

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

Electronically Filed  
May 04 2021 05:04 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

VINCENT HESSER

Petitioner,

vs.

KENNEDY FUNDING, INC.

Respondent

Case No. 81383

District Court

Case No 09A582746.

**APPEAL**

From the Eighth Judicial District Court  
Department XI  
Clark County Nevada  
HONORABLE ELIZABETH GONZALEZ

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**APPELLANT'S APPENDIX VOL I**

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LAW OFFICES OF BYRON THOMAS  
BYRON THOMAS, ESQ.  
BAR NO: 8906  
*Attorney for*  
*VINCENT HESSER*

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SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

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FILED  
FEB 13 3 06 PM '09  
*Earl D. Smith*  
CLERK OF THE COURT

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

KENNEDY FUNDING, INC., a New Jersey corporation,

Plaintiff,

v.

ONECAP PARTNERS MM, INC, a Nevada corporation; VINCENT W. HESSER, an individual; DOE INDIVIDUALS I through X; and ROE CORPORATIONS I through X,

Defendants.

Case No.:  
Dept. No.:

A582746  
XI

**COMPLAINT**

**BUSINESS COURT REQUESTED**

(Arbitration Exemption Requested:  
Damages Exceed \$50,000)

COMES NOW, Kennedy Funding, Inc., a New Jersey corporation ("Plaintiff" or "Kennedy Funding"), by and through its undersigned counsel, and hereby submits the following Complaint against Defendants and states and alleges as follows:

**PARTIES**

1. Kennedy Funding is a New Jersey corporation conducting business in the State of Nevada.

2. Vincent W. Hesser ("Hesser" or "Guarantor") is, and at all relevant times was, an individual residing in Las Vegas, Clark County, Nevada, and a Guarantor of the underlying Loan of OneCap Partners 2, LLC, a Nevada limited liability company, also known as Nevada Ueno Mita, LLC (alternatively "OneCap", "Nevada Ueno" or "Borrower"). At the time of the transaction between OneCap and Kennedy Funding, Hesser was the President of OneCap.

3. OneCap Partners MM, Inc. ("OneCap Partners MM, Inc." or "Guarantor") is, and at all relevant times was, a Nevada corporation doing business in Las Vegas, Clark County, Nevada, and a Guarantor of the underlying Loan of OneCap. At the time of the transaction between OneCap and Kennedy Funding, OneCap Partners MM, Inc. held a 1% interest in the OneCap.

4. The true names and capacities, whether individual, corporate, associate, or otherwise of Defendants herein designated as Does I through X, inclusive, and Roe Corporations I through X, inclusive, are not known to Plaintiff at this time and are therefore named as fictitious defendants. Plaintiff will seek to amend this Complaint to allege the true names and capacities of Does I through X and Roe Corporations I through X when and as ascertained.

**GENERAL ALLEGATIONS APPLICABLE TO ALL CLAIMS FOR RELIEF**

5. Plaintiff incorporates by reference Paragraphs 1 through 4 of this Complaint as though fully set forth herein.

6. On June 15, 2006, OneCap and Kennedy Funding entered into a Loan and Security Agreement ("Loan Agreement"), pursuant to which Kennedy Funding made the Loan to OneCap to facilitate the purchase of the Property.

7. According the Paragraph 6(h) of the Loan Agreement, the members of OneCap at the time of the loan transaction were Ascendant Universal Fund I, LLC (25 Units), Namale Limited Partnership (74 Units) and OneCap Partners MM Inc. (1 Unit).

8. The Loan is evidenced by a Promissory Note dated June 15, 2006 in the original principal sum of Twelve Million and 00/100 Dollars (\$12,000,000.00) ("Note"), from Lender to Borrower.

9. Under the Note, OneCap promised to pay Kennedy Funding monthly installments of accrued interest only at a rate of Eleven and One Half (11 ½ %) percent per annum, to accrue from July 1, 2006 through June 1, 2007, to be paid monthly on the last day of the month prior to when the interest is due.

10. Under the Note, OneCap promised to pay Kennedy Funding monthly installments of accrued interest only at a rate of Eighteen (18%) percent per annum, to accrue from July 1,

1 2007 through the Maturity Date, to be paid monthly commencing August 1, 2007, and  
2 continuing on the first day of each month thereafter until the Maturity Date.

