defendants.

Case No.:

Dept. No.:

COMPLAINT

Exempt from Arbitration: Action in Equity

Plaintiff alleges:

Parties, Jurisdiction And Venue

1. Plaintiff is LaSalle Bank National Association as Trustee For The Registered
Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-
Through Certificates Series 2007-7, by and through Midland Loan Services, Inc., as its
Special Servicer ("Lender" or "Plaintiff").

2. Plaintiff alleges upon information that Hagai Rapaport ("Guarantor") is, and
at all times relevant to this action was, an individual doing business in Las Vegas, Nevada.

3. This Court has personal jurisdiction over Guarantor because he is an
individual who transacted business within Nevada and because he consented to this Court's

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MAR 16 2009
CLERK OF THE COURT

1 personal jurisdiction over him.¹

2 4. Venue is proper in the Eighth Judicial District Court because Guarantor
3 incurred and contracted to perform certain obligations in Clark County, which are the
4 subject of this suit, and because Guarantor consented to this venue as the proper venue for
5 this dispute.²

6 5. The true names and capacities, whether individual, corporate, associate,
7 trust/trustee or otherwise, of defendants named herein as Does I through X and Roe
8 Corporations X through XX, are unknown to Plaintiff. Plaintiff shall amend this complaint
9 to include the true names and capacities of such Doe and Roe defendants as the same are
10 ascertained.

11 **General Allegations**

12 6. Palmilla Development Co., Inc. ("Borrower") borrowed \$20,150,000.00 with
13 interest from Artesia Mortgage Capital Corporation, a Delaware corporation ("Original
14 Lender") on or about March 28, 2007 (the "Loan").

15 7. The Loan is evidenced by, among other things, that certain Fixed Rate Note
16 dated March 28, 2007, bearing an authorized signature on behalf of the Borrower (the
17 "Promissory Note").

18 8. The Loan was and is secured by that certain Commercial Deed of Trust,
19 Security Agreement, Fixture Filing Financing Statement and Assignment of Leases, Rents,
20 Income and Profits (as same may have been amended) recorded in the Clark County
21 Records' Office as Document No. 20070330-0002946 ("Deed of Trust").

22
23
24 ¹ (See Limited Recourse Obligations Guarantee at ¶ 19 (providing that "Guarantor, in order to induce
25 Lender to accept this Guaranty, agrees that all actions or proceedings arising directly, indirectly or
26 otherwise in connection with this Guaranty shall be litigated, at Lender's sole election, only in courts having
27 a situs within the county and State where the Property is located, in any jurisdiction in which Borrower or
28 Guarantor (or any individual or entity comprising Borrower or Guarantor) may reside or hold assets, or in
anyone or more of the foregoing jurisdictions. Guarantor hereby consents and submits to the jurisdiction of
any local, state or federal court located therein. Guarantor hereby waives any right it may have to transfer or
change the venue of any litigation brought against it by Lender on this Guaranty in accordance with this
paragraph.").

² See *id.*

1 9. The Loan was and is further secured by that certain Assignment of Leases,
2 Rents, Income and Profits (as same may have been amended) recorded in the Clark County
3 Records' Office as Document No. 20070330-0002947 ("Assignment of Rents").

4 10. Original Lender assigned all of its rights and interests in and to the Deed of
5 Trust and the Assignment of Rents to the Plaintiff pursuant to that certain Assignment of
6 (a) Commercial Deed of Trust, Security Agreement, Fixture Filing Financing Statement
7 and (b) Assignment Of Leases, Rents, Income and Profits And Assignment of Assignment
8 of Leases, Rents, Income and Profits recorded in the Clark County Records' Office as
9 Document No. 20080103-0000543 (the "Assignment of Deed of Trust").

10 11. The Guarantor personally guaranteed to "unconditionally, irrevocably, jointly
11 and severally guarantee(s) to Lender and to its successors, endorsees and/or assigns the full
12 and prompt payment when due, by acceleration or otherwise, of all amounts owing by
13 Borrower to Lender under the Loan Documents...."

14 12. As detailed more fully in the Deed of Trust, the real property securing the
15 Promissory Note and the real property referenced in the Personal Guarantee (the "Real
16 Property") is identified by the Clark County Tax Assessor Parcel Nos.

- 17 i. 124-30-311-031;
18 ii. 124-30-312-014 and 015;
19 iii. 124-30-312-017 and 018;
20 iv. 124-30-312-025 – 169, inclusive;
21 v. 124-30-312-171 and 172;
22 vi. 124-30-312-177; and
23 vii. 124-30-312-180 – 182, inclusive,

24 more commonly referred to as the Palmilla Townhomes, generally located northeast of the
25 intersection of West Ann Road and North Decatur Boulevard in North Las Vegas.

26 13. The Real Property is a development containing approximately 157 single-
27 family rental townhomes, each of which is currently generating, or capable of generating,
28 rental income.

1 14. Borrower filed a voluntary petition under Chapter 11 of Title 11 United
2 States Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code") in the United States
3 Bankruptcy Court for the Central District of California, San Fernando Valley Division,
4 Case No.: 1:09-bk-11504-MT on February 11, 2009.

5 15. The Personal Guarantee provides that the Guarantor shall be and remain
6 personally liable without exculpation or limitation of liability whatsoever for the entire
7 amount of the indebtedness evidenced by the Note (including all principal, interest, and
8 other charges) and all other sums due or to become due under the other Loan Documents,
9 whether at maturity or by acceleration or otherwise, under certain circumstances listed in
10 the Personal Guarantee, §§ 2(b)(i)-(iv).

11 16. The Lender is entitled to full recourse against the Guarantor pursuant to §
12 2(b)(ii) of the Personal Guarantee on the grounds that, on information and belief, Guarantor
13 has been involved in fraud or intentional misrepresentation in connection with the Real
14 Property, Loan Documents, or Loan Application.

15 17. The Lender is entitled to full recourse against the Guarantor pursuant to §
16 2(b)(iii) of the Personal Guarantee on the grounds that, on information and belief,
17 Guarantor has not satisfied the Stabilized Operating Threshold (as defined in the Reserve
18 Agreement).

19 18. The Lender is entitled to full recourse against the Guarantor pursuant to §
20 2(b)(iv) of the Personal Guarantee on the grounds that the Real Property has become an
21 asset in a voluntary bankruptcy or insolvency proceeding commenced by Borrower.

22 19. As detailed more fully in the Promissory Note and Deed of Trust, the
23 Borrower was required to remit monthly payments which included, among other amounts,
24 a constant \$111,530.40 per month, with a final maturity date of April 11, 2018.

25 20. Borrower is currently in default on its payments to Plaintiff on the Loan, and
26 currently owes not less than \$669,182.40 in past due principal and interest, \$192,047.22 in
27 past due escrow/reserve, \$34,449.18 in past due late charges, \$141,539.24 in past due tax
28 advance payments, \$18,288.00 in past due insurance advance payments, and an additional

1 \$332,350.36 in default interest.

2 21. In addition, the Promissory Note and the Deed of Trust, together with other
3 Loan Documents, provide for acceleration of the entire unpaid Secured Obligations upon
4 the happening of certain events.

5 22. Among other provisions, Deed of Trust § 2.02 (a)(13) provides "if any Event
6 of Default as described in clause (h), (i), (j) or (k) of Section 2.01 [of the Deed of Trust]
7 shall occur, the entire unpaid Secured Obligations shall be automatically due and payable,
8 without any further notice, demand or other action by Lender."

9 23. Multiple events and Events of Default triggering the acceleration clause have
10 occurred, and the entire unpaid Secured Obligations is therefore immediately due and
11 payable.

12 24. The Personal Guarantee requires Guarantor personally cure Borrower's
13 monetary breaches, including but not limited to all unpaid Secured Obligations, whether
14 due in the normal course or by acceleration, which Guarantor has refused and failed to do.

15 25. The Guarantor is personally liable for Plaintiff's attorneys' fees, costs and
16 expenses as follows:

17 Guarantor shall be and remain personally liable for ... all court
18 costs and attorneys' fees, costs and expenses actually incurred
by Lender pursuant to the Note or any other Loan Documents.

19 26. The Guarantor is unable and/or unwilling to cure the Events of Default
20 and/or other breaches, some of which have been summarized hereinabove.

21 **First Cause of Action**³

22 **(Breach of Contract)**

23 27. The Personal Guaranty and Loan Documents entered into by Guarantor and
24 Plaintiff are valid and existing contracts.

25 28. Plaintiff fully performed or was excused from performance of its duties under
26 the Personal Guaranty and Loan Documents.

27
28 ³ The allegations of this Complaint are continuous, so that the prior allegations are part of allegations
supporting each cause of action.

1 29. The Guarantor has breached the Personal Guarantee, which provides each
2 Guarantor shall "unconditionally, irrevocably, jointly and severally guarantee(s) to Lender
3 and to its successors, endorsees and/or assigns the full and prompt payment when due, by
4 acceleration or otherwise, of all amounts owing by Borrower to Lender under the Loan
5 Documents...." by refusing and failing to cure the defaults referenced hereinabove.

6 30. As a direct and proximate result of the beach of the Personal Guaranty and
7 Loan Documents by Guarantor, Plaintiff has been damaged in an amount in excess of
8 \$10,000.00, the exact amount to be determined at trial.

9 31. As a result of Guarantor's actions, Plaintiff has been required to retain the
10 services of an attorney to prosecute this claim and is entitled to be compensated for any
11 costs incurred in the prosecution of this action, including without limitation, any and all
12 costs and reasonable attorney's fees.

13 **Second Cause of Action**

14 **(Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing)**

15 32. The Personal Guaranty and Loan Documents entered into by Guarantor and
16 Plaintiff are valid and existing contracts.

17 33. Guarantor owed a duty of good faith to Plaintiff in connection the Personal
18 Guaranty and Loan Documents.

19 34. Guarantor breached that duty by performing in a manner that is unfaithful to
20 the purposes of the Personal Guaranty and Loan Documents

21 35. As a result of Guarantor's actions, Plaintiff has been required to retain the
22 services of an attorney to prosecute this claim and is entitled to be compensated for any
23 costs incurred in the prosecution of this action, including without limitation, any and all
24 costs and reasonable attorney's fees.

25 **Third Cause of Action**

26 **(Accounting)**

27 36. Upon information and belief, Guarantor has misappropriated, wasted,
28 converted, and otherwise transferred or hypothecated the Rents received from the Property

1 in violation the Loan Documents and Personal Guaranty for personal use.

2 37. The full extent of Guarantor's misappropriation of Rents received from the
3 Property is unknown to Plaintiff.

4 38. Upon information and belief, an accounting of Guarantor's personal property,
5 assets, and accounts is necessary to ascertain the full extent of Rents received from the
6 Property that have been improperly taken by Guarantor.

7 39. There is no adequate remedy at law by which to obtain such an accounting,
8 therefore, Plaintiff requests that the court compel an accounting of all Guarantor's
9 personal property of any nature whatsoever to ascertain the extent of Plaintiff's damages.

10 40. As a result of Guarantor's actions, Plaintiff has been required to retain the
11 services of an attorney to prosecute this claim and is entitled to be compensated for any
12 costs incurred in the prosecution of this action, including without limitation, any and all
13 costs and reasonable attorney's fees.

14 ...

15 ...

16 ...

17 ...

18 ...

19 ...

20 ...

21 ...

22 ...

23 ...

24 ...

25 ...

26 ...

27 ...

28 ...

1 Plaintiff requests the following relief:

- 2 1. For judgment in Plaintiff's favor and against Guarantor on the Complaint
3 and all claims for relief asserted therein;
4 2. For actual and compensatory damages in excess of \$10,000.00, plus interest
5 thereon at the contract or statutory rate until paid in full, plus penalties and costs;
6 3. For consequential damages in excess of \$10,000.00;
7 4. For special damages in excess of \$10,000.00;
8 5. For an accounting of Guarantor's personal property, assets, and accounts;
9 6. For reasonable attorneys' fees and costs; and
10 7. For such other and further relief as the Court may deem just and proper.

11 DATED this 16th day of March, 2009.

12 LEWIS AND ROCA LLP

13 *Michael F. Lynch*
14 MICHAEL F. LYNCH, ESQ.
15 Nevada Bar No. 8555
16 mlynch@lrlaw.com
17 3993 Howard Hughes Parkway, Suite 600
18 Las Vegas, Nevada 89169
19 (702) 385-3373
20 (702) 385-9447 (fax)

21 *Attorneys for Plaintiff*
22
23
24
25
26
27
28

EXHIBIT 5

EXHIBIT 5

received
7/16/09

FILED

JUL 15 11 33 AM '09

Ed [Signature]
CLERK OF THE COURT

1 **NEOJ**
2 MICHAEL F. LYNCH, ESQ.
3 Nevada Bar No. 8555
4 MLynch@lrlaw.com
5 LEWIS AND ROCA LLP
6 3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169-5996
Telephone: (702) 385-3373
Facsimile: (702) 385-9447

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

9 LaSalle Bank National Association as Trustee
10 for the Registered Holders of ML-CFC
11 Commercial Mortgage Pass-Through
12 Certificates Series 2007-7, by and through
Midland Loan Services, Inc., as its Special
Servicer,

Plaintiff,

vs.

Hagai Rapaport, an individual; and Does I to
X; and Roe Corporations X to XX,

Defendants.

Case No. A585424

Dept. No. VIII

**NOTICE OF ENTRY OF
STIPULATION AND ORDER FOR
DISMISSAL WITHOUT
PREJUDICE**

17 Please take notice that on the 14th day of July, 2009, a Stipulation and Order for
18 Dismissal Without Prejudice was entered in the above-captioned action, a copy of said
19 Stipulation and Order is attached hereto.
20

21 DATED this 14th day of July, 2009.

LEWIS AND ROCA LLP

24 *Michael F. Lynch*
25 MICHAEL F. LYNCH, ESQ.
26 Nevada Bar No. 8555
27 MLynch@lrlaw.com
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996

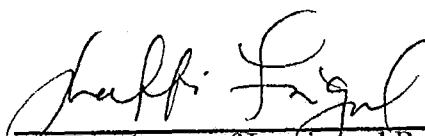
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that a copy of the **NOTICE OF ENTRY OF STIPULATION AND ORDER FOR DISMISSAL WITHOUT PREJUDICE** in the above-captioned litigation was made on July 15, 2009 by depositing the same in the U.S. Mail, at Las Vegas, Nevada, addressed to the following:

Brent Larsen, Esq.
DEANER, DEANER, SCANN, MALAN & LARSEN
720 S. Fourth Street, #300
Las Vegas, NV 89101

Attorney for Defendant



An Employee of Lewis and Roca LLP

1 **SAO**
 2 **MICHAEL F. LYNCH, ESQ.**
 3 Nevada Bar No. 8555
 4 MLynch@lrlaw.com
 5 **LEWIS AND ROCA LLP**
 6 3993 Howard Hughes Parkway
 7 Suite 600
 8 Las Vegas, Nevada 89169-5996
 9 Telephone: (702) 385-3373
 10 Facsimile: (702) 385-9447

11 Attorneys for Plaintiff

FILED

JUL 14 12 35 PM '09

[Signature]
 CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

12 LaSalle Bank National Association as Trustee for
 13 the Registered Holders of ML-CFC Commercial
 14 Mortgage Pass-Through Certificates Series 2007-
 15 7, by and through Midland Loan Services, Inc., as
 16 its Special Servicer,

Plaintiff,

17 vs.

18 Hagai Rapaport, an individual; and Does I to X;
 19 and Roe Corporations X to XX,

Defendants.

Case No. A585424

Dept. No. VIII

**STIPULATION AND ORDER FOR
 DISMISSAL WITHOUT
 PREJUDICE**

20 **IS HEREBY STIPULATED** by and between Plaintiffs LaSalle Bank National
 21 Association as Trustee for the Registered Holders of ML-CFC Commercial Mortgage Pass-
 22 Through Certificates Series 2007-7 and Midland Loan Services, Inc., and Defendant Hagai
 23 Rapaport, by and through their respective counsel, stipulate that all claims asserted in this matter

24 ///

25 ///

26 ///

27 ///

1 shall be and hereby are dismissed without prejudice, with each party to bear his, her or its own
2 attorney's fees and costs.

3 DATED this ____ day of July, 2009.

DATED this 10 day of July, 2009.

4 LEWIS AND ROCA LLP

DEANER, DEANER, SCANN, MALAN &
LARSEN

5
6 MICHAEL F. LYNCH, ESQ.
7 Nevada Bar No. 8555
8 MLynch@lrlaw.com
9 3993 Howard Hughes Parkway
10 Suite 600
11 Las Vegas, Nevada 89169-5996
12 Telephone: (702) 385-3373
13 Facsimile: (702) 385-9447

Brent Larsen
BRENT LARSEN, ESQ.
Nevada Bar No. 1184
720 S. Fourth Street, #300
Las Vegas, NV 89101

Attorney for Defendant

Attorneys for Plaintiff

ORDER

13 IT IS HEREBY ORDERED that all claims asserted in this matter are hereby dismissed
14 without prejudice, with each party to bear his, her or its own attorney's fees and costs.

15 DATED _____

16 _____
DISTRICT COURT JUDGE

17 Respectfully Submitted
18 LEWIS AND ROCA LLP

19
20 MICHAEL F. LYNCH, ESQ.
21 Nevada Bar No. 8555
22 MLynch@lrlaw.com
23 3993 Howard Hughes Parkway
24 Suite 600
25 Las Vegas, Nevada 89169-5996
26 Telephone: (702) 385-3373
27 Facsimile: (702) 385-9447

Attorneys for Plaintiff

EXHIBIT 6

000652

000652

EXHIBIT 6

| | |
|--|---|
| Attorney or Party Name, Address, Telephone & Fax Numbers, and California State Bar Number Gary Owen Caris (SBN 088918) Lesley Anne Hawes (SBN 117101) McKENNA LONG & ALDRIDGE LLP 444 South Flower Street, 8th Floor Los Angeles, CA 90071 Telephone: (213) 688-1000; Facsimile: (213) 243-6330 <input type="checkbox"/> Individual appearing without counsel <input checked="" type="checkbox"/> Attorney for Movant | FOR COURT USE ONLY <div style="border: 1px solid black; padding: 5px; text-align: center;"> FILED & ENTERED JUL 02 2009 </div> CLERK U.S. BANKRUPTCY COURT Central District of California BY Williams DEPUTY CLERK |
| UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA | |
| In re: PALMILLA DEVELOPMENT COMPANY, INC., a Nevada corporation <div style="text-align: right;">Debtor(s).</div> | CHAPTER: 11 CASE NO.: 1:09-bk-11504 MT DATE: June 29, 2009 TIME: 10:00 a.m. CTRM: 302 FLOOR: |

ORDER GRANTING MOTION FOR RELIEF FROM THE AUTOMATIC STAY
UNDER 11 U.S.C. § 362 (Real Property)
(MOVANT: U.S. Bank National Association as Successor Trustee for the Registered Holders
of ML-CFC Commercial Mortgage Trust 2007-7, Commercial Mortgage Pass-Through
Certificate Series 2007-7, by and through Midland Loan Services, Inc., as its Special Servicer)

1. The Motion was: ☒ Contested ☐ Uncontested ☐ Settled by Stipulation

2. The Motion affects the following real property ("Property"):

Street Address: See attached page
 Apartment/Suite No.:
 City, State, Zip Code:

Legal description or document recording number (including county of recording): See attached page

☒ See attached page.

3. The Motion is granted under: ☒ 11 U.S.C. § 362(d)(1) ☒ 11 U.S.C. § 362(d)(2) ☐ 11 U.S.C. § 362(d)(3)
☐ 11 U.S.C. § 362(d)(4)

4. As to Movant, its successors, transferees and assigns ("Movant"), the stay of 11 U.S.C. § 362(a) is:

- a. ☒ Terminated as to Debtor(s) and Debtor's(s) bankruptcy estate.
 b. ☐ Annulled retroactively to the date of the bankruptcy petition filing.
 c. ☐ Modified or conditioned as set forth in Exhibit _____ to this Order.

5. ☒ Movant may enforce its remedies to foreclose upon and obtain possession of the Property in accordance with applicable non-bankruptcy law, but may not pursue any deficiency claim against the Debtor(s) or property of the estate except by filing a Proof of Claim pursuant to 11 U.S.C. § 501.

(This Order is continued on next page)

This form is mandatory by Order of the United States Bankruptcy Court for the Central District of California.

F 4001-10.RP

Order on Motion for Relief from Stay (Real Property) – Page 2 of 7

In re: Palmilla Development Company, Inc., a Nevada corporation

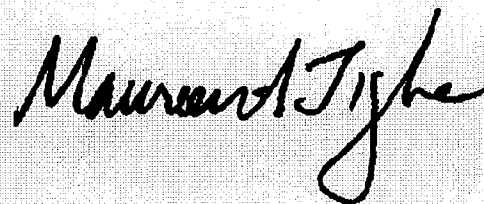
CHAPTER 11

Debtor(s).

CASE NUMBER 1:09-bk-11504 MT

6. ☐ Movant shall not conduct a foreclosure sale before the following date (*specify*):
7. ☐ The stay shall remain in effect subject to the terms and conditions set forth in the Adequate Protection Attachment to this Order.
8. ☐ In chapter 13 cases, the trustee shall not make any further payments on account of Movant's secured claim after entry of this Order. The secured portion of Movant's claim is deemed withdrawn upon entry of this Order without prejudice to Movant's right to file an amended unsecured claim for any deficiency. Absent a stipulation or order to the contrary, Movant shall return to the trustee any payments received from the trustee on account of Movant's secured claim after entry of this Order.
9. The filing of the petition was part of a scheme to delay, hinder and defraud creditors that involved either:
- ☐ transfer of all or part ownership of, or other interest in, the Property without the consent of the secured creditor or court approval.
- ☐ multiple bankruptcy filings affecting the Property.
- If recorded in compliance with applicable state laws governing notices of interest or liens in the Property, this Order is binding and effective under 11 U.S.C. § 362(d)(4)(A) and (B) in any other bankruptcy case purporting to affect the Property filed not later than two (2) years after the date of entry of this Order, except that a debtor in a subsequent bankruptcy case may move for relief from this Order based upon changed circumstances or for good cause shown, after notice and a hearing. Any federal, state or local governmental unit that accepts notices of interests or liens in real property shall accept a certified copy of this Order for indexing and recording.
10. This Court further orders as follows:
- a. ☐ This Order shall be binding and effective despite any conversion of this bankruptcy case to a case under any other chapter of Title 11 of the United States Code.
- b. ☐ The 10-day stay provided by Bankruptcy Rule 4001(a)(3) is waived.
- c. ☐ The provisions set forth in the Extraordinary Relief Attachment shall also apply (*attach Optional Form F 4001-10-ER*).
- d. ☐ See attached continuation page for additional provisions.

###



DATED: July 2, 2009

United States Bankruptcy Judge

This form is mandatory by Order of the United States Bankruptcy Court for the Central District of California.

F 4001-10.RP

F 4001-10.RP

Order on Motion for Relief from Stay (Real Property) – Page 3 of 7

| | |
|---|------------------------------|
| In re: Palmilla Development Company, Inc., a Nevada corporation | CHAPTER 11 |
| Debtor(s) | CASE NUMBER 1:09-bk-11504 MT |

Continuation Page for Order Granting Motion for Relief from the Automatic Stay, para. 2:

The Property consists of 157 separate apartment units with the following street addresses:

5815, 5845 and 5855 Nuevo Leon Street
5820, 5825, 5835, 5850, 5860 and 5865 Palmilla Street
5830, 5840 and 5870 Barbosa Drive
5920 Palmilla Street #11 and 12
5925 Palmilla Street #3, 7, 8, 10 and 11
5945 Palmilla Street #7
5915 Nuevo Leon Street #1, 4, 9, 10 and 12
North Las Vegas, NV 89031

This form is mandatory by Order of the United States Bankruptcy Court for the Central District of California.

F 4001-10.RP

F 4001-10.RP

Order on Motion for Relief from Stay (Real Property) – Page 4 of 7

| | |
|---|------------------------------|
| In re: Palmilla Development Company, Inc., a Nevada corporation | CHAPTER 11 |
| Debtor(s). | CASE NUMBER 1:09-bk-11504 MT |

Legal Description of Property

The Property is located in Clark County, Nevada, and is legally described as follows:

Parcel One (1):

Lot Seven (7) in Building Three (3) of AMENDED PLAT OF PALMILLA TOWNHOMES – PHASE 1, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as amended by Certificate of Amendment recorded March 15, 2005 in Book 20050315 as Document No. 02792, Official Records, and by Certificate of Amendment recorded March 16, 2005 in Book 20050316 as Document No. 04327, Official Records.

Parcel Two (2):

Lots Three (3), Seven (7), Eight (8), Ten (10) and Eleven (11) in Building Six (6); Lots One through Twelve (1-12) inclusive, in Building Seven (7); Lots One through Twelve (1-12) inclusive, in Building Eight (8); Lots One through Twelve (1-12) inclusive, in Building Nine (9); Lots One through Twelve (1-12) inclusive, in Building Ten (10); Lots One through Twelve (1-12) inclusive, in Building Eleven (11); Lots One through Twelve (1-12) inclusive, in Building Twelve (12); Lots One through Twelve (1-12) inclusive, in Building Thirteen (13); Lots One through Twelve (1-12) inclusive, in Building Fourteen (14); Lots One through Twelve (1-12) inclusive, in Building Fifteen (15); Lots One through Twelve (1-12) inclusive, in Building Sixteen (16); Lots One through Twelve (1-12) inclusive, in Building Seventeen (17); Lots One through Twelve (1-12) inclusive, in Building Eighteen (18); Lots One (1), Four (4), Nine (9), Ten (10) and Twelve (12) in Building Nineteen (19); and Lots Eleven (11) and Twelve (12) in Building Twenty (20) of PALMILLA TOWNHOMES – PHASE 2 as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada.

Parcel Three (3):

The non-exclusive easements appurtenant to the property described in Parcels One (1) and Two (2) over, across and for the use of the Private Streets, Common Elements and Common Areas as delineated upon the of Plat of PALMILLA TOWNHOMES – PHASE 2, as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada, and upon the Plat of AMENDED PLAT OF PALMILLA TOWNHOMES – PHASE 1, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as further set forth in that certain Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Palmilla, recorded December 10, 2003 in Book 20031210 as Document No. 03076, Official Records, and in Annexation Amendments thereto recorded August 21, 2006 in Book 20060821 as Document No. 003685, recorded September 6, 2006 in Book 20060906 as Document No. 00388, and recorded February 7, 2006 in Book 20060207 as Document No. 02991, and recorded February 27, 2007 in Book 20070227 as Document No. 03972, Official Records.

F 4001-10.RP

F 4001-10.RP

Order on Motion for Relief from Stay (Real Property) – Page 5 of 7

In re: Palmilla Development Company, Inc., a Nevada corporation

CHAPTER 11

Debtor(s).

CASE NUMBER 1:09-bk-11504 MT

CLARIFICATIONLegal Description of PropertyParcel One (1):

Lot Seven (7) in Building Three (3) of AMENDED PLAT OF PALMILLA TOWNHOMES – PHASE 1, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as amended by Certificate of Amendment recorded March 15, 2005 in Book 20050315 as Document No. 02792, Official Records, and by Certificate of Amendment recorded March 16, 2005 in Book 20050316 as Document No. 04327, Official Records.

Parcel Two (2):

Lots Three (3), Seven (7), Eight (8), Ten (10) and Eleven (11) in Building Six (6); Lots One through Twelve (1-12) inclusive, in Building Seven (7); Lots One through Twelve (1-12) inclusive, in Building Eight (8); Lots One through Twelve (1-12) inclusive, in Building Nine (9); Lots One through Twelve (1-12) inclusive, in Building Ten (10); Lots One through Twelve (1-12) inclusive, in Building Eleven (11); Lots One through Twelve (1-12) inclusive, in Building Twelve (12); Lots One through Twelve (1-12) inclusive, in Building Thirteen (13); Lots One through Twelve (1-12) inclusive, in Building Fourteen (14); Lots One through Twelve (1-12) inclusive, in Building Fifteen (15); Lots One through Twelve (1-12) inclusive, in Building Sixteen (16); Lots One through Twelve (1-12) inclusive, in Building Seventeen (17); Lots One through Twelve (1-12) inclusive, in Building Eighteen (18); Lots One (1), Four (4), Nine (9), Ten (10) and Twelve (12) in Building Nineteen (19); and Lots Eleven (11) and Twelve (12) in Building Twenty (20) of PALMILLA TOWNHOMES – PHASE 2 as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada.

Parcel Three (3):

The non-exclusive easements appurtenant to the property described in Parcels One (1) and Two (2) over, across and for the use of the Private Streets, Common Elements and Common Areas as delineated upon the of Plat of PALMILLA TOWNHOMES – PHASE 2, as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada, and upon the Plat of AMENDED PLAT OF PALMILLA TOWNHOMES – PHASE 1, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as further set forth in that certain Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Palmilla, recorded December 10, 2003 in Book 20031210 as Document No. 03076, Official Records, and in Annexation Amendments thereto recorded August 21, 2006 in Book 20060821 as Document No. 003685, recorded September 6, 2006 in Book 20060906 as Document No. 00388, and recorded February 7, 2006 in Book 20060207 as Document No. 02991, and recorded February 27, 2007 in Book 20070227 as Document No. 03972, Official Records.

This form is mandatory by Order of the United States Bankruptcy Court for the Central District of California.

F 4001-10.RP

In re: Palmilla Development Company, Inc., a Nevada corporation

CHAPTER: 11

Debt or(s).

CASE NUMBER: 1:09-bk-11504 MT

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on the CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 444 South Flower Street, 8th Floor, Los Angeles, CA 90071.

A true and correct copy of the foregoing document described ORDER GRANTING MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (Real Property) will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On June 29, 2009 I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

Ron Bender – rb@lnbrb.com
 Katherine Bunker – kate.bunker@usdoj.gov
 Anthony A. Friedman – aaf@lnbrb.com
 United States Trustee (SV) – ustpregion16.wh.ecf@usdoj.gov

☐ Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):

On June 29, 2009 I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Palmilla Development Company, Inc. (Debtor)
 7116 Valjean Avenue
 Van Nuys, CA 91406

☐ Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

June 29, 2009
Date

Pamela A. Coates
Type Name

/s/ Pamela A. Coates
Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

In re: Palmilla Development Company, Inc., a Nevada corporation

Debt or(s).

CHAPTER: 11

CASE NUMBER: 1:09-bk-11504 MT

NOTE TO USERS OF THIS FORM:

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) **Category I.** below: The United States trustee and case trustee (if any) will always be in this category.
- 4) **Category II.** below: List **ONLY** addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. **DO NOT** list an address if person/entity is listed in category I.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **ORDER GRANTING MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (Real Property)** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of June 29, 2009, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

Ron Bender – rb@lnrb.com
 Katherine Bunker – kate.bunker@usdoj.gov
 Gary Owen Caris – gcaris@mckennalong.com
 Anthony A. Friedman – aaf@lnrb.com
 Lesley Anne Hawes – lhawes@mckennalong.com
 United States Trustee (SV) – ustpreion16.wh.ecf@usdoj.gov

☐ Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Palmilla Development Company, Inc. (Debtor)
 7116 Valjean Avenue
 Van Nuys, CA 91406

☐ Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

☐ Service information continued on attached page

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

January 2009
 LA:17689794:1

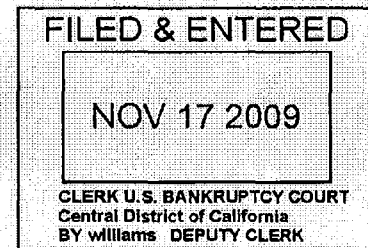
F 4001-10.RP

EXHIBIT 7

099000

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EXHIBIT 7



PETER C. ANDERSON
UNITED STATES TRUSTEE
 Jennifer L. Braun, Bar No. 130932
 Assistant United States Trustee
 Katherine C. Bunker, Bar No. 240593
 Trial Attorney for the United States Trustee
OFFICE OF THE UNITED STATES TRUSTEE
 21051 Warner Center Lane, Suite 115
 Woodland Hills, California 91367
 Telephone: (818) 610-2376; Facsimile: (818) 716-1576
 Email: jennifer.l.braun@usdoj.gov; kate.bunker@usdoj.gov

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

| | | |
|-----------------------------|---|------------------------------|
| In re | } | Case No. SV 09-11504 MT |
| PALMILLA DEVELOPMENT | | Chapter 11 |
| COMPANY, INC., | | ORDER DISMISSING CASE |
| | | Date: October 26, 2009 |
| | } | Time: 10:00 a.m. |
| Debtor. | | Crtm: 302 |

Palmilla Development Company, Inc. ("Debtor") filed a voluntary petition under Chapter 11 on February 11, 2009. On October 26, 2009, the Court held a continued status and case management conference. Based on the Debtor's failure to prosecute the case and an absence of a reasonable likelihood of rehabilitation,

IT IS HEREBY ORDERED that the Debtor's Chapter 11 case is dismissed for failure to prosecute.

IT IS FURTHER ORDERED that the U.S. Trustee is granted a judgment in the amount of \$1,300.00 with applicable interest for quarterly fees.

###

DATED: November 17, 2009

United States Bankruptcy Judge

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: **21051 Warner Center Lane, Suite 115, Woodland Hills, CA 91367**

The foregoing document entitled **ORDER DISMISSING CASE** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") -

Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On N/A, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

☐ Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL(indicate method for each person or entity served):

On **November 17, 2009**, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. *Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.*

☒ Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on **November 17, 2009**, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. *Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.*

**The Honorable M. Tighe,
21041 Burbank Boulevard, Woodland Hills, CA (bin inside of the lobby)**

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

November 17, 2009

Gabriel A. Rodriguez

/s/ Gabriel A. Rodriguez

Date

Type Name

Signature

SERVICE LIST FOR ORDER

SERVED BY U.S. MAIL

Palmilla Development Company, Inc.
7116 Valjean Avenue
Van Nuys, CA 91406

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NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled **ORDER DISMISSING CASE**, was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of **November 17, 2009**, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

☒ Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail to the following person(s) and/or entity(ies) at the address(es) indicated below:

☒ Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below:

☐ Service information continued on attached page

SERVICE LIST FOR ENTERED ORDER

BY NOTICE OF ELECTRONIC FILING ("NEF")

- Ron Bender rb@lnbrb.com
- Katherine Bunker kate.bunker@usdoj.gov
- Gary O Caris gcaris@mckennalong.com,
pcoates@mckennalong.com
- Anthony A Friedman aaf@lnbrb.com
- Lesley A Hawes lhawes@mckennalong.com,
pcoates@mckennalong.com

BY THE U.S. MAIL

Palmilla Development Company, Inc.
7116 Valjean Avenue
Van Nuys, CA 91406

Coates, Pamela

From: cmecfhelpdesk@cacb.uscourts.gov
Sent: Tuesday, November 17, 2009 1:48 PM
To: Courtmail@cacb.uscourts.gov
Subject: 1:09-bk-11504-MT Order Dismissing Case

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30-page limit do not apply.

U.S. Bankruptcy Court

Central District Of California

Notice of Electronic Filing

The following transaction was received from Williams, Jewell entered on 11/17/2009 at 1:47 PM PST and filed on 11/17/2009

Case Name: Palmilla Development Company, Inc.
Case Number: 1:09-bk-11504-MT
Document Number: 89

Docket Text:

Order Dismissing Case - **Debtor** Dismissed. Signed on 11/17/2009. (Williams, Jewell)

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename: V:\Ciao\CC_Orders\MT\Order_For_Entry_1_09-11504-bk_Doc#_1_williams_Id#21049.pdf

Electronic document Stamp:

[STAMP bkecfStamp_ID=1106918562 [Date=11/17/2009] [FileNumber=29785871-0] [1806c8d116e120ccbe0dd790d978c7723dc9fa4fa7afb9de3e1bcf916ea7a150695c667600ed543b1b98214c3e4b0a73b04d9d78a7dbe2b76d1d6bb27f33da7c]]

1:09-bk-11504-MT Notice will be electronically mailed to:

Ron Bender on behalf of Debtor Palmilla Development Company, Inc.
rb@lnbrb.com

Katherine Bunker on behalf of U.S. Trustee United States Trustee (SV)
kate.bunker@usdoj.gov

Gary O Caris on behalf of Creditor Lasalle Bank National Association
gearis@mckennalong.com, pcoates@mckennalong.com

11/17/2009

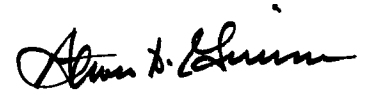
Anthony A Friedman on behalf of Debtor Palmilla Development Company, Inc.
aaf@lnbrb.com

Lesley A Hawes on behalf of Creditor Lasalle Bank National Association
lhawes@mckennalong.com, pcoates@mckennalong.com

United States Trustee (SV)
ustpreion16.wh.ecf@usdoj.gov

1:09-bk-11504-MT Notice will not be electronically mailed to:





CLERK OF THE COURT

1 ANS
BRENT LARSEN, ESQ.
2 Nevada Bar No. 001184
DEANER, MALAN, LARSEN & CIULLA
3 720 S. Fourth Street, #300
Las Vegas, Nevada 89101
4 (702) 382-6911
Attorney for Defendant
5

6 DISTRICT COURT
7 CLARK COUNTY, NEVADA

8 U.S. Bank National Association as Trustee
9 for The Registered Holders of ML-CFC
Commercial Mortgage Trust 2007-7
10 Commercial Mortgage Pass-Through
Certificates Series 2007-7, by and through
11 Midland Loan Services, Inc., as its Special
Servicer,

Case No.: 09-A-595321-C

Dept. No.: XX

Plaintiff,

v.

14 Palmilla Development Co., Inc., a Nevada
15 corporation; Hagai Rapaport, an
individual; Does I to X; and Roe
16 Corporations X to XX,

Defendants.

DEFENDANTS' ANSWER TO SECOND AMENDED COMPLAINT

19 COME NOW the Defendants, PALMILLA DEVELOPMENT CO., INC. and HAGAI
20 RAPAPORT, by and through their attorney, BRENT LARSEN, ESQ., of the law firm of
21 DEANER, MALAN, LARSEN & CIULLA, and hereby answer Plaintiff's Second Amended
22 Complaint.
23

Parties, Jurisdiction and Venue

24 1. Answering Paragraphs 1 and 6 of Plaintiff's Second Amended Complaint,
25 Defendants are without information or knowledge sufficient to form a belief as to the
26 allegations contained therein, and therefore deny same.
27

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DEANER, MALAN, LARSEN & CIULLA

720 South Fourth Street, Suite 300

Las Vegas, Nevada 89101

Telephone (702) 382-6911 • Facsimile (702) 366-0854

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DEANER, MALAN, LARSEN & CIULLA
720 South Fourth Street, Suite 300
Las Vegas, Nevada 89101
Telephone (702) 382-6911 • Facsimile (702) 366-0854

2. Answering Paragraphs 2, 3, 4 and 5 of Plaintiff's Second Amended Complaint, Defendants admit each and every allegation contained therein.

General Allegations

3. Answering Paragraphs 7, 8, 10, 11, 38 and 40 of Plaintiff's Second Amended Complaint, Defendants admit each and every allegation contained therein.

4. Answering Paragraphs 9, 12, 13, 14, 15, 19, 21, 23, 24, 25, 28, 29, 39, 41, 44 and 45 of Plaintiff's Second Amended Complaint, Defendants are without information or knowledge sufficient to form a belief as to the allegations contained therein, and therefore deny same.

5. Answering Paragraph 16 of Plaintiff's Second Amended Complaint, Defendants admit each and every allegation contained therein except they deny that Parcel No. 124-30-312-022 was included as a parcel of real property securing the Promissory Note.

6. Answering Paragraph 17 of Plaintiff's Second Amended Complaint, Defendants admit that the Real Property is a development containing approximately 157 single-family rental townhomes. As to the remaining allegations contained in Paragraph 17, Defendants deny such allegations because some of the townhomes were sold prior to the filing of the Complaint.

7. Answering Paragraph 18 of Plaintiff's Second Amended Complaint, Defendants admit that the Borrower filed a voluntary petition under Chapter 11 in the United States Bankruptcy Court for the Central District of California, San Fernando Valley Division, Case No. 1:09-BK-11504-mt ON February 11, 2009. Defendants are without information or knowledge sufficient to form a belief as to whether the case was dismissed without discharge on November 17, 2009.

8. Answering Paragraphs 20, 22, 26, 27, 31, 32, 33, 34, 35, 36, 37, 42 and 43 of Plaintiff's Second Amended Complaint, such paragraphs allege statements of law rather than statements of facts, and accordingly no answer is required to statements of law, particularly because these Defendants affirmatively state that such allegations of law are incomplete and fail to take into account how statutory provisions may alter contractual obligations, and such

1 allegations of law fail to include other facts and circumstances which would very well result
2 in modification of such allegations of law because there are other considerations to be taken
3 into account. Therefore, to the extent that such paragraphs have not been denied, they are
4 expressly denied herein as incomplete and/or unenforceable allegations of law and the
5 current status of any contracts. Moreover, such statements of law are also moot in that such
6 paragraphs assume that there is a basis to appoint a receiver in this case when a receiver has
7 already been appointed and discharged.

8 9. Answering Paragraph 30 of Plaintiff's Complaint, Defendants deny each and
9 every allegation contained therein.

10 **First Cause of Action**

11 **(Breach of Contract -- Borrower)**

12 10. Answering Paragraphs 46, 49, 50 and 53 of Plaintiff's Second Amended
13 Complaint, such paragraphs allege statements of law rather than statements of facts, and
14 accordingly no answer is required to statements of law, particularly because these Defendants
15 affirmatively state that such allegations of law are incomplete and fail to take into account
16 how statutory provisions may alter contractual obligations, and such allegations of law fail to
17 include other facts and circumstances which would very well result in modifications of such
18 allegations of law because there are other considerations to be taken into account. Therefore,
19 to the extent that such paragraphs have not been denied, they are expressly denied herein as
20 incomplete and/or unenforceable allegations of law and the current status of any contracts.
21 Moreover, such statements of law are also moot in that such paragraphs assume that there is a
22 basis to appoint a receiver in this case when a receiver has already been appointed and
23 discharged.

24 11. Answering Paragraphs 47, 48, 51 and 52 of Plaintiff's Complaint, Defendants
25 are without information or knowledge sufficient to form a belief as to the allegations
26 contained therein, and therefore deny same.

27 ///

28 ///

Second Cause of Action**(Breach of Contract -- Guarantor)**

12. Answering Paragraphs 54, 57, 58, 60 and 61 of Plaintiff's Second Amended Complaint, such paragraphs allege statements of law rather than statements of facts, and accordingly no answer is required to statements of law, particularly because these Defendants affirmatively state that such allegations of law are incomplete and fail to take into account how statutory provisions may alter contractual obligations, and such allegations of law fail to include other facts and circumstances which would very well result in modifications of such allegations of law because there are other considerations to be taken into account. Therefore, to the extent that such paragraphs have not been denied, they are expressly denied herein as incomplete and/or unenforceable allegations of law and the current status of any contracts. Moreover, such statements of law are also moot in that such paragraphs assume that there is a basis to appoint a receiver in this case when a receiver has already been appointed and discharged.

13. Answering Paragraphs 55, 56 and 59 of Plaintiff's Complaint, Defendants deny each and every allegation contained therein.

14. Answering Paragraph 62 of Plaintiff's Complaint, Defendants are without information or knowledge sufficient to form a belief as to the allegations contained therein, and therefore deny same.

Third Cause of Action**(Accounting -- Borrower and Guarantor)**

15. Answering Paragraphs 63, 64 and 65 of Plaintiff's Complaint, Defendants are without information or knowledge sufficient to form a belief as to the allegations contained therein, and therefore deny same.

16. Answering Paragraphs 66 and 67 of Plaintiff's Complaint, Defendants deny each and every allegation contained therein.

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1 **FIRST AFFIRMATIVE DEFENSE**

2 Plaintiff's Second Amended Complaint fails to state a claim against these answering
3 Defendants upon which relief can be granted.

4 **SECOND AFFIRMATIVE DEFENSE**

5 By Plaintiff's own volition it chose to avoid a foreclosure sale. A foreclosure sale is a
6 condition precedent to obtaining a deficiency judgment under Nevada statute. Therefore, the
7 Plaintiff is not eligible to recover a deficiency judgment.

8 **THIRD AFFIRMATIVE DEFENSE**

9 Plaintiff's Second Amended Complaint references a sale that was confirmed on
10 March 18, 2010, and yet the Plaintiff waited more than six months after that date to file an
11 application for a deficiency judgment or to file its Second Amended Complaint. As such, the
12 Plaintiff's claims are barred by the statute of limitations as codified in Nevada Statutes.

13 **FOURTH AFFIRMATIVE DEFENSE**

14 Plaintiff's Second Amended Complaint should be dismissed because it failed to serve
15 its First Amended Complaint on Hagai Rapaport in a timely manner. Hagai Rapaport was
16 named as a Defendant in this case for the first time on November 24, 2010, and the Plaintiff
17 failed to accomplish that service of process within 120 days thereafter, as required by Nevada
18 Rules of Civil Procedure. Moreover, the ex parte orders that the Plaintiff obtained for an
19 extension of time for such service are invalid because there was no basis to seek an ex parte
20 order under circumstances where Mr. Larsen was attorney of record in the case, and Plaintiff
21 sought such orders without any service on Mr. Larsen, and the Plaintiff also failed to make
22 any inquiry to Mr. Larsen as to whether he would accept service on behalf of Hagai
23 Rapaport, or whether Mr. Larsen could provide an address for Hagai Rapaport as expressly
24 provided for in Nevada Supreme Court decisions.

25 **FIFTH AFFIRMATIVE DEFENSE**

26 Plaintiff's Second Amended Complaint has not shown that it is in ownership and
27 possession of the promissory note it is suing upon or that it is the true and lawful owner of
28 the claims set forth in the Second Amended Complaint.

1 **SIXTH AFFIRMATIVE DEFENSE**

2 The filing of the First Amended Complaint was an improper filing because it
3 named LaSalle Bank as the Plaintiff when according to the allegations in the Second
4 Amended Complaint, LaSalle Bank had no interest or ownership of the claims asserted in
5 this action. Plaintiff's Second Amended Complaint is an improper filing because the Plaintiff
6 only had the right to amend the Complaint once as a matter of course that occurred when it
7 filed the First Amended Complaint. The filing of the Second Amended Complaint required
8 leave of Court, and the Plaintiff has not yet obtained leave of Court for the filing of the
9 Second Amended Complaint.

10 **SEVENTH AFFIRMATIVE DEFENSE**

11 Plaintiff's Second Amended Complaint fails to disclose how much the Plaintiff or its
12 predecessor in interest paid for the alleged assignment it basis its claim on, and the amount of
13 any recovery Plaintiff could obtain, even if it could get past the aforementioned affirmative
14 defenses. In all events, Plaintiff's recovery would be limited to how much the Plaintiff paid
15 for the purchase of the promissory note, in accordance with statutory definitions of
16 indebtedness.

17 **EIGHTH AFFIRMATIVE DEFENSE**

18 Plaintiff is estopped from asserting the claims in its Second Amended Complaint.

19 **NINTH AFFIRMATIVE DEFENSE**

20 Plaintiff's damages, if any, are a result of the acts and decisions of other persons or
21 entities over whom these Defendants had no control.

22 **TENTH AFFIRMATIVE DEFENSE**

23 It has been necessary for Defendants to retain the services of an attorney to defend this
24 action, and therefore, Defendants are entitled to recover reasonable attorney fees, together
25 with the costs expended in this action.

26 **ELEVENTH AFFIRMATIVE DEFENSE**

27 The Plaintiff is attempting to recover on claims that were never bargained for, for
28 which there is a failure of consideration.

1 **TWELFTH AFFIRMATIVE DEFENSE**

2 Any injury the Plaintiff suffered was a result of its own negligence, which contributed
3 substantially to its injuries.

4 **THIRTEENTH AFFIRMATIVE DEFENSE**

5 The actions that are being complained of were beyond the control of these
6 Defendants, and therefore, any claim for the satisfaction of attorneys fees, obligations, etc.,
7 should be directed solely against the Plaintiff.

8 **FOURTEENTH AFFIRMATIVE DEFENSE**

9 Plaintiff's claims as set forth in its Second Amended Complaint are barred by the
10 Statute of Frauds.

11 **FIFTEENTH AFFIRMATIVE DEFENSE**

12 Plaintiff had notice of all the facts and acts of the Defendants set forth in its Second
13 Amended Complaint and nonetheless, refrained from commencing this action until
14 November 24, 2010, and has thereby been guilty of laches as should in equity bar the
15 Plaintiff from maintaining this action.

16 **SIXTEENTH AFFIRMATIVE DEFENSE**

17 Defendants are entitled to an offset against any damages caused by the Plaintiff or
18 results from the Plaintiff's conduct.

19 **SEVENTEENTH AFFIRMATIVE DEFENSE**

20 Plaintiff has failed to satisfy all conditions precedent that would be necessary for the
21 Plaintiff to hold Defendants in breach of contract.

22 **EIGHTEENTH AFFIRMATIVE DEFENSE**

23 Plaintiff comes into Court with unclean hands and therefore this Court should deny
24 Plaintiff any relief whatsoever.

25 **NINETEENTH AFFIRMATIVE DEFENSE**

26 Plaintiff has waived its right to pursue the claims that it is asserting in its Second
27 Amended Complaint.

28 ///

TWENTIETH AFFIRMATIVE DEFENSE

Defendants are informed and believe and thereon allege that Plaintiff has failed to minimize and/or mitigate its damages, if any.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Defendants are informed and believe and thereon allege that at the time and place referred to in the Second Amended Complaint and before such event, Plaintiff knew, or should have known and appreciated and understood each and every risk involved in placing itself in the position for which it has assumed each risk of injury or damage.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Defendants are informed and believe and thereon allege that Plaintiff lacks standing to bring the instant claim(s) in that it is not the real party-in-interest.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Pursuant to N.R.C.P. 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of Defendants' Answer, and therefore, Defendants reserve the right to amend their Answer to allege additional affirmative defenses if subsequent investigation warrants.

WHEREFORE, Defendants pray for judgment as follows:

1. That Plaintiff take nothing by way of its Complaint on file herein;
2. That Defendants recover reasonable attorneys' fees and costs of suit incurred

herein; and

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1 3. For such other and further relief as the Court may deem just and proper in the
2 premises.

3 DATED this 19 day of August, 2011.

4 Respectfully submitted,

5 DEANER, MALAN, LARSEN & CIULLA

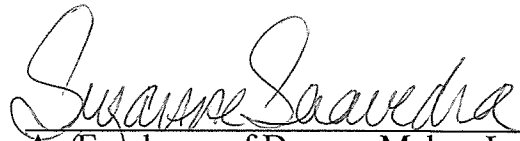
6 
7 BRENT LARSEN, ESQ.
8 Nevada Bar No. 001184
9 720 South Fourth St., #300
10 Las Vegas, Nevada 89101
11 Attorney for Defendants

DEANER, MALAN, LARSEN & CIULLA
720 South Fourth Street, Suite 300
Las Vegas, Nevada 89101
Telephone (702) 382-6911 • Facsimile (702) 366-0854

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of DEANER, MALAN, LARSEN & CIULLA; that on the 19th day of August, 2011, I served a copy of the above and foregoing DEFENDANTS' ANSWER TO SECOND AMENDED COMPLAINT, in a sealed envelope, postage prepaid, by depositing same in the United States mail, addressed to the following:

Michael F. Lynch, Esq.
Lewis and Roca LLP
3993 Howard Hughes Pkwy., Ste. 600
Las Vegas, Nevada 89169-5996
Attorneys for Plaintiff


An Employee of Deaner, Malan, Larsen
& Ciulla

829000
DEANER, MALAN, LARSEN & CIULLA
720 South Fourth Street, Suite 300
Las Vegas, Nevada 89101
Telephone (702) 382-6911 • Facsimile (702) 366-0854

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CLERK OF THE COURT

1 **NOE**
Michael F. Lynch
2 Nevada Bar No. 8555
LEWIS AND ROCA LLP
3 3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169
4 (702) 949-8200
(702) 216-6191 (fax)
5 mlynch@lrlaw.com
Attorney for Plaintiff

DISTRICT COURT**CLARK COUNTY, NEVADA**

9 U.S. Bank National Association as Trustee for
The Registered Holders of ML-CFC
10 Commercial Mortgage Trust 2007-7
Commercial Mortgage Pass-Through
11 Certificates Series 2007-7, by and through
Midland Loan Services, Inc., as its Special
12 Servicer,

Case No. 09-A-595321-C

Dept. No. XX

NOTICE OF ENTRY OF ORDER

Plaintiff,

vs.

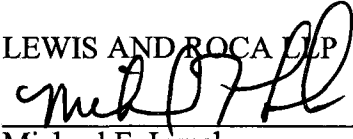
15 Palmilla Development Co., Inc. a Nevada
corporation; Hagai Rapaport, an individual;
16 Does I to X; and Roe Corporations X to XX,,

Defendants.

18 PLEASE TAKE NOTICE that an Order Denying Defendants' Motion to Dismiss, or in the
19 alternative, Motion to Require a substantial Bond from Plaintiff and to Stay the Proceedings until
20 the Bond is Posted filed by Plaintiff was entered on September 9, 2011, a copy is attached hereto.

Dated September 13, 2011.

LEWIS AND ROCA LLP

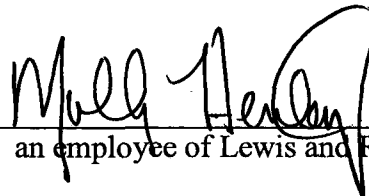

Michael F. Lynch
Nevada Bar No. 8555
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
Telephone: (702) 949-8200
Facsimile: (702) 216-6191
Attorney for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of **Notice of Entry of Order** was made this date by depositing a copy for mailing, first class mail, postage prepaid, at Las Vegas, Nevada, to the following:

Brent A. Larson
DEANER, MALAN, LARSEN & CIULA
720 S. Fourth Street, #300
Las Vegas, NV 89101
Attorneys for Defendants

Dated: September 13th, 2011



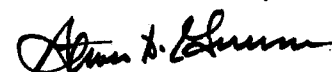
an employee of Lewis and Roca LLP

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ORIGINAL**ORD**

Michael F. Lynch
 Nevada Bar No. 8555
 Marjan Hajimirzaee
 Nevada Bar No. 11984
 LEWIS AND ROCA LLP
 3993 Howard Hughes Pkwy., Suite 600
 Las Vegas, Nevada 89169
 (702) 949-8200
 (702) 216-6191 (fax)
Attorneys for Plaintiff

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 09/09/2011 02:02:32 PM



CLERK OF THE COURT

DISTRICT COURT**CLARK COUNTY, NEVADA**

U.S. Bank National Association as Trustee for
 The Registered Holders of ML-CFC
 Commercial Mortgage Trust 2007-7
 Commercial Mortgage Pass-Through
 Certificates Series 2007-7, by and through
 Midland Loan Services, Inc., as its Special
 Servicer,

Plaintiff,

v.

Palmilla Development Co., Inc., a Nevada
 corporation; Hagai Rapaport, an individual;
 Does I to X; and Roe Corporations X to XX,

Defendants.

Case No.: 09-A-595321-C

Dept. No.: XX

**ORDER DENYING DEFENDANT'S
 MOTION TO DISMISS, OR IN THE
 ALTERNATIVE, MOTION TO
 REQUIRE A SUBSTANTIAL BOND
 FROM PLAINTIFF AND TO STAY THE
 PROCEEDINGS UNTIL THE BOND IS
 POSTED**

Date of Hearing: 7/20/2011

Time of Hearing: 9:00 a.m.

This came before the Court on Palmilla Development Co., Inc.'s and Hagai Rapaport's
 Motion to Dismiss, or in the Alternative, Motion to Require a Substantial Bond from Plaintiff
 and to Stay the Proceedings Until the Bond is Posted (the "Motion"). Plaintiff U.S. Bank
 National Association as Trustee for The Registered Holders of ML-CFC Commercial Mortgage
 Trust 2007-7 Commercial Mortgage Pass-Through Certificates Series 2007-7, by and through
 Midland Loan Services, Inc., as its Special Servicer, filed an Opposition.

The Court read and considered the Motion and Opposition, and the pleadings and papers
 on file herein, and finding good cause,

RECEIVED

SEP 0 / 2011

DEPT. 20

1 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion is Denied.

SEP 08 2011

2 DATED this _____ day of ~~August~~, 2010.

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DISTRICT COURT JUDGE

Prepared and submitted by:

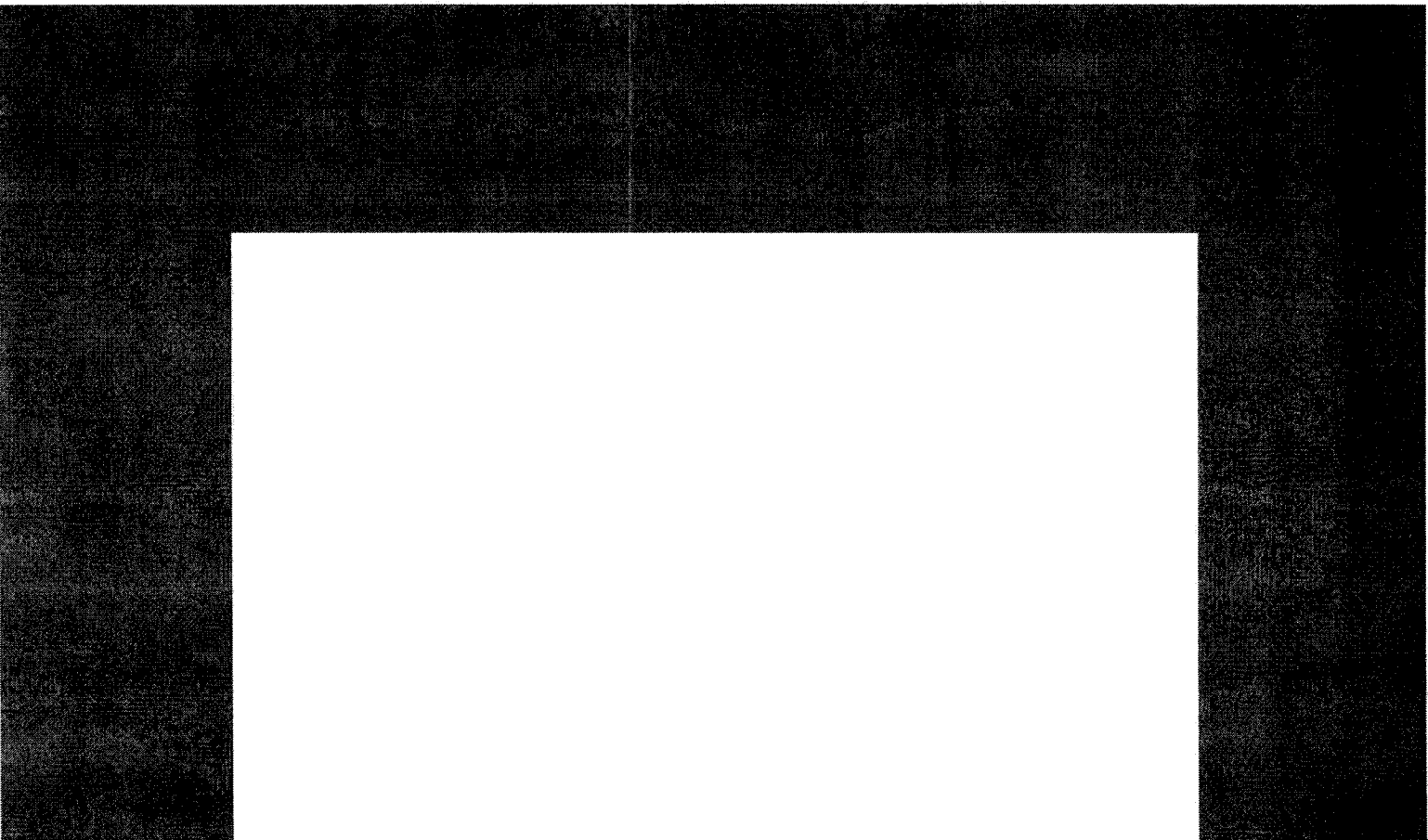
LEWIS AND ROCA LLP

Michael F. Lynch
Michael F. Lynch
Nevada Bar No. 8555
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169
Attorneys for Plaintiff

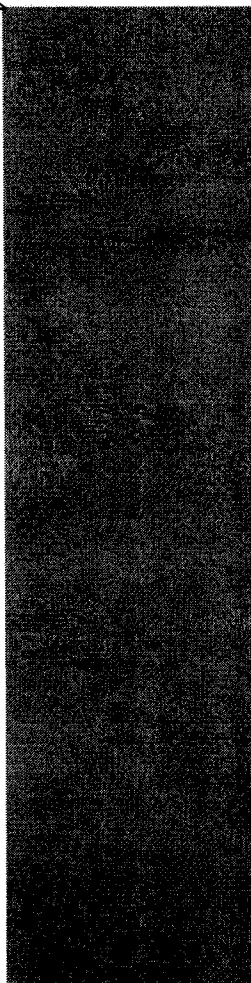
Approved / Disapproved by:

DEANER, MALAN, LARSEN & CIULLA

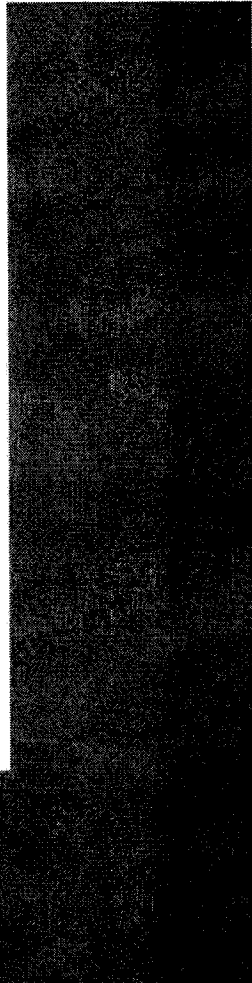
Brent A. Larsen
Brent A. Larsen
Nevada Bar No. 1184
720 S. Fourth Street, #300
Las Vegas, NV 89101
Attorneys for Defendants



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IN THE SUPREME COURT OF NEVADA

U.S. BANK NATIONAL ASSOCIATION as
trustee for the Registered Holders of ML-
CFC Commercial Mortgage Trust 2007-7
Commercial Mortgage Pass-Through
Certificates Series 2007-7, by and through
MIDLAND LOAN SERVICES, as its Special
Servicer,

Appellant,

vs.

PALMILLA DEVELOPMENT CO., INC., a
Nevada corporation, and HAGAI RAPAPORT,
an individual,

Respondents.

Electronically Filed
Aug 27 2013 08:59 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JEROME T. TAO, District Judge
District Court Case No. A595321

**APPELLANT'S APPENDIX
VOLUME 3
PAGES 501-750**

DANIEL F. POLSENBERG
Nevada Bar No. 2376
ROBERT M. CHARLES, JR.
Nevada Bar 6593
JOEL D. HENRIOD
Nevada Bar No. 8492
LEWIS AND ROCA LLP
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169
(702) 474-2616
DPolsenberg@LRLaw.com
RCharles@LRLaw.com
JHenriod@LRLaw.com

Attorneys for Appellant

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| 10 | Second Amended Complaint | 04/11/11 | 2 3 | 424-500 501-557 |

and licensees' money deposits or other property (including, without limitation, any letter of credit) given to secure tenants', subtenants' and licensees' obligations under Leases, subleases or licenses, together with a list of the foregoing; all lists pertaining to current rent and license fee arrears; any and all architects' plans and specifications, licenses and permits, documents, books, records, accounts, surveys and property which relate to the management, leasing, operation, occupancy, ownership, insurance, maintenance, or service of or construction upon the Property and Borrower shall surrender possession thereof and of the Property to Lender upon demand, and thereupon Lender may (i) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with all and every part of the Property and conduct the business thereat; (ii) complete any construction on the Property in such manner and form as Lender deems advisable; (iii) make alterations, additions, renewals, replacements and improvements to or on the Property; (iv) exercise all rights and powers of Borrower with respect to the Property, whether in the name of Borrower or otherwise, including, without limitation, the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents of the Property and every part thereof; (v) either require Borrower (A) to pay monthly in advance to Lender, or any receiver appointed to collect the Rents, the fair and reasonable rental value for the use and occupation of such part of the Property as may be occupied by Borrower, or (B) to vacate and surrender possession of the Property to Lender or to such receiver and, in default thereof, Borrower may be evicted by summary proceedings or otherwise; and (vi) apply the receipts from the Property to the payment of the Secured Obligations, in such order, priority and proportions as Lender shall determine after deducting therefrom all expenses (including, without limitation, attorneys' fees) incurred in connection with the aforesaid operations and all amounts necessary to pay the Taxes, Other Impositions, Insurance Premiums and other expenses in connection with the Property, as well as just and reasonable compensation for the services of Lender, its counsel, agents and employees;

(9) exercise any and all rights and remedies granted to a secured party upon default under the Uniform Commercial Code, including, without limitation: (i) the right to take possession of the Personal Property and other UCC collateral or any part thereof, and to take such other measures as Lender or Trustee may deem necessary for the care, protection and preservation of the Personal Property, and other UCC collateral, and (ii) request Borrower at its expense to assemble the Personal Property and other UCC collateral and make it available to Lender at a convenient place acceptable to Lender. Any notice of sale, disposition or other intended action by Lender or Trustee with respect to the Personal Property and other UCC collateral sent to Borrower in accordance with the provisions hereof at least ten (10) days prior to such action, shall constitute commercially reasonable notice to Borrower;

(10) apply any sums then deposited in the Impounds and any other sums held in escrow or otherwise by Lender in accordance with the terms of this Security Instrument or any other Loan Document to the payment of the following items in any order as determined by Lender:

- (i) Taxes and Other Impositions;
- (ii) Insurance Premiums;
- (iii) interest on the unpaid principal balance of the Note;
- (iv) amortization of the unpaid principal balance of the Note; and
- (v) all other sums payable pursuant to the Note, this Security Instrument and the other Loan Documents, including, without limitation, advances made by Lender pursuant to the terms of this Security Instrument;

(11) surrender the insurance policies maintained pursuant to Section 1.07 hereof, collect the unearned Insurance Premiums and apply such sums as a credit on the Secured Obligations in such priority and proportion as Lender shall determine, and in connection therewith, Borrower hereby appoints Lender as agent and attorney-in-fact (which is coupled with an interest and is therefore irrevocable) for Borrower to collect such unearned Insurance Premiums;

(12) apply the undisbursed balance of any Net Proceeds Deficiency deposit, together with interest thereon, to the payment of the Secured Obligations in such order, priority and proportions as Lender shall determine; or

(13) pursue such other remedies as Lender may have under applicable state or federal law.

In the event of a sale, by foreclosure, power of sale, or otherwise, of less than all of the Property, this Security Instrument shall continue as a lien and security interest on the remaining portion of the Property unimpaired and without loss of priority. Notwithstanding the provisions of this Section 2.02(a) hereof to the contrary, if any Event of Default as described in clause (h), (i), (j) or (k) of Section 2.01 hereof shall occur, the entire unpaid Secured Obligations shall be automatically due and payable, without any further notice, demand or other action by Lender.

(b) **Application of Proceeds.** The purchase money, proceeds and avails of any disposition of the Property, or any part thereof, or any other sums collected by Lender pursuant to the Note, this Security Instrument or the other Loan Documents, may be applied by Lender to the payment of the Secured Obligations in such priority and proportions as Lender shall determine.

(c) **Right to Cure Defaults.** Upon the occurrence of any Event of Default or if Borrower fails to make any payment or to do any act as herein provided, Lender may, but without any obligation to do so and without notice to or demand on Borrower and without releasing Borrower from any obligation hereunder, make or do the same in such manner and to such extent as Lender may deem necessary to protect the security hereof. Lender or Trustee is authorized to enter upon the Property for such purposes, or appear in, defend, or bring any action or proceeding to protect its interest in the Property or to foreclose this Security Instrument or collect the Secured Obligations. The cost and expense of any cure hereunder (including, without limitation, attorneys' fees to the extent permitted by law), with interest as provided in this Section 2.02(c) hereof, shall constitute a portion of the Secured Obligations and shall be due and payable to Lender upon demand. All such costs and expenses incurred by Lender or Trustee in remedying such Event of Default or such failed payment or act or in appearing in, defending, or bringing any such action or proceeding shall bear interest at the Default Rate (defined in the Note), for the period after notice from Lender that such cost or expense was incurred to the date of payment to Lender. All such costs and expenses incurred by Lender together with interest thereon calculated at the Default Rate shall be deemed to constitute a portion of the Secured Obligations and shall be immediately due and payable upon demand by Lender therefor.

(d) **Actions and Proceedings.** Lender or Trustee has the right to appear in and defend any action or proceeding brought with respect to the Property and, after the occurrence and during the continuance of an Event of Default, to bring any action or proceeding, in the name and on behalf of Borrower, which Lender decides should be brought to protect its interest in the Property.

(e) **Recovery of Sums Required To Be Paid.** Lender shall have the right from time to time to take action to recover any sum or sums which constitute a part of the Secured Obligations as the same become due, without regard to whether or not the balance of the Secured Obligations shall be due, and without prejudice to the right of Lender or Trustee thereafter to bring an action of foreclosure, or any other action, for a default or defaults by Borrower existing at the time such earlier action was commenced.

(f) **Examination of Books and Records.** Lender, its agents, accountants and attorneys shall have the right upon reasonable prior notice to Borrower (unless an Event of Default exists, in which case no notice shall be required), to examine and audit, during reasonable business hours, the records, books, management and other papers of Borrower and its affiliates or of any Guarantor or Indemnitor which pertain to their financial condition or the income, expenses and operation of the Property, at the Property or at any office regularly maintained by Borrower, its affiliates or any Guarantor or Indemnitor.

where the books and records are located. Lender and its agents shall have the right upon notice to make copies and extracts from the foregoing records and other papers.

(g) **Other Rights, etc.**

(1) The failure of Lender or Trustee to insist upon strict performance of any term hereof shall not be deemed to be a waiver of any term of this Security Instrument. Borrower shall not be relieved of Borrower's obligations hereunder by reason of (1) the failure of Lender or Trustee to comply with any request of Borrower, any Guarantor or any Indemnitor to take any action to foreclose this Security Instrument or otherwise enforce any of the provisions hereof or of the Note or the other Loan Documents, (2) the release, regardless of consideration, of the whole or any part of the Property, or of any person liable for the Secured Obligations or any portion thereof, or (3) any agreement or stipulation by Lender extending the time of payment, changing the rate of interest, or otherwise modifying or supplementing the terms of the Note, this Security Instrument or the other Loan Documents.

(2) It is agreed that the risk of loss or damage to the Property is on Borrower, and Lender shall have no liability whatsoever for decline in value of the Property, for failure to maintain the insurance policies required pursuant to Section 1.07 hereof, or for failure to determine whether insurance in force is adequate as to the amount of risks insured. Possession by Lender shall not be deemed an election of judicial relief. If any such possession is requested or obtained, with respect to any portion of the Property, or collateral not in Lender's possession.

(3) Lender may resort for the payment of the Secured Obligations to any other security held by Lender in such order and manner as Lender may elect. Lender or Trustee may take action to recover the Secured Obligations, or any portion thereof, or to enforce any covenant hereof without prejudice to the right of Lender or Trustee thereafter to foreclose this Security Instrument. The rights of Lender or Trustee under this Security Instrument shall be separate, distinct and cumulative and none shall be given effect to the exclusion of the others. No act of Lender or Trustee shall be construed as an election to proceed under any one provision herein to the exclusion of any other provision. Neither Lender nor Trustee shall be limited exclusively to the rights and remedies herein stated but shall be entitled to every right and remedy now or hereafter afforded at law or in equity.