3 11. Pursuant to the Note, OneCap agreed to pay all principal, interest and other sums  
4 due under the Note in full on the Maturity Date. Pursuant to extensions and amendments to the  
5 Loan Documents, the Maturity Date is June 30, 2009 (the "Maturity Date").

6 12. In the event of a late payment under the Note, OneCap agreed to pay a late charge  
7 equal to ten percent (10%) of the overdue payment.

8 13. In the event of a default under the Note, OneCap agreed to pay a default rate of  
9 twenty-five percent (25.0%) per annum.

10 14. As further security for the Loan, Borrower executed and delivered to Lender that  
11 certain Deed of Trust with Security Agreement, Financing Statement for Fixture Filing and  
12 Assignment of Rents (the "Deed of Trust") against the Property dated June 15 2006, and  
13 recorded on June 15, 2006, with the Clark County Recorder's Office ("Recorder") as Instrument  
14 No. 20060615-0005324.

15 15. On June 15, 2006, Kennedy Funding, Gary Owen II, LLC ("Option Holder"), and  
16 OneCap executed that certain Subordination and Attornment Agreement ("Subordination  
17 Agreement") dated June 15, 2006. Under the Option Agreement, the Option Holder agreed to  
18 subordinate its limited option to purchase the Property for \$30,000,000 pursuant to that certain  
19 First Amended Purchase and Sale Agreement dated June 9, 2006, to Kennedy Funding's Deed of  
20 Trust.

21 16. As security for the Loan, Borrower executed and delivered to Lender that certain  
22 Assignment of Leases and Rents on the Property dated June 14, 2006, and recorded on June 15,  
23 2006, with the Recorder as Instrument No. 20060615-0005325.

24 17. As additional security for the Loan, OneCap executed in favor of Kennedy  
25 Funding that certain Assignment of Licenses, Contracts, Plans, Specifications, Surveys,  
26 Drawings and Report ("Assignment of Licenses") dated June 15, 2006.

27 ...

28 ...

1 18. To further secure payment of the Note, on June 14, 2006, Vincent W. Hesser and  
2 OneCap Partners MM, Inc. (the "Guarantors") executed personal unconditional guaranties of the  
3 Note to Kennedy Funding (the "Guaranty").

4 19. OneCap granted a properly perfected security interest to Kennedy Funding by  
5 way of that certain UCC-1 Financing Statement ("UCC-1") filed with the Recorder on June 15,  
6 2006 as Instrument No. 20060615-0005326.

7 20. OneCap and the Guarantors executed an Environmental Indemnity Agreement in  
8 favor of Kennedy Funding, under which they agreed to indemnify Kennedy Funding for  
9 noncompliance of Environmental Laws, and reimburse Kennedy Funding for all reasonable costs  
10 and expenses in the event OneCap failed to fully comply with Environmental Law.

11 **Defaults**

12 21. OneCap defaulted under the Loan and Deed of Trust, including, but not limited to,  
13 OneCap's failure to make monthly installment payment under the Note in the amount of  
14 \$250,000 due April 1, 2008.

15 22. OneCap is also in default for failure to timely pay its tax obligations relating to  
16 the Property. State and County Taxes are outstanding for the fiscal period 2008 to 2009 in the  
17 total amount of \$25,086.45 on the Property.

18 23. OneCap is also in default for the apparent unauthorized transfer of OneCap's  
19 assets to Nevada Ueno Mita, LLC and/or name change from OneCap to Nevada Ueno Mita, LLC  
20 ("Nevada Ueno Mita, LLC"), purportedly effectuated pursuant to an Amendment to the Articles  
21 of Incorporation of OneCap.

22 24. As set forth in the Declaration of Default and Notice of Breach dated August 14,  
23 2008, OneCap was in default for failure to make the April 1, 2008 installment.

24 25. In connection with OneCap's default under the Loan and Deed of Trust, the  
25 Notice of Breach and Election to Sell Under Deed of Trust was recorded with the Clark County  
26 Recorder's Office on August 20, 2008.

27 26. Kennedy Funding scheduled the foreclosure sale for December 29, 2008.

28 . . .