(h) **Right to Release Any Portion of the Property.** Lender may release any portion of the Property for such consideration as Lender may require without, as to the remainder of the Property, in any way impairing or affecting the lien or priority of this Security Instrument, or improving the position of any subordinate lienholder with respect thereto, except to the extent that the obligations hereunder shall have been reduced by the actual monetary consideration, if any, received by Lender for such release, and may accept by assignment, pledge or otherwise any other Property in place thereof as Lender may require without being accountable for so doing to any other lienholder. This Security Instrument shall continue as a lien and security interest in the remaining portion of the Property.

(i) **Violation of Laws.** If the Property is not in compliance with applicable laws, Lender may impose additional requirements upon Borrower in connection herewith including, without limitation, monetary reserves or financial equivalents.

(j) **Right of Entry.** Lender and its agents shall have the right to enter and inspect the Property at all reasonable times. Except in case of emergency, such entries shall be with reasonable prior notice and shall be with due regard for rights of tenants.

ARTICLE 3.
ASSIGNMENT OF LEASES, RENTS, INCOME AND PROFITS

3.01 Assignment; Priority of Assignment. Borrower (referred to in this Article 3 as "Assignor") hereby irrevocably, absolutely, presently and unconditionally grants, sells, assigns, transfers, pledges and sets over to Lender (referred to in this Article 3 as "Assignee"):

(a) any and all Leases, together with all of Assignor's right, title and interest in and to the Leases including, without limitation, all modifications, amendments, extensions and renewals of the Leases and all rights and privileges incident thereto and all demands of claims arising thereunder (including, without limitation, any cancellation fees or other premiums collected in connection with the Leases) or under any policies insuring against loss of rents or profits;

(b) all Rents, including, without limitation, expenses paid by tenants; and

(c) all security deposits, guaranties and other security now or hereafter held by Assignor as security for the performance of the obligations of the tenants under such Leases.

The foregoing assignment of Rents and Leases is intended by Assignor and Assignee to create and shall be construed to create a present and absolute assignment to Assignee of all of Assignor's right, title and interest in the Rents and in the Leases and shall not be deemed to create merely an assignment for security only for the payment of any indebtedness or the performance of any obligations of Assignor under any of the Loan Documents. This assignment is included within the text of this Security Instrument for convenience only, but such inclusion shall not derogate from its effectiveness any other assignment of Rents or Leases contained in any other Loan Documents or otherwise and all shall be supplementary to one another.

Nothing contained herein shall operate or be construed to obligate Assignee to perform any of the terms, covenants and conditions contained in any Lease or otherwise to impose any obligation upon Assignee with respect to any Lease, including, without limitation, any obligation arising out of any covenant of quiet enjoyment therein contained in the event the tenant under any such Lease shall have been joined as a party defendant in any action to foreclose and the estate of such tenant shall have been thereby terminated. Assignor and Assignee further agree that, during the term of this Security Instrument, the Rents shall not constitute property of Assignor (or of any estate of Assignor) within the meaning of 11 U.S.C. §541, as may be amended from time to time.

Assignor hereby represents and warrants that (i) Assignor has good title to the Leases and the full power and right to assign the Leases; (ii) no other persons have any title or interest in the Leases; (iii) the Leases are in full force and effect and have not been modified except as set forth in the certified occupancy statement delivered to and approved by Assignee; (iv) there are no defaults under any of the Leases; (v) no other assignments of all or any portion of the Rents or the Leases exist or remain outstanding; (vi) all Rents due have been paid in full; (vii) none of the Rents reserved in the Leases have been assigned or otherwise pledged or hypothecated; (viii) none of the Rents have been collected for more than one (1) month in advance (except a security deposit shall not be deemed rent collected in advance); (ix) the property demised under the Leases have been completed and the tenants under the Leases have accepted the same and have taken possession of the same on a rent-paying basis; (x) there exist no offsets or defenses to the payment of any portion of the Rents; (xi) Assignor has received no notice from any tenant challenging the validity or enforceability of any Lease; (xii) there are no agreements with the tenants under the Leases other than expressly set forth in each Lease; (xiii) the Leases are valid and enforceable against Assignor and the tenants set forth therein; (xiv) no Lease contains an option to purchase, right of first refusal to purchase, or any other similar provision; (xv) no person or entity has any possessory interest in, or right to occupy, the Property except under and pursuant to a Lease; (xvi) each Lease is subordinate to this Security Instrument, either pursuant to its terms or a recordable subordination agreement; (xvii) no Lease has the benefit of a non-disturbance agreement other than the non-disturbance agreements executed by the Lender in connection with the closing of the Loan and the non-disturbance provisions contained within the Lease(s) provided by the Borrower and reviewed by the Lender in connection with the closing of the Loan; (xviii) all security

deposits relating to the Leases reflected on the certified rent roll delivered to Assignee have been collected by Assignor; and (xix) no brokerage commissions or finders fees are due and payable regarding any Lease.

Assignor shall take such action and execute, deliver and record such documents as may be reasonably necessary to evidence such assignment, to establish the priority thereof and to carry out the intent and purpose hereof.

Assignor shall faithfully perform and discharge all of Assignor's obligations under the Leases and to enforce all obligations undertaken by tenants thereunder. Assignor shall defend Assignee in any action relating to the Leases and shall indemnify, defend and hold Assignee harmless from and against any claims of tenants or third parties with respect to the Leases. Assignor shall not receive or collect any Rents in advance of the date due or waive or defer any terms of the Leases without the consent of Assignee. Assignor shall not pledge, assign or further encumber the Leases or any Rents or (except as is permitted by Section 1.26(b) above) modify or terminate the Leases, or permit any assignment or sublease thereunder, without Assignee's prior written consent. Assignor irrevocably appoints Assignee its true and lawful attorney-in-fact, at the option of Assignee at any time and from time to time, to demand, receive and enforce payment, to give receipts, releases and satisfactions, and to sue, in the name of Assignor, Trustee or Assignee, for all such Rents, and apply the same to the Secured Obligations.

3.02 Grant of Revocable License to Collect Rents. So long as an Event of Default shall not have occurred and be continuing under this Security Instrument, Assignee hereby grants to Assignor a revocable license to enforce the Leases, to collect the Rents, to apply the Rents to the payment of the costs and expenses incurred in connection with the Property and to any Secured Obligations. If requested by Assignee, Assignor shall (a) give written notice to the tenants under the Leases of the assignment of Rents and Leases by Assignor to Assignee pursuant to Section 3.01 hereof, of the grant of the revocable license by Assignee to Assignor pursuant to this Section 3.02, and of the respective rights of Assignor and Assignee under this Article 3; and (b) obtain such tenants' agreements to be bound by and comply with the provisions of such assignment and grant. All Leases hereafter executed with respect to the Property shall contain a reference to the foregoing assignment and grant and shall state that the tenant executing such Lease shall be bound by and shall comply with the provisions hereof.

3.03 Revocation of License; Assignee's Rights. Upon the occurrence of an Event of Default and at any time thereafter during the continuance thereof, subject to applicable laws, the license granted to Assignor hereunder shall automatically be revoked. Upon such revocation, Assignor shall promptly deliver to Assignee all Rents then held by or for the benefit of Assignor. Assignee, in addition to any other rights granted to Assignee under this Security Instrument, shall have the right: (i) to notify the tenants under the Leases that Assignor's license to collect Rents has been revoked, and, with or without taking possession of the Property, to direct such tenant to thereafter make all payments of Rent and to perform all obligations under its Lease to or for the benefit of Assignee or as directed by Assignee; (ii) to enter upon the Property and to take over and assume the management, operation and maintenance of the Property, to enforce all Leases and collect all Rents due thereunder, to amend, modify, extend, renew and terminate any or all Leases and execute new Leases; and (iii) to perform all other acts which Assignee shall determine to be necessary or desirable to carry out the foregoing. Each tenant under any Lease shall be entitled to rely upon any notice from Assignee and shall be protected with respect to any payment of Rent made pursuant to such notice, irrespective of whether a dispute exists between Assignor and Assignee with respect to the existence of an Event of Default or the rights of Assignee hereunder. The payment of Rent to Assignee pursuant to any such notice and the performance of obligations under any Lease to or for the benefit of Assignee shall not cause Assignee to assume or be bound by the provisions of such Lease including, without limitation, the duty to return any security deposit to the tenant under such Lease unless and to the extent such security deposit was paid to Assignee by Assignor. Assignor shall indemnify, defend and hold Assignee harmless from and against any and all losses, claims, damage or liability arising out of any claim by a tenant with respect thereto.

3.04 Application of Rents; Security Deposits. All Rents received by Assignee pursuant to this Security Instrument shall be applied by Assignee, as determined by Assignee, to any of the following: (i) the costs and expenses of collection, including, without limitation, attorneys' fees and receivership fees, costs and expenses; (ii) the costs and expenses incurred in connection with the management, operation and maintenance of the Property; (iii) the establishment of reasonable reserves for working capital and for anticipated or projected costs and expenses, including, without limitation, capital improvements which may be necessary or desirable or required by law; and (iv) the payment of any indebtedness then owing by Assignor to Assignee. In connection therewith, Assignor further agrees that all Rents received by Assignee from any tenant may be allocated first, if Assignee so elects, to the payment of all current obligations of such tenant under its Lease and not to amounts which may be accrued and unpaid as of the date of revocation of Assignor's license to collect such Rents. Assignee may, but shall have no obligation to, pursue any tenant for the payment of Rent which may be due under its Lease with respect to any period prior to the exercise of Assignee's rights hereunder or which may become due thereafter. Assignor agrees that the collection of Rents by Assignee and the application of such Rents by Assignee to the costs, expenses and obligations referred to in this Section 3.04 shall not cure or waive any default or Event of Default or invalidate any act (including, without limitation, any sale of all or any portion of the Property now or hereafter securing the Loan) done in response to or as a result of such default or Event of Default or pursuant to any notice of default or notice of sale issued pursuant to any Loan Document.

3.05 No Mortgagee in Possession. Nothing contained in this Security Instrument shall be construed as constituting Assignee a "mortgagee in possession" in absence of the taking of actual possession of the Property by Lender. In the exercise of the powers herein granted Lender, no liability shall be asserted or enforced against Assignee, all such liability being expressly waived and released by Assignor.

ARTICLE 4. SECONDARY MARKET

4.01 Transfer of Loan. Lender may, at any time, sell, transfer or assign the Note, this Security Instrument and the other Loan Documents, and any or all servicing rights with respect thereto, or grant participations therein or issue mortgage pass-through certificates or other securities evidencing a beneficial interest in a rated or unrated public offering or private placement (the "Securities"). Lender may forward to each purchaser, transferee, assignee, servicer, participant or investor in such Securities or any rating agency ("Rating Agency") rating such Securities (collectively, the "Investor") and each prospective Investor, all documents and information which Lender now has or may hereafter acquire relating to the Loan and to Borrower, and the Property, whether furnished by Borrower, or otherwise, as Lender determines necessary or desirable. Borrower shall cooperate with Lender in connection with any transfer made or any Securities created pursuant to this Security Instrument, including, without limitation, the delivery of an estoppel certificate in accordance therewith, and such other documents as may be reasonably required by Lender. Borrower shall also furnish and Borrower consents to Lender furnishing to such Investors or such prospective Investors or Rating Agency any and all information concerning the Property, the Leases, the financial condition of Borrower as may be requested by Lender, any Investor or any prospective Investor or Rating Agency in connection with any sale, transfer or participation interest. Lender may retain or assign responsibility for servicing the Note, this Security Instrument, and the other Loan Documents, or may delegate some or all of such responsibility and/or obligations to a servicer (including, without limitation, any subservicer or master servicer) or agent. Lender may make such assignment or delegation on behalf of the Investors if the Note is sold or this Security Instrument or the other Loan Documents are assigned. All references to "Lender" in the Loan Documents shall refer to and include any such servicer or agent, to the extent applicable, in each case as designated by Lender from time to time.

4.02 Conversion to Registered Form. At the request and the expense of Lender, Borrower shall appoint, as its agent, a registrar and transfer agent (the "Registrar") acceptable to Lender which

shall maintain, subject to such reasonable regulations as it shall provide, such books and records as are necessary for the registration and transfer of the Note in a manner that shall cause the Note to be considered to be in registered form for purposes of Section 163(f) of the U.S. Internal Revenue Code. The option to convert the Note into registered form once exercised may not be revoked. Any agreement setting out the rights and obligations of the Registrar shall be subject to the reasonable approval of Lender. Borrower may revoke the appointment of any particular person as Registrar, effective upon the effectiveness of the appointment of a replacement Registrar. The Registrar shall not be entitled to any fee from Lender or any other Lender in respect of transfers of the Note and this Security Instrument (other than taxes and governmental charges and fees).

4.03 Estoppel Certificate. Upon any transfer or proposed transfer contemplated by Section 4.01 above, at Lender's request, Borrower, or any guarantors or indemnitors shall provide an estoppel certificate to the investor or any prospective investor in such form, substance and detail as Lender, such investor or prospective investor may require.

ARTICLE 5. FURTHER ASSURANCES

5.01 Recording of Security Instrument; Other Assurances. Borrower forthwith upon the execution and delivery of this Security Instrument and thereafter, from time to time, will cause this Security Instrument and any of the Loan Documents creating a lien or security interest or evidencing the lien hereof upon the Property and each instrument of further assurance to be filed, registered or recorded in such manner and in such places as may be required by any present or future law in order to publish notice of and fully to protect and perfect the lien or security interest hereof upon, and the interest of Lender in, the Property. Borrower will pay all taxes, filing, registration or recording fees, and all expenses incident to the preparation, execution, acknowledgment and/or recording of the Note, this Security Instrument, the other Loan Documents, any note or deed of trust or mortgage supplemental hereto, any security instrument with respect to the Property and any instrument of further assurance, and any modification or amendment of the foregoing documents, and all federal, state, county and municipal taxes, duties, imposts, assessments and charges arising out of or in connection with the execution and delivery of this Security Instrument, any deed of trust or mortgage supplemental hereto, any security instrument with respect to the Property or any instrument of further assurance, and any modification or amendment of the foregoing documents, except where prohibited by law so to do.

5.02 Further Acts. Borrower will, at the cost of Borrower, and without expense to Lender, do, execute, acknowledge and deliver all and every such further acts, deeds, conveyances, deeds of trust, mortgages, assignments, notices of assignments, transfers and assurances as Lender shall, from time to time, require, for the better assuring, conveying, assigning, transferring, and confirming unto Lender and Trustee the Property and rights hereby deeded, mortgaged, granted, bargained, sold, conveyed, confirmed, pledged, assigned, warranted and transferred or intended now or hereafter so to be, or which Borrower may be or may hereafter become bound to convey or assign to Lender, or for carrying out the intention or facilitating the performance of the terms of this Security Instrument or for filing, registering or recording this Security Instrument, or for complying with all applicable laws. Borrower, on demand, will execute and deliver and hereby authorizes Lender to execute in the name of Borrower or without the signature of Borrower to the extent Lender may lawfully do so, one or more financing statements, chattel mortgages or other instruments, to evidence more effectively the security interest of Lender in the Property. Borrower grants to Lender an irrevocable power of attorney coupled with an interest for the purpose of exercising and perfecting any and all rights and remedies available to Lender at law and in equity, including, without limitation, such rights and remedies available to Lender pursuant to this paragraph. Borrower specifically agrees that all power granted to Lender under this Security Instrument may be assigned by Lender to its successors or assigns as holder of the Note.

5.03 Changes in Laws Regarding Taxation; Documentary Stamps.

(a) In the event of the passage after the date of this Security Instrument of any law of the State where the Property is located deducting from the value of real property for the purpose of taxation any lien or encumbrance thereon or changing in any way the laws for the taxation of mortgages or loans secured by mortgages for state or local purposes or the manner of the collection of any such taxes, and imposing a tax, (including, without limitation, a withholding tax) either directly or indirectly, on this Security Instrument, the Note or the Loan, Borrower shall, if permitted by law, pay any tax imposed as a result of any such law within the statutory period or within fifteen (15) days after demand in Lender, whichever is less, provided, however, that if, in the opinion of the attorneys for Lender, Borrower is not permitted by law to pay such taxes, Lender shall have the right, at its option, to declare the Loan due and payable on a date specified in a prior notice to Borrower of not less than thirty (30) days. Any prepayment made by Borrower pursuant to the terms of this paragraph shall be made without any Prepayment Charge (as defined in the Note).

(b) If at any time the United States of America, any State thereof, or any governmental subdivision of any such State, shall require revenue or other stamps to be affixed to the Note or this Security Instrument, Borrower will, upon demand, pay for the same, with interest and penalties thereon, if any.

ARTICLE 6.

NEVADA PROVISIONS/MODIFICATIONS AND OTHER PROVISIONS

6.01 **Governing Provisions.** In the event of any conflicts or inconsistencies between the terms and conditions of this Article 6 and the remainder of this Security Instrument, the terms and conditions of this Article 6 shall control and be binding, but only to the extent of any such conflicts or inconsistencies.

6.02 **Evasion of Prepayment Terms.** If an Event of Default shall occur, a tender of any payment of principal by Borrower, its successors or assigns or by anyone on behalf of Borrower, its successors or assigns, in excess of the amount which would have been payable had the Event of Default not occurred, shall constitute an evasion of the prepayment terms of the Note, as incorporated herein by reference, and shall be deemed to be a voluntary prepayment thereunder and any such payment, to the extent permitted by law, must include the prepayment charge computed in accordance with the terms of the Note.

6.03 **Receiver.** In furtherance of and not in limitation of any other provisions of this Security Instrument, including without limitation Section 2.02(a):

If an Event of Default shall occur, the Lender shall be entitled as a matter of right and without notice to Borrower or anyone claiming under Borrower and without giving bond and without regard to the solvency or insolvency of the Borrower or any party bound for the payment of the Secured Obligations, or waste of the Property or adequacy of the security of the Property for the obligations then secured hereby or the then value of the Property, to apply *ex parte* for the appointment of a receiver in accordance with the statutes and law made and provided for and such receiver shall have, in addition to all rights and powers customarily given to and exercised by such receivers and all rights and powers granted to such receiver or Lender under this Security Instrument (to the extent allowed by law), all the rights, powers and remedies as provided by law or as may be contained in any court order or decree applying such remedy. A court is authorized to appoint a receiver on request or petition of Lender, and Borrower irrevocably consents to the appointment of a receiver and waives any notice of application therefor. Such receiver shall collect the Rents as hereinafter defined, and all other income of any kind; manage the Property so to prevent waste; execute Leases (as hereinafter defined) within or beyond the period of receivership, pay all expenses for normal maintenance of the Property and perform the terms of this Security Instrument and apply the Rents to the costs and expenses of the receivership, including reasonable attorneys' fees, to the repayment of the Secured Obligations and to the operation, maintenance and upkeep and repair of the Property, including payment of taxes on the Property and payments of premiums of insurance on the

Property and any other rights permitted by law, Borrower does hereby irrevocably consent to such appointment. Lender's right to appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the indebtedness secured hereby by a substantial amount and without any showing as required by N.R.S. 107.100. The receiver may, to the extent permitted under applicable law, without notice, enter upon and take possession of the Property, or any part thereof, by force, summary proceedings, ejectment or otherwise, and remove Borrower or any other person or entity and any personal property therefrom, and may hold, operate and manage the same, receive all Rents and do the things the receiver finds necessary to preserve and protect the Property, whether during pendency of foreclosure, during a redemption period, if any, or otherwise, and as further provided in any assignment of Rents and Leases executed by the Borrower to the Lender, whether contained in this Security Instrument or in a separate instrument. Borrower shall not contest the appointment of a receiver to operate the Property at any time from and after the occurrence of an Event of Default including, without limitation, during the institution of foreclosure proceedings. Upon an Event of Default, Borrower shall peaceably turn over possession of the Property to a receiver upon request of Lender.

6.04 Right to Collect Rents. In furtherance of and not in limitation of any other provisions of this Security Instrument, including without limitation Section 3.03:

Upon an Event of Default and whether before or after the institution of legal proceedings to foreclose the lien hereof or before or after sale of the Property or during any period of redemption the Lender, and without regard to waste, adequacy of the security or solvency of the Borrower, may revoke the privilege/license granted Borrower hereunder to collect the Rents and may, at its option, without notice in person or by agent, with or without taking possession of or entering the Property, with or without bringing any action or proceeding, or by a duly appointed receiver, give or require Borrower to give, notice to any or all tenants under any Lease authorizing and directing the tenant to pay Rents to Lender or such receiver, as the case may be; collect all of the Rents; enforce the payment thereof and exercise all of the rights of the landlord under any Lease (as hereinafter defined) and all of the rights of Lender hereunder; enter upon, take possession of, manage and operate said Property, or any part thereof; may cancel, enforce or modify any Leases, and fix or modify Rents, and do any acts which the Lender deems proper to protect the security hereof with or without taking possession of the Property.

Any Rents whether collected by the Lender or by such receiver, as the case may be, shall be applied to the costs and expenses of operation, management and collection, including reasonable attorneys' fees, to the payment of the fees and expenses of any agent or receiver so acting, to the payment of taxes, assessments, insurance premiums and expenditures for the management and upkeep of the Property, to the performance of the landlord's obligations under the Leases and to any Secured Obligations, all in such order as the Lender may determine.

The entering upon and taking possession of the Property, the collection of such Rents and the application thereof as aforesaid shall not cure or waive any Event of Default under this Security Instrument or affect any notice of default or invalidate any act done pursuant to such notice nor in any way operate to prevent the Lender from pursuing any other remedy which it may now or hereafter have under the terms of this Security Instrument or the Note or any other security securing the same, nor shall it in any way be deemed to constitute the Lender a mortgagee-in-possession. The rights hereunder shall in no way be dependent upon and shall apply without regard to whether the Property are in danger of being lost, materially injured or damaged or whether the Property are adequate to discharge the Secured Obligations. The rights contained herein are in addition to and shall be cumulative with the rights given in any separate instrument, assigning any Rents or Leases of the Property and shall not amend or modify the rights in any such separate agreement.

6.05 Right to Foreclose. In furtherance of and not in limitation of any other provisions of this Security Instrument, including without limitation Section 2.02(a):

If an Event of Default shall occur the Lender may, either with or without entry or taking possession, proceed by suit or suits at law or in equity or by any other appropriate proceedings or remedy to enforce payment of the Secured Obligations or the performance of any other term hereof or any other right and the Borrower hereby authorizes and fully empowers the Lender to foreclose or cause to be foreclosed this Security Instrument by judicial proceedings or non-judicial proceedings, including without limitation by advertisement with power of sale (to the extent allowed by law), or by such other statutory procedure available in the State where the Property is located and grants to the Lender full authority to cause Trustee to sell the Property at public auction and convey title to the Property to the purchaser, either in one parcel or separate lots and parcels, at the option of Lender, all in accordance with and in the manner prescribed by law, and out of the proceeds arising from sale and foreclosure to retain the principal and interest due on the Note and the Secured Obligations together with all such sums of money as Lender shall have expended or advanced pursuant to this Security Instrument or pursuant to statute together with interest thereon as herein provided and all costs and expenses of such foreclosure, including without limitation lawful maximum reasonable attorneys' fees, the cost of environmental inspection and appraisal costs and expenses, with the balance, if any, to be paid to the persons entitled thereto by law. In any such proceeding the Lender may apply all or any portion of the Secured Obligations to the amount of the purchase price.

6.06 Forbearance by Lender Not A Waiver. Borrower waives to the extent permitted by law, notice of election to mature or declare due the whole of the Secured Obligations. Any forbearance by Lender in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any right or remedy. The acceptance by Lender of payment of any sum secured by this Security Instrument after the due date of such payment shall not be a waiver of Lender's right either to require prompt payment when due of all other sums so secured or to declare an Event of Default for failure to make prompt payment. The procurement of insurance or the payment of taxes or other liens or charges by Lender shall not be a waiver of Lender's right to accelerate the maturity of the Secured Obligations nor shall Lender's receipt of any awards, proceeds or damages under this Security Instrument operate to cure or waive Borrower's default in payment of sums secured by this Security Instrument.

6.07 Remedies Cumulative and Not Exclusive. In furtherance of and not in limitation of any other provisions of this Security Instrument, including without limitation Section 2.02(g):

Lender shall be entitled to enforce payment and performance of any indebtedness or obligations secured hereby and to exercise all rights and powers under this Security Instrument or under any Loan Document or other agreement or any laws now or hereafter in force, notwithstanding some or all of the said indebtedness and obligations secured hereby may now or hereafter be otherwise secured, whether by mortgage, deed of trust, pledge, lien, assignment or otherwise. Neither the acceptance of this Security Instrument nor its enforcement, whether by court action or pursuant to the power of sale (to the extent allowed by law) or other rights, powers and remedies herein contained, shall prejudice or in any manner affect Lender's right to realize upon or enforce any other security now or hereafter held by Lender, it being agreed that Lender shall be entitled to enforce this Security Instrument and any other security now or hereafter held by Lender in such order and manner as it may in its absolute discretion determine. No remedy herein conferred upon or reserved to Lender is intended to be exclusive of any other remedy herein or by law provided or permitted, but each shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute. Every right, power or remedy given by any of the Loan Documents to Lender or to which Lender may be otherwise entitled, may be exercised, concurrently or independently, from time to time and as often as may be deemed expedient by Lender and Lender may pursue inconsistent remedies.

6.08 Waiver of Notice. Borrower shall not be entitled to any notices of any nature whatsoever from Lender except with respect to matters for which this Security Instrument specifically and expressly provides for the giving of notice by Lender to Borrower and except with respect to matters for which Lender is required by applicable law to give notice, and Borrower, to the fullest extent allowed by law,

hereby expressly waives the right to receive any notice from Lender with respect to any matter for which this Security Instrument does not specifically and expressly provide for the giving of notice by Lender to Borrower.

6.09 Nevada Covenants. The covenant numbers 1, 3, 4 (the default rate of interest as provided in the Note), 5, 6, 7 (counsel fees), 8 and 9 of N.R.S. 107.030, are hereby adopted and made a part of this Security Instrument; provided, however, that the express provisions of this Security Instrument shall control if in conflict with Covenant Nos. 1, 3, 4 and 9, and the provisions of Covenant Nos. 5, 6, 7 and 8 shall control if in conflict with the express provisions of this Security Instrument; the provisions of both otherwise to be cumulative. Any default of Borrower shall entitle Lender to the remedies available for a violation of the covenants incorporated by reference.

6.10 Waiver of N.R.S. 675. The Borrower does hereby warrant to Lender, that Borrower as owner of the Property, does hereby waive its rights, if any, under N.R.S. 675.060 and N.R.S. 675.470, and does further warrant to Lender that Borrower will not use N.R.S. 675.060 and/or N.R.S. 675.470 as a defense in its obligation for repayment of the Loan and Indebtedness secured hereby to Lender.

6.11 Acknowledgment of Waiver of Hearing Before Sale.

Borrower understands that under the Constitution of the United States and the Constitution of the State where the Property is located it may have the right to notice and hearing before the Property may be sold and that the non-judicial procedures for foreclosure, including, without limitation, by advertisement with power of sale, do not insure that personal notice will be given to the Borrower and neither said non-judicial procedures nor the Uniform Commercial Code may require any hearing or other judicial proceeding. BORROWER HEREBY EXPRESSLY CONSENTS AND AGREES THAT THE PROPERTY MAY BE FORECLOSED BY NON-JUDICIAL PROCEDURES AND THAT THE PERSONAL PROPERTY MAY BE DISPOSED OF PURSUANT TO THE UNIFORM COMMERCIAL CODE OF THE STATE WHERE THE PROPERTY IS LOCATED. BORROWER ACKNOWLEDGES THAT IT IS REPRESENTED BY LEGAL COUNSEL AND THAT BEFORE SIGNING THIS DOCUMENT THIS PARAGRAPH AND BORROWER'S CONSTITUTIONAL RIGHTS WERE FULLY EXPLAINED BY SUCH COUNSEL AND THAT BORROWER UNDERSTANDS THE NATURE AND EXTENT OF THE RIGHTS WAIVED HEREBY AND THE EFFECT OF SUCH WAIVER.

6.12 Trustee.

It shall be no part of the duty of the Trustee to see to any recording, filing or registration of this Security Instrument or any other instrument in addition or supplemental thereto, or to give any notice thereof, or to see to the payment of or be under any duty in respect of any tax or assessment or other governmental charge which may be levied or assessed on the Property, or any part hereof, or against the Borrower, or to see to the performance or observance by the Borrower of any of the covenants and agreements contained herein. The Trustee shall not be responsible for the execution, acknowledgment or validity of this Security Instrument or of any instrument in addition or supplemental hereto, or for the sufficiency of the security purported to be created hereby, and makes no representation in respect thereof or in respect of the rights of the Lender. The Trustee shall have the right to advise with counsel upon any matters arising hereunder and shall be fully protected in relying as to legal matters on the advice of counsel. The Trustee shall not incur any personal liability hereunder except for its own willful misconduct; and the 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 the Trustee hereunder, believed by the Trustee in good faith to be genuine.

In case of the death, inability, refusal or incapacity of the Trustee to act, or at the option of the Lender at any time and without cause or notice, a successor or substitute Trustee may be named, constituted and appointed, and the successor trustee shall so notify the Borrower. Successor or substitute trustees may be named, constituted and appointed without procuring the resignation of the

former trustee and without other formality except the execution and acknowledgment by the Lender of a written instrument (which instrument, if the Lender is a corporation, shall be executed by the President or any Vice President, without the necessity of any action by the Board of Directors authorizing such appointment) appointing and designating such successor or substitute trustee, whereupon such successor or substitute trustee shall become vested with and succeed to all of the rights, titles, privileges, powers and duties of the Trustee named herein. Such right of appointment of a substitute or successor trustee shall exist as often and whenever for any of said causes the original or successor or substitute trustee cannot or will not act or has been removed as herein provided.

6.13 Maturity Date. The final payment of the indebtedness evidenced by the Note is due and payable on April 11, 2018 (the "Maturity Date").

6.14 Default Rate. The "highest rate permitted under applicable law" referred to in Section 1.03 shall mean the Default Rate (as defined in the Note) if such a rate is not specified by applicable law.

6.15 Planned Community. The Property includes certain units in, together with an undivided interest in the common elements/common elements of a residential community-interest planned community project known as: Palmilla (the "Planned Community"). If the Palmilla Homeowner's Association, a Nevada non-profit corporation, or another entity which acts for the Planned Community (the "Planned Community Association"), holds title to the Property, or any part thereof or interest therein, for the benefit or use of the Owners (as that term is defined in the Declaration [defined below]), the Property also includes Borrower's interest in the Planned Community Association and the uses, proceeds and benefits of Borrower's interest. In addition to the covenants and agreements made in this Security Instrument, Borrower and Lender further covenant and agree as follows:

(a) **Planned Community Obligations.** Borrower shall perform all of Borrower's obligations under the Planned Community's Constituent Documents. The "Constituent Documents" are collectively (i) Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Palmilla, recorded December 10, 2003 in Book 20031210 as Document No. 03076, as amended by Annexation Amendments thereto recorded August 21, 2006 in Book 20060821 as Document No. 003685, recorded September 6, 2006 in Book 20060908 as Document No. 00388, recorded February 7, 2006 in Book 20060207 as Document No. 02991 and recorded February 27, 2007, in Book 20070227 as Document No. 0003972, and as amended by the instruments recorded on July 1, 2004, in Book 20040701 as Document No. 04832, July 2, 2004, in Book 20040702 as Document No. 03888, May 19, 2005, in Book 20050519 as Document No. 03905, all such instruments and documents being recorded in the real estate records of Clark County, Nevada (collectively, the "Declaration"); (ii) the and articles of incorporation and by-laws of the Planned Community Association; (iii) any rules and regulations adopted by the Planned Community Association; and (iv) other equivalent documents. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

(b) **Public Liability Insurance.** Borrower will take such actions as may be reasonable to insure that the Planned Community Association maintains a public liability insurance policy acceptable in form, amount and extent of coverage to Lender.

(c) **Condemnation.** The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property, whether of any unit or of the common elements, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender. Such proceeds shall be applied by Lender to the sums secured by this Security Instrument as provided in Section 1.08 of this Security Instrument. The Borrower shall immediately notify Lender in writing of: (i) the receipt by the Borrower of any notice or other writing or communication from the Planned Community, or any person or party acting on behalf of the Planned Community, noting or claiming any default by the Borrower in performance or observance under the Constituent Documents; and (ii) the occurrence of any damage or destruction to, or commencement or institution of any condemnation or eminent domain proceeding against, the Land or

improvements, Borrower shall accept direction of Lender with respect to the exercise of the Borrower's rights and options under the Constituent Documents.

(d) **Lender's Prior Consent.** Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to or cause any of the following to occur:

(i) the abandonment or termination of the Planned Community except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain;

(ii) any amendment to any provision of the Constituent Documents;

(iii) termination of professional management and assumption of self-management of the Planned Community Association; or

(iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Planned Community Association unacceptable to Lender.

(e) **Remedies.** If Borrower does not pay Planned Community dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this Section 6.15 shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable with interest, upon notice from Lender to Borrower requesting payment.

(f) **Books and Records.** Borrower will maintain books and records and bank accounts separate from those of the Planned Community and the Planned Community Association.

(g) **Funds.** Borrower will not commingle the funds and other assets of Borrower with those of the Planned Community or Planned Community Association.

(h) **Contracts and Agreements.** Borrower will not enter into any contract or agreement with the Planned Community or Planned Community Association except upon terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arms-length basis with third parties other than the Planned Community or Planned Community Association.

(i) **Compliance With Covenants.** Borrower agrees to cause to be done all things necessary to comply with the covenants contained in this Security Instrument and the other Loan Documents, except to the extent the Borrower is prevented from doing so by the Constituent Documents.

(j) **Planned Community Association Actions.** Borrower will not take any action, or will withhold approval from, as the case may be, any action proposed to be taken by the Planned Community Association which, if taken by Borrower would be an Event of Default hereunder. Without limiting the foregoing, Borrower covenants and agrees to exercise its voting rights in the Planned Community Association:

(i) to disapprove any proposed action to decrease any member of the Planned Community Association's contribution to the Planned Community's reserve account which is maintained for the Property's common area repair and maintenance (the "Reserve Account") if the effect of such decrease would be to decrease the Reserve Account below a level sufficient to fund anticipated repairs, maintenance and improvements, as determined by the Planned Community's operating budget, its current reserve account analysis and any current property assessment reports; provided, however, that if Lender based upon a current property assessment report for the Property, determines that such decrease was not appropriate, Lender may require Borrower to increase the On-going Replacement

Reserve (as defined in the Reserve Agreement of even date herewith executed by Borrower) by an amount sufficient in Lender's reasonable discretion, based upon such property assessment report, to meet anticipated repairs, maintenance and improvements, provided however, that in no event shall such increase per unit exceed the amount of decrease per unit otherwise approved by the Planned Community;

(ii) to disapprove disbursements from the Reserve Account for matters other than repair and maintenance to the Property's common areas;

(iii) to disapprove any proposed action which would result in any further encumbrance of the Property;

(iv) to initiate and approve increases in the member's contribution to the Reserve Account if such increase is necessary to establish the reserve fund at a level sufficient to fund anticipated repairs, maintenance and improvements, as determined by the Planned Community Association's operating budget, its current reserve account analysis and any current property assessment reports; and

(v) for purposes hereof, action taken by the Borrower shall also mean that taken by the directors of the Planned Community Association nominated and appointed by the Borrower.

(k) **Assessment Report.** Not more often once during each calendar year, Lender may require that a current property assessment report be prepared, at Borrower's expense, to estimate the need for current and anticipated repairs, maintenance and improvements for the Planned Community, or any portion thereof.

(l) **Planned Community Association Reports.** Borrower agrees, upon request, to provide copies to Lender, in a timely manner, of reports, financial analyses, budgets, notices, minutes of Planned Community - related meetings, and any other material information received by Borrower affecting the operation and management of the Property.