**Bankruptcy of Nevada Ueno Mita, LLC, formerly known as OneCap**

27. On December 26, 2008 ("Petition Date"), three (3) days before the foreclosure sale, Nevada Ueno, formerly known as OneCap, filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy for the District of Nevada, Case No. BK-S-08-25487-BAM (the "Bankruptcy").

28. In accordance with the information provided in the Bankruptcy Petition, it appears that OneCap transferred its interest in the Property to Nevada Ueno. Specifically, the first page of the Bankruptcy Petition identifies the debtor as "NEVADA UENO MITA, LLL...FKA OneCap Partners 2, LLC". The Bankruptcy Petition includes Kennedy Funding in the list of creditors.

29. Under the Bankruptcy Petition, Nevada Ueno purports to hold a fee simple interest in the Property.

30. Under Sections 2.20(a) and (c) of the Deed of Trust, in the event of a transfer of the Property, the principle balance becomes due upon the sale of the Property. The Deed of Trust defines which actions constitute a "transfer" as follows:

(c) Any sale, assignment, lease, transfer, pledge, or other disposition, whether voluntary or involuntary, by operation of law or otherwise, of any partnership, membership or other ownership interest or shares of stock in the Trustor, shall be deemed to be a transfer of the Property for the purposes of this Section 2.20; provided, however, that Trustor shall be permitted to sell, assign or transfer any membership or other ownership interest in the Trustor if such sale, assignment or transfer does not change the control, management or majority ownership of Trustor.

31. Pursuant to the Deed of Trust, an event of default arises under Section 3.01 in the event OneCap transfers to a third party its beneficial interest in the Property or other collateral of Kennedy Funding.

32. As set forth on page 19, Section 10(e) of the Loan Agreement, the transfer of title to the collateral, among other things, constitutes an event of default under the following provision of the Loan Agreement:

...

...

10. Events of Default. The occurrence of any of the following shall constitute an Event of Default hereunder:

\*\*\*

- (e) the sale, conveyance, assignment, transfer or other disposition or divestiture of Borrower's title to any of the Collateral, or the mortgage or other conveyance of a security interest in, or other encumbrance on any of the Collateral or any interest therein, whether voluntary or involuntary, except provided herein;

33. OneCap's apparent transfer of its interest in the Property to OneCap, including OneCap's title to the Property, is in direct violation of the provisions of the Loan Agreement and Deed of Trust.

34. On page 2 of the Guaranty, the Guarantors, Vincent W. Hesser and OneCap Partners MM, Inc., expressly waived the applicability of the one-action-rule for Kennedy Funding's efforts to commence an action on OneCap's obligations due and owing to Kennedy Funding under the Loan Documents:

Without limiting the generality of the foregoing, Guarantor expressly waives, to the fullest extent allowed by law, any and all rights and benefits provided to guarantors under Nevada Revised Statutes Section 40.430 through 40.495, inclusive, and Guarantor agrees that Lender shall be entitled to commence and maintain an action for the enforcement of this Guaranty separately and independently from any action to enforce Borrower's obligations under the Loan Documents, any action to foreclose the lien of the Deed of Trust, or any other action or proceeding to enforce the Lender's legal rights and remedies under the Loan Documents, all as authorized pursuant to Nevada Revised Statutes Section 40.495...

35. As of the date of the filing of this Complaint, One Cap is in default under the Loan and Deed of Trust.

36. As of February 12, 2009, a total of \$14,644,898.45 in principal, accrued interest and other charges are due and payable by OneCap to Kennedy Funding, and now the Guarantors. This outstanding balance is comprised of the following amounts:

- i. \$12,000,000.00, representing principal due under the Note;

...

- ii. \$2,600,000.00, representing interest accrued under the Note at the default rate as of April 1, 2008;
- iii. \$18,000.00, representing late charges accrued under the Note from October 2007;
- iv. \$24,142.95, representing a foreclosures costs and appraisal costs incurred as of February 12, 2009; and
- v. \$2,755.50, representing attorney's fees and costs.

37. The commencement of this action does not constitute the bringing of an "action" as contemplated by NRS 40.430(4)(a), because NRS 40.430(4)(i) expressly provides for the commencement of an action against a guarantor of an underlying debt upon the bankruptcy of the primary obligor. See NEV. REV. STAT. 40.430(4)(i).