(m) **Proxy Agreement.** Borrower shall not vote to amend or modify or otherwise approve, consent to or suffer the amendment or modification of the Constituent Documents in any manner whatsoever without obtaining Lender's prior written approval. Borrower hereby appoints Lender as Borrower's irrevocable power-of-attorney, coupled with an interest, to act on behalf of Borrower with respect to (a) voting to amend or modify the Constituent Documents (except that Borrower shall not be deemed to have breached the foregoing by reason of any amendment or modification of the Constituent Documents not requiring the approval of the Borrower under the Constituent Documents), and (b) voting with respect to the disposition of casualty proceeds or any condemnation award which shall be voted at the direction of Lender and consistently with the provisions of this Security Instrument. Borrower agrees to enter into a Proxy Agreement(s) and to execute such other documents and take such other action as Lender may require to evidence Lender's rights to exercise Borrower's voting rights in the Planned Community while any Event of Default is continuing.

(n) **Control.** The Planned Community Association shall at all times be under the collective control of Borrower. As used in this Subsection 6.15(n), the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of management, policies or activities of a person or entity, whether through ownership of voting securities, by contract, by operation of law, or otherwise.

(o) **Declarant Rights.** Borrower shall not convey, transfer, assign, relinquish or otherwise dispose of its rights and interests as the "Declarant" under the Declaration without the Lender's prior written consent.

(p) **Increase in the Number of Units in the Association.** Without limiting any of the foregoing, without the Lender's prior written consent, the Borrower shall not exercise any rights it may have, as the "Declarant" under the under Declaration, under Section 14.1(h)(2) of the Declaration (captioned "Certain Other Rights").

(q) **Conversion.** Borrower agrees not to convert the Property to any additional common interest community, condominium, planned community or cooperative of any kind, and the conversion or recording of any additional common interest community, condominium, planned community or cooperative documents on the Property or any part thereof with respect to the Property shall be an Event of Default hereunder.

ARTICLE 7. MISCELLANEOUS

7.01 Amendments. This instrument cannot be waived, changed, discharged or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of any waiver, change, discharge or termination is sought.

7.02 Borrower Waiver of Rights; Waiver of Automatic Stay.

(a) Borrower waives to the extent permitted by law, (i) the benefit of all laws now existing or that may hereafter be enacted providing for any appraisal before sale of any portion of the Property, (ii) all rights of valuation, appraisal, stay of execution, reinstatement and redemption laws and marshaling in the event of foreclosure of the liens hereby created, (iii) all rights and remedies which Borrower may have or be able to assert by reason of the laws of the State where the Property is located pertaining to the rights and remedies of sureties, (iv) the right to assert any statute of limitations as a bar to the enforcement of the lien of this Security Instrument or to any action brought to enforce the Note or any other obligation secured by this Security Instrument, and (v) any rights, legal or equitable, to require marshaling of assets or to require upon foreclosure sales in a particular order. Lender shall have the right to determine the order in which any or all of the Property shall be subjected to the remedies provided herein. Lender shall have the right to determine the order in which any or all portions of the Secured Obligations are satisfied from the proceeds realized upon the exercise of the remedies provided herein.

(b) WITHOUT LIMITING ANY OF THE FOREGOING SET FORTH IN SUBSECTION (a) ABOVE, BORROWER HEREBY AGREES THAT, IN CONSIDERATION OF LENDER'S AGREEMENT TO MAKE THE LOAN AND IN RECOGNITION THAT THE FOLLOWING COVENANT IS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN, IF BORROWER SHALL (i) FILE WITH ANY BANKRUPTCY COURT OF COMPETENT JURISDICTION OR BE THE SUBJECT OF ANY PETITION UNDER ANY SECTION OR CHAPTER OF THE BANKRUPTCY CODE, OR SIMILAR LAW OR STATUTE; (ii) BE THE SUBJECT OF ANY ORDER FOR RELIEF ISSUED UNDER THE BANKRUPTCY CODE OR SIMILAR LAW OR STATUTE; (iii) FILE OR BE THE SUBJECT OF ANY PETITION SEEKING ANY REORGANIZATION, ARRANGEMENT, COMPOSITION, READJUSTMENT, LIQUIDATION, DISSOLUTION, OR SIMILAR RELIEF UNDER ANY PRESENT OR FUTURE FEDERAL OR STATE ACT OR LAW RELATING TO BANKRUPTCY, INSOLVENCY, OR OTHER RELIEF FOR DEBTORS; (iv) HAVE SOUGHT OR CONSENTED TO OR ACQUIRED IN THE APPOINTMENT OF ANY TRUSTEE, RECEIVER, CONSERVATOR, OR LIQUIDATOR; OR (v) BE THE SUBJECT OF AN ORDER, JUDGMENT OR DECREE ENTERED BY ANY COURT OF COMPETENT JURISDICTION APPROVING A PETITION FILED AGAINST ANY BORROWER FOR ANY REORGANIZATION, ARRANGEMENT, COMPOSITION, READJUSTMENT, LIQUIDATION, DISSOLUTION, OR SIMILAR RELIEF UNDER ANY PRESENT OR FUTURE FEDERAL OR STATE ACT OR LAW RELATING TO BANKRUPTCY, INSOLVENCY OR RELIEF FOR DEBTORS, THEN, SUBJECT TO COURT APPROVAL, LENDER SHALL THEREUPON BE ENTITLED AND BORROWER HEREBY IRREVOCABLY CONSENTS TO, AND WILL NOT CONTEST, AND AGREES TO STIPULATE TO RELIEF FROM ANY AUTOMATIC STAY OR OTHER INJUNCTION IMPOSED BY SECTION 362 OF THE BANKRUPTCY CODE OR SIMILAR

LAW OR STATUTE (INCLUDING, WITHOUT LIMITATION, RELIEF FROM ANY EXCLUSIVE PERIOD SET FORTH IN SECTION 1121 OF THE BANKRUPTCY CODE) OR OTHERWISE AVAILABLE TO LENDER AS PROVIDED IN THE NOTE AND THE LOAN DOCUMENTS, AND AS OTHERWISE PROVIDED BY LAW, AND BORROWER HEREBY IRREVOCABLY WAIVES ITS RIGHT TO OBJECT TO SUCH RELIEF.

7.03 Statements by Borrower. Borrower shall, within ten (10) days after written notice thereof from Lender, deliver to Lender (or any person designated by Lender) a written statement, in form satisfactory to Lender, fully acknowledged, stating the unpaid principal of and interest on the Note and any other amounts secured by this Security Instrument and stating whether any offset, counterclaim or defense exists against such sums and the obligations of this Security Instrument.

7.04 Loan Statement Fees. Lender or its authorized loan servicing agent may impose a service charge for any statement requested by Borrower regarding the Secured Obligations; provided, however, that such amount may not exceed the maximum amount allowed by law at the time request for the statement is made.

7.05 Notices. Whenever Borrower, Trustee or Lender shall desire to give or serve any notice, demand, request or other communication with respect to this Security Instrument, each such notice, demand, request or communication shall be given in writing at the address of the intended recipient set forth below by any of the following means: (a) personal service (including, without limitation, service by overnight courier service); (b) electronic communication, whether by telax, telegram, facsimile or telecopying (if confirmed in writing sent by personal service or by registered or certified, first class mail, return receipt requested); or (c) registered or certified, first class mail, return receipt requested:

If to Lender: ARTESIA MORTGAGE CAPITAL CORPORATION
1180 NW Maple Street, Suite 202
Issaquah, Washington 98027
Attn: Servicing Department
Fax: (425) 313-1005

with a copy to: BEST & FLANAGAN LLP
225 South Sixth Street, Suite 4000
Minneapolis, Minnesota 55402
Attn: Thomas G. Garry
Fax: (612) 339-5897

If to Borrower: PALMILLA DEVELOPMENT CO., INC.
235 West Brooks Avenue, 2nd Floor,
North Las Vegas, Nevada 89030
Fax: (702) 399-6243
Attn: Hagai Rapaport

with a copy to: RONALD E. GILLETTE, Esq.
235 West Brooks Avenue, 2nd Floor
North Las Vegas, Nevada 89030
Fax: (702) 399-6243

If to Trustee: Equity Title, LLC, a Nevada limited liability company
7360 West Flamingo Road
Las Vegas, Nevada 89147
Attn: Robert Roseles
Fax: (702) 432-1113

Such addresses may be changed by notice to the other parties given in the same manner as provided above. Any notice, demand or request sent pursuant to either subsection (a) or (b) hereof shall be deemed received upon such personal service or upon dispatch by electronic means, and, if sent pursuant to subsection (c) shall be deemed received five (5) days following deposit in the mail.

7.06 Captions. The captions or headings at the beginning of each Section hereof are for the convenience of reference only and are not a part of this Security Instrument.

7.07 Savings Clause; Invalidity of Certain Provisions. Notwithstanding any provisions in the Note or in this Security Instrument to the contrary, the total liability for payments in the nature of interest, including, without limitation, prepayment charges, default interest and late fees, shall not exceed the limits imposed by the laws of the State where the Property is located or the United States of America relating to maximum allowable charges of interest. Lender shall not be entitled to receive, collect or apply, as interest on the Secured Obligations, any amount in excess of the maximum lawful rate of interest permitted to be charged by applicable laws. If Lender ever receives, collects or applies as interest such amount which would be excessive, such interest shall be applied to reduce the unpaid principal balance of the Note, and any remaining excess shall be paid over to person or persons legally entitled thereto. Every provision of this Security Instrument is intended to be severable. In the event any term or provision hereof is declared to be illegal, invalid or unenforceable for any reason whatsoever by a court of competent jurisdiction, such illegal or invalid or unenforceable term or provision shall not affect the balance of the terms and provisions hereof, which terms and provisions shall remain binding and enforceable.

7.08 Provisions Regarding Trustees. At any time, or from time to time, without liability therefor and without notice to Borrower, upon written request of Lender and presentation of this Security Instrument and the Note secured hereby for endorsement, and without affecting the personal liability of any person for payment of the Secured Obligations (subject to the limitations on recourse set forth in the Note) or the effect of this Security Instrument upon the remainder of the Property, Trustee [or the one acting] may (i) reconvey any part of the Property, (ii) consent in writing to the making of any map or plat thereof, (iii) join in granting any easement thereon, or (iv) join in any extension agreement or any agreement subordinating the lien or charge hereof.

Trustee shall not be liable for any error of judgment or act done by Trustee, or be otherwise responsible or accountable under any circumstances whatsoever. Trustee shall not be personally liable in case of entry by it or anyone acting by virtue of the powers herein granted it upon the Property for debts contracted or liability or damages incurred in the management or operation of the Property. All monies 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 monies (except to the extent required by law) and Trustee shall be under no liability for interest on any monies received by it hereunder.

Trustee may resign by giving of notice of such resignation in writing to Lender. If Trustee shall die, resign or become disqualified from acting, or shall fail or refuse to exercise its powers hereunder when requested by Lender so to do, or if for any reason and without cause Lender shall prefer to appoint a substitute trustee to act instead of the original Trustee named herein, or any prior successor or substitute trustee, Lender shall have full power to appoint a substitute trustee and, if preferred, several substitute trustees in succession who shall succeed to all the estate, rights, powers and duties of the aforementioned Trustee. Upon appointment by Lender and upon recording of the substitution in the land records of the County where the Property is located, any new Trustee appointed pursuant to any of the provisions hereof shall, without any further act, deed or conveyance, become vested with all the estates, properties, rights, powers and trusts of its predecessor in the rights hereunder with the same effect as if originally named as Trustee herein.

7.09 Subrogation. To the extent that proceeds of the Note are used to pay any outstanding lien, charge or prior encumbrance against the Property, such proceeds have been or will be advanced by Lender at Borrower's request and Lender shall be subrogated to any and all rights and liens held by any owner or holder of such outstanding liens, charges and prior encumbrances, irrespective of whether said liens, charges or encumbrances are released.

7.10 Costs and Expenses; Attorneys' Fees for Preparation and Enforcement.

(a) Borrower acknowledges and confirms that Lender shall impose certain administrative processing and/or commitment fees in connection with (i) the extension, renewal, modification, amendment and termination of the Loan, (ii) the release or substitution of collateral therefor, (iii) obtaining certain consents, waivers and approvals with respect to the Property, or (iv) the review of any Lease or proposed Lease or the preparation or review of any subordination, non-disturbance and attornment agreement (the occurrence of any of the above shall be called an "Event"). Borrower further acknowledges and confirms that it shall be responsible for the payment of all costs of reappraisal of the Property or any part thereof, whether required by law, regulation, Lender or any governmental or quasi-governmental authority. Borrower hereby acknowledges and agrees to pay, immediately, with or without demand, all such fees (as the same may be increased or decreased from time to time), and any additional fees of a similar type or nature which may be imposed by Lender from time to time, upon the occurrence of any Event or otherwise. Wherever it is provided for herein that Borrower pay any costs and expenses, such costs and expenses shall include, but not be limited to, all attorneys' fees and disbursements of Lender.

(b) Borrower shall pay all attorneys' fees incurred by Lender in connection with (i) the preparation of the Note, this Security Instrument and the other Loan Documents, and (ii) the items set forth in Section 7.10(a) above. In addition, Borrower shall pay to Lender on demand any and all expenses, including, without limitation, attorneys' fees and costs, incurred or paid by Lender in protecting its interest in the Property or in collecting any amount payable hereunder or in enforcing its rights hereunder with respect to the Property (including, without limitation, commencing any foreclosure action), whether or not any legal proceeding is commenced hereunder or thereunder, together with interest thereon at the Default Rate from the date paid or incurred by Lender until such expenses are paid by Borrower.

As used in this Security Instrument, the terms "attorneys' fees" or "attorneys' fees and costs" or "attorneys' fees, costs and expenses" shall mean the reasonable attorneys' fees and the costs and expenses of counsel to Lender (including, without limitation, in-house counsel employed by Lender), which may include, without limitation, printing, duplicating, telephone, fax, air freight and other charges, and fees billed for law clerks, paralegals, librarians, expert witnesses and others not admitted to the bar but performing services under the supervision of an attorney and all such fees, costs and expenses incurred with respect to trial, appellate proceedings, arbitrations, out-of-court negotiations, workouts and settlements, and bankruptcy or insolvency proceedings (including, without limitation, seeking relief from stay in bankruptcy proceedings), and whether or not any action or proceeding is brought or is concluded with respect to the matter for which such fees, costs and expenses were incurred, and whether or not the Lender is the prevailing party. Lender shall also be entitled to its attorneys' fees, costs and expenses incurred in any post-judgment action or proceeding to enforce and collect the judgment. This Section 7.10 is separate and several, shall survive the discharge of this Security Instrument, and shall survive the merger of this Security Instrument into any judgment on this Security Instrument.

7.11 No Merger of Lease. If both the Borrower's and tenant's estate under any Lease or any portion thereof which constitutes a part of the Property shall at any time become vested in one owner, this Security Instrument and the lien created hereby shall not be destroyed or terminated by application of the doctrine of merger unless Lender so elects as evidenced by recording a written declaration so stating, and, unless and until Lender so elects, Lender shall continue to have and enjoy all of the rights and privileges of Lender as to the separate estates. In addition, upon the foreclosure of the lien created by

this Security Instrument on the Property pursuant to the provisions hereof, any leases or subleases then existing and affecting all or any portion of the Property shall not be destroyed or terminated by application of the law of merger or as a matter of law or as a result of such foreclosure unless Lender or any purchaser at such foreclosure sale shall so elect. No act by or on behalf of Lender or any such purchaser shall constitute a termination of any Lease or sublease unless Lender or such purchaser shall give written notice thereof to such tenant or subtenant.

7.12 Governing Law. This Security Instrument shall be governed by and construed in accordance with the laws of the State where the Property is located.

7.13 Joint and Several Obligations. If this Security Instrument is signed by more than one party, all obligations herein contained shall be deemed to be the joint and several obligations of each party executing this Security Instrument. Any married person signing this Security Instrument agrees that recourse may be had against community assets and against his or her separate property for the satisfaction of all obligations contained herein.

7.14 Interpretation. In this Security Instrument the singular shall include the plural and the masculine shall include the feminine and neuter and vice versa, if the context so requires.

7.15 Reconveyance by Trustee. Upon written request of Lender stating that all sums secured hereby have been paid, and upon surrender of this Security Instrument and the Note to Trustee for cancellation and retention and upon payment by Borrower of Trustee's fees, Trustee shall reconvey to Borrower, or to the person or persons legally entitled thereto, without warranty, any portion of the Property then held hereunder. The recitals in such reconveyance of any matters or facts shall be conclusive proof of the truthfulness thereof. The grantee in any reconveyance may be described as "the person or persons legally entitled thereto." Such grantee shall pay Trustee a reasonable fee and Trustee's costs incurred in so reconveying the Property.

7.16 Counterparts. This document may be executed and acknowledged in counterparts, all of which executed and acknowledged counterparts shall together constitute a single document. Signature and acknowledgment pages may be detached from the counterparts and attached to a single copy of this document to physically form one document, which may be recorded.

7.17 Effect of Security Agreement; Fixture Filing. To the extent of the existence of any Personal Property encumbered by this Security Instrument, this Security Instrument constitutes both (a) a security agreement intended to create a security interest in such Personal Property in favor of Lender; and, (b) a financing statement filed as a fixture filing in the real estate records of the county in which the Property is located with respect to any and all Fixtures included within the Personal Property with respect to any goods or other personal property that may now be or hereafter become such fixtures. The information in the subsections below this paragraph is provided in connection with the filing of this Security Instrument as a financing statement as referred to above, and the Borrower hereby represents and warrants such information to be true and complete as of the date of this Security Instrument. This Security Instrument shall be self-operative with respect to such Personal Property, but Borrower shall, upon the request of Lender, execute and deliver to Lender, in form and content satisfactory to Lender, such financing statements, descriptions of property and such further assurances as Lender may determine from time to time to be necessary or desirable to create, perfect, continue and preserve the lien and encumbrances hereof and the security interest granted herein upon and in the Personal Property specifically described herein, or generally described and intended to be the subject of the security interest, lien and encumbrance hereby created, granted and conveyed. Lender, at the expense of Borrower, may cause such statements, descriptions and assurances as provided in this Security Instrument to be recorded and re-recorded, filed and refiled, at such times and in such places as may be required or permitted by law to so create, perfect and preserve the lien and encumbrance hereof upon all of the Personal Property. By signing this Security Instrument, Borrower authorizes Lender to file such financing statements before, on or after the date hereof, and to file such amendments or continuation

statements, all as Lender determines necessary or desirable from time to time to perfect or continue the lien of the Lender's security interest in the Personal Property.

(a) The Borrower is the record owner of the real estate described in this Security Instrument. The name and mailing address of the record owner of the real estate described in this Security Instrument is set forth in the first paragraph of this Security Instrument.

(b) The name, mailing address, type of organization and state of formation of the Borrower is set forth in the first paragraph of this Security Instrument. The Organizational Identification Number of the Borrower is NV C32005-2003.

(c) The name and mailing address of the Secured Party (Lender) is:

ARTESIA MORTGAGE CAPITAL CORPORATION
1180 NW Maple Street, Suite 202
Issaquah, Washington 98027
Attn: Servicing Department

(d) This document covers goods which are or are to become fixtures.

7.18 Spouse's Separate Property. Any Borrower who is a married person expressly agrees that recourse may be had against his or her separate property, subject to the limitations on recourse set forth in Section 10 of the Note.

7.19 Offsets. No Secured Obligations shall be deemed to have been offset or to be offset or compensated by all or part of any claim, cause of action, counterclaim or cross claim, whether liquidated or unliquidated, which Borrower or any successor to Borrower now or hereafter may have or may claim to have against Lender; and, in respect to the indebtedness now or hereafter secured hereby, Borrower waives, to the fullest extent permitted by law, the benefits of any law which authorizes or permits such offsets.

7.20 Construction of this Security Instrument. Borrower and Lender agree that this Security Instrument shall be interpreted in a fair, equal and neutral manner as to each of the parties.

7.21 Clerical Error. In the event Lender at any time discovers that the Note, any other note secured by this Security Instrument, this Security Instrument or any other Loan Document contains an error that was caused by a clerical mistake, calculation error, computer malfunction, printing error or similar error, Borrower agrees, upon notice from Lender, to re-execute any documents that are necessary to correct any such error(s). Borrower further agrees that Lender will not be liable to Borrower for any damages incurred by Borrower that are directly or indirectly caused by any such error.

7.22 Lost, Stolen, Destroyed or Mutilated Loan Documents. In the event of the loss, theft or destruction of the Note, any other note secured by this Security Instrument or any other Loan Document, or in the event of the mutilation of any of the Loan Documents, upon Lender's surrender to Borrower of the mutilated Loan Document, Borrower shall execute and deliver to Lender a Loan Document in form and content identical to, and to serve as a replacement of, the lost, stolen, destroyed, or mutilated Loan Document and such replacement shall have the same force and effect as the lost, stolen, destroyed, or mutilated Loan Document, and may be treated for all purposes as the original copy of such Loan Document.

7.23 Time is of the Essence. Time is of the essence in the performance of each provision of this Security Instrument.

7.24 Legislation Affecting Lender's Rights. If enactment or expiration of applicable laws has the effect of rendering any material provision of the Note or this Security Instrument unenforceable according to its terms, Lender, at its option, may demand immediate payment in full of all sums secured by this Security Instrument and may invoke any remedies permitted under this Security Instrument.

7.25 RESERVED.

7.26 Exhibits and Riders. The exhibits and riders, if any, attached hereto are incorporated herein by reference and made a part hereof.

7.27 Successors and Assigns. Without in anyway limiting or affecting the provisions of Section 1.15 hereof, all of the terms, covenants, provisions and conditions herein contained shall be for the benefit of, apply to, and bind the heirs, successors and assigns of the Borrower and the Lender, and are intended and shall be held to be covenants running with the Land.

7.28 Declaration of No Offset. The Borrower represents and warrants to the Lender that the Borrower has no knowledge of any offsets, counterclaims or defenses to the principal of the Secured Obligations, or to any part thereof, or the interest thereon, either at law or in equity.

7.29 Entire Agreement. This Security Instrument and the other Loan Documents contain the entire agreement between the Borrower and the Lender relating to or connected with the Loan. Any other agreements relating to or connected with the Loan not expressly set forth in this Security Instrument and/or other Loan Documents are null and void and superseded in their entirety by the provisions of this Security Instrument and the other Loan Documents.

7.30 No Joint Venture or Partnership. The relationship of the Borrower and the Lender created hereby is strictly of debtor-creditor and nothing contained herein or in any other documents or instrument secured hereby shall be deemed or construed to create a partnership or joint venture between Borrower and Lender.

7.31 No Lender Obligations.

(a) Notwithstanding any of the provisions contained herein with respect to Lender taking a security interest in the Leases, Lender is not undertaking the performance of any obligations under the Leases.

(b) By accepting or approving anything required to be observed, performed or fulfilled or to be given to Lender pursuant to this Security Instrument, the Note or the other Loan Documents, including without limitation, any officer's certificate, balance sheet, statement of profit and loss or other financial statement, survey, appraisal, or insurance policy, Lender shall not be deemed to have warranted, consented to, or affirmed the sufficiency, the legality or effectiveness of same, and such acceptance or approval thereof shall not constitute any warranty or affirmation with respect thereto by Lender.

7.32 Estoppel Certificates. After request by Lender, Borrower, within ten (10) days, shall furnish Lender or any proposed assignee with a statement, duly acknowledged and certified, setting forth the amount of the original principal amount of the Note, the unpaid principal amount of the Note, the rate of interest of the Note, the terms of payment and maturity date of the Note, the date installments of interest and/or principal were last paid, that, except as provided in such statement, there are no defaults or events which with the passage of time or the giving of notice or both, would constitute an Event of Default under the Note or this Security Instrument, that the Note and this Security Instrument are valid, legal and binding obligations and have not been modified or if modified, giving particulars of such modification, whether any offsets or defenses exist against the Secured Obligations and, if any are alleged to exist, a detailed description thereof, that all Leases are in full force and effect and (provided the Property is not a residential multifamily property) have not been modified (or if modified, setting forth

all modifications), the date to which the Rents thereunder have been paid pursuant to the Leases, whether or not, to the best knowledge of Borrower, any of the tenants under the Leases are in default under the Leases, and, if any of the tenants are in default, setting forth the specific nature of all such defaults, the amount of security deposits held by Borrower under each Lease and that such amounts are consistent with the amounts required under each Lease, and as to any other matters reasonably requested by Lender and reasonably related to the Leases, the Secured Obligations, the Property or this Security Instrument.

7.33 Renewals and Extensions. Any renewal or extension, modification or amendment of the Note and/or this Security Instrument will not operate to release, in any manner, the liability of Borrower or any other party liable for the Loan and their respective successors in interest.

7.34 Incorporation. The terms and conditions of all the other Loan Documents are hereby incorporated by reference.

[Signatures on Following Page(s)].

IN WITNESS WHEREOF, Borrower has executed this Security Instrument as of the day and year first above written.

BORROWER:

PALMILLA DEVELOPMENT CO., INC.,
a Nevada corporation

By: _____

Hagal Rapaport, President

STATE OF _____)

COUNTY OF _____)

This instrument was acknowledged before me on _____, 2007, by Hagal Rapaport, the President of Palmilla Development Co., Inc., a Nevada corporation.

Notary Public

My Commission Expires: _____

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Los Angeles

} ss.

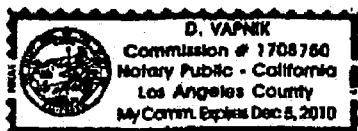
On March 29, 2007 before me, Dorot Vapnik, Notary Public

Name and Title of Officer (e.g., "Jose Doe, Notary Public")

personally appeared

Hagai Asparach

Name(s) of Signer(s)

☒ personally known to me

☐ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Place Notary Seal Above

Signature of Notary Public
OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____

Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

 RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

Signer Is Representing: _____

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

 RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

Signer Is Representing: _____

EXHIBIT A
LEGAL DESCRIPTION OF PROPERTY

The Property is located in Clark County, Nevada, and is legally described as follows:

Parcel One (1):

Lot Seven (7) in Building Three (3) of **AMENDED PLAT OF PALMILLA TOWNHOMES - PHASE 1**, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as amended by Certificate of Amendment recorded March 15, 2005 in Book 20050315 as Document No. 02792, Official Records, and by Certificate of Amendment recorded March 16, 2005 in Book 20050316 as Document No. 04327, Official Records

Parcel Two (2):

Lots Three (3), Seven (7), Eight (8), Ten (10) and Eleven (11) in Building Six (6); Lots One through Twelve (1-12) inclusive, in Building Seven (7); Lots One through Twelve (1-12) inclusive, in Building Eight (8); Lots One through Twelve (1-12) inclusive, in Building Nine (9); Lots One through Twelve (1-12) inclusive, in Building Ten (10); Lots One through Twelve (1-12) inclusive, in Building Eleven (11); Lots One through Twelve (1-12) inclusive, in Building Twelve (12); Lots One through Twelve (1-12) inclusive, in Building Thirteen (13); Lots One through Twelve (1-12), inclusive, in Building Fourteen (14); Lots One through Twelve (1-12), inclusive, in Building Fifteen (15); Lots One through Twelve (1-12) inclusive, in Building Sixteen (16); Lots One through Twelve (1-12) inclusive, in Building Seventeen (17); Lots One through Twelve (1-12), inclusive, in Building Eighteen (18); Lots One (1), Four (4), Nine (9), Ten (10) and Twelve (12) in Building Nineteen (19); and Lots Eleven (11) and Twelve (12) in Building Twenty (20) of **PALMILLA TOWNHOMES - PHASE 2** as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada.

Parcel Three (3):

The non-exclusive easements appurtenant to the property described in Parcels One (1) and Two (2) over, across and for the use of the Private Streets, Common Elements and Common Areas as delineated upon the of Plat of **PALMILLA TOWNHOMES - PHASE 2**, as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada, and upon the Plat of **AMENDED PLAT OF PALMILLA TOWNHOMES - PHASE 1**, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as further set forth in that certain Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Palmilla, recorded December 10, 2003 in Book 20031210 as Document No. 03076, Official Records, and in Annexation Amendments thereto recorded August 21, 2006 in Book 20060821 as Document No. 003685, recorded September 6, 2006 in Book 20060906 as Document No. 00388, and recorded February 7, 2006 in Book 20060207 as Document No. 02991, and recorded February 27, 2007 in Book 20070227 as Document No. 03972, Official Records.

016075/270010/521943_7

CLARIFICATION**EXHIBIT A****LEGAL DESCRIPTION OF PROPERTY**

The Property is located in Clark County, Nevada, and is legally described as follows:

Parcel One (1):

Lot Seven (7) in Building Three (3) of **AMENDED PLAT OF PALMILLA TOWNHOMES - PHASE 1**, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as amended by Certificate of Amendment recorded March 15, 2005 in Book 20050315 as Document No. 02792, Official Records, and by Certificate of Amendment recorded March 16, 2005 in Book 20050316 as Document No. 04327, Official Records

Parcel Two (2):

Lots Three (3), Seven (7), Eight (8), Ten (10) and Eleven (11) in Building Six (6); Lots One through Twelve (1-12) inclusive, in Building Seven (7); Lots One through Twelve (1-12) inclusive, in Building Eight (8); Lots One through Twelve (1-12) inclusive, in Building Nine (9); Lots One through Twelve (1-12) inclusive, in Building Ten (10); Lots One through Twelve (1-12) inclusive, in Building Eleven (11); Lots One through Twelve (1-12) inclusive, in Building Twelve (12); Lots One through Twelve (1-12) inclusive, in Building Thirteen (13); Lots One through Twelve (1-12), inclusive, in Building Fourteen (14); Lots One through Twelve (1-12), inclusive, in Building Fifteen (15); Lots One through Twelve (1-12) inclusive, in Building Sixteen (16); Lots One through Twelve (1-12) inclusive, in Building Seventeen (17); Lots One through Twelve (1-12), inclusive, in Building Eighteen (18); Lots One (1), Four (4), Nine (9), Ten (10) and Twelve (12) in Building Nineteen (19); and Lots Eleven (11) and Twelve (12) in Building Twenty (20) of **PALMILLA TOWNHOMES - PHASE 2** as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada.

Parcel Three (3):

The non-exclusive easements appurtenant to the property described in Parcels One (1) and Two (2) over, across and for the use of the Private Streets, Common Elements and Common Areas as delineated upon the Plat of **PALMILLA TOWNHOMES - PHASE 2**, as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada, and upon the Plat of **AMENDED PLAT OF PALMILLA TOWNHOMES - PHASE 1**, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as further set forth in that certain Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Palmilla, recorded December 10, 2003 in Book 20031210 as Document No. 03076, Official Records, and in Annexation Amendments thereto recorded August 21, 2006 in Book 20060821 as Document No. 003685, recorded September 6, 2006 in Book 20060906 as Document No. 00388, and recorded February 7, 2006 in Book 20060207 as Document No. 02991, and recorded February 27, 2007 in Book 20070227 as Document No. 03972, Official Records.

Exhibit “4”

Exhibit “4”

ART WHSE
010-00001095

20070330-0002947

Fee: \$26.00
N/C Fee: \$0.00

03/30/2007 12:04:42

T20070056264

Requestor:
EQUITY TITLE OF NEVADA

Debbie Conway SGI
Clark County Recorder Pgs: 13

13

25

APN: 124-30-311-031
124-30-312-014 and 015
124-30-312-017 and 018
124-30-312-025 through 169
124-30-312-171 and 172
124-30-312-177; and
124-30-312-180 through 182

Recording requested by
and when recorded mail to :

Name : Best & Flanagan LLP
Attention: Thomas G. Garry
Address: 225 South Sixth Street, Suite 4000
City/State/Zip : Minneapolis, Minnesota 55402

Assignment of Leases, Rents,
Income and Profits
(Title on Document)

This page added to provide additional information required by N.R.S. 111.312
Sections 1-2. (Additional recording fee applies)

This cover page must be typed or printed in black ink only.

APN: 124-30-312-014; 124-30-312-025 through 169, inclusive; 124-30-312-171 and 172; 124-30-312-177; 124-30-312-180 through 182, inclusive; 124-30-311-031; 124-30-312-017 and 018; 124-30-312-022; 124-30-312-015

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

BEST & FLANAGAN LLP
225 South Sixth Street, Suite 4000
Minneapolis, Minnesota 55402
Attn: Thomas G. Garry

Order/Escrow No.: 07450038
Loan No.: 010-00001895

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

ASSIGNMENT OF LEASES, RENTS, INCOME AND PROFITS

THIS ASSIGNMENT OF LEASES, RENTS, INCOME AND PROFITS (this "Assignment") is made as of March 28, 2007, by PALMILLA DEVELOPMENT CO., INC., a(n) Nevada corporation ("Borrower"). This Assignment is being given to secure the payment of that certain Fixed Rate Note of even date herewith in the amount of Twenty Million One Hundred and Fifty Thousand and 00/100 Dollars (\$20,150,000.00) (the "Note") executed by Borrower, payable to the order of ARTESIA MORTGAGE CAPITAL CORPORATION, a Delaware corporation, and its successors and assigns, having its principal office at 1180 NW Maple Street, Suite 202, Issaquah, Washington 98027 (the "Lender").

Borrower is justly indebted to Lender in the aggregate sum of Twenty Million One Hundred and Fifty Thousand and 00/100 Dollars (\$20,150,000.00), with interest thereon as set forth in the Note, which Note is due and payable on or before April 11, 2018 (the "Maturity Date"); and

Borrower is the present owner in fee simple of that certain piece, parcel or tract of real property more particularly described in Exhibit A attached hereto and by this reference incorporated herein (the "Property"); and

Lender is the owner and holder of the Security Instrument (as defined in the Note) encumbering the Property, which Security Instrument secures the payment of the Note; and

Lender, as a condition to making the aforesaid loan and to obtain additional security therefor, has required the execution of this Assignment by Borrower; and

NOW THEREFORE, in order to further secure the payment of the indebtedness of Borrower to Lender evidenced by the Note, which Note is secured by the Security Instrument, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Borrower hereby irrevocably, absolutely, presently and unconditionally grants, sells, assigns, transfers, pledges and sets over to Lender,

(a) any and all leases, contracts, subleases, licenses, franchises, concessions, occupancy agreements, rights to use or other agreements now or hereafter affecting all or any portion of the Property or the use or occupancy thereof, whether written or verbal (individually, a "Lease", collectively, the "Leases"), together with all of Borrower's right, title and interest in the Leases including all modifications, amendments, extensions and renewals of the Leases and all rights and privileges incident thereto and all demands or claims arising thereunder (including any cancellation fees or other premiums collected in connection with the Leases) or under any policies insuring against loss of rents or profits;

(b) all rents, royalties, issues, revenues, profits, proceeds, income and other benefits, including accounts receivable, of, accruing to or derived from such Leases, or now due and which may hereafter become due under or by virtue of the Leases, including without limitation expenses paid by tenants (collectively, "Rents"), and

(c) all security deposits, guaranties and other security now or hereafter held by Borrower as security for the performance of the obligations of the tenants under such Leases.

The foregoing assignment of Rents and Leases is intended by Borrower and Lender to create and shall be construed to create a present and absolute assignment to Lender of all of Borrower's right, title and interest in the Rents and in the Leases and shall not be deemed to create merely an assignment for security only for the payment of any indebtedness or the performance of any obligations of Borrower under any of the Loan Documents, as defined in the Security Instrument. This assignment is included within the text of the Security Instrument for convenience only, but such inclusion shall not derogate from its effectiveness as a present and absolute assignment. Nothing contained herein shall operate or be construed to obligate Lender to perform any of the terms, covenants and conditions contained in any Lease or otherwise to impose any obligation upon Lender with respect to any Lease, including without limitation, any obligation arising out of any covenant of quiet enjoyment therein contained in the event the tenant under any such Lease shall have been joined as a party defendant in any action to foreclose and the estate of such tenant shall have been thereby terminated. Borrower and Lender further agree that, during the term of the Security Instrument, the Rents shall not constitute property of Borrower (or of any estate of Borrower) within the meaning of 11 U.S.C. §541, as may be amended from time to time.