38. Thus, given existing defaults under Loan, Note, First Deed of Trust (collectively, the "Loan Documents"), the Guaranties of the Guarantors, Vincent W. Hesser and OneCap Partners MM, Inc., and Nevada Ueno's, formerly OneCap, recent bankruptcy, Kennedy Funding is entitled to pursue the Guarantors for repayment of the outstanding loan.

#### **FIRST CLAIM FOR RELIEF**

##### **(Breach of Contract – Against Vincent W. Hesser for Guaranty)**

39. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 38 of this Complaint with the same force and effect as though the allegations were specifically stated herein.

40. Pursuant to the Guaranty, Defendant Vincent W. Hesser agreed to fully, faithfully and unconditionally perform and pay all of the obligations of the Borrower OneCap to Plaintiff Kennedy Funding under the Loan Documents.

41. The Borrower, OneCap, defaulted under the Loan Documents.

42. Subsequent to default of the Borrower, OneCap, under the Loan Documents, Plaintiff Kennedy Funding made demand upon Defendant Vincent W. Hesser to honor his guaranty and fully and faithfully perform and pay all obligations, including, but not limited to, the outstanding balance due of the Borrower, OneCap, under the Loan Document.

43. To date, Defendant Vincent W. Hesser has failed and refused to honor his obligations under the Guaranty.

44. The Guaranty constitutes a valid and enforceable contract between Plaintiff and Defendant Vincent W. Hesser, the Guarantor.

45. Despite demand being made by Plaintiff for repayment, the Guarantor, Vincent W. Hesser, has breached the Guaranty by, among other things, failing to pay the Plaintiff amounts owed and payable under the Guaranty.

46. Plaintiff has been damaged by Vincent W. Hesser's breaches of the Guaranty in an amount in excess of \$10,000.00.

47. Plaintiff has been required to retain the services of counsel to prosecute this matter and, as such, Plaintiff is entitled to an award for their costs and attorney's fees incurred as a result.

### **SECOND CLAIM FOR RELIEF**

#### **(Breach of Contract – Against OneCap Partners MM, Inc. for Guaranty)**

48. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 47 of this Complaint with the same force and effect as though the allegations were specifically stated herein.

49. Pursuant to the Guaranty, Defendant OneCap Partners MM, Inc. agreed to fully, faithfully and unconditionally perform and pay all of the obligations of the Borrower OneCap to Plaintiff Kennedy Funding under the Loan Documents.

50. The Borrower, OneCap, defaulted under the Loan Documents.

51. Subsequent to default of the Borrower, OneCap, under the Loan Documents, Plaintiff Kennedy Funding made demand upon Defendant OneCap Partners MM, Inc. to honor its guaranty and fully and faithfully perform and pay all obligations, including, but not limited to, the outstanding balance due of the Borrower, OneCap, under the Loan Document.

52. To date, Defendant OneCap Partners MM, Inc. has failed and refused to honor its obligations under the Guaranty.

...



53. The Guaranty constitutes a valid and enforceable contract between Plaintiff and Defendant OneCap Partners MM, Inc., the Guarantor.

54. Despite demand being made by Plaintiff for repayment, the Guarantor, OneCap Partners MM, Inc., has breached the Guaranty by, among other things, failing to pay the Plaintiff amounts owed and payable under the Guaranty.

55. Plaintiff has been damaged by OneCap Partners MM, Inc.'s breaches of the Guaranty in an amount in excess of \$10,000.00.

56. Plaintiff has been required to retain the services of counsel to prosecute this matter and, as such, Plaintiff is entitled to an award for their costs and attorney's fees incurred as a result.

#### DEMAND

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

1. With respect to the First Claim of Relief (Breach of Contract – Against Vincent W. Hesser for Guaranty), judgment in an amount in excess of \$10,000.00;

2. With respect to the Second Claim of Relief (Breach of Contract – Against OneCap Partners MM, Inc. for Guaranty), judgment in an amount in excess of \$10,000.00;

3. For attorney's fees and costs incurred by Plaintiffs in enforcing it rights under the Note and Guaranty, including but not limited to, attorney's fees and costs incurred in bringing this action; and

4. For such other and further relief as the Court may deem just and proper.

DATED this 13<sup>th</sup> day of February, 2009.

**SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON**

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12 *Attorneys for Kennedy Funding, Inc.*

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 KENNEDY FUNDING, INC., a New Jersey  
16 corporation,

17 Plaintiff,

18 v.

19 ONECAP PARTNERS MM, INC, a Nevada  
20 corporation; VINCENT W. HESSER, an  
21 individual; DOE INDIVIDUALS I through X,  
22 and ROE CORPORATIONS I through X,

23 Defendants.

Case No:  
Dept. No.:

A 582746

XI

INITIAL APPEARANCE FEE  
DISCLOSURE  
(NRS CHAPTER 19)

24 Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for  
25 parties appearing in the above-entitled action as indicated below:

26 Name of Plaintiff: \$151.00

27 TOTAL REMITTED \$151.00

28 DATED this 13<sup>th</sup> day of February, 2009.

29 **SANTORO, DRIGGS, WALCH,  
30 KEARNEY, HOLLEY & THOMPSON**

31 *[Signature]*  
32 RICHARD F. HOLLEY, ESQ. (NBN 3077)  
33 OGONNA M. ATAMOH, ESQ. (NBN 7589)  
34 400 South Fourth Street, Third Floor  
35 Las Vegas, Nevada 89101  
36 *Attorneys for Kennedy Funding, Inc.*

FILED  
FEB 13 3 06 PM '09

*[Signature]*  
CLERK OF THE COURT

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

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FEB 13 2009  
CLERK OF THE COURT

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FILED

MAR 13 11 43 AM '09

CLERK OF THE COURT

10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 \*\*\*\*\*

13 KENNEDY FUNDING, INC., a New Jersey  
14 corporation,

15 Plaintiff,

16 vs.

17 ONECAP PARTNERS MM, INC., a Nevada  
18 corporation; VINCENT HESSER, an  
19 individual; DOE INDIVIDUALS I through X;  
20 and ROE CORPORATIONS I through X,

21 Defendants.

CASE NO.: A582746  
DEPT. NO.: XI

22 DEFENDANTS' ANSWER TO  
23 COMPLAINT and AFFIRMATIVE  
24 DEFENSES

25 COME NOW, Defendants, ONECAP PARTNERS MM, INC. and VINCENT HESSER,  
26 by and through their attorney or record, HAROLD P. GEWERTER, ESQ., of the law firm of  
27 HAROLD P. GEWERTER, ESQ., LTD., herewith file their Answer to Complaint and  
28 Affirmative Defenses as follows:

Defendants deny each and every allegation of Plaintiff's Complaint except those  
allegations which are herein specifically admitted, qualified, or otherwise answered.

These answering Defendants deny that Plaintiff is entitled to any recovery, and  
Defendants request that Plaintiff's Complaint be dismissed with prejudice on the merits.

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MAR 13 2009

CLERK OF THE COURT

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1           1.     Defendants are without sufficient knowledge or information as to the truth or  
2 falsity of the allegations contained in paragraph 1 of the Complaint, and therefore, deny each and  
3 every allegation contained in said paragraph.

4           2.     Defendants are without sufficient knowledge or information as to the truth or  
5 falsity of the allegations contained in paragraph 2 of the Complaint, and therefore, deny each and  
6 every allegation contained in said paragraph.

7           3.     Defendants are without sufficient knowledge or information as to the truth or  
8 falsity of the allegations contained in paragraph 3 of the Complaint, and therefore, deny each and  
9 every allegation contained in said paragraph.

10          4.     Defendants deny each and every allegation contained in paragraph 4 of the  
11 Complaint.

12          5.     Defendants deny each and every allegation contained in paragraph 5 of the  
13 Complaint.

14          6.     Defendants are without sufficient knowledge or information as to the truth or  
15 falsity of the allegations contained in paragraph 6 of the Complaint, and therefore, deny each and  
16 every allegation contained in said paragraph.

17          7.     Defendants are without sufficient knowledge or information as to the truth or  
18 falsity of the allegations contained in paragraph 7 of the Complaint, and therefore, deny each and  
19 every allegation contained in said paragraph.

20          8.     Defendants are without sufficient knowledge or information as to the truth or  
21 falsity of the allegations contained in paragraph 8 of the Complaint, and therefore, deny each and  
22 every allegation contained in said paragraph.

23          9.     Defendants are without sufficient knowledge or information as to the truth or  
24 falsity of the allegations contained in paragraph 9 of the Complaint, and therefore, deny each and  
25 every allegation contained in said paragraph.