Borrower hereby represents and warrants that, to Borrower's knowledge, except as otherwise expressly set forth in the certified rent roll delivered to Lender: (i) Borrower has good title to the Leases and the full power and right to assign the Leases; (ii) no other persons have any title or interest in the Leases; (iii) the Leases are in full force and effect and have not been modified except as set forth in the certified occupancy statement delivered to and approved by Lender; (iv) there are no defaults under any of the Leases; (v) no other assignments of all or any portion of the Rents or the Leases exist or remain outstanding; (vi) all Rents due have been paid in full; (vii) none of the Rents reserved in the Leases have been assigned or otherwise pledged or hypothecated; (viii) none of the Rents have been collected for more than one (1) month in advance (except a security deposit shall not be deemed rent collected in advance); (ix) the property demised under the Leases have been completed and the tenants under the Leases have accepted the same and have taken possession of the same on a rent-paying basis; (x) there exist no offsets or defenses to the payment of any portion of the Rents; (xi) Borrower has received no notice from any tenant challenging the validity or enforceability of any Lease; (xii) there are no agreements with the tenants under the Leases other than expressly set forth in each Lease; (xiii) the Leases are valid and enforceable against Borrower and the tenants set forth therein; (xiv) no Lease contains an option to purchase, right of first refusal to purchase, or any other similar provision; (xv) no person or entity has any possessory interest in, or right to occupy, the Property except under and

pursuant to a Lease; (xvi) each Lease is subordinate to the Security Instrument, either pursuant to its terms or a recordable subordination agreement; (xvii) no Lease has the benefit of a non-disturbance agreement other than the non-disturbance agreements executed by the Lender in connection with the closing of the Loan and the non-disturbance provisions contained within the Lease(s) provided by the Borrower and reviewed by the Lender in connection with the closing of the Loan; (xviii) all security deposits relating to the Leases reflected on the certified rent roll delivered to Lender have been collected by Borrower; and (xix) no brokerage commissions or finders fees are due and payable regarding any Lease.

Borrower agrees to take such action and to execute, deliver and record such documents as may be reasonably necessary to evidence such assignment, to establish the priority thereof and to carry out the intent and purpose hereof.

Borrower agrees to faithfully perform and discharge all of Borrower's obligations as landlord or lessor under the Leases and to enforce all obligations undertaken by tenants thereunder. Borrower shall defend Lender in any action relating to the Leases and shall indemnify, defend and hold Lender harmless from and against any claims of tenants or third parties with respect to the Leases. Borrower shall not receive or collect any Rents in advance of the date due or waive or defer any terms of the Leases without the consent of Lender. Borrower shall not pledge, assign or encumber the Leases or any Rents or (except as is permitted by Section 1.26(b) of the Security Instrument) modify or terminate the Leases, or permit any assignment or sublease thereunder, without the consent of Lender. Borrower irrevocably appoints Lender its true and lawful attorney-in-fact, at the option of Lender at any time and from time to time, to demand, receive and enforce payment, to give receipts, releases and satisfactions, and to sue, in the name of Borrower or Lender, for all such Rents, and apply the same to the indebtedness secured hereby. Borrower specifically agrees that all power granted to Lender under this paragraph may be assigned by Lender to its successors and assigns.

All initially capitalized terms used herein which are defined in the Security Instrument shall have the same meaning herein unless the context otherwise requires.

ARTICLE 1 REPRESENTATIONS, WARRANTIES, COVENANTS AND AGREEMENTS OF BORROWER

1.1 **Representations, Warranties, Covenants and Agreements of Borrower.** In furtherance of the foregoing assignment, Borrower represents, warrants, covenants and agrees as follows:

(a) Borrower represents and warrants that Borrower is the owner in fee simple of the Property and has good title to the Leases and Rents and has good right to assign the same, and that no other person, entity, firm or corporation has any right, title or interest therein; that Borrower has not previously sold, assigned, transferred, mortgaged or pledged the Leases or Rents; and that payment of any of the same has not otherwise been anticipated, waived, released, discounted, set off or otherwise discharged or compromised.

(b) Except as provided in Section 1.26 of the Security Instrument, Borrower agrees and warrants that, without the prior written consent of Lender, the terms of any Lease will not be amended, altered, modified or changed in any manner whatsoever, nor will they be surrendered or canceled, nor will proceedings for dispossession or eviction of any lessee under any Lease be instituted by Borrower.

(c) Borrower agrees and warrants that no request will be made of any lessee to pay any Rents, and no Rents will be accepted by Borrower, for more than one (1) month in advance of the date such Rents become due and payable under the terms of any and all Leases, it being agreed between Borrower and Lender that Rents shall be paid as provided in said Leases and not otherwise.

The foregoing shall not prevent Borrower from charging and collecting security deposits from each tenant leasing space at the Property.

(d) Borrower authorizes Lender, by and through its employees or agents or a duly appointed receiver, at its option, after the occurrence of an Event of Default, to enter upon the Property and to collect, in the name of Borrower, as Borrower's agent and lawful attorney (which appointment is coupled with an interest), or in Lender's own name, any Rents accrued but unpaid and/or in arrears at the date of such default, as well as the Rents thereafter accruing and becoming payable during the period of the continuance of such Event of Default or any other default. To this end, Borrower further agrees to cooperate with and facilitate, in all reasonable ways, Lender's collection of Rents and upon request by Lender, execute a written notice to each tenant, occupant or licensee directing said tenant, occupant or licensee to pay directly to Lender all Rents due and payable under the Leases; provided, however, that Lender may notify said tenant, occupant or licensee of the effectiveness of this Assignment without giving notice to Borrower or requesting Borrower to give such notice or join in such notice.

(e) Borrower authorizes Lender, upon such entry, at its option, to take over and assume the management, operation and maintenance of the Property and to perform all acts necessary and proper and to expend such sums out of the income of the Property as in Lender's sole discretion may be reasonable or necessary in connection therewith, in the same manner and to the same extent as Borrower theretofore might do. Borrower hereby releases all claims against Lender arising out of such management, operation and maintenance, except for the gross negligence or willful misconduct of Lender.

(f) Borrower agrees to execute, upon the request of Lender, any and all other instruments requested by Lender to effectuate this Assignment or to accomplish any other purpose deemed by Lender to be necessary or appropriate in connection with this Assignment.

(g) Borrower agrees and acknowledges that nothing in this Assignment shall be construed to limit or restrict in any way the rights and powers granted to Lender in the Note, the Security Instrument or any of the other Loan Documents. The collection and application of the Rents as described herein shall not constitute a waiver of any default or Event of Default which might at the time of application or thereafter exist under the Note, the Security Instrument or any of the other Loan Documents, and the exercise by Lender of the rights herein provided shall not prevent Lender's exercise of any rights provided under the Note, the Security Instrument or any of the other Loan Documents.

ARTICLE 2 ABSOLUTE ASSIGNMENT

2.1 **Grant of Revocable License to Collect Rents.** So long as an Event of Default shall not have occurred and be continuing, Lender hereby grants to Borrower a revocable license to enforce the Leases, to collect the Rents, to apply the Rents to the payment of the costs and expenses incurred in connection with the Property and to any indebtedness secured thereby. If requested by Lender, Borrower shall (a) give written notice to the tenants under the Leases of the Assignment of Rents and Leases by Borrower to Lender herein and pursuant to Section 3.01 of the Security Instrument, of the grant of the revocable license by Lender to Borrower herein and pursuant to Section 3.02 of the Security Instrument, and of the respective rights of Borrower and Lender hereunder and under Article 3 of the Security Instrument; and (b) obtain such tenants' agreements to be bound by and comply with the provisions of such assignment and grant. All Leases hereafter executed with respect to the Property shall contain a reference to the foregoing assignment and grant and shall state that the tenant executing such Lease shall be bound by and shall comply with the provisions hereof.

2.2 **Revocation of License; Lender's Rights.** Upon the occurrence of an Event of Default and at any time thereafter during the continuance thereof, subject to applicable laws, the license granted to Borrower pursuant to Section 2.1 shall automatically be revoked. Upon such revocation, Borrower

shall promptly deliver to Lender all Rents then held by or for the benefit of Borrower. Lender, in addition to any other rights granted to Lender under the Security Instrument, shall have the right: (i) to notify the tenants under the Leases that Borrower's license to collect Rents has been revoked, and, with or without taking possession of the Property, to direct such tenant to thereafter make all payments of Rent and to perform all obligations under its Lease to or for the benefit of Lender or as directed by Lender; (ii) to enter upon the Property and to take over and assume the management, operation and maintenance of the Property, to enforce all Leases and collect all Rents due thereunder, to amend, modify, extend, renew and terminate any or all Leases and execute new Leases; and (iii) to perform all other acts which Lender shall determine, in its sole discretion, to be necessary or desirable to carry out the foregoing. Each tenant under any Lease shall be entitled to rely upon any notice from Lender and shall be protected with respect to any payment of Rent made pursuant to such notice. Irrespective of whether a dispute exists between Borrower and Lender with respect to the existence of an Event of Default or the rights of Lender hereunder, The payment of Rent to Lender pursuant to any such notice and the performance of obligations under any Lease to or for the benefit of Lender shall not cause Lender to assume or be bound by the provisions of such Lease including but not limited to the duty to return any security deposit to the tenant under such Lease unless and to the extent such security deposit was paid to Lender by Borrower. Borrower agrees to indemnify, defend and hold Lender harmless from and against any and all losses, claims, damage or liability arising out of any claim by a tenant with respect thereto.

2.3 Application of Rents. All Rents received by Lender pursuant to this Assignment shall be applied by Lender, in its sole discretion, to any of the following: (i) the costs and expenses of collection, including, without limitation, reasonable attorneys' fees and receivership fees, costs and expenses; (ii) the costs and expenses incurred in connection with the management, operation and maintenance of the Property, including without limitation the payment of management fees and expenses, taxes, assessments and insurance premiums; (iii) the establishment of reasonable reserves for working capital and for anticipated or projected costs and expense, including, without limitation, capital improvements which may be necessary or desirable or required by law; (iv) the performance of landlord's obligations under the Leases; and (v) the payment of any indebtedness then owing by Borrower to Lender. In connection therewith, Borrower further agrees that all Rents received by Lender from any tenant may be allocated first, if Lender so elects, to the payment of all current obligations of such tenant under its Lease and not to amounts which may be accrued and unpaid as of the date of revocation of Borrower's license to collect such Rents. Lender may, but shall have no obligation to, pursue any tenant for the payment of Rent which may be due under its Lease with respect to any period prior to the exercise of Lender's rights hereunder or which may become due thereafter. Borrower agrees that the collection of Rents by Lender and the application of such Rents by Lender to the costs, expenses and obligations referred to in this Section 2.3 shall not cure or waive any default or Event of Default or invalidate any act (including, but not limited to, any sale of all or any portion of the Property now or hereafter securing the Loan) done in response to or as a result of such default or Event of Default or pursuant to any notice of default or notice of sale issued pursuant to any Loan Document.

ARTICLE 3 GENERAL

3.1 Limitation of Lender's Liability. Lender shall not be obligated to perform or discharge any obligation under the Leases hereby assigned or under or by reason of this Assignment, and Borrower hereby agrees to indemnify, hold harmless and defend Lender against any and all liability, loss or damage which Lender might incur under the Leases or under or by reason of this Assignment and of and from any and all claims and demands whatsoever which may be asserted against Lender by reason of any alleged obligation or undertaking on Lender's part to perform or discharge any of the terms of such Leases, except for claims and demands arising by reason of Lender's gross negligence or willful misconduct.

3.2 Tenant's Notification of Assignment. Upon request by Lender, at any time, Borrower will deliver a written notice to each of the tenants and lessees of the Property, which notice shall inform

such tenants and lessees of this Assignment and instruct them that upon receipt of notice by them from Lender of the existence of a default by Borrower under the Note, the Security Instrument or any of the other Loan Documents, all rent due thereafter shall be paid directly to Lender. Any tenant or occupant of the Property is hereby authorized and directed upon receipt of notice to it by the Lender to pay all Rents to Lender.

3.3 Satisfaction of Security Instrument; Satisfaction of Assignment. This Assignment shall remain in full force and effect as long as the indebtedness evidenced by the Note and secured by the Security Instrument remains unpaid in whole or in part. It is understood and agreed that a complete release or satisfaction of the aforesaid Security Instrument shall operate as a complete release or satisfaction of all of Lender's rights and interest hereunder, and that recording of a satisfaction of the Security Instrument shall operate to satisfy this Assignment.

3.4 No Mortgagee in Possession. Nothing contained in this Assignment shall be construed as constituting Lender a "mortgagee in possession" in absence of the taking of actual possession of the Property by Lender. In the exercise of the powers herein granted Lender, no liability shall be asserted or enforced against Lender, all such liability being expressly waived and released by Borrower. Further, entry upon and taking possession of the Property by a receiver shall not constitute possession by Lender.

ARTICLE 4 NEVADA PROVISIONS

4.1 Governing Provisions. In the event of any conflicts or inconsistencies between the terms and conditions of this Article 4 and the remainder of this Assignment, the terms and conditions of this Article 4 shall control and be binding, but only to the extent of any such conflicts or inconsistencies.

4.2 Revocation of License; Lender's Additional Rights. In furtherance of and not in limitation of any other provisions of this Assignment, including without limitation Section 2.2:

Upon an Event of Default and at any time thereafter during the continuance thereof, subject to applicable laws, and whether before or after the institution of legal proceedings to foreclose the lien of the Security Instrument or before or after sale of the Property or during any period of redemption the Lender, without regard to waste, adequacy of the security or solvency of the Borrower, may declare all indebtedness secured hereby immediately due and payable, may revoke the privilege/license granted Borrower hereunder to collect the Rents of the Property, and may, at its option, without notice in person or by agent, with or without taking possession of or entering the Property, with or without bringing any action or proceeding, or by a receiver duly appointed by a court, give, or require Borrower to give, notice to any or all tenants under any Leases authorizing and directing the tenant to pay the Rents to Lender or such receiver, as the case may be; collect all of the Rents; enforce the payment thereof and exercise all of the rights of the landlord under any Leases and all of the rights of the Lender hereunder; may enter upon, take possession of, manage and operate the Property, or any part thereof; may cancel, enforce or modify the Leases, and fix or modify the Rents, and do any acts which the Lender deems proper to protect the security hereof with or without taking possession of the Property. The entering upon and taking possession of the Property, the collection of such Rents and the application thereof as aforesaid shall not cure or waive any Event of Default or affect any notice of default or invalidate any act done pursuant to such notice nor in any way operate to prevent the Lender from pursuing any other remedy which it may now or hereafter have under the terms of the Security Instrument or the Note or any other security securing the same. The rights hereunder shall in no way be dependent upon and shall apply without regard to whether the Property is in danger of being lost, materially injured or damaged or whether the Property is adequate to discharge the indebtedness secured hereby. The rights contained herein are in addition to and shall be cumulative with the rights given in any separate instrument, assigning any Leases and Rents and shall not amend or modify the rights in any such separate agreement.

4.3 **Receiver.** If an Event of Default shall occur, the Lender shall be entitled as a matter of right without notice and without giving bond and without regard to the solvency or insolvency of the Borrower, or waste of the Property or adequacy of the security of the Property, to apply *ex parte* for the appointment of a receiver who shall have all the rights, powers and remedies as provided by law or as may be contained in any court decree applying such remedy and who shall collect and apply the Rents in such order as Lender may require to all expenses for management, operation and maintenance of the Property and to the costs and expenses of the receivership, including, without limitation, reasonable attorneys' fees and the repayment of the indebtedness secured hereby. A court is authorized to appoint a receiver on request or petition of Lender, and Borrower irrevocably consents to the appointment of a receiver and waives any notice of application therefor. Borrower shall not contest the appointment of a receiver to operate the Property at any time from and after the occurrence of an Event of Default including, without limitation, during the institution of foreclosure proceedings and shall peaceably turn over possession of the Property to such receiver upon request of Lender.

4.4 **Collection of Rents.** Lender may exercise, in Lender's or Borrower's name, all rights and remedies available to Borrower with respect to the collection of Rents. The Lender is also specifically empowered to endorse the name of the Borrower, or any subsequent owner of the Property, on any checks, notes, or other instruments for the payment of money, to deposit the same in bank accounts, to give any and all acquittances or any other instrument in relation thereto in the name of the Borrower, and to institute, prosecute, settle, or compromise any summary or legal proceedings in the name of the Borrower or in the name of the Lender for the recovery of such rents, income or profits, or for the recovery of any damages done to the Property or for the abatement of any nuisance thereon, and to defend any legal proceedings brought against the Borrower arising out of the operation of the Property. The Borrower will reimburse the Lender for any charges, expenses or fees, including attorneys, fees and costs, incurred by the Lender.

4.5 **Application of Rents.** In no event will this Assignment reduce the indebtedness owing under the terms of, and evidenced by, the Note or otherwise secured by the Security Instrument and this Assignment, except only to the extent, if any, that Rents are actually received by Lender and applied as payment of the indebtedness secured hereby. Without impairment of its rights hereunder, Lender may, at its option, at any time and from time to time, release to Borrower Rents so received by Lender or any part thereof.

4.6 **Enforcement.** Lender may enforce this Assignment without first resorting to or exhausting any security or collateral for the indebtedness. As used in this Assignment, the word "lease" shall mean "sublease" if the Security Instrument is on a leasehold.

4.7 **References to Other Documents.** The Note and Security Instrument are hereby made a part hereof as if expressly set forth herein. Wherever the Note or Security Instrument are inconsistent with the terms hereof, the provisions which impose the greater or more stringent requirements, liability and obligations upon the Borrower shall govern and prevail.

ARTICLE 5 MISCELLANEOUS

5.1 **Remedies Cumulative.** It is understood and agreed that the Lender's rights and remedies under this Assignment are not to be deemed to be mutually exclusive and Lender may pursue all such remedies simultaneously.

5.2 **Captions.** The captions set forth at the beginning of the various paragraphs of this Assignment are for convenience only and shall not be used to interpret or construe the provisions of this Assignment.

5.3 Invalidity of Certain Provisions. Every provision of this Assignment is intended to be severable. In the event any term or provision hereof is declared to be illegal, invalid or unenforceable for any reason whatsoever by a court of competent jurisdiction, such illegality, invalidity or unenforceability shall not affect the balance of the terms and provisions hereof, which terms and provisions shall remain binding and enforceable.

5.4 Successors and Assigns. The provisions of this Assignment shall inure to the benefit of Lender and its successors and assigns, and shall be binding upon Borrower, its heirs, personal representatives, successors and assigns. The creation of rights and powers under this Assignment in favor of, or available to, Lender shall, in no way whatsoever, be construed to impose concomitant duties or obligations on Lender in favor of Borrower except as expressly set forth herein.

5.5 Governing Law. This Assignment is executed and delivered as additional security for a loan transaction governed by and negotiated and consummated in the County and State where the Property is located and is to be governed by and construed according to the laws of the State where the Property is located, and if controlling, by the laws of the United States.

5.6 Amendments. This instrument cannot be waived, changed, discharged or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of any waiver, change, discharge or termination is sought.

5.7 Interpretation. In this Assignment the singular shall include the plural and the masculine shall include the feminine and neuter and vice versa, if the context so requires.

5.8 Counterparts. This document may be executed and acknowledged in counterparts, all of which executed and acknowledged counterparts shall together constitute a single document. Signature and acknowledgment pages may be detached from the counterparts and attached to a single copy of this document to physically form one document, which may be recorded.

5.9 Construction of this Assignment. Borrower and Lender agree that this Assignment shall be interpreted in a fair, equal and neutral manner as to each of the parties.

[SIGNATURE PAGE(S) ATTACHED]

IN WITNESS WHEREOF, the Borrower has executed this Assignment as of the day and year first above written.

PALMILLA DEVELOPMENT CO., INC.,
a Nevada corporation

By: _____

Hagai Rapaport, President

STATE OF _____)

COUNTY OF _____)

This instrument was acknowledged before me on _____, 2007, by Hagai Rapaport, the President of Palmilla Development Co., Inc., a Nevada corporation.

Notary Public

My Commission Expires: _____

THIS DOCUMENT WAS DRAFTED BY:

Thomas G. Garry
BEST & FLANAGAN LLP
225 South Sixth Street
Suite 4000
Minneapolis, Minnesota 55402
(612) 339-7121

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of

Los Angeles

} ss.

On

March 29, 2007

Date

before me,

Derek Vapnik Notary Public

Name and Title of Officer (e.g., "Jane Doe, Notary Public")

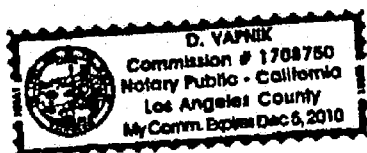
personally appeared

Hagai Rapaport

Name(s) of Signer(s)

☒ personally known to me

☐ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.

Place Notary Seal Above

D. Vapnik

Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____

Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

 RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

Signer Is Representing: _____

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

 RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

Signer Is Representing: _____

EXHIBIT A**LEGAL DESCRIPTION OF PROPERTY**

The Property is located in Clark County, Nevada, and is legally described as follows:

Parcel One (1):

Lot Seven (7) in Building Three (3) of AMENDED PLAT OF PALMILLA TOWNHOMES - PHASE 1, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as amended by Certificate of Amendment recorded March 15, 2005 in Book 20050315 as Document No. 02792, Official Records, and by Certificate of Amendment recorded March 16, 2005 in Book 20050316 as Document No. 04327, Official Records

Parcel Two (2):

Lots Three (3), Seven (7), Eight (8), Ten (10) and Eleven (11) in Building Six (6); Lots One through Twelve (1-12) inclusive, in Building Seven (7); Lots One through Twelve (1-12) inclusive, in Building Eight (8); Lots One through Twelve (1-12) inclusive, in Building Nine (9); Lots One through Twelve (1-12) inclusive, in Building Ten (10); Lots One through Twelve (1-12) inclusive, in Building Eleven (11); Lots One through Twelve (1-12) inclusive, in Building Twelve (12); Lots One through Twelve (1-12) inclusive, in Building Thirteen (13); Lots One through Twelve (1-12), inclusive, in Building Fourteen (14); Lots One through Twelve (1-12), inclusive, in Building Fifteen (15); Lots One through Twelve (1-12) inclusive, in Building Sixteen (16); Lots One through Twelve (1-12) inclusive, in Building Seventeen (17); Lots One through Twelve (1-12), inclusive, in Building Eighteen (18); Lots One (1), Four (4), Nine (9), Ten (10) and Twelve (12) in Building Nineteen (19); and Lots Eleven (11) and Twelve (12) in Building Twenty (20) of PALMILLA TOWNHOMES - PHASE 2 as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada.

Parcel Three (3):

The non-exclusive easements appurtenant to the property described in Parcels One (1) and Two (2) over, across and for the use of the Private Streets, Common Elements and Common Areas as delineated upon the Plat of PALMILLA TOWNHOMES - PHASE 2, as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada, and upon the Plat of AMENDED PLAT OF PALMILLA TOWNHOMES - PHASE 1, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as further set forth in that certain Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Palmilla, recorded December 10, 2003 in Book 20031210 as Document No. 03076, Official Records, and in Annexation Amendments thereto recorded August 21, 2006 in Book 20060821 as Document No. 003685, recorded September 6, 2006 in Book 20060906 as Document No. 00388, and recorded February 7, 2006 in Book 20060207 as Document No. 02991, and recorded February 27, 2007 in Book 20070227 as Document No. 03972, Official Records.

016075/270010/521937_4

CLARIFICATION**EXHIBIT A****LEGAL DESCRIPTION OF PROPERTY**

The Property is located in Clark County, Nevada, and is legally described as follows:

Parcel One (1):

Lot Seven (7) in Building Three (3) of **AMENDED PLAT OF PALMILLA TOWNHOMES - PHASE 1**, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as amended by Certificate of Amendment recorded March 15, 2005 in Book 20050315 as Document No. 02792, Official Records, and by Certificate of Amendment recorded March 16, 2005 in Book 20050316 as Document No. 04327, Official Records

Parcel Two (2):

Lots Three (3), Seven (7), Eight (8), Ten (10) and Eleven (11) in Building Six (6); Lots One through Twelve (1-12) inclusive, in Building Seven (7); Lots One through Twelve (1-12) inclusive, in Building Eight (8); Lots One through Twelve (1-12) inclusive, in Building Nine (9); Lots One through Twelve (1-12) inclusive, in Building Ten (10); Lots One through Twelve (1-12) inclusive, in Building Eleven (11); Lots One through Twelve (1-12) inclusive, in Building Twelve (12); Lots One through Twelve (1-12) inclusive, in Building Thirteen (13); Lots One through Twelve (1-12), inclusive, in Building Fourteen (14); Lots One through Twelve (1-12), inclusive, in Building Fifteen (15); Lots One through Twelve (1-12) inclusive, in Building Sixteen (16); Lots One through Twelve (1-12) inclusive, in Building Seventeen (17); Lots One through Twelve (1-12), inclusive, in Building Eighteen (18); Lots One (1), Four (4), Nine (9), Ten (10) and Twelve (12) in Building Nineteen (19); and Lots Eleven (11) and Twelve (12) in Building Twenty (20) of **PALMILLA TOWNHOMES - PHASE 2** as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada.

Parcel Three (3):

The non-exclusive easements appurtenant to the property described in Parcels One (1) and Two (2) over, across and for the use of the Private Streets, Common Elements and Common Areas as delineated upon the of Plat of **PALMILLA TOWNHOMES - PHASE 2**, as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada, and upon the Plat of **AMENDED PLAT OF PALMILLA TOWNHOMES - PHASE 1**, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as further set forth in that certain Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Palmilla, recorded December 10, 2003 in Book 20031210 as Document No. 03076, Official Records, and in Annexation Amendments thereto recorded August 21, 2006 in Book 20060821 as Document No. 003685, recorded September 6, 2006 in Book 20060906 as Document No. 00388, and recorded February 7, 2006 in Book 20060207 as Document No. 02991, and recorded February 27, 2007 in Book 20070227 as Document No. 03972, Official Records.

Exhibit “5”

000541

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Exhibit “5”

20080103-0000543

Fee: \$15.00

N/C Fee: \$0.00

01/03/2008

09:28:18

120030000903

Requestor:

ANDERSON MCCOY & ORTA

Debbie Conway

BRT

Clark County Recorder Pgs: 3

THIS DOCUMENT PREPARED BY AND
UPON RECORDATION RETURN TO:
VANESSA ORTA, ESQ.
ANDERSON, MCCOY & ORTA, P.C.
100 North Broadway, Suite 2600
Oklahoma City, Oklahoma 73102
Telephone: 888-236-0007
AMO File No. 1146.001
Loan/Property Name: PALMILLA APARTMENTS
Custodian ID No. 1536-0148-000
County of Clark, Nevada

3
414

APN: 124-30-311-031; 124-30-312-014 and 015; 124-30-312-017 and 018; 124-30-312-025 thru 169;
124-30-312-171 and 172; 124-30-312-177; and 124-30-312-18- thru 182

**ASSIGNMENT OF COMMERCIAL DEED OF TRUST, SECURITY AGREEMENT,
FIXTURE FILING FINANCING STATEMENT AND ASSIGNMENT OF LEASES,
RENTS, INCOME AND PROFITS**

AND

ASSIGNMENT OF ASSIGNMENT OF LEASES AND RENTS

KNOW THAT

ARTESIA MORTGAGE CAPITAL CORPORATION, a Delaware corporation,
having an address at 1180 NW Maple Street, Suite 202, Issaquah, Washington 98027,
("Assignor"),

For valuable consideration paid by:

LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE
REGISTERED HOLDERS OF ML-CFC COMMERCIAL MORTGAGE TRUST 2007-7,
COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-7,
having an address of 135 South LaSalle Street, Suite 1640, Chicago, Illinois 60603,
("Assignee"),

the receipt and sufficiency of which is hereby acknowledged, Assignor does hereby grant, bargain, sell, convey, assign, transfer, and set over, without recourse, representation and warranty, except as set forth in that certain related Mortgage Loan Purchase Agreement, all of Assignor's right, title and interest, of any kind whatsoever, including that of mortgagee, beneficiary, payee, assignee or secured party (as the case may be), in and to the following:

Commercial Deed of Trust, Security Agreement, Fixture Filing Financing Statement and Assignment of Leases, Rents, Income and Profits (as same may have been amended) by YORK NEVADA MANAGEMENT, LLC II, a Nevada limited liability company, ("Borrower") to Assignor, and recorded April 13, 2007, as Instrument Number 20070413-0000918, in the Real Estate Records pertaining to land situated in the State of Nevada, County of Clark ("Real Estate Records");

Assignment of Leases, Rents, Income and Profits (as same may have been amended) by Borrower to Assignor and recorded April 13, 2007, as Instrument Number 20070413-0000919, in the Real Estate Records;

TO HAVE AND TO HOLD the same unto the Assignee and to the successors, legal representatives and assigns of the Assignee forever.

IN WITNESS WHEREOF, the Assignor has caused these presents to be effective as of June 13, 2007.

(The remainder of this page has been intentionally left blank.)

~~RECORDED~~

TOGETHER WITH THE NOTE OR NOTES THEREIN DESCRIBED OR REFERRED TO, THE MONEY DUE AND TO BECOME DUE THEREON WITH INTEREST, AND ALL RIGHTS ACCRUED OR TO ACCRUE UNDER SAID COMMERCIAL DEED OF TRUST, SECURITY AGREEMENT, FIXTURE FILING FINANCING STATEMENT AND ASSIGNMENT OF LEASES, RENTS, INCOME AND PROFITS.

DATED: April 17, 2007

WITNESS:

Cynthia Root
PRINT NAME: Cynthia Root

Judy Hoffine
PRINT NAME: JUDY HOFFINE

ARTESIA MORTGAGE CAPITAL CORPORATION,
a Delaware corporation

BY: Diana Kelsey Kutas

NAME: Diana Kelsey Kutas

TITLE: Managing Director

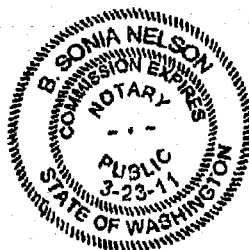
STATE OF WASHINGTON

COUNTY OF KING

On this 17th day of April, 2007, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Diana Kelsey Kutas, to me known to be the Managing Director of ARTESIA MORTGAGE CAPITAL CORPORATION, a Delaware corporation, the corporation that executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act of and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that she is authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and seal the day and year first above written.

B. Sonia Nelson
Notary Public residing at Caribou, WA
Print Name: B. Sonia Nelson
My Commission Expires: 3-23-11



016075/270034/544748_1

DO NOT WRITE BELOW THIS LINE.

Page 2

Exhibit “6”

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Exhibit “6”

LaSalle Global Trust Services

June 30, 2008

NOTICE OF RESIGNATION OF TRUSTEE

To: The parties listed on Schedule A


RE: ML-CFC Commercial Mortgage Trust 2007-7,
Commercial Mortgage Pass-Through Certificates Series 2007-7

Reference is hereby made to the Pooling and Servicing Agreement, dated as of June 1, 2007 (the "Pooling Agreement"), by and among Merrill Lynch Mortgage Investors, Inc., as Depositor, Midland Loan Services, Inc., as Master Servicer No.1, Wachovia Bank, National Association, as Master Servicer No.2, Midland Loan Services, Inc., as Special Servicer, and LaSalle, as Trustee and as Custodian. Capitalized terms used but not defined herein shall have the respective meanings assigned thereto in the Pooling Agreement.

In connection with the pending acquisition by Bank of America Corporation of Countrywide Financial Corporation, scheduled to close July 1, 2008, and pursuant to Section 8.07(a) of the Pooling Agreement, LaSalle hereby resigns as Trustee, Certificate Registrar, Authenticating Agent and REMIC Administrator under the Pooling Agreement, effective as of the date hereof.

This notice shall also satisfy the notice requirements with respect to resignation of the Trustee set forth in Section 11.11 of the Pooling Agreement.

LASALLE BANK NATIONAL ASSOCIATION

By: 
Name: Peter Sablich
Title: Assistant Vice President

CMBS Services, IL4-135-16-25
135 S. LaSalle Street, Chicago, IL 60603

SCHEDULE A**LaSalle Global Trust Services**

| | |
|--|--|
| Merrill Lynch Mortgage Investors, Inc. c/o Global Commercial Real Estate 4 World Financial Center, 16 th Floor 250 Vesey Street New York, New York 10080 Attn: David M. Rodgers | Merrill Lynch Mortgage Investors, Inc. c/o Global Commercial Real Estate 4 World Financial Center, 16 th Floor 250 Vesey Street New York, New York 10080 Attn: Director of CMBS Securitizations |
| Merrill Lynch Mortgage Investors, Inc. 4 World Financial Center, 12 th Floor 250 Vesey Street New York, New York 10080 Attn: General Counsel for Global Commercial Real Estate in the Office of the General Counsel | Wachovia Bank, National Association 8739 Research Drive, URP4 Charlotte, North Carolina 28262-1075 Re: ML-CFC Commercial Mortgage Trust 2007-7, Commercial Mortgage Pass-Through Certificates, Series 2007-7 Facsimile: 704.715.0036 |
| Midland Loan Services, Inc. 10851 Mastin, Building 82, 7 th Floor Overland Park, Kansas 66210 Attn: President Facsimile: 913.253.9001 | Dechert LLP 30 Rockefeller Plaza New York, New York 10112 Attn: Stephanie M. Tita Facsimile: 212.698.3599 |
| Moody's Investors Services, Inc. 7 World Trade Center 250 Greenwich Street New York, New York 10007 Attn: Commercial Mortgage Surveillance | Standard & Poor's Ratings Services, a division of The McGraw Hill Companies, Inc. 55 Water Street New York, New York 10041 Attn: CMBS Surveillance Group |
| Certificateholders | Controlling Class Representative |
| Non-Trust Noteholders | |

CMBS Services, IL4-135-15-25
135 S. LaSalle Street, Chicago, IL 60603

890



Corporate Trust Services
 MAC N2702-011
 9062 Old Annapolis Road
 Columbia, MD 21045
 410 884-2000
 410 715-2380 Fax

Wells Fargo Bank, N.A.

NOTICE OF APPOINTMENT OF SUCCESSOR TRUSTEE

To: The parties listed on Schedule A

RE: ML-CFC Commercial Mortgage Trust 2007-7,
 Commercial Mortgage Pass-Through Certificates Series 2007-7

Reference is hereby made to the Pooling and Servicing Agreement, dated as of June 1, 2007 (the "Pooling Agreement"), by and among Merrill Lynch Mortgage Investors, Inc., as depositor, Midland Loan Services, Inc., as Master Servicer No.1 and as Special Servicer, Wachovia Bank, National Association, as Master Servicer No.2, and LaSalle, as Trustee and Custodian. Capitalized terms used but not defined herein have the respective meanings assigned thereto in the Pooling Agreement.

Pursuant to Section 8.08(c) of the Pooling Agreement, notice is hereby provided that LaSalle has resigned as Trustee and Wells Fargo Bank, N.A. ("Wells Fargo") has been appointed as successor Trustee pursuant to Section 8.07 of the Pooling Agreement. LaSalle, as agent on behalf of Wells Fargo, as successor Trustee, will continue to make available each month the Distribution Date Statement on its website, located at www.etrustee.net. The address of the corporate trust office for Wells Fargo is:

Wells Fargo Bank, N.A.
 9062 Old Annapolis Road
 Columbia, Maryland 21045
 Attention: Corporate Trust Services (CMBS)—ML-CFC 2007-7
 Tel: (410) 884-2000
 Fax: (410) 715-2380

Pursuant to Sections 5.02(a), 8.12 and 8.14 of the Pooling Agreement notice is also hereby provided that Wells Fargo has appointed LaSalle to act as Certificate Registrar, Authenticating Agent and REMIC Administrator, respectively, in accordance with the terms of the Pooling Agreement.