26          10.    Defendants are without sufficient knowledge or information as to the truth or  
27 falsity of the allegations contained in paragraph 10 of the Complaint, and therefore, deny each  
28 and every allegation contained in said paragraph.

1           11. Defendants are without sufficient knowledge or information as to the truth or  
2 falsity of the allegations contained in paragraph 11 of the Complaint, and therefore, deny each  
3 and every allegation contained in said paragraph.

4           12. Defendants are without sufficient knowledge or information as to the truth or  
5 falsity of the allegations contained in paragraph 12 of the Complaint, and therefore, deny each  
6 and every allegation contained in said paragraph.

7           13. Defendants are without sufficient knowledge or information as to the truth or  
8 falsity of the allegations contained in paragraph 13 of the Complaint, and therefore, deny each  
9 and every allegation contained in said paragraph.

10           14. Defendants are without sufficient knowledge or information as to the truth or  
11 falsity of the allegations contained in paragraph 14 of the Complaint, and therefore, deny each  
12 and every allegation contained in said paragraph.

13           15. Defendants are without sufficient knowledge or information as to the truth or  
14 falsity of the allegations contained in paragraph 15 of the Complaint, and therefore, deny each  
15 and every allegation contained in said paragraph.

16           16. Defendants are without sufficient knowledge or information as to the truth or  
17 falsity of the allegations contained in paragraph 16 of the Complaint, and therefore, deny each  
18 and every allegation contained in said paragraph.

19           17. Defendants are without sufficient knowledge or information as to the truth or  
20 falsity of the allegations contained in paragraph 17 of the Complaint, and therefore, deny each  
21 and every allegation contained in said paragraph.

22           18. Defendants are without sufficient knowledge or information as to the truth or  
23 falsity of the allegations contained in paragraph 18 of the Complaint, and therefore, deny each  
24 and every allegation contained in said paragraph.

25           19. Defendants are without sufficient knowledge or information as to the truth or  
26 falsity of the allegations contained in paragraph 19 of the Complaint, and therefore, deny each  
27 and every allegation contained in said paragraph.

28

1           20. Defendants are without sufficient knowledge or information as to the truth or  
2 falsity of the allegations contained in paragraph 20 of the Complaint, and therefore, deny each  
3 and every allegation contained in said paragraph.

4           21. Defendants are without sufficient knowledge or information as to the truth or  
5 falsity of the allegations contained in paragraph 21 of the Complaint, and therefore, deny each  
6 and every allegation contained in said paragraph.

7           22. Defendants are without sufficient knowledge or information as to the truth or  
8 falsity of the allegations contained in paragraph 22 of the Complaint, and therefore, deny each  
9 and every allegation contained in said paragraph.

10          23. Defendants are without sufficient knowledge or information as to the truth or  
11 falsity of the allegations contained in paragraph 20 of the Complaint, and therefore, deny each  
12 and every allegation contained in said paragraph.

13          24. Defendants are without sufficient knowledge or information as to the truth or  
14 falsity of the allegations contained in paragraph 24 of the Complaint, and therefore, deny each  
15 and every allegation contained in said paragraph.

16          25. Defendants are without sufficient knowledge or information as to the truth or  
17 falsity of the allegations contained in paragraph 25 of the Complaint, and therefore, deny each  
18 and every allegation contained in said paragraph.

19          26. Defendants are without sufficient knowledge or information as to the truth or  
20 falsity of the allegations contained in paragraph 26 of the Complaint, and therefore, deny each  
21 and every allegation contained in said paragraph.

22          27. Defendants are without sufficient knowledge or information as to the truth or  
23 falsity of the allegations contained in paragraph 27 of the Complaint, and therefore, deny each  
24 and every allegation contained in said paragraph.

25          28. Defendants are without sufficient knowledge or information as to the truth or  
26 falsity of the allegations contained in paragraph 28 of the Complaint, and therefore, deny each  
27 and every allegation contained in said paragraph.

28

1           29. Defendants are without sufficient knowledge or information as to the truth or  
2 falsity of the allegations contained in paragraph 29 of the Complaint, and therefore, deny each  
3 and every allegation contained in said paragraph.