WELLS FARGO BANK, N.A.,
 as Trustee

By: 

Name: Judith J. Rishel

Title: Vice President

SCHEDULE A

| | |
|--|---|
| Merrill Lynch Mortgage Investors, Inc. c/o Global Commercial Real Estate 4 World Financial Center, 16 th Floor 250 Vesey Street New York, New York 10080 Attn: David M. Rodgers | Merrill Lynch Mortgage Investors, Inc. c/o Global Commercial Real Estate 4 World Financial Center, 16 th Floor 250 Vesey Street New York, New York 10080 Attn: Director of CMBS Securitizations |
| Merrill Lynch Mortgage Investors, Inc. 4 World Financial Center, 12 th Floor 250 Vesey Street New York, New York 10080 Attn: General Counsel for Global Commercial Real Estate in the Office of the General Counsel | Midland Loan Services, Inc. 10851 Mastin, Building 82, 7 th Floor Overland Park, Kansas 66210 Attn: President Facsimile: 913.253.9001 |
| Wachovia Bank, National Association 8739 Research Drive, URP4 Charlotte, North Carolina 28262-1075 Re: ML-CFC Commercial Mortgage Trust 2007-7, Commercial Mortgage Pass-Through Certificates, Series 2007-7 Facsimile: 704.715.0036 | Dechert LLP 30 Rockefeller Plaza New York, New York 10112 Attn: Stephanie M. Tita Facsimile: 212.698.3599 |
| LaSalle Bank National Association 135 South LaSalle Street, Suite 1625 Mailcode: IL4-135-16-25 Chicago, Illinois 60603 | Non-Trust Noteholders |
| Certificateholders | |

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Exhibit “7”

Exhibit “7”



Corporate Trust Services
MAC N2702-011
9062 Old Annapolis Road
Columbia, MD 21045
410 884-2000
410 715-2380 Fax

Wells Fargo Bank, N.A.

December 30, 2008

NOTICE OF RESIGNATION OF TRUSTEE

To: The parties listed on Schedule A

RE: ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through
Certificates Series 2007-7


Reference is hereby made to the Pooling and Servicing Agreement, dated as of June 1, 2007 (the "Pooling Agreement"), by and among Merrill Lynch Mortgage Investors, Inc., as Depositor, Midland Loan Services, Inc., as Master Servicer No.1, Wachovia Bank, National Association, as Master Servicer No.2, Midland Loan Services, Inc., as Special Servicer, Wells Fargo Bank, N.A. ("Wells Fargo"), as Trustee and Bank of America, N.A., successor by merger to LaSalle Bank National Association, as Custodian. Capitalized terms used but not defined herein shall have the respective meanings assigned thereto in the Pooling Agreement.

In connection with the pending acquisition of Wachovia Corporation, the parent company of Wachovia Bank, National Association and the indirect parent corporation of Wachovia Commercial Mortgage Securities, Inc., by Wells Fargo & Company, the parent corporation of Wells Fargo Bank, N.A. which is scheduled to close at 11:59 p.m. on December 31, 2008 (the "Acquisition Closing Date"), under applicable law, Wells Fargo is required to resign as trustee from various securitization transactions, including the above-referenced transaction, by the Acquisition Closing Date. Pursuant to Section 8.07(a) of the Pooling Agreement, Wells Fargo hereby resigns as Trustee, Certificate Registrar, Authenticating Agent, and REMIC Administrator under the Pooling Agreement, effective as of December 31, 2008.

For purposes of clarification, the resignation of Wells Fargo, as Trustee, Certificate Registrar, Authenticating Agent, and REMIC Administrator under the Pooling Agreement shall be deemed to occur at the last moment of time on December 31, 2008. U.S. Bank National Association will be appointed as successor trustee and such appointment shall be deemed to occur at the first moment of time on January 1, 2009.

This notice shall also satisfy the notice requirements with respect to resignation of the Trustee set forth in Section 11.11 of the Pooling Agreement.

WELLS FARGO BANK, N.A.

By: 
Name: Elisabeth A. Brewster
Title: Vice President

SCHEDULE A

| | |
|--|--|
| Merrill Lynch Mortgage Investors, Inc. c/o Global Commercial Real Estate 4 World Financial Center, 16 th Floor 250 Vesey Street New York, New York 10080 Attn: David M. Rodgers | Merrill Lynch Mortgage Investors, Inc. c/o Global Commercial Real Estate 4 World Financial Center, 16 th Floor 250 Vesey Street New York, New York 10080 Attn: Director of CMBS Securitizations |
| Merrill Lynch Mortgage Investors, Inc. 4 World Financial Center, 12 th Floor 250 Vesey Street New York, New York 10080 Attn: General Counsel for Global Commercial Real Estate in the Office of the General Counsel | Wachovia Bank, National Association NC 1075, 9th Floor 201 South College Street Charlotte, NC 28244-1075 Re: ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through Certificates, Series 2007-7 Facsimile: 704.715.0036 |
| Midland Loan Services, Inc. 10851 Mastin, Building 82, 7 th Floor Overland Park, Kansas 66210 Attn: President Facsimile: 913.253.9001 | Dechert LLP 30 Rockefeller Plaza New York, New York 10112 Attn: Stephanie M. Tita Facsimile: 212.698.3599 |
| Moody's Investors Services, Inc. 7 World Trade Center 250 Greenwich Street New York, New York 10007 Attn: Commercial Mortgage Surveillance | Standard & Poor's Ratings Services, a division of The McGraw Hill Companies, Inc. 55 Water Street New York, New York 10041 Attn: CMBS Surveillance Group |
| Certificateholders | Controlling Class Representative |
| Non-Trust Noteholders | |

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usbank.com

Corporate Trust Services
Rookery Building
209 South LaSalle Street, Suite 300
Chicago, IL 60604

January 2, 2009

NOTICE OF APPOINTMENT OF SUCCESSOR TRUSTEE

To: The parties listed on Schedule A

RE: ML-CFC Commercial Mortgage Trust 2007-7
Commercial Mortgage Pass-Through Certificates, Series 2007-7

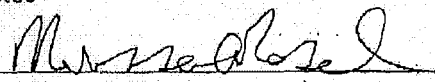
Reference is hereby made to the Pooling and Servicing Agreement, dated as of June 1, 2007 (the "Pooling Agreement"), by and among Merrill Lynch Mortgage Investors, Inc., as depositor, Midland Loan Services, Inc., as Master Servicer No.1 and as Special Servicer, Wachovia Bank, National Association, as Master Servicer No.2, Wells Fargo Bank, N.A. ("Wells Fargo"), as Trustee and Bank of America, N.A., successor by merger to LaSalle Bank National Association, as Custodian. Capitalized terms used but not defined herein have the respective meanings assigned thereto in the Pooling Agreement.

Pursuant to Section 8.08(c) of the Pooling Agreement, notice is hereby provided that Wells Fargo has resigned as Trustee and U.S. Bank National Association ("U.S. Bank") has been appointed as successor Trustee pursuant to Section 8.07 of the Pooling Agreement. Bank of America, N.A., as agent on behalf of U.S. Bank, as successor Trustee, will continue to make available each month the Distribution Date Statement on its website, located at www.etrustee.net. The address of the corporate trust office for U.S. Bank is:

U.S. Bank National Association
209 South LaSalle Street Suite 300
Chicago, Illinois 60604
Tel: 312-325-8904
Fax: 312-325-8905
Attention: ML-CFC 2007-7

Pursuant to Sections 5.02(a), 8.12 and 8.14 of the Pooling Agreement notice is also hereby provided that U.S. Bank has appointed Bank of America, N.A. to act as Certificate Registrar, Authenticating Agent and REMIC Administrator, respectively, in accordance with the terms of the Pooling Agreement.

U.S. BANK NATIONAL ASSOCIATION
as Trustee

By: 
Name: Melissa A. Rosal
Title: Vice President



SCHEDULE A

| | |
|---|---|
| Merrill Lynch Mortgage Investors, Inc. c/o Global Commercial Real Estate 4 World Financial Center, 16 th Floor 250 Vesey Street New York, New York 10080 Attn: David M. Rodgers | Merrill Lynch Mortgage Investors, Inc. c/o Global Commercial Real Estate 4 World Financial Center, 16 th Floor 250 Vesey Street New York, New York 10080 Attn: Director of CMBS Securitizations |
| Merrill Lynch Mortgage Investors, Inc. 4 World Financial Center, 12 th Floor 250 Vesey Street New York, New York 10080 Attn: General Counsel for Global Commercial Real Estate in the Office of the General Counsel | Midland Loan Services, Inc. 10851 Mastin, Building 82, 7 th Floor Overland Park, Kansas 66210 Attn: President Facsimile: 913.253.9001 |
| Wachovia Bank, National Association NC 1075, 9th Floor 201 South College Street Charlotte, NC 28244-1075 Re: ML-CFC Commercial Mortgage Trust 2007-7, Commercial Mortgage Pass-Through Certificates, Series 2007-7 Facsimile: 704.715.0036 | Dechert LLP 30 Rockefeller Plaza New York, New York 10112 Attn: Stephanie M. Tita Facsimile: 212.698.3599 |
| Wells Fargo Bank, N.A. 9062 Old Annapolis Road Columbia, Maryland 21045-1951 | Bank of America, N.A. 135 South LaSalle Street Mailcode: IL4-135-16-25 Chicago, Illinois 60603 |
| Certificateholders | Non-Trust Noteholders |

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Exhibit “8”

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Exhibit “8”

EXHIBIT A
LEGAL DESCRIPTION OF PROPERTY

The Property is located in Clark County, Nevada, and is legally described as follows:

Parcel One (1):

Lot Seven (7) in Building Three (3) of **AMENDED PLAT OF PALMILLA TOWNHOMES - PHASE 1**, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as amended by Certificate of Amendment recorded March 15, 2005 in Book 20050315 as Document No. 02792, Official Records, and by Certificate of Amendment recorded March 16, 2005 in Book 20050316 as Document No. 04327, Official Records

Parcel Two (2):

Lots Three (3), Seven (7), Eight (8), Ten (10) and Eleven (11) in Building Six (6); Lots One through Twelve (1-12) inclusive, in Building Seven (7); Lots One through Twelve (1-12) inclusive, in Building Eight (8); Lots One through Twelve (1-12) inclusive, in Building Nine (9); Lots One through Twelve (1-12) inclusive, in Building Ten (10); Lots One through Twelve (1-12) inclusive, in Building Eleven (11); Lots One through Twelve (1-12) inclusive, in Building Twelve (12); Lots One through Twelve (1-12) inclusive, in Building Thirteen (13); Lots One through Twelve (1-12), inclusive, in Building Fourteen (14); Lots One through Twelve (1-12), inclusive, in Building Fifteen (15); Lots One through Twelve (1-12) inclusive, in Building Sixteen (16); Lots One through Twelve (1-12) inclusive, in Building Seventeen (17); Lots One through Twelve (1-12), inclusive, in Building Eighteen (18); Lots One (1), Four (4), Nine (9), Ten (10) and Twelve (12) in Building Nineteen (19); and Lots Eleven (11) and Twelve (12) in Building Twenty (20) of **PALMILLA TOWNHOMES - PHASE 2** as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada.

Parcel Three (3):

The non-exclusive easements appurtenant to the property described in Parcels One (1) and Two (2) over, across and for the use of the Private Streets, Common Elements and Common Areas as delineated upon the of Plat of **PALMILLA TOWNHOMES - PHASE 2**, as shown by map thereof on file in Book 115 of Plats, Page 49, in the Office of the County Recorder of Clark County, Nevada, and upon the Plat of **AMENDED PLAT OF PALMILLA TOWNHOMES - PHASE 1**, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as further set forth in that certain Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Palmilla, recorded December 10, 2003 in Book 20031210 as Document No. 03076, Official Records, and in Annexation Amendments thereto recorded August 21, 2006 in Book 20060821 as Document No. 003685, recorded September 6, 2006 in Book 20060906 as Document No. 00388, and recorded February 7, 2006 in Book 20060207 as Document No. 02991, and recorded February 27, 2007 in Book 20070227 as Document No. 03972, Official Records.

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CLARIFICATION

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

The Property is located in Clark County, Nevada, and is legally described as follows:

Parcel One (1):

Lot Seven (7) in Building Three (3) of **AMENDED PLAT OF PALMILLA TOWNHOMES - PHASE 1**, as shown by map thereof on file in Book 118 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada, as amended by Certificate of Amendment recorded March 15, 2005 in Book 20050315 as Document No. 02792, Official Records, and by Certificate of Amendment recorded March 16, 2005 in Book 20050316 as Document No. 04327, Official Records

Parcel Two (2):

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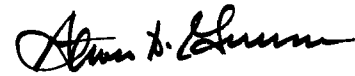
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BRENT LARSEN, ESQ.
2 Nevada Bar No. 001184
DEANER, MALAN, LARSEN & CIULLA
3 720 S. Fourth Street, #300
Las Vegas, Nevada 89101
4 (702) 382-6911
Attorney for Defendant
5

6 DISTRICT COURT
7 CLARK COUNTY, NEVADA

8 U.S. Bank National Association as Trustee)
9 for The Registered Holders of ML-CFC)
Commercial Mortgage Trust 2007-7)
10 Commercial Mortgage Pass-Through)
Certificates Series 2007-7, by and through)
11 Midland Loan Services, Inc., as its Special)
Servicer,)

Case No.: 09-A-595321-C

Dept. No.: XX

12 Plaintiff,

ORAL ARGUMENT REQUESTED

13 v.

14 Palmilla Development Co., Inc., a Nevada)
15 corporation; Hagai Rapaport, an)
individual; Does I to X; and Roe)
16 Corporations X to XX,)

17 Defendants.

18 **MOTION TO DISMISS, OR IN THE ALTERNATIVE,**
19 **MOTION TO REQUIRE A SUBSTANTIAL BOND FROM PLAINTIFF**
20 **AND TO STAY THE PROCEEDINGS UNTIL THE BOND IS POSTED**

21 COME NOW the Defendants, HAGAI RAPAPORT and PALMILLA
22 DEVELOPMENT CO., INC., by and through their attorney, BRENT LARSEN, ESQ., of the
23 law firm of DEANER, MALAN, LARSEN & CIULLA, and hereby move to dismiss this
24 case against Hagai Rapaport based upon the "twice dismissed" rule set forth in NRCP
25 41(a)(1); and in the alternative as to both Defendants, to require the Plaintiff to pay the
26 Defendants' costs, including attorneys fees that were incurred as a result of two previously
27 dismissed actions filed by the Plaintiff, and to stay this instant proceeding until an
28 appropriate amount of a necessary bond and attorneys fees is determined by this Court and is

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DEANER, MALAN, LARSEN & CIULLA
720 South Fourth Street, Suite 300
Las Vegas, Nevada 89101
Telephone (702) 382-6911 • Facsimile (702) 366-0854

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1 tendered by the Plaintiff. The Defendant Hagai Rapaport has also filed a Demand for
 2 Security of Cost Bond from the non-resident Plaintiff, and Defendants request a bond in an
 3 amount much larger than the \$500 that the Plaintiff has posted, because of the substantial
 4 costs that will certainly be required in defending this case.

5 This Motion is made and based upon all the pleadings on file herein, the Points and
 6 Authorities submitted herewith, and any other such argument this Court may consider.

7 DATED this 13 day of June, 2011.

8 Respectfully submitted,

9 DEANER, MALAN, LARSEN & CIULLA

10 

11 BRENT LARSEN, ESQ.
 12 Nevada Bar No. 001184
 13 720 South Fourth St., #300
 14 Las Vegas, Nevada 89101
 15 Attorney for Defendants

16 **NOTICE OF MOTION**

17 PLEASE TAKE NOTICE that the undersigned will bring the foregoing MOTION TO
 18 DISMISS, OR IN THE ALTERNATIVE, MOTION TO REQUIRE A SUBSTANTIAL
 19 BOND FROM PLAINTIFF AND TO STAY THE PROCEEDINGS UNTIL THE BOND IS
 20 POSTED on for hearing [ORAL ARGUMENT REQUESTED] in Department 20 of the
 21 above-entitled Court on the 20 day of ^{July} ~~June~~, 2011, at 9:00 AM.m., or as soon
 22 thereafter as counsel may be heard.

23 DATED this 13 day of June, 2011.

24 Respectfully submitted,

25 DEANER, MALAN, LARSEN & CIULLA

26 

27 BRENT LARSEN, ESQ.
 28 Nevada Bar No. 001184
 720 South Fourth St., #300
 Las Vegas, Nevada 89101
 Attorney for Defendants

POINTS AND AUTHORITIES

I. The instant lawsuit should be dismissed against Hagai Rapaport because this action is the third time that the Plaintiff has filed a lawsuit against him, and all three lawsuits are identical in seeking a recovery against Mr. Rapaport based on his personal guarantee of a secured real estate loan.

A. The Facts.

When the Plaintiff filed a Second Amended Complaint in this action on April 11, 2011¹, and later served Hagai Rapaport with that Second Amended Complaint, that event became the third instance where Mr. Rapaport was sued by the Plaintiffs² on claims arising from his personal guarantee of a real estate loan. Both Defendants in this instant action (Palmilla and Mr. Rapaport) were first sued on January 30, 2009 by LaSalle Bank, as Trustee of the Plaintiffs in Case No. A581425. *See* first Complaint attached hereto as **Exhibit A**. The claims against Hagai Rapaport were based on his signing a personal guarantee. *See* **Exhibit A**. Thereafter, that first case was voluntarily dismissed on July 10, 2009 as shown by **Exhibit B** attached hereto.

On March 16, 2009, LaSalle Bank, as Trustee of the Plaintiffs, filed a second lawsuit (Case No. A585424) against Hagai Rapaport where he was named as the sole Defendant. *See* second Complaint attached hereto as **Exhibit C**. That second lawsuit was also based on the same personal guarantee that was the subject of the first lawsuit. The second Complaint was dismissed by stipulation between counsel, as shown by the Stipulation for Dismissal attached hereto as **Exhibit D** and filed on July 14, 2009. While the second dismissal states

¹ The Second Amended Complaint was not filed by obtaining "leave of court" or "written consent" as required by NRCp 15(a).

² In all three lawsuits described in this brief there is a continuity of Plaintiffs, who are named as "Midland Loan Services" and "Registered Holders of ML-CFC Commercial Trust" through a bank Trustee, such as LaSalle Bank and U.S. Bank. According to the Plaintiff's Second Amended Complaint, U.S. Bank succeeded to the position of the "Trustee's" interest in the loan documents that are subject of such Complaint. Thus, LaSalle Bank who was also named as a Plaintiff in the first two actions described in this Motion, is merely a predecessor-in-interest or assignor to US Bank. LaSalle Bank also appeared as the Plaintiff in this third lawsuit when the Plaintiff filed their First Amended Complaint on November 24, 2010. Thus, when this Motion uses the term "Plaintiffs," such term refers to both LaSalle Bank and US Bank as "Trustees" since they are alleged to be "Trustees" of the aforementioned Plaintiffs, and they are in privity with each other and they have both appeared in this case as Plaintiffs in this action.

1 that such dismissal is without prejudice, that Stipulation does not address the dismissal of the
 2 first lawsuit, or the effect or consequences that the first dismissal presents with regard to the
 3 “twice dismissed” rule as described below in the legal argument of this brief. The
 4 Defendants contend in the legal argument below, that the effect of the dismissal of the first
 5 action, combined with the dismissal of the second action, clearly brings into play the
 6 consequences of the “twice dismissed” rule when an identical third lawsuit is filed, as set
 7 forth in NRCP 41(a)(1).

8 After the two aforementioned dismissals, US Bank as the successor³ to LaSalle Bank,
 9 filed a third lawsuit, which is the instant case. In this third lawsuit initially filed on July 16,
 10 2009, US Bank sought the sole remedy of the appointment of a receiver over the real
 11 property assets (townhomes) owned by Palmilla. Thus, Palmilla was the only named
 12 Defendant when this third lawsuit was initially filed.

13 Hagai Rapaport was not named as a defendant in this third lawsuit until the Plaintiff
 14 filed its First Amended Complaint on November 24, 2010, which was more than a year after
 15 this instant third action was filed. Thereafter the Plaintiff filed, without leave of Court, a
 16 Second Amended Complaint on April 11, 2011. Again, the First and Second Amended
 17 Complaints in this third lawsuit alleges the identical claims of personal liability against Mr.
 18 Rapaport that were previously asserted in the first two actions (Case Nos. A581245, **Exh. A**
 19 and A585424, **Exh. C**).

20 **B. Legal Argument in Favor of Dismissing This Case Against Mr. Rapaport.**

21 This third lawsuit against Hagai Rapaport must be dismissed under the “twice
 22 dismissed” rule codified in NRCP 41(a)(1) and as recognized by the Nevada Supreme Court
 23 in the case of *Brown v. F.S.L.I.C.*, 105 Nev. 409, 777 P.2d 661 (1989). The “twice
 24

25 ³ The adjudication of this Motion requires the application of the fundamental rule that
 26 an assignee of a contract acquires no greater rights than was owned by the assignor. *Arid*
 27 *Insurance Agency v. Zions Natl. Bank*, 612 P.2d 341 (Ut. 1980), *HD Supply Facility*
 28 *Maintenance Ltd. v. Bymoen*, 126 Nev. 13, 210 P.3d 183 (2009), *Kumberg v. Kumberg*, 659
 P.2d 823 (Kan. 1983). Thus, in the instant case, US Bank is bound by the actions of its
 predecessor, LaSalle Bank, in voluntarily dismissing the two prior actions filed in this case in
 just the same manner that LaSalle Bank would be if it was still the designated “Trustee” for
 the Plaintiffs in this action.

dismissed” rule arises from the language expressly contained in NRCP 41(a)(1), which specifically states that whenever a plaintiff voluntarily dismisses an action more than once, then the combination of such dismissals results in the notice of dismissal operating as an adjudication on the merits of the case. Thus, NRCP 41(a)(1) provides as follows:

Rule 41. Dismissal of actions.

(a) *Voluntary dismissal: Effect thereof.*

(1) *By plaintiff; by stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute, an action may be dismissed by the plaintiff upon repayment of defendants’ filing fees, without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. [Emphasis added.]

In making this argument, the Defendants recognize that the stipulation for dismissal of the second lawsuit states that it is without prejudice, and such a stipulation may confuse or muddy the consequences of the “twice dismissed” rule as set forth in NRCP 41(a)(1). However, the Notice of Dismissal of the first action (**Exh. B**) became an adjudication on the merits, regardless of anything stated in the stipulation for the dismissal of the second case. That is because the Notice of Dismissal of the first case falls within the language of the rule which states that when a plaintiff has “once dismissed in any court of the United States . . . an action based on or including the same claim,” that dismissal [the first] becomes an adjudication on the merits when the same case is dismissed a second time.

The Rule’s use of the words “except that” clearly state that parties to litigation can voluntarily provide in a stipulation that a dismissal is without prejudice. However, when that dismissal becomes a second dismissal following a previous case that has been “once dismissed in a any court of the United States . . . based on or including the same claim,” the plain language of the rule itself would result in the first dismissal becoming “an adjudication on the merits.” Thus, the clear language in NRCP 41(a)(1) states that the parties have a right to voluntarily enter into a stipulation to dismiss without prejudice. However, when a plaintiff

1 exercises that right, and under circumstances where another case has also previously been
2 dismissed in a voluntary manner as provided in NRCP 41(a), then even a stipulation to
3 dismiss a second case without prejudice, still invokes the consequences of the rule when a
4 plaintiff has exercised a voluntary right of dismissal of two identical cases.

5 Thus, while the Plaintiffs in this case had the right to dismiss their prior two identical
6 Complaints against Mr. Rapaport, that does not mean that both dismissals can be without
7 prejudice under the “twice dismissed” rule. Accordingly, this Court should rule with regard
8 to this third lawsuit, that the combination of both prior dismissals “operates as an
9 adjudication upon the merits” where this third lawsuit against Mr. Rapaport is identical to the
10 claims that were made against him in the two previous lawsuits.

11 In addressing the “twice dismissed” rule in *Brown v. F.S.L.I.C.*, *supra*, the Nevada
12 Supreme Court held that the rule did not factually apply in the *Brown* case because the record
13 did not show that the defendants had been “twice dismissed” from previous “actions that
14 were based upon or including the same claims.” 105 Nev. at 412. In the *Brown* case, the
15 Court recognized that there were two prior lawsuits that were dismissed and involved the
16 same claims, but those lawsuits did not name the same parties as Defendants. The first
17 action was filed in Missouri while the second action was filed in California. Then a third
18 action was filed in Nevada after the dismissal of the Missouri and California actions. In
19 *Brown* the Court found that the defendants in the third Nevada action were previously
20 dismissed only once, which was in the California action. The Court further noted that the
21 defendants in the Nevada action were not named as defendants in the first filed Missouri
22 action. Thus, the Court held that the “twice dismissed” rule did not apply to the facts of that
23 case. Nonetheless the Court specifically recognized the applicability of the “twice
24 dismissed” rule in the appropriate set of facts by stating as follows:

25 . . . Appellants assert that the action below was barred by the two
26 dismissal rule embodied in NRCP 41(a)(1). We do not agree.
27 The record does not support appellants’ contention that they have
28 been twice dismissed from actions based upon or including the
same claim.

. . . The record reveals that appellants have been dismissed but

1 once, in the California action wherein appellants were named
2 defendants. This single dismissal does not support adequately
3 appellants' motion to dismiss pursuant to the two dismissal rule
embodied in NRCP 41(a)(1), and, therefore, the trial judge
properly denied appellants' motion to dismiss. 105 Nev. at 412.

4 Thus, the facts which precluded a dismissal in the *Brown* case are easily
5 distinguishable from the facts in the instant case because Mr. Rapaport was named as a
6 Defendant in both of the two prior Complaints filed against him. Those Complaints, attached
7 hereto as **Exhibits A** and **C**, along with the Second Amended Complaint in this action,
8 clearly show that Hagai Rapaport has now been personally sued in three identical lawsuits.
9 Therefore, because the instant lawsuit represents the third time that Mr. Rapaport has been
10 sued on a personal guarantee, he should be dismissed from this action based on the "twice
11 dismissed" rule, as articulated by the Nevada Supreme Court in the *Brown* case, *supra* and
12 the plain language set forth in NRCP 41(a)(1).

13 **II. If for any reason this Court declines to dismiss Mr. Rapaport from this**
14 **action, then both Defendants are nonetheless entitled to the protections**
15 **provided for in NRCP 41(d), and NRS 18.130, which involves payment of**
16 **costs, posting a bond, and staying the proceedings until a bond is tendered.**

17 The instant action is the second time that the Defendant Palmilla has been sued under
18 the loan documents that are the subject of the guarantee. Thus, NRCP 41(d) governs actions
19 when a second lawsuit is filed against the same defendant on the same claims. That
20 provision protects such Defendants by providing for such court orders as the Court "... may
21 deem proper . . .," including payment of costs from the prior action, as well as providing for
22 a stay until the costs are paid. While NRCP 41(1)(a) applies to a lawsuit following a "twice
23 dismissed" action, the protections contained in NRCP 41(d) clearly applies to a new lawsuit
24 following a "once dismissed" action. Thus, NRCP 41(d) would most certainly have even
greater application in a third lawsuit following a "twice dismissed" action.

25 The Affidavit of Brent Larsen attached hereto as **Exhibit E** explains that when he
26 represented Mr. Rapaport in the aforementioned second dismissed action, which also
27 involved legal services connected with a bankruptcy filing in California on a companion
28 case, that Mr. Rapaport incurred attorneys fees in excess of \$20,000 as a result of the second

1 dismissed action and the related bankruptcy action in California. Given the dictates of NRC
2 41(d), Defendants respectfully submit that if this Court is not prepared to immediately
3 dismiss this action under the aforementioned "twice dismissed" rule, then the Plaintiff should
4 be required to pay the Defendants \$20,000 in attorneys fees from the second dismissed
5 action, and/or post a bond for the anticipated amount that the instant action will cost the
6 Defendants in defending this third lawsuit.

7 On May 20, 2011, the Defendants filed a Demand for Security of Costs in this case
8 because the Plaintiff is a non-resident or a foreign corporation. In response to that demand,
9 the Plaintiff filed a \$500 cost bond. The Defendants have the right to demand such a bond as
10 "security for costs" under NRS 18.130. While subsection 1 of that statute initially limits the
11 bond requirement to \$500, subsection 2 of that statute allows "... an additional undertaking
12 may be ordered by the court or judge upon proof that the original undertaking is insufficient
13 security" Given the tortured history of the Plaintiff's repeated actions in making "on
14 again/off again" decisions about when they choose to sue Hagai Rapaport, the Defendants
15 submit that a very substantial undertaking should be required of the Plaintiff before
16 proceeding any further in this case. In Mr. Larsen's Affidavit, he estimates that the costs for
17 defending this third lawsuit would most likely exceed \$50,000.

18 The instant case involves those unique situations where affirmative defenses really
19 mean something. For instance, the Plaintiff's standing in this case, and the alleged owner of
20 the subject promissory note will be challenged. The Defendants will also present a
21 significant statute of limitations defense. The Fair Market Value defense on claims against
22 guarantors will also be a big issue in this case. The Defendants may also present a defense as
23 to whether the Plaintiff timely served the Defendants within the required 120-day period
24 required by NRC 4.

25 CONCLUSION

26 For the foregoing reasons, this third action should be dismissed against Hagai
27 Rapaport, where the Plaintiffs have sued and then dismissed Hagai Rapaport on two separate
28 occasions. The combination of the two prior dismissals should clearly result in an

1 adjudicated dismissal of this action against Hagai Rapaport, based upon the "twice
2 dismissed" rule as expressly set forth in NRCP 4(a)(1) and specifically recognized in the
3 *Brown v. F.S.L.I.C.* case.

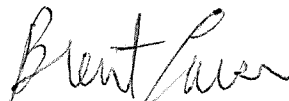
4 If this Court is not persuaded by such dismissal argument, then the Plaintiff should
5 nonetheless be required to pay for the Defendants' costs and attorney fees from the prior
6 dismissed actions, and to file a surety bond for the Defendants' anticipated cost of litigating
7 this third action, which will involve sophisticated briefing on the aforementioned issues.

8 Moreover, these proceedings must be stayed under NRCP 41(d) and NRS 18.130,
9 until the Plaintiff has complied with this Court's bond requirements.

10 DATED this 13 day of June, 2011.

11 Respectfully submitted,

12 DEANER, MALAN, LARSEN & CIULLA

13 

14 BRENT LARSEN, ESQ.
15 Nevada Bar No. 001184
16 720 South Fourth St., #300
17 Las Vegas, Nevada 89101
18 Attorney for Defendants
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Michael F. Lynch, Esq.
Lewis and Roca LLP
3993 Howard Hughes Pkwy., Ste. 600
Las Vegas, Nevada 89169-5996
Attorneys for Plaintiff

Swanne Saavedra
An Employee of Deaner, Malan, Larsen
& Ciulla

895000
DEANER, MALAN, LARSEN & CIULLA
720 South Fourth Street, Suite 300
Las Vegas, Nevada 89101
Telephone (702) 382-6911 • Facsimile (702) 366-0854

Exhibit A

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Exhibit A

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ORIGINAL

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CLERK OF THE COURT

1 COMP

2 MICHAEL F. LYNCH, ESQ.

3 Nevada Bar No. 8555

4 MLynch@lrlaw.com

5 LEWIS AND ROCA LLP

6 3993 Howard Hughes Parkway, Suite 600

7 Las Vegas, Nevada 89169-5996

8 Telephone: (702) 385-3373

9 Facsimile: (702) 385-9447

10 *Attorneys for Plaintiff*

11 DISTRICT COURT

12 CLARK COUNTY, NEVADA

13 LaSalle Bank National Association as Trustee
 14 For The Registered Holders of ML-CFC
 15 Commercial Mortgage Trust 2007-7
 16 Commercial Mortgage Pass-Through
 17 Certificates Series 2007-7, by and through
 18 Midland Loan Services, Inc., as its Special
 19 Servicer,

20 Plaintiff,

21 vs.

22 Palmilla Development Co., Inc., a Nevada
 23 corporation; Hagai Rapaport, an individual;
 24 and Does I to X; and Roe Corporations X to
 25 XX,

26 Defendants.

Case No. A581425

Dept. No. XX

COMPLAINT

Exempt from arbitration: Action in equity

27 Plaintiff alleges:

28 Parties, Jurisdiction And Venue

1. Plaintiff is LaSalle Bank National Association as Trustee For The Registered
 Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through
 Certificates Series 2007-7, by and through Midland Loan Services, Inc., as its Special Servicer
 ("Lender" or "Plaintiff").

2. Palmilla Development Co., Inc. ("Borrower") is a Nevada corporation.

3. Plaintiff alleges upon information that Hagai Rapaport is, and at all times relevant
 to this action was, an individual doing business in Las Vegas, Nevada.

...

LEWIS
AND
ROCA
LLP
ATTORNEYS

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1 prompt payment when due, by acceleration or otherwise, of all amounts owing by Borrower to
2 Lender under the Loan Documents....” (See Limited Recourse Obligations Guarantee, a true and
3 correct copy of which is attached and incorporated by this reference as **Exhibit “2”**).

4 10. The Loan was and is secured by that certain Commercial Deed of Trust, Security
5 Agreement, Fixture Filing Financing Statement and Assignment of Leases, Rents, Income and
6 Profits (as same may have been amended) recorded in the Clark County Recorders’ Office as
7 Document No. 20070330-0002946 (“Deed of Trust”). (A true and correct copy of the Deed of
8 Trust is attached and incorporated by this reference as **Exhibit “3”**).

9 11. The Loan was and is further secured by that certain Assignment of Leases, Rents,
10 Income and Profits (as same may have been amended) recorded in the Clark County Recorders’
11 Office as Document No. 20070330-0002947 (“Assignment of Rents”). (A true and correct copy
12 of the Assignment of Rents is attached and incorporated by this reference as **Exhibit “4”**).

13 12. Original Lender assigned all of its rights and interests in and to the Deed of Trust
14 and the Assignment of Rents to the Plaintiff pursuant to that certain Assignment of (a)
15 Commercial Deed of Trust, Security Agreement, Fixture Filing Financing Statement and (b)
16 Assignment Of Leases, Rents, Income and Profits And Assignment of Assignment of Leases,
17 Rents, Income and Profits recorded in the Clark County Recorders’ Office as Document No.
18 20080103-0000543 (the “Assignment of Deed of Trust”). (A true and correct copy of the
19 Assignment of Deed of Trust is attached hereto and incorporated herein by this reference as
20 **Exhibit “5”**).

21 13. Pursuant to the Assignment of Deed of Trust, the Plaintiff holds all beneficial
22 interest under the Deed of Trust and the Assignment of Rents, and is thereby authorized and
23 empowered to bring this action.

24 14. As detailed more fully in the Deed of Trust, the real property securing the
25 Promissory Note (the “Real Property”) is identified by the Clark County Tax Assessor Parcel Nos.

- 26 a. 124-30-311-031;
27 b. 124-30-312-014 and 015;
28 c. 124-30-312-017 and 018;

- 1 d. 124-30-312-025 – 169, inclusive;
2 e. 124-30-312-171 and 172;
3 f. 124-30-312-177; and
4 g. 124-30-312-180 – 182, inclusive,

5 more commonly referred to as the Palmilla Townhomes, generally located northeast of the
6 intersection of West Ann Road and North Decatur Boulevard in North Las Vegas, and more
7 specifically described in the Legal Description attached hereto as **Exhibit "6"**.

8 15. The Real Property is a development containing approximately 157 single-family
9 rental townhomes, each of which is currently generating, or capable of generating, rental income.
10 Occupancy is currently estimated at 80%.

11 16. As detailed more fully in the Promissory Note and Deed of Trust, the Borrower was
12 required to remit monthly payments which included, among other amounts, a constant
13 \$111,530.40 per month, with a final maturity date of April 11, 2018. (See e.g., Promissory Note, ¶
14 3(a); Deed of Trust, ¶¶ 1.04-06).

15 17. Borrower is not current on its payments to Plaintiff on the Loan, and currently owes
16 \$390,941.14 in past due interest, \$55,180.46 in past due principal, \$128,031.48 in past due
17 escrow/reserve, \$22,966.12 in past due late charges, \$33,033.66 in past due tax advance payments,
18 and as of January 31, 2009, an additional \$252,166.87 in default interest.

19 18. In sum, Borrower is currently over \$630,000 in arrears on interest and other monies
20 owed to Plaintiff, which will increase to an amount exceeding \$880,000 by January 31, 2009.

21 19. The Deed of Trust defines an "Event of Default" as including when "Borrower fails
22 to pay any interest, principal or other monies due under the Note or other Loan Documents on the
23 date any such amount is due." (See Deed of Trust, ¶ 2.01 Events of Default, p. 31).

24 20. Defendants' failure to make the past due payments referenced above constitute
25 "Events of Default" under the Loan, the Promissory Note, the Deed of Trust, and the Limited
26 Recourse Obligations Guarantee.

27 21. The Deed of Trust also provides that "[a]ll Rents generated by or derived from the
28 Property shall first be utilized solely for Operating Expenses, and none of the Rents generated by

1 or derived from the Property shall be diverted by Borrower and utilized for any other purpose
2 unless all such Operating Expenses have been fully paid and satisfied." (See Deed of Trust, ¶
3 1.02(m) Performance of Other Obligations, pp. 6-7).

4 22. On information, the Rents derived from the Property have exceeded, and continue
5 to exceed, the Operating Expenses, but Borrower has failed, and continues to fail, to provide such
6 excess Rents derived from the Property to Plaintiff as required by the Deed of Trust, ¶ 1.02(m).

7 23. For example, the most recent financial statements submitted by Borrower appear to
8 indicate that Borrower collected approximately \$238,462.97 in Rents exceeding Operating
9 Expenses, which should have been remitted to Plaintiff pursuant to ¶ 1.02(m) of the Deed of Trust.

10 24. Borrower agreed to comply with the provisions of the Deed of Trust, including ¶
11 1.02(m), and its failure to pay the Rents exceeding the Operating Expenses as detailed above is an
12 Event of Default.

13 25. The Deed of Trust further provides the Borrower will maintain books, records, and
14 financial statements, and provide the same to Plaintiff at regular intervals, including the following,
15 including quarterly and annual Rent Rolls, operating statements of the Property, an audited annual
16 operating statement prepared and certified by an independent certified public accountant, balance
17 sheets and profit and loss statements of Borrower, and an annual operating budget presented on a
18 monthly basis consistent with the annual operating statement described above for the Property.
19 (See Deed of Trust, ¶ 1.24(a) Books and Records; Financial Statements, pp. 22-24).

20 26. The Deed of Trust further provides the Borrower and Guarantor will maintain
21 books, records, and financial statements, and timely provide the same to Plaintiff upon request, a
22 property management report for the Property, an accounting of all security deposits held in
23 connection with any Lease of any part of the Property, and such other additional financial or
24 management information (including, without limitation, state and federal tax returns) as may, from
25 time to time, be reasonably required by Lender in form and substance satisfactory to Lender.
26 (See Deed of Trust, ¶ 1.24(b) Books and Records; Financial Statements, pp. 23-24).

27 27. Defendants have refused, and continue to refuse, to furnish the documents required
28 by the Loan Documents, violating, among other covenants, the provisions contained within the

1 Deed of Trust, ¶¶ 1.24(a), (b).

2 28. A representative sample of documents that Defendants are refusing to produce
3 include Borrower-certified copies of the Property's current financials and balance sheets, a
4 complete and current copy of the Rent Rolls, and a 2009 annual operating budget.

5 29. For the reasons set forth above, Plaintiff is entitled to exercise any and all of its
6 rights and remedies as provided for in the Loan, the Promissory Note, the Deed of Trust, and the
7 Limited Recourse Obligations Guarantee, including seeking and obtaining the appointment of a
8 receiver.

9 30. The Deed of Trust contemplates the appointment of a receiver of the Real Property
10 in the event of a default as follows:

11 (a) Remedies. Upon the occurrence of any Event of Default, lender
12 may or acting by or through Trustee may take such action, without
13 notice or demand, as it deems advisable to protect and enforce its
14 rights against Borrower in and to the Property, including, without
15 limitation, the following actions, each of which may be pursued
16 concurrently or otherwise, at such time and in such order as lender
17 or Trustee may determine, in their sole discretion, without impairing
18 or otherwise affecting the other rights and remedies of lender or
19 Trustee:

16 (7) **apply for the appointment of a receiver, trustee, liquidator or**
17 **conservator of the Property, *without notice*** and without regard for
18 the adequacy of the security for the Secured Obligations and without
19 regard for the solvency of Borrower, any Guarantor, any Indemnitor
or of any person, firm or other entity liable for the payment of the
Secured Obligations;

20 Deed of Trust ¶ 2.02, p. 33 (emphasis added).

21 31. The Deed of Trust further provides:

22 In furtherance of and not in limitation of any other provisions of this
23 Security Instrument, including without Limitation Section 2.02(a):

24 If an Event of Default shall occur, the Lender shall be entitled as a
25 matter of right and without notice to Borrower or anyone claiming
26 under Borrower and without giving bond and without regard to the
27 solvency or insolvency of the Borrower or any party bound for the
28 payment of the Secured Obligations, or waste of the Property or
adequacy of the security of the Property for the obligations then
secured hereby Or the then value of the Property, **to apply *ex parte***
for the appointment of a receiver in accordance with the statutes
and law made and provided for and such receiver shall have, in
addition to all rights and powers customarily given to and exercised
by such receivers and all rights and powers granted to such receiver
or Lender under this Security Instrument (to the extent allowed by

law), all the rights, powers and remedies as provided by law or as may be contained in any court order or decree applying such remedy. **A court is authorized to appoint a receiver on request or petition of Lender, and Borrower irrevocably consents to the appointment of a receiver and waives any notice of application therefor.** Such receiver shall collect the Rents as hereinafter defined, and all other income of any kind; manage the Property so to prevent waste; execute Leases (as hereinafter defined) within or beyond the period of receivership, pay all expenses for normal maintenance of the Property and perform the terms of this Security Instrument and apply the Rents to the costs and expenses of the receivership, including reasonable attorneys' fees, to the repayment of the Secured Obligations and to the operation, maintenance and upkeep and repair of the Property, including payment of taxes on the Property and payments of premiums of insurance on the Property and any other rights permitted by law, **Borrower does hereby irrevocably consent to such appointment.** Lender's right to appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the indebtedness secured hereby by a substantial amount and without any showing as required by N.R.S. 107.100. The receiver may, to the extent permitted under applicable law, without notice, enter upon and take possession of the Property, or any part thereof, by force, summary proceedings, ejectment or otherwise, and remove Borrower or any other person or entity and any personal property therefrom, and may hold, operate and manage the same, receive all Rents and do the things the receiver finds necessary to preserve and protect the Property, whether during pendency of foreclosure, during a redemption period, if any, or otherwise, and as further provided in any assignment of Rents and Leases executed by the Borrower to the Lender, whether contained in this Security Instrument or in a separate instrument. **Borrower shall not contest the appointment of a receiver to operate the Property at any time from and after the occurrence of an Event of Default** including, without limitation, during the institution of foreclosure proceedings. Upon an Event of Default, Borrower shall peaceably turn over possession of the Property to a receiver upon request of Lender.

Deed of Trust ¶ 6.03, pp. 41-42 (emphasis added).

32. Similarly, the Assignment of Rents provides:

If an Event of Default shall occur, the Lender shall be entitled as a matter of right without notice and without giving bond and without regard to the solvency or insolvency of the Borrower, or waste of the property or adequacy of the security of the Property, to apply *ex parte* for the appointment of a receiver who shall have all the rights, powers and remedies as provided by law or as may be contained in any court decree applying such remedy and who shall collect and apply the Rents in such order as Lender may require to all expenses for management, operation and maintenance of the Property and to the costs and expenses of the receivership, including, without limitation, reasonable attorneys' fees and the repayment of the indebtedness secured hereby. **A court is authorized to appoint a receiver on request or petition of Lender, and Borrower irrevocably consents to the appointment**

of a receiver and waives any notice of application therefor.

Borrower shall not contest the appointment of a receiver to operate the Property at any time from and after the occurrence of an Event of Default including, without limitation, during the institution of foreclosure proceedings and shall peaceably turn over possession of the Property to such receiver upon request of Lender.

(See Assignment of Rents ¶ 4.3 Receiver, p. 7 (emphasis added)).

33. Borrower's right to collect Rents derived from the Property is limited to those rights granted to it by the following revocable license: "So long as an Event of Default shall not have occurred and be continuing, Lender hereby grants to Borrower a revocable license to enforce the Leases, to collect the Rents, to apply the Rents to the payment of the costs and expenses incurred in connection with the Property and to any indebtedness secured thereby." (See Assignment of Rents ¶ 2.1 Grant of Revocable License to Collect Rents, p. 4).

34. The revocable license is subject to the following limitation: "Upon the occurrence of an Event of Default and at any time thereafter during the continuance thereof, subject to applicable Laws, the license granted to Borrower pursuant to Section 2.1 shall automatically be revoked. Upon such revocation, Borrower shall promptly deliver to lender all Rents then held by or for the benefit of Borrower." (See Assignment of Rents, ¶ 2.2 Revocation of License; lender's Rights, pp. 3-4).

35. Despite the occurrence of several Events of Default, and the automatic revocation of Borrower's right to collect and/or possess Rents pursuant to the Assignment of Rents, Borrower is still possessing and collecting the rent derived from the Real Property, in contravention of the provisions of the Assignment of Rents.

36. The Deed of Trust provides for recovery of attorneys' fees, costs and expenses from Borrower as follows:

Upon the occurrence of any Event of Default or if Borrower fails to make any payment or to do any act as herein provided, Lender may, but without any obligation to do so and without notice to or demand on Borrower and without releasing Borrower from any obligation hereunder, make or do the same in such manner and to such extent as Lender may deem necessary to protect the security hereof. Lender or Trustee is authorized to enter upon the Property for such purposes, or appear in, defend, or bring any action or proceeding to protect its interest in the Property or to foreclose this Security Instrument or collect the Secured Obligations. **The cost and**

1 **expense of any cure hereunder (including, without limitation,**
 2 **attorneys' fees to the extent permitted by law), with interest as**
 3 **provided in this Section 2.02(c) hereof, shall constitute a portion**
 4 **of the Secured Obligations and shall be due and payable to**
 5 **Lender upon demand.** All such costs and expenses incurred by
 6 Lender or Trustee in remedying such Event of Default or such failed
 7 payment or act or in appearing in, defending, or bringing any such
 8 action or proceeding shall bear interest at the Default Rate (defined
 9 in the Note), for the period after notice from Lender that such cost or
 10 expense was incurred to the date of payment to Lender. All such
 11 costs and expenses incurred by Lender together with interest thereon
 12 calculated at the Default Rate shall be deemed to constitute a portion
 13 of the Secured Obligations and shall be immediately due and
 14 payable upon demand by Lender therefor.

15 (See Deed of Trust, ¶ 2.02(c), Right to Cure Defaults, p. 35 (emphasis added)).

16 37. The Guarantors have breached the Limited Recourse Obligations Guarantee
 17 (Exhibit "2"), by failing to cure the defaults upon demand, which provides each Guarantor shall
 18 "unconditionally, irrevocably, jointly and severally guarantee(s) to Lender and to its successors,
 19 endorsees and/or assigns the full and prompt payment when due, by acceleration or otherwise, of
 20 all amounts owing by Borrower to Lender under the Loan Documents...." (See Limited Recourse
 21 Obligations Guarantee ¶ 1, p. 1).

22 38. The Guarantors are also personally liable for Plaintiff's attorneys' fees, costs and
 23 expenses as follows:

24 Guarantor shall be and remain personally liable for ... all court costs
 25 and attorneys' fees, costs and expenses actually incurred by Lender
 26 pursuant to the Note or any other Loan Documents;

27 (See Limited Recourse Obligations Guarantee, ¶ 2(a)(iv), p. 1).

28 39. The Defendants are unable and/or unwilling to cure the Events of Default and/or
 other breaches, some of which have been summarized hereinabove.

40. The Defendants are unable and/or unwilling to cure the Events of Default and/or
 other breaches, some of which have been summarized hereinabove.

...

...

...

First Cause Of Action³

(Appointment of a Receiver – NRS § 107A.260)

41. Borrower has irrevocably consented to the *ex parte* appointment of a receiver in any Event of a Default.

42. Borrower is in default of the Promissory Note, the Deed of Trust, and the Assignment of Rents, each of which constitute an Event of Default.

43. Borrower continues to possess and collect rents, despite the fact its license to collect rents has been automatically revoked due to the aforementioned Events of Default, as provided for in, among other places, the following provision: “upon the occurrence of an Event of Default and at any time thereafter during the continuance thereof, subject to applicable laws, the license [to collect rents] granted to [Borrower] hereunder shall automatically be revoked. Upon such revocation, [Borrower] shall promptly deliver to [Lender] all Rents then held by or for the benefit of [Lender]....” (See Assignment of Rents, ¶ 3.03).

44. As Borrower’s license to collect rents has been revoked, Borrower is the licensee-in-default, and Lender is entitled to the appointment of a receiver.

45. NRS § 107A.260 provides that an assignee is entitled to the appointment of a receiver for the real property subject to the assignment of rents if the assignor is in default and:

- a. **The assignor has agreed in a signed document to the appointment of a receiver in the event of the assignor’s default; or**
- b. It appears likely that the real property may not be sufficient to satisfy the secured obligation; or
- c. **The assignor has failed to turn over to the assignee proceeds that the assignee was entitled to collect; or**
- d. Other circumstances exist that would justify the appointment of a receiver under law of this State other than this chapter.

46. Lender is entitled to the appointment of a receiver under each of the above-listed subsections of NRS § 107A.260 (emphasis added).

³ The allegations of this Complaint are continuous, so that the prior allegations are part of allegations supporting each cause of action.

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1 distribute the proceeds thereof to the Lender in satisfaction of the Loan.

2 56. The Real Property is in danger of substantial waste and/or that the income
3 therefrom is in danger of being lost or that the property is or may become insufficient to discharge
4 the debt which it secures.

5 57. Based upon the foregoing, Lender is entitled to the appointment of a receiver under
6 NRS § 107.100: "A receiver shall be appointed where it appears that ... real property subject to
7 the deed of trust is in danger of substantial waste or that the income therefrom is in danger of
8 being lost, or that the property is or may become insufficient to discharge the debt which it
9 secures."

10 58. Unless a receiver is appointed immediately, the Real Property securing Defendants'
11 indebtedness to Lender is and will continue to be in danger of being lost, removed, or materially
12 injured.

13 59. Lender is also entitled to the appointment of a receiver under each of the following
14 subsections of NRS § 32.010:

15 a. NRS § 32.010(1), which provides that a receiver may be appointed "[i]n an
16 action by ... by a creditor to subject any property or fund to his claim ... on
17 application of the plaintiff, or of any party whose right to or interest in the property
18 or fund, or the proceeds thereof is probable, and where it is shown that the property
19 or fund is in danger of being lost, removed or materially injured."

20 b. NRS § 32.010(6), which provides that a receiver may be appointed "[i]n all
21 other cases where receivers have heretofore been appointed by the usages of the
22 courts of equity."

23 60. As a result of Defendants' actions, Plaintiff has been required to retain the services
24 of an attorney to prosecute this claim and is entitled to be compensated for any costs incurred in
25 the prosecution of this action, including without limitation, any and all costs and reasonable
26 attorney's fees.

27 ...

28 ...

1 Plaintiff requests the following relief:

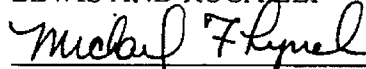
2 1. That a receiver be appointed, pursuant to NRS § 107A.260, NRS § 107.100, or
3 NRS § 32.010, to collect and take possession of the Real Property and to take all actions necessary
4 to collect rents, conserve, preserve, protect, manage, and administer the Real Property in which
5 Lender has an interest. Lender further requests that Defendants be ordered to provide an
6 accounting of all accounts and to fully cooperate with the receiver, pay the receiver all rents, rental
7 deposits, imposition deposits, proceeds, issues, and profits now held by Borrower or coming into
8 Defendants' possession during the pendency of the receivership, to surrender possession and
9 control of the Real Property and all books, records, documents, keys, and pass codes necessary for
10 the discharge of the receiver's responsibilities;

11 2. For attorneys' fees and costs incurred by Lender in enforcing its rights, including
12 but not limited to, attorneys' fees and costs incurred by bringing this action; and

13 3. For such other and further relief as this Court deems proper under the
14 circumstances.

15 DATED this 30th day of January, 2009.

16 LEWIS AND ROCA LLP

17 
18 MICHAEL F. LYNCH, ESQ.

Nevada Bar No. 8555

mlynch@lrlaw.com

3993 Howard Hughes Parkway, Suite 600

Las Vegas, Nevada 89169

(702) 385-3373

(702) 385-9447 (fax)

Attorneys for Plaintiff

Exhibit B

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Exhibit B

ORIGINAL**NOTC**

MICHAEL F. LYNCH, ESQ.

Nevada Bar No. 8555

MLynch@lrlaw.com

LEWIS AND ROCA LLP

3993 Howard Hughes Pkwy., Suite 600

Las Vegas, Nevada 89169-5996

Telephone: (702) 385-3373

Facsimile: (702) 385-9447

*Attorneys for Plaintiff***FILED**

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Edmund
CLERK OF THE COURT**DISTRICT COURT****CLARK COUNTY, NEVADA**

LaSalle Bank National Association as Trustee
For The Registered Holders of ML-CFC
Commercial Mortgage Trust 2007-7
Commercial Mortgage Pass-Through
Certificates Series 2007-7, by and through
Midland Loan Services, Inc., as its Special
Servicer,

Plaintiff,

vs.

Palmilla Development Co., Inc., a Nevada
corporation; Hagai Rapaport, an individual;
and Does I to X; and Roe Corporations X to
XX,

Defendants.

Case No. A581425

Dept. No. XX

**NOTICE OF DISMISSAL OF ACTION
WITHOUT PREJUDICE**09A581425
243219

PLEASE TAKE NOTICE that, no Appearance, Answer, or Motion for Summary
Judgment having been made or filed in this action, Plaintiff LaSalle Bank National Association as
Trustee For The Registered Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial
Mortgage Pass-Through Certificates Series 2007-7 by and thought Midland Loan Services, Inc. as
its Special Servicer ("Plaintiff") hereby voluntarily dismisses this action without prejudice
pursuant to NRCP 41 (a)(1)(i).

DATED this 10th day of July, 2009.

LEWIS AND ROCA LLP

Michael F. Lynch
MICHAEL F. LYNCH, ESQ.

Nevada Bar No. 8555

3993 Howard Hughes Pkwy., Suite 600

Las Vegas, Nevada 89169-5996

Telephone: (702) 385-3373

Facsimile: (702) 385-9447

*Attorneys for Plaintiff***RECEIVED**

JUL 1 10 2009

CLERK OF THE COURT

Lewis and Roca LLP
393 Howard Hughes Pkwy., STE
600
Las Vegas, Nevada 89169

Exhibit C

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Exhibit C

ORIGINAL**COPY****FILED**

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CLERK OF THE COURT

COMP

MICHAEL F. LYNCH, ESQ.
 Nevada Bar No. 8555
 MLynch@lrlaw.com
 LEWIS AND ROCA LLP
 3993 Howard Hughes Parkway, Suite 600
 Las Vegas, Nevada 89169-5996
 Telephone: (702) 385-3373
 Facsimile: (702) 385-9447

*Attorneys for Plaintiff***DISTRICT COURT****CLARK COUNTY, NEVADA**

LaSalle Bank National Association as
 Trustee For The Registered Holders of
 ML-CFC Commercial Mortgage Trust
 2007-7 Commercial Mortgage Pass-
 Through Certificates Series 2007-7, by and
 through Midland Loan Services, Inc., as its
 Special Servicer,

Plaintiff,

vs.

Hagai Rapaport, an individual; and Does I
 to X; and Roe Corporations X to XX,

Defendants.

Case No.:

A585424

Dept. No.:

VIII

COMPLAINT*Exempt from Arbitration: Action in Equity*

Plaintiff alleges:

Parties, Jurisdiction And Venue

1. Plaintiff is LaSalle Bank National Association as Trustee For The Registered
 Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-
 Through Certificates Series 2007-7, by and through Midland Loan Services, Inc., as its
 Special Servicer ("Lender" or "Plaintiff").

2. Plaintiff alleges upon information that Hagai Rapaport ("Guarantor") is, and
 at all times relevant to this action was, an individual doing business in Las Vegas, Nevada.

3. This Court has personal jurisdiction over Guarantor because he is an
 individual who transacted business within Nevada and because he consented to this Court's

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1 personal jurisdiction over him.¹

2 4. Venue is proper in the Eighth Judicial District Court because Guarantor
3 incurred and contracted to perform certain obligations in Clark County, which are the
4 subject of this suit, and because Guarantor consented to this venue as the proper venue for
5 this dispute.²

6 5. The true names and capacities, whether individual, corporate, associate,
7 trust/trustee or otherwise, of defendants named herein as Does I through X and Roe
8 Corporations X through XX, are unknown to Plaintiff. Plaintiff shall amend this complaint
9 to include the true names and capacities of such Doe and Roe defendants as the same are
10 ascertained.

11 **General Allegations**

12 6. Palmilla Development Co., Inc. ("Borrower") borrowed \$20,150,000.00 with
13 interest from Artesia Mortgage Capital Corporation, a Delaware corporation ("Original
14 Lender") on or about March 28, 2007 (the "Loan").

15 7. The Loan is evidenced by, among other things, that certain Fixed Rate Note
16 dated March 28, 2007, bearing an authorized signature on behalf of the Borrower (the
17 "Promissory Note").

18 8. The Loan was and is secured by that certain Commercial Deed of Trust,
19 Security Agreement, Fixture Filing Financing Statement and Assignment of Leases, Rents,
20 Income and Profits (as same may have been amended) recorded in the Clark County
21 Records' Office as Document No. 20070330-0002946 ("Deed of Trust").

22
23
24 ¹ (See Limited Recourse Obligations Guarantee at ¶ 19 (providing that "Guarantor, in order to induce
25 Lender to accept this Guaranty, agrees that all actions or proceedings arising directly, indirectly or
26 otherwise in connection with this Guaranty shall be litigated, at Lender's sole election, only in courts having
27 a situs within the county and State where the Property is located, in any jurisdiction in which Borrower or
28 Guarantor (or any individual or entity comprising Borrower or Guarantor) may reside or hold assets, or in
anyone or more of the foregoing jurisdictions. Guarantor hereby consents and submits to the jurisdiction of
any local, state or federal court located therein. Guarantor hereby waives any right it may have to transfer or
change the venue of any litigation brought against it by Lender on this Guaranty in accordance with this
paragraph.").

² See *id.*

1 9. The Loan was and is further secured by that certain Assignment of Leases,
2 Rents, Income and Profits (as same may have been amended) recorded in the Clark County
3 Recorders' Office as Document No. 20070330-0002947 ("Assignment of Rents").

4 10. Original Lender assigned all of its rights and interests in and to the Deed of
5 Trust and the Assignment of Rents to the Plaintiff pursuant to that certain Assignment of
6 (a) Commercial Deed of Trust, Security Agreement, Fixture Filing Financing Statement
7 and (b) Assignment Of Leases, Rents, Income and Profits And Assignment of Assignment
8 of Leases, Rents, Income and Profits recorded in the Clark County Recorders' Office as
9 Document No. 20080103-0000543 (the "Assignment of Deed of Trust").

10 11. The Guarantor personally guaranteed to "unconditionally, irrevocably, jointly
11 and severally guarantee(s) to Lender and to its successors, endorsees and/or assigns the full
12 and prompt payment when due, by acceleration or otherwise, of all amounts owing by
13 Borrower to Lender under the Loan Documents...."

14 12. As detailed more fully in the Deed of Trust, the real property securing the
15 Promissory Note and the real property referenced in the Personal Guarantee (the "Real
16 Property") is identified by the Clark County Tax Assessor Parcel Nos.

- 17 i. 124-30-311-031;
18 ii. 124-30-312-014 and 015;
19 iii. 124-30-312-017 and 018;
20 iv. 124-30-312-025 – 169, inclusive;
21 v. 124-30-312-171 and 172;
22 vi. 124-30-312-177; and
23 vii. 124-30-312-180 – 182, inclusive,

24 more commonly referred to as the Palmilla Townhomes, generally located northeast of the
25 intersection of West Ann Road and North Decatur Boulevard in North Las Vegas.

26 13. The Real Property is a development containing approximately 157 single-
27 family rental townhomes, each of which is currently generating, or capable of generating,
28 rental income.

1 14. Borrower filed a voluntary petition under Chapter 11 of Title 11 United
2 States Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code") in the United States
3 Bankruptcy Court for the Central District of California, San Fernando Valley Division,
4 Case No.: 1:09-bk-11504-MT on February 11, 2009.

5 15. The Personal Guarantee provides that the Guarantor shall be and remain
6 personally liable without exculpation or limitation of liability whatsoever for the entire
7 amount of the indebtedness evidenced by the Note (including all principal, interest, and
8 other charges) and all other sums due or to become due under the other Loan Documents,
9 whether at maturity or by acceleration or otherwise, under certain circumstances listed in
10 the Personal Guarantee, §§ 2(b)(i)-(iv).

11 16. The Lender is entitled to full recourse against the Guarantor pursuant to §
12 2(b)(ii) of the Personal Guarantee on the grounds that, on information and belief, Guarantor
13 has been involved in fraud or intentional misrepresentation in connection with the Real
14 Property, Loan Documents, or Loan Application.

15 17. The Lender is entitled to full recourse against the Guarantor pursuant to §
16 2(b)(iii) of the Personal Guarantee on the grounds that, on information and belief,
17 Guarantor has not satisfied the Stabilized Operating Threshold (as defined in the Reserve
18 Agreement).

19 18. The Lender is entitled to full recourse against the Guarantor pursuant to §
20 2(b)(iv) of the Personal Guarantee on the grounds that the Real Property has become an
21 asset in a voluntary bankruptcy or insolvency proceeding commenced by Borrower.

22 19. As detailed more fully in the Promissory Note and Deed of Trust, the
23 Borrower was required to remit monthly payments which included, among other amounts,
24 a constant \$111,530.40 per month, with a final maturity date of April 11, 2018.

25 20. Borrower is currently in default on its payments to Plaintiff on the Loan, and
26 currently owes not less than \$669,182.40 in past due principal and interest, \$192,047.22 in
27 past due escrow/reserve, \$34,449.18 in past due late charges, \$141,539.24 in past due tax
28 advance payments, \$18,288.00 in past due insurance advance payments, and an additional

1 \$332,350.36 in default interest.

2 21. In addition, the Promissory Note and the Deed of Trust, together with other
3 Loan Documents, provide for acceleration of the entire unpaid Secured Obligations upon
4 the happening of certain events.

5 22. Among other provisions, Deed of Trust § 2.02 (a)(13) provides "if any Event
6 of Default as described in clause (h), (i), (j) or (k) of Section 2.01 [of the Deed of Trust]
7 shall occur, the entire unpaid Secured Obligations shall be automatically due and payable,
8 without any further notice, demand or other action by Lender."

9 23. Multiple events and Events of Default triggering the acceleration clause have
10 occurred, and the entire unpaid Secured Obligations is therefore immediately due and
11 payable.

12 24. The Personal Guarantee requires Guarantor personally cure Borrower's
13 monetary breaches, including but not limited to all unpaid Secured Obligations, whether
14 due in the normal course or by acceleration, which Guarantor has refused and failed to do.

15 25. The Guarantor is personally liable for Plaintiff's attorneys' fees, costs and
16 expenses as follows:

17 Guarantor shall be and remain personally liable for ... all court
18 costs and attorneys' fees, costs and expenses actually incurred
by Lender pursuant to the Note or any other Loan Documents.

19 26. The Guarantor is unable and/or unwilling to cure the Events of Default
20 and/or other breaches, some of which have been summarized hereinabove.

21 **First Cause of Action**³

22 **(Breach of Contract)**

23 27. The Personal Guaranty and Loan Documents entered into by Guarantor and
24 Plaintiff are valid and existing contracts.

25 28. Plaintiff fully performed or was excused from performance of its duties under
26 the Personal Guaranty and Loan Documents.

27
28 ³ The allegations of this Complaint are continuous, so that the prior allegations are part of allegations
supporting each cause of action.

1 29. The Guarantor has breached the Personal Guarantee, which provides each
2 Guarantor shall "unconditionally, irrevocably, jointly and severally guarantee(s) to Lender
3 and to its successors, endorsees and/or assigns the full and prompt payment when due, by
4 acceleration or otherwise, of all amounts owing by Borrower to Lender under the Loan
5 Documents...." by refusing and failing to cure the defaults referenced hereinabove.

6 30. As a direct and proximate result of the beach of the Personal Guaranty and
7 Loan Documents by Guarantor, Plaintiff has been damaged in an amount in excess of
8 \$10,000.00, the exact amount to be determined at trial.

9 31. As a result of Guarantor's actions, Plaintiff has been required to retain the
10 services of an attorney to prosecute this claim and is entitled to be compensated for any
11 costs incurred in the prosecution of this action, including without limitation, any and all
12 costs and reasonable attorney's fees.

13 **Second Cause of Action**

14 **(Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing)**

15 32. The Personal Guaranty and Loan Documents entered into by Guarantor and
16 Plaintiff are valid and existing contracts.

17 33. Guarantor owed a duty of good faith to Plaintiff in connection the Personal
18 Guaranty and Loan Documents.

19 34. Guarantor breached that duty by performing in a manner that is unfaithful to
20 the purposes of the Personal Guaranty and Loan Documents

21 35. As a result of Guarantor's actions, Plaintiff has been required to retain the
22 services of an attorney to prosecute this claim and is entitled to be compensated for any
23 costs incurred in the prosecution of this action, including without limitation, any and all
24 costs and reasonable attorney's fees.

25 **Third Cause of Action**

26 **(Accounting)**

27 36. Upon information and belief, Guarantor has misappropriated, wasted,
28 converted, and otherwise transferred or hypothecated the Rents received from the Property

1 in violation the Loan Documents and Personal Guaranty for personal use.

2 37. The full extent of Guarantor's misappropriation of Rents received from the
3 Property is unknown to Plaintiff.

4 38. Upon information and belief, an accounting of Guarantor's personal property,
5 assets, and accounts is necessary to ascertain the full extent of Rents received from the
6 Property that have been improperly taken by Guarantor.

7 39. There is no adequate remedy at law by which to obtain such an accounting,
8 therefore, Plaintiff requests that the court compel an accounting of all Guarantor's
9 personal property of any nature whatsoever to ascertain the extent of Plaintiff's damages.

10 40. As a result of Guarantor's actions, Plaintiff has been required to retain the
11 services of an attorney to prosecute this claim and is entitled to be compensated for any
12 costs incurred in the prosecution of this action, including without limitation, any and all
13 costs and reasonable attorney's fees.

14 ...

15 ...

16 ...

17 ...

18 ...

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25 ...

26 ...

27 ...

28 ...

1 Plaintiff requests the following relief:

- 2 1. For judgment in Plaintiff's favor and against Guarantor on the Complaint
3 and all claims for relief asserted therein;
- 4 2. For actual and compensatory damages in excess of \$10,000.00, plus interest
5 thereon at the contract or statutory rate until paid in full, plus penalties and costs;
- 6 3. For consequential damages in excess of \$10,000.00;
- 7 4. For special damages in excess of \$10,000.00;
- 8 5. For an accounting of Guarantor's personal property, assets, and accounts;
- 9 6. For reasonable attorneys' fees and costs; and
- 10 7. For such other and further relief as the Court may deem just and proper.

11 DATED this 16th day of March, 2009.

12 LEWIS AND ROCA LLP

13 *Michael F. Lynch*
14 MICHAEL F. LYNCH, ESQ.

15 Nevada Bar No. 8555

16 mlynch@lrlaw.com

17 3993 Howard Hughes Parkway, Suite 600

18 Las Vegas, Nevada 89169

19 (702) 385-3373

20 (702) 385-9447 (fax)

21 *Attorneys for Plaintiff*

Exhibit D

000594

000594

Exhibit D

received
7/16/09

1 **NEOJ**
2 MICHAEL F. LYNCH, ESQ.
3 Nevada Bar No. 8555
4 MLynch@lrlaw.com
5 LEWIS AND ROCA LLP
6 3993 Howard Hughes Parkway
7 Suite 600
8 Las Vegas, Nevada 89169-5996
9 Telephone: (702) 385-3373
10 Facsimile: (702) 385-9447

11 Attorneys for Plaintiff

FILED
Jul 15 11 33 AM '09
Ed [Signature]
CLERK OF THE COURT

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 LaSalle Bank National Association as Trustee
15 for the Registered Holders of ML-CFC
16 Commercial Mortgage Pass-Through
17 Certificates Series 2007-7, by and through
18 Midland Loan Services, Inc., as its Special
19 Servicer,

20 Plaintiff,

21 vs.

22 Hagai Rapaport, an individual; and Does I to
23 X; and Roe Corporations X to XX,

24 Defendants.

Case No. A585424

Dept. No. VIII

**NOTICE OF ENTRY OF
STIPULATION AND ORDER FOR
DISMISSAL WITHOUT
PREJUDICE**

25 Please take notice that on the 14th day of July, 2009, a Stipulation and Order for
26 Dismissal Without Prejudice was entered in the above-captioned action, a copy of said
27 Stipulation and Order is attached hereto.

28 DATED this 14th day of July, 2009.

LEWIS AND ROCA LLP

Michael F. Lynch

MICHAEL F. LYNCH, ESQ.

Nevada Bar No. 8555

MLynch@lrlaw.com

3993 Howard Hughes Parkway, Suite 600

Las Vegas, Nevada 89169-5996

Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that a copy of the **NOTICE OF ENTRY OF STIPULATION AND ORDER FOR DISMISSAL WITHOUT PREJUDICE** in the above-captioned litigation was made on July 15, 2009 by depositing the same in the U.S. Mail, at Las Vegas, Nevada, addressed to the following:

Brent Larsen, Esq.
DEANER, DEANER, SCANN, MALAN & LARSEN
720 S. Fourth Street, #300
Las Vegas, NV 89101

Attorney for Defendant

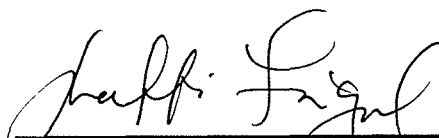

An Employee of Lewis and Roca LLP

Exhibit 1

1 **SAO**
 2 **MICHAEL F. LYNCH, ESQ.**
 3 Nevada Bar No. 8555
 4 MLynch@lrlaw.com
 5 **LEWIS AND ROCA LLP**
 6 3993 Howard Hughes Parkway
 7 Suite 600
 8 Las Vegas, Nevada 89169-5996
 9 Telephone: (702) 385-3373
 10 Facsimile: (702) 385-9447

11 Attorneys for Plaintiff

12 **DISTRICT COURT**
 13 **CLARK COUNTY, NEVADA**

14 LaSalle Bank National Association as Trustee for
 15 the Registered Holders of ML-CFC Commercial
 16 Mortgage Pass-Through Certificates Series 2007-
 17 7, by and through Midland Loan Services, Inc., as
 18 its Special Servicer,

19 Plaintiff,

20 vs.