4           30. Defendants are without sufficient knowledge or information as to the truth or  
5 falsity of the allegations contained in paragraph 30 of the Complaint, and therefore, deny each  
6 and every allegation contained in said paragraph.

7           31. Defendants are without sufficient knowledge or information as to the truth or  
8 falsity of the allegations contained in paragraph 31 of the Complaint, and therefore, deny each  
9 and every allegation contained in said paragraph.

10          32. Defendants are without sufficient knowledge or information as to the truth or  
11 falsity of the allegations contained in paragraph 32 of the Complaint, and therefore, deny each  
12 and every allegation contained in said paragraph.

13          33. Defendants are without sufficient knowledge or information as to the truth or  
14 falsity of the allegations contained in paragraph 33 of the Complaint, and therefore, deny each  
15 and every allegation contained in said paragraph.

16          34. Defendants are without sufficient knowledge or information as to the truth or  
17 falsity of the allegations contained in paragraph 34 of the Complaint, and therefore, deny each  
18 and every allegation contained in said paragraph.

19          35. Defendants are without sufficient knowledge or information as to the truth or  
20 falsity of the allegations contained in paragraph 35 of the Complaint, and therefore, deny each  
21 and every allegation contained in said paragraph.

22          36. Defendants are without sufficient knowledge or information as to the truth or  
23 falsity of the allegations contained in paragraph 36 of the Complaint, and therefore, deny each  
24 and every allegation contained in said paragraph.

25          37. Defendants are without sufficient knowledge or information as to the truth or  
26 falsity of the allegations contained in paragraph 37 of the Complaint, and therefore, deny each  
27 and every allegation contained in said paragraph.

28

1           38. Defendants deny each and every allegation contained in paragraph 38 of the  
2 Complaint.

3           39. Defendants deny each and every allegation contained in paragraph 39 of the  
4 Complaint.

5           40. Defendants are without sufficient knowledge or information as to the truth or  
6 falsity of the allegations contained in paragraph 40 of the Complaint, and therefore, deny each  
7 and every allegation contained in said paragraph.

8           41. Defendants are without sufficient knowledge or information as to the truth or  
9 falsity of the allegations contained in paragraph 41 of the Complaint, and therefore, deny each  
10 and every allegation contained in said paragraph.

11           42. Defendants are without sufficient knowledge or information as to the truth or  
12 falsity of the allegations contained in paragraph 42 of the Complaint, and therefore, deny each  
13 and every allegation contained in said paragraph.

14           43. Defendants are without sufficient knowledge or information as to the truth or  
15 falsity of the allegations contained in paragraph 43 of the Complaint, and therefore, deny each  
16 and every allegation contained in said paragraph.

17           44. Defendants are without sufficient knowledge or information as to the truth or  
18 falsity of the allegations contained in paragraph 44 of the Complaint, and therefore, deny each  
19 and every allegation contained in said paragraph.

20           45. Defendants are without sufficient knowledge or information as to the truth or  
21 falsity of the allegations contained in paragraph 45 of the Complaint, and therefore, deny each  
22 and every allegation contained in said paragraph.

23           46. Defendants deny each and every allegation contained in paragraph 46 of the  
24 Complaint.

25           47. Defendants deny each and every allegation contained in paragraph 47 of the  
26 Complaint.

27           48. Defendants deny each and every allegation contained in paragraph 48 of the  
28 Complaint.



1           49. Defendants are without sufficient knowledge or information as to the truth or  
2 falsity of the allegations contained in paragraph 49 of the Complaint, and therefore, deny each  
3 and every allegation contained in said paragraph.

4           50. Defendants are without sufficient knowledge or information as to the truth or  
5 falsity of the allegations contained in paragraph 50 of the Complaint, and therefore, deny each  
6 and every allegation contained in said paragraph.

7           51. Defendants are without sufficient knowledge or information as to the truth or  
8 falsity of the allegations contained in paragraph 51 of the Complaint, and therefore, deny each  
9 and every allegation contained in said paragraph.

10          52. Defendants are without sufficient knowledge or information as to the truth or  
11 falsity of the allegations contained in paragraph 52 of the Complaint, and therefore, deny each  
12 and every allegation contained in said paragraph.

13          53. Defendants are without sufficient knowledge or information as to the truth or  
14 falsity of the allegations contained in paragraph 53 of the Complaint, and therefore, deny each  
15 and every allegation contained in said paragraph.