21 Hagai Rapaport, an individual; and Does I to X;
 22 and Roe Corporations X to XX,

23 Defendants.

Case No. A585424

Dept. No. VIII

**STIPULATION AND ORDER FOR
 DISMISSAL WITHOUT
 PREJUDICE**

24 **IS HEREBY STIPULATED** by and between Plaintiffs LaSalle Bank National
 25 Association as Trustee for the Registered Holders of ML-CFC Commercial Mortgage Pass-
 26 Through Certificates Series 2007-7 and Midland Loan Services, Inc., and Defendant Hagai
 27 Rapaport, by and through their respective counsel, stipulate that all claims asserted in this matter

28 ///

///

///

///

1 shall be and hereby are dismissed without prejudice, with each party to bear his, her or its own
2 attorney's fees and costs.

3 DATED this ____ day of July, 2009.

DATED this 10 day of July, 2009.

4 LEWIS AND ROCA LLP

DEANER, DEANER, SCANN, MALAN &
LARSEN

6 MICHAEL F. LYNCH, ESQ.

Brent Larsen
BRENT LARSEN, ESQ.

Nevada Bar No. 8555

Nevada Bar No. 1184

7 MLynch@lrlaw.com

720 S. Fourth Street, #300

8 3993 Howard Hughes Parkway
Suite 600

Las Vegas, NV 89101

9 Las Vegas, Nevada 89169-5996

Attorney for Defendant

10 Telephone: (702) 385-3373

Facsimile: (702) 385-9447

11 *Attorneys for Plaintiff*

12 ORDER

13 IT IS HEREBY ORDERED that all claims asserted in this matter are hereby dismissed
14 without prejudice, with each party to bear his, her or its own attorney's fees and costs.

16 DATED _____

DISTRICT COURT JUDGE

17 Respectfully Submitted

18 LEWIS AND ROCA LLP

20 MICHAEL F. LYNCH, ESQ.

Nevada Bar No. 8555

21 MLynch@lrlaw.com

3993 Howard Hughes Parkway

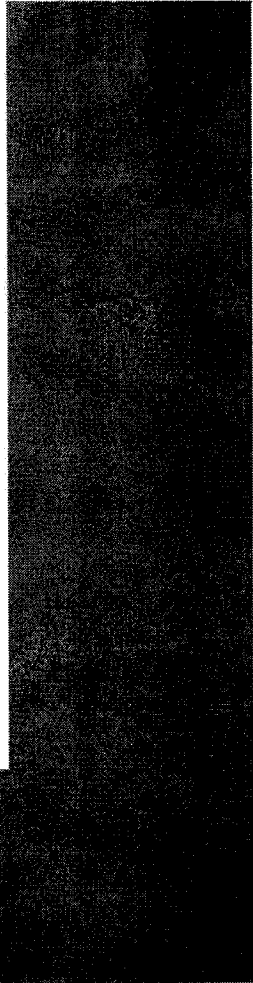
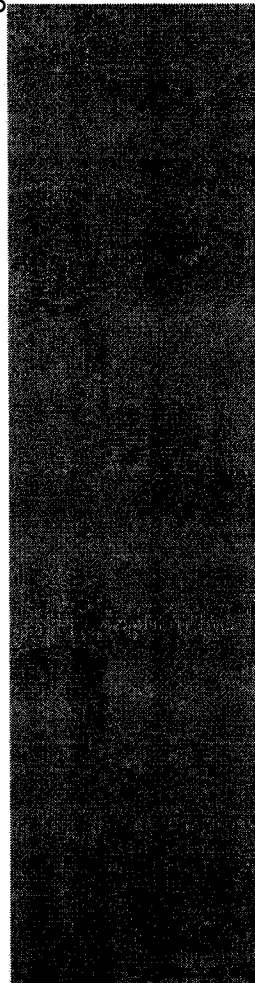
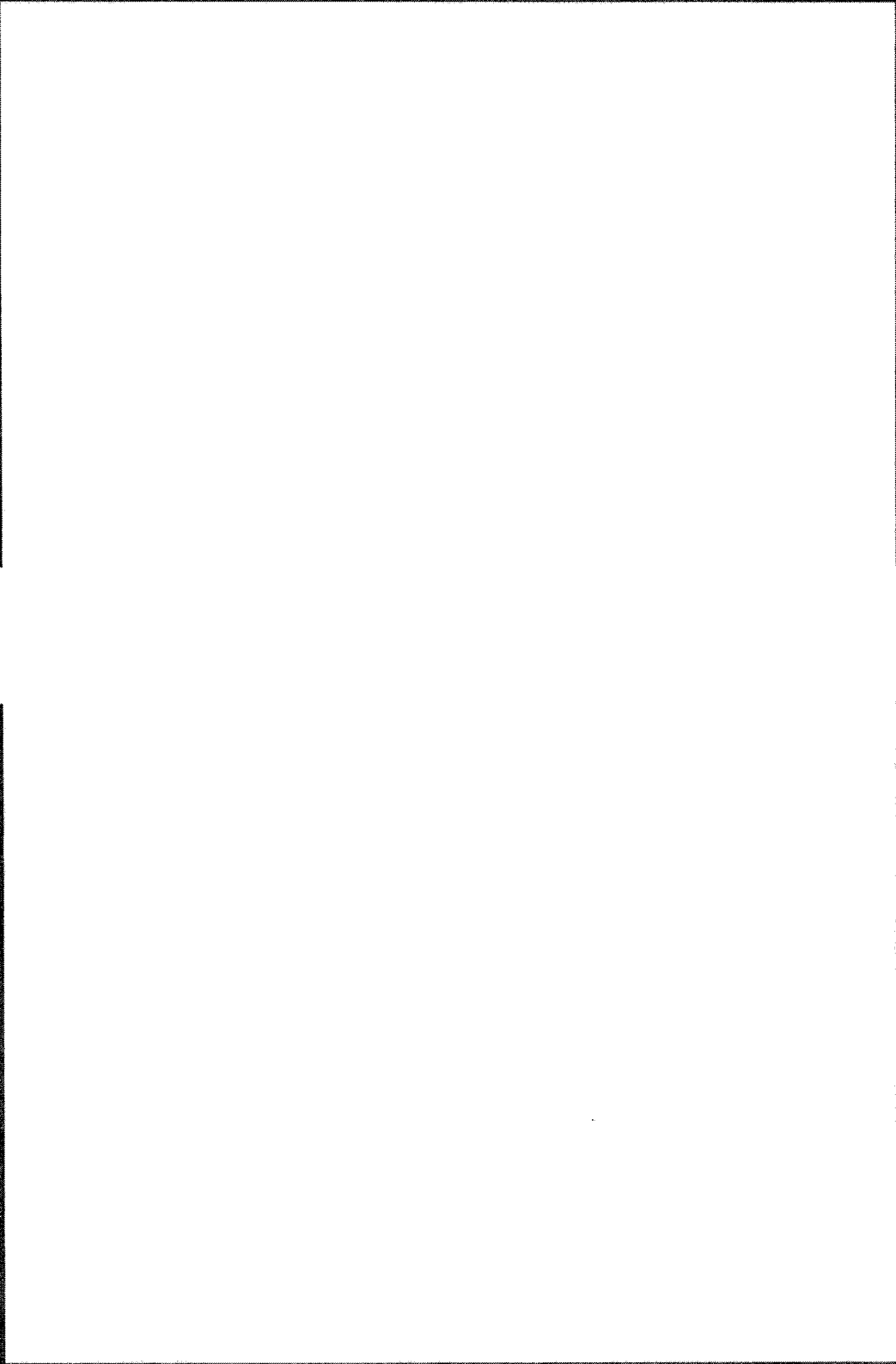
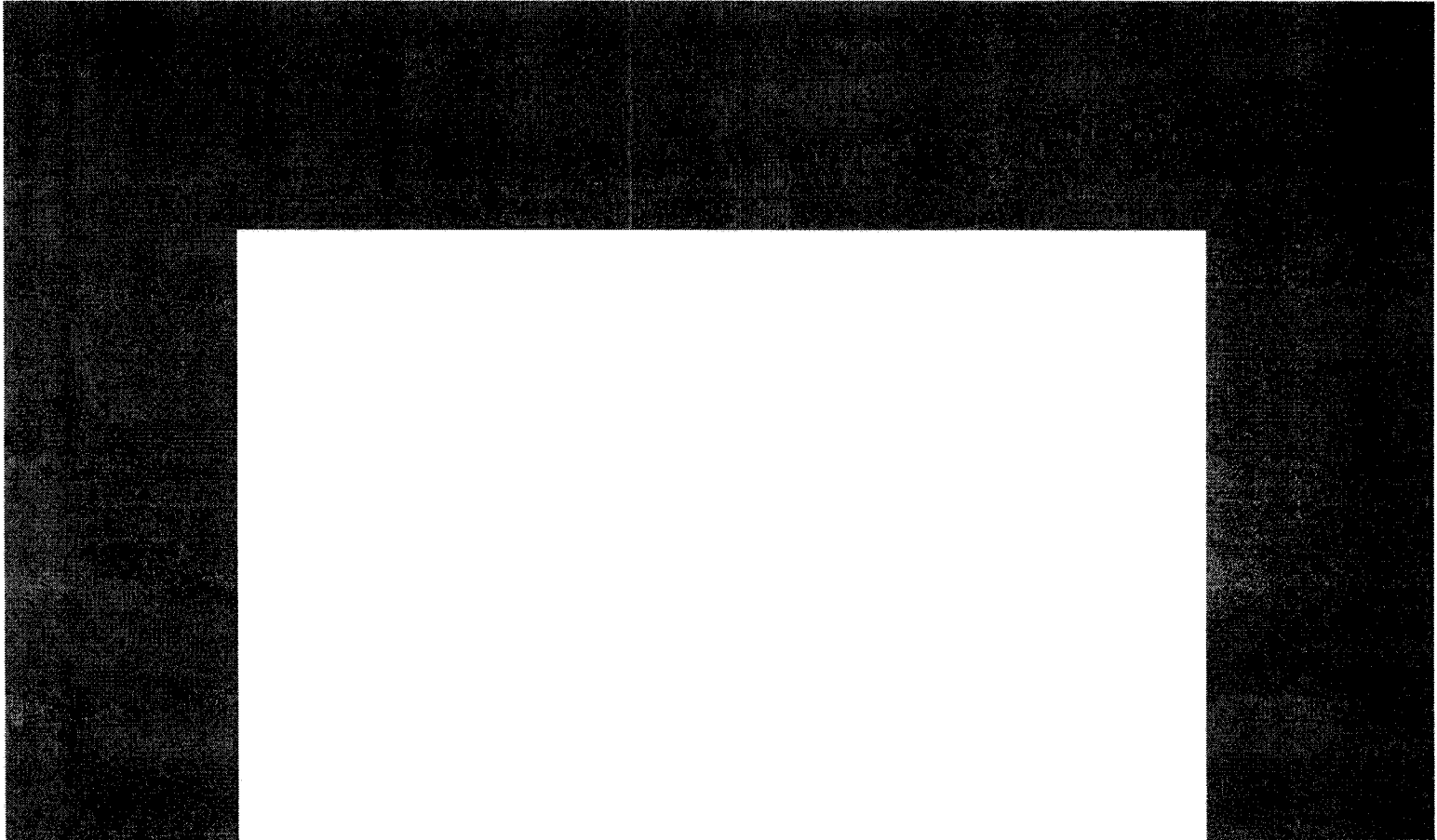
22 Suite 600

Las Vegas, Nevada 89169-5996

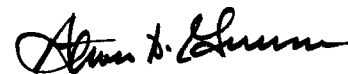
23 Telephone: (702) 385-3373

24 Facsimile: (702) 385-9447

25 *Attorneys for Plaintiff*



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CLERK OF THE COURT

OPPS
MICHAEL F. LYNCH
Nevada Bar No. 8555
MARJAN HAJIMIRZAEI
Nevada Bar No. 11984
LEWIS AND ROCA LLP
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169
(702) 949-8200
(702) 216-6191 (fax)
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. Bank National Association as Trustee for
The Registered Holders of ML-CFC
Commercial Mortgage Trust 2007-7
Commercial Mortgage Pass-Through
Certificates Series 2007-7, by and through
Midland Loan Services, Inc., as its Special
Servicer,
Plaintiff,

v.

Palmilla Development Co., Inc., a Nevada
corporation; Hagai Rapaport, an individual;
Does I to X; and Roe Corporations X to XX,

Defendants.

Case No.: 09-A-595321-C

Dept. No.: XX

**OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS, OR IN THE
ALTERNATIVE, MOTION TO
REQUIRE A SUBSTANTIAL BOND
FROM PLAINTIFF AND TO STAY THE
PROCEEDINGS UNTIL THE BOND IS
POSTED**

Date of Hearing: 7/20/2011
Time of Hearing: 9:00 a.m.

Plaintiff U.S. Bank National Association as Trustee for The Registered Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through Certificates Series 2007-7, by and through Midland Loan Services, Inc., as its Special Servicer, ("Lender") hereby submits its Opposition to Defendants' Motion to Dismiss (the "Motion"). This Opposition is supported by the following memorandum of points and authorities, the pleadings and papers on file herein, and any oral argument at the hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants' arguments for dismissal pursuant to NRCP 41(a) fail for two primary reasons. First, the previous complaints that Defendants' complain of were based on different claims, thereby NRCP 41(a) is inapplicable. Second, each claim before this Court was

1 voluntarily dismissed only *once* previously. As such, this Court should deny the Motion in its
2 entirety.

3 II. STATEMENT OF FACTS

4 As alleged in the Complaint on file herein, Palmilla Development Co., Inc. ("Palmilla")
5 is the borrower on a loan in the original principal amount of \$20,150,000.00 secured by a Deed
6 of Trust on a commercial rental property more commonly referred to as the Palmilla Townhomes
7 (the "Property"). Mr. Rapaport personally guaranteed the loan.

8 On Plaintiff's Application, this Court appointed a Receiver in this action on September 3,
9 2009, to take possession, custody, and control of the Property, as said order was amended on
10 May 19, 2010 (the "Order Appointing Receiver"). A proposed sale of the Property came before
11 this Court on March 18, 2010, on Plaintiff's unopposed Motion to Approve Sale of Receivership
12 Property (the "Motion to Approve Sale"), and a copy of the proposed Purchase and Sale
13 Agreement ("PSA") was filed and served. Upon the unopposed Motion to Approve Sale, the
14 proposed sale of the Property for \$9.5 million was approved, with Defendants' counsel signing
15 off on the form of the order. The sale resulted in a deficiency against Palmilla and Rapaport,
16 jointly and severally, of well over \$10 million.

17 Subsequently, Plaintiff filed this action for breach of contract and accounting against the
18 Defendants.

19 III. HISTORY OF LAWSUITS

20 The above-captioned action was filed as a receivership action, and has since been
21 recently amended to add a breach of contract claim against both Defendants. It is the breach of
22 contract claim for recovery of the deficiency that prompted Defendants' Motion to Dismiss.
23 Defendants seek to dismiss the deficiency action on the grounds that the same claims have been
24 dismissed twice previously within the meaning of Rule 41. Defendants are incorrect, and the
25 Motion to Dismiss should be denied.

26 a. First Lawsuit – Receivership Only

27 On January 30, 2009, LaSalle Bank National Association ("LaSalle") as Trustee for the
28 Registered Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage

1 Pass-Through Certificates Series 2007-7, by and through Midland Loan Services, Inc., as its
2 Special Servicer, filed a Complaint ("First Lawsuit") against Palmilla and Mr. Rapaport seeking
3 the appointment of a Receiver, Case No. A581425. A true and correct copy of the First
4 Complaint is attached hereto as **Exhibit "1"**. And not only was the First Lawsuit brought by a
5 different plaintiff, the First Lawsuit contained just two causes of action – Appointment of a
6 Receiver under NRS 107A.260 and Appointment of a Receiver under NRS 107.100 or NRS
7 32.010. *See id.* The First Lawsuit did not allege a breach of contract claim, and did not seek a
8 deficiency against either Defendant. *See id.* Mr. Rapaport was not an essential party to that
9 action, and was only named to provide formal notice to him that Plaintiff was seeking a receiver
10 relating to a loan that he had personally guaranteed, but there were no claims particular to him,
11 and certainly no breach of contract or deficiency causes of action against either Palmilla or Mr.
12 Rapaport.

13 Plaintiff had obtained a hearing on its application for receiver, which was set to come on
14 for hearing in the First Lawsuit on February 12, 2009, at 8:30 a.m. Just hours before the
15 receivership hearing, however, Palmilla filed bankruptcy in California, which prevented that
16 hearing from going forward. *See* Palmilla's Notice of Bankruptcy, attached hereto as **Exhibit**
17 **"2"**.

18 As in the instant case, Mr. Rapaport was extremely difficult and expensive to serve in the
19 First Lawsuit, and rather than have a fight about whether service of process had been effected
20 prior to the bankruptcy petition, and in light of the automatic stay created by Palmilla's
21 bankruptcy filing, LaSalle voluntarily dismissed the receivership action on July 10, 2009. A
22 true and correct copy of the Notice of Dismissal of Action Without Prejudice is attached hereto
23 as **Exhibit "3"**.

24 The First Complaint does not implicate the "twice dismissed" rule because it was brought
25 by a different plaintiff and because it did not seek recovery of a deficiency through a breach of
26 contract or accounting causes of action, which is the essence of the above-captioned lawsuit as it
27 presently exists as discussed in more detail below. As it exists today, the instant lawsuit is not a
28 receivership action in any relevant sense.

1 **b. Second Lawsuit – Deficiency Only**

2 On March 16, 2009, LaSalle filed a separate lawsuit against for breach of contract,
3 contractual breach of the implied covenant of good faith and fair dealing, and accounting
4 (“Second Lawsuit”), Case No. A585424. A true and correct copy of the complaint filed in the
5 Second Lawsuit is attached hereto as **Exhibit “4”**. The parties entered into a Stipulation and
6 Order for Dismissal Without Prejudice in that matter on July 15, 2009. A true and correct copy
7 of the Notice of Entry of Stipulation and Order for Dismissal Without Prejudice is attached
8 hereto as **Exhibit “5”**.

9 The Second Lawsuit does not implicate the “twice dismissed” rule, not only because it
10 was brought by a different plaintiff, but because the “twice dismissed” rule does not apply to
11 stipulated dismissals as discussed in more detail below.

12 **c. The Present Action**

13 On July 2, 2009, Plaintiff obtained stay relief in the Palmilla Bankruptcy case in order to
14 pursue its rights to obtaining a receiver for the Property. *See* Order Granting Motion for Relief
15 from the Automatic Stay, attached hereto as **Exhibit “6”**. The stay relief order specifically
16 provided that the stay relief was granted to allow Plaintiff to pursue its rights as to the Property,
17 but did not include the right to pursue a deficiency claim at that time. *See id.*

18 As the record shows, the Palmilla Bankruptcy case filed just hours before the first
19 receivership hearing, and as the record suggests, the bankruptcy appears to have been nothing
20 more than a delay tactic to impede the First Lawsuit. This is further borne out by the bankruptcy
21 court’s dismissal of the Palmilla bankruptcy, finding that dismissal of the bankruptcy was
22 appropriate due to Palmilla’s “failure to prosecute the case and an absence of a reasonable
23 likelihood of rehabilitation” and awarding a costs judgment against Palmilla in favor of the
24 trustee in the amount of \$1,300 with interest. *See* November 17, 2009, Order Dismissing
25 [Palmilla’s] Bankruptcy Case, attached hereto as **Exhibit “7”**.

26 On July 16, 2009, just two weeks after obtaining stay relief to bring the receivership
27 action, Plaintiff filed the above-captioned action against Palmilla only for the appointment of
28 receiver only. This Court appointed a Receiver on Plaintiff’s application. The Receiver took

1 control of the Property, and marketed the Property for sale. A motion to sell the Property out of
2 receivership was then made and approved by this Court on March 18, 2010. Palmilla did not
3 oppose the Motion to Approve Sale, but did insist having the ability to provide input on, and did
4 provide input on, on the order approving the sale, which was entered by this Court. The Property
5 was sold pursuant to this Court's order for approximately \$9.5 million

6 The sale obviated the need for the Receiver, who was subsequently discharged after filing
7 its notice of final report and accounting were approved after notice and a hearing. The sale of
8 the property left a very large deficiency, which is and there are no longer any impediments to this
9 deficiency action, which alleges breach of contract and accounting against both Defendants. As
10 it exists today, the receivership causes of action are moot as the Receiver has already been
11 appointed and discharged after having sold the Property. All that remains is the deficiency
12 action, which is properly before this Court. After the Receiver was discharged, Plaintiff
13 amended the present action to bring the deficiency causes of action.

14 IV. LEGAL ARGUMENT

15 a. The First Complaint Does Not Implicate Rule 41(A)(1) Because It Was 16 Not a Deficiency Action, but Was Solely a Receivership Action as to Palmilla Only.

17 Nevada Rule of Civil Procedure 41(a) governs the voluntarily dismissals of actions. As a
18 matter of right, a plaintiff may file a notice of dismissal of an action before an adverse party files
19 an answer or responsive pleading. NRCP 41(a)(1)(i); *see, e.g., Federal Sav. & Loan Ins. Corp.*
20 *v. Moss*, 88 Nev. 256, 495 P.2d 616 (1972). Here, LaSalle dismissed the First Complaint as to its
21 claim for appointment of receiver before any responsive pleading had been filed.

22 Even Defendants admit that the Nevada Supreme Court, “[i]n addressing the ‘twice
23 dismissed’ rule in *Brown v. F.S.L.I.C.*, *supra*, ... held that the rule did not factually apply in the
24 *Brown* case because the record did not show that the defendants had been ‘twice dismissed’ from
25 previous ‘actions that were based upon or including the same claims.’” 105 Nev. at 412
26 (emphasis added). *See* Opposition at 11-16. Because the First Complaint and the instant action
27 are not for the same claims, the First Lawsuit does not implicate the “twice dismissed” rule as
28 recognized by *Brown*. *Id.* First Complaint did not include a deficiency, breach of contract, or

1 accounting claim, and the present lawsuit today is solely a deficiency action, as the receivership
2 claims are now moot.

3 **b. The Second Complaint Does Not Implicate Rule 41(A)(1) Because It Was**
4 **a Dismissal Without Prejudice by Stipulation.**

5 The Second Complaint was not for a receiver, but solely for a deficiency. A stipulation
6 for dismissal does not implicate the “twice dismissed” rule of Rule 41(a):

7 **(a) Voluntary Dismissal: Effect Thereof.**

8 **(1) By Plaintiff; by Stipulation.** Subject to the provisions
9 of Rule 23(e), of Rule 66, and of any statute, an action may be
10 dismissed by the plaintiff upon repayment of defendants’ filing
11 fees, without order of court (i) by filing a notice of dismissal at any
12 time before service by the adverse party of an answer or of a
13 motion for summary judgment, whichever first occurs, or (ii) by
14 filing a stipulation of dismissal signed by all parties who have
15 appeared in the action. **Unless otherwise stated in the notice of
dismissal or stipulation, the dismissal is without prejudice,
except that a notice of dismissal operates as an adjudication
upon the merits** when filed by a plaintiff who has once dismissed
in any court of the United States or of any state an action based on
or including the same claim.

16 (emphasis added).

17 No notice of dismissal was ever filed for the Second Complaint, and the plain language of
18 the statute makes it only applicable to notices of dismissal and not to stipulated dismissals. *City*
19 *Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989)
20 (holding “[w]hen the language of a statute is plain and unambiguous, a court should give that
21 language its ordinary meaning and not go beyond it”). The Rule references notices and
22 stipulations for dismissals, and then when discussing when a dismissal operates as an
23 “adjudication upon the merits” drops the stipulation from dismissal, and references instead only
24 notices of dismissal. If the Nevada Legislature had intended stipulations for dismissal to operate
25 as an adjudication on the merits under the “twice dismissed” rule, it would have so stated.
26 Instead, while it discusses stipulations earlier in the same sentence, it specifically provided a
27 carve-out for stipulations for dismissal when setting forth the rule. In addition, the Second
28 Complaint was brought by a different plaintiff.

1 For these reasons, the Second Complaint having been a deficiency action only, and not a
2 receivership action, and having further been dismissed by stipulation, Rule 41(a)(1) is not
3 implicated. Not do Defendants' fail to point to *two* previous actions that implicate the "twice
4 dismissed" rule, they cannot even point to *one*.

5 **c. NRCP 41(d) is Equally Inapplicable**

6 Defendants' request for an additional bond is unfounded and inappropriate. Rule 41(d) is
7 inapplicable in this case for several reasons. Rule 41(d) is intended to prevent vexatious
8 litigation and forum shopping. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir.
9 2000) (*cert denied*, 532 U.S. 953 (2001) (applying the federal rule)). A court may impose costs
10 when the subsequent claim is "based upon or including the same claim" and the circumstances of
11 the case warrant an award of costs to prevent prejudice to the defendant. NRCP 41(d).

12 Here, there has been no forum shopping, but rather, the First Lawsuit was dismissed
13 because Defendants were so difficult to serve. The Second Lawsuit was dismissed because of
14 Palmilla chose to file bankruptcy to delay the receivership.

15 Similarly, there is no prejudice to the Defendants in not ordering an additional bond. The
16 case at hand will not result in an award of costs for Defendants. In truth, it is Plaintiff who is
17 contractually entitled to recover its fees and costs:

18 **The cost and expense of any cure hereunder (including,**
19 **without limitation, attorneys' fees to the extent permitted by**
20 **law), with interest as provided in this Section 2.02(c) hereof,**
21 **shall constitute a portion of the Secured Obligations and shall**
22 **be due and payable to Lender upon demand.** All such costs and
23 expenses incurred by Lender or Trustee in remedying such Event
24 of Default or such failed payment or act or in appearing in,
25 defending, or bringing any such action or proceeding shall bear
26 interest at the Default Rate (defined in the Note), for the period
27 after notice from Lender that such cost or expense was incurred to
28 the date of payment to Lender. All such costs and expenses
incurred by Lender together with interest thereon calculated at the
Default Rate shall be deemed to constitute a portion of the Secured
Obligations and shall be immediately due and payable upon
demand by Lender therefor.

(See Deed of Trust, ¶ 2.02(c), Right to Cure Defaults, p. 35 (emphasis added), attached as
Exhibit 3 to the Second Amended Complaint).

1 Defendants owe a very large deficiency to Plaintiff. Defendants have failed to make any
2 argument demonstrating that an award of costs is appropriate. Plaintiff's underlying claims have
3 not been resolved, and this is not vexatious litigation or forum shopping, which NRCP 41(d)
4 seeks to prevent. Accordingly, Defendants are not entitled to recover its costs or attorney fees
5 under NRCP 41(d).

6 Moreover, Rule 41(d) does not apply where a later suit is based on a different claim.
7 *Volpert v. Papagna*, 83 Nev. 429, 433 P.2d 533 (1967). As previously explained, the complaint
8 was amended to add the deficiency causes of action subsequent to the sale of the Property that
9 established the amount of the deficiency. Thereby, Defendants' request for an additional bond
10 pursuant to Rule 41(d) should be denied.

11 Finally, as the title of NRCP 41(d) suggests the Rule allows for "costs" of previously
12 dismissed action not attorneys fees. As the Rule does not provide for consideration of
13 defendants' attorneys fees, Defendants request relating to attorneys fees should not be well
14 taken. *Simeone v. First Bank Nat'l Ass'n*, 125 F.R.D. 150 (D.Minn. 1989).

15 **d. Plaintiff Has Already Posted A Security Bond**

16 As unlikely as any cost award is for Defendants, rather than argue the point, Plaintiff has
17 already posted a \$500 security bond pursuant to Defendants' request as contemplated by NRS
18 18.130. Defendants are now demanding that Plaintiff post an additional bond without justifying
19 their request. Defendants contend that the \$500 security bond is insufficient "[g]iven the
20 tortured history of the Plaintiff's repeated actions." See Motion at 8:13. Not only is the history
21 not tortured, except for perhaps the bankruptcy filing on the eve of the first receivership hearing
22 and the extraordinary service efforts and expenses that have been expended trying to serve Mr.
23 Rapaport, the purpose of NRS 18.130 is to protect a defendant from a frivolous lawsuit, and
24 requires an out-of-state plaintiff to post security for any future adverse award of costs. Here,
25 Defendants cannot in good faith claim that Plaintiff's action is frivolous given the many millions
26 of dollars they owe. Moreover, Defendants have failed to set forth any evidence establishing that
27 the initial bond was or has become insufficient, or that Defendants have any chance of being
28

1 awarded costs or fees at the conclusion of this matter. Quite the contrary, it is Plaintiff who has
2 the contractual right to its fees and costs as provided for in the contracts between the parties.

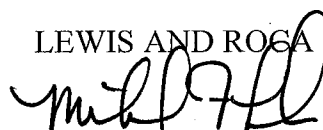
3 V. CONCLUSION

4 The previous actions are not identical to the instant action. There was one prior
5 receivership action that was dismissed, but that did not include a deficiency action, which was
6 voluntarily dismissed prior to any answer by Defendants because Palmilla filed a bankruptcy
7 petition that was itself dismissed by order of the bankruptcy court due to Palmilla's own non-
8 prosecution. The second action was a deficiency action, and did not include any request for a
9 receiver, and was dismissed without prejudiced by stipulation.

10 Defendants can not point to a even single previous action, much less two actions, that
11 result in the "twice dismissed" rule to justify dismissal. In addition, Defendants have not shown
12 any justification for ordering an increase in the existing cost bond, so their request to increase the
13 cost bond should also be denied.

14 Dated this 29 day of June, 2011.

15 LEWIS AND ROCA LLP



16 MICHAEL LYNCH

17 Nevada Bar No. 8555

18 MARJAN HAJIMIRZAEI

19 Nevada Bar No. 11984

3993 Howard Hughes Pkwy., Suite 600

Las Vegas, Nevada 89169

Attorneys for Plaintiff

21 List of Exhibits:

- 22 1 Complaint filed in First Lawsuit
- 23 2 Palmilla's Notice of Bankruptcy
- 24 3 Notice of Dismissal of Action Without Prejudice (First Lawsuit)
- 25 4 Complaint filed in Second Lawsuit
- 26 5 Notice of Stipulation and Order for Dismissal Without Prejudice (Second Lawsuit)
- 27 6 Order Granting Motion for Relief from the Automatic Stay (Palmilla Bankruptcy)
- 28 7 Order Dismissing [Palmilla's] Bankruptcy Case

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And by fax this day to (702) 366-0854.

DATED this 30th day of June, 2011.

Maly Huly

An Employee of Lewis and Roca LLP

EXHIBIT 1

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EXHIBIT 1

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1 **COMP**
 2 MICHAEL F. LYNCH, ESQ.
 3 Nevada Bar No. 8555
 4 MLynch@lrlaw.com
 5 LEWIS AND ROCA LLP
 3993 Howard Hughes Parkway, Suite 600
 Las Vegas, Nevada 89169-5996
 Telephone: (702) 385-3373
 Facsimile: (702) 385-9447

6 *Attorneys for Plaintiff*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 LaSalle Bank National Association as Trustee
 10 For The Registered Holders of ML-CFC
 11 Commercial Mortgage Trust 2007-7
 12 Commercial Mortgage Pass-Through
 Certificates Series 2007-7, by and through
 Midland Loan Services, Inc., as its Special
 Servicer,

13 Plaintiff,

14 vs.

15 Palmilla Development Co., Inc., a Nevada
 16 corporation; Hagai Rapaport, an individual;
 17 and Does I to X; and Roe Corporations X to
 XX,

18 Defendants.

Case No. **A581425**

Dept. No. **XX**

COMPLAINT

Exempt from arbitration: Action in equity

19 Plaintiff alleges:

20 **Parties, Jurisdiction And Venue**

21 1. Plaintiff is LaSalle Bank National Association as Trustee For The Registered
 22 Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through
 23 Certificates Series 2007-7, by and through Midland Loan Services, Inc., as its Special Servicer
 24 ("Lender" or "Plaintiff").

25 2. Palmilla Development Co., Inc. ("Borrower") is a Nevada corporation.

26 3. Plaintiff alleges upon information that Hagai Rapaport is, and at all times relevant
 27 to this action was, an individual doing business in Las Vegas, Nevada.

28 ...

**LEWIS
AND
ROCA**
LLP
ATTORNEYS

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6. The true names and capacities, whether individual, corporate, associate, trust/trustee or otherwise, of defendants named herein as Does I through X and Roe Corporations X through XX, are unknown to Plaintiff. Said Doe and Roe defendants may assert an interest in the property at issue in this complaint, and are proper parties to this action. Plaintiff shall amend this complaint to include the true names and capacities of such Doe and Roe defendants as the same are ascertained.

General Allegations

7. Borrower borrowed \$20,150,000.00 with interest from Artesia Mortgage Capital Corporation, a Delaware corporation ("Original Lender") on or about March 28, 2007 (the "Loan").

8. The Loan is evidenced by, among other things, that certain Fixed Rate Note dated March 28, 2007, bearing an authorized signature on behalf of the Borrower (the "Promissory Note"). (A true and correct copy of the Promissory Note is attached and incorporated by this reference as **Exhibit "1"**).

9. The Guarantor personally guaranteed to "unconditionally, irrevocably, jointly and severally guarantee(s) to Lender and to its successors, endorsees and/or assigns the full and

1 (See Limited Recourse Obligations Guarantee at ¶ 19 (Exhibit "2") (providing that "Guarantor, in order to induce Lender to accept this Guaranty, agrees that all actions or proceedings arising directly, indirectly or otherwise in connection with this Guaranty shall be litigated, at Lender's sole election, only in courts having a situs within the county and State where the Property is located, in any jurisdiction in which Borrower or Guarantor (or any individual or entity comprising Borrower or Guarantor) may reside or hold assets, or in anyone or more of the foregoing jurisdictions. Guarantor hereby consents and submits to the jurisdiction of any local, state or federal court located therein. Guarantor hereby waives any right it may have to transfer or change the venue of any litigation brought against it by Lender on this Guaranty in accordance with this paragraph.")).

² See *id.*

1 prompt payment when due, by acceleration or otherwise, of all amounts owing by Borrower to
2 Lender under the Loan Documents....” (See Limited Recourse Obligations Guarantee, a true and
3 correct copy of which is attached and incorporated by this reference as **Exhibit “2”**).

4 10. The Loan was and is secured by that certain Commercial Deed of Trust, Security
5 Agreement, Fixture Filing Financing Statement and Assignment of Leases, Rents, Income and
6 Profits (as same may have been amended) recorded in the Clark County Recorders’ Office as
7 Document No. 20070330-0002946 (“Deed of Trust”). (A true and correct copy of the Deed of
8 Trust is attached and incorporated by this reference as **Exhibit “3”**).

9 11. The Loan was and is further secured by that certain Assignment of Leases, Rents,
10 Income and Profits (as same may have been amended) recorded in the Clark County Recorders’
11 Office as Document No. 20070330-0002947 (“Assignment of Rents”). (A true and correct copy
12 of the Assignment of Rents is attached and incorporated by this reference as **Exhibit “4”**).

13 12. Original Lender assigned all of its rights and interests in and to the Deed of Trust
14 and the Assignment of Rents to the Plaintiff pursuant to that certain Assignment of (a)
15 Commercial Deed of Trust, Security Agreement, Fixture Filing Financing Statement and (b)
16 Assignment Of Leases, Rents, Income and Profits And Assignment of Assignment of Leases,
17 Rents, Income and Profits recorded in the Clark County Recorders’ Office as Document No.
18 20080103-0000543 (the “Assignment of Deed of Trust”). (A true and correct copy of the
19 Assignment of Deed of Trust is attached hereto and incorporated herein by this reference as
20 **Exhibit “5”**).

21 13. Pursuant to the Assignment of Deed of Trust, the Plaintiff holds all beneficial
22 interest under the Deed of Trust and the Assignment of Rents, and is thereby authorized and
23 empowered to bring this action.

24 14. As detailed more fully in the Deed of Trust, the real property securing the
25 Promissory Note (the “Real Property”) is identified by the Clark County Tax Assessor Parcel Nos.

- 26 a. 124-30-311-031;
27 b. 124-30-312-014 and 015;
28 c. 124-30-312-017 and 018;