16          54. Defendants are without sufficient knowledge or information as to the truth or  
17 falsity of the allegations contained in paragraph 54 of the Complaint, and therefore, deny each  
18 and every allegation contained in said paragraph.

19          55. Defendants deny each and every allegation contained in paragraph 55 of the  
20 Complaint.

21          56. Defendants deny each and every allegation contained in paragraph 56 of the  
22 Complaint.

23                   **AFFIRMATIVE DEFENSES**

24                   **FIRST AFFIRMATIVE DEFENSE**

25           Plaintiff's Complaint on file herein fails to state a claim against these answering Defendants upon  
26 which relief can be granted.

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SECOND AFFIRMATIVE DEFENSE

That it has been necessary for the Defendants to retain the services of an attorney to defend this action and Defendants are entitled to an award of reasonable attorney's fees and costs incurred herein.

THIRD AFFIRMATIVE DEFENSE

Pursuant to NRCp 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon filing of this Answer, and therefore, these answering Defendants reserve their right to amend their Answer to allege additional affirmative defenses if subsequent investigation so warrants.

FOURTH AFFIRMATIVE DEFENSE

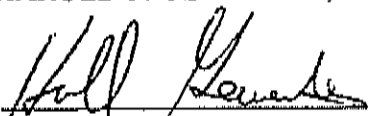
Plaintiff has knowingly and intentionally waived all claims against Defendants because Plaintiff has violated the "one-action rule" in Nevada by foreclosing on the real property and pursuing remedies under the Note and/or Guaranty.

FIFTH AFFIRMATIVE DEFENSE

This Court is without jurisdiction because sole jurisdiction of the real property, the Deed of Trust, the Note, the Guaranty and related claims are part of or related to the U.S. Bankruptcy Court Case No. BK-S-08-25487-BAM, now pending in the District of Nevada.

DATED this 11 day of March, 2009.

HAROLD P. GEWERTER, ESQ., LTD.

  
HAROLD P. GEWERTER, ESQ.  
Nevada Bar No. 499  
5440 W. Sahara Avenue, Third Floor  
Las Vegas, Nevada 89146  
Attorney for Defendants

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    X     By being served via facsimile to the following individuals at their last known facsimile number, this same date, as follows:

M. Aloys  
An employee of Harold P. Gewerter, Esq., Ltd.

SUMM

**ORIGINAL**  
**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

KENNEDY FUNDING, INC., a New Jersey corporation,

Plaintiff,

v.

ONECAP PARTNERS MM, INC, a Nevada corporation;  
 VINCENT W. HESSER, an individual; DOE  
 INDIVIDUALS I through X; and ROE CORPORATIONS  
 I through X,

Defendants.

CASE NO.:

DEPT. NO.:

A 582746ED

X MAR 19 10 15 AM '09

*E. A. Friedland*  
 SUMMONS  
 CLERK OF THE COURT

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.**

TO: VINCENT W. HESSER

A civil Complaint has been filed by the Plaintiff[s] against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you, exclusive of the day of service, you must do the following:

- a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.
- b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff[s] and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members, and legislators, each have 45 days after service of this Summons within which to file an answer or other responsive pleading to the Complaint.

Submitted by:

SANTORO, DRIGGS, WALCH,  
 KEARNEY, HOLLEY & THOMPSON

Richard F. Holley, Esq. (Nevada Bar No. 3077)  
 Ogonna M. Adamoh, Esq. (Nevada Bar No. 7589)  
 400 South Fourth Street, Third Floor  
 Las Vegas, NV 89101  
 (702) 791-0308  
 Attorneys for Plaintiff

EDWARD A. FRIEDLAND, CLERK OF COURT

SALEVAO ASIFO

By: Deputy Clerk



FEB 13 2009

Regional Justice Center  
 200 Lewis Avenue  
 Las Vegas, Nevada 89155

NOTE: When service is by publication, add a brief statement of the object of the action.  
 See Rules of Civil Procedure, Rule 4(b).

06209-097318-8

RECEIVED

MAR 19 2009

CLERK OF THE COURT

VH000020

# AFFIDAVIT OF SERVICE

STATE OF NEVADA )  
 )  
COUNTY OF CLARK )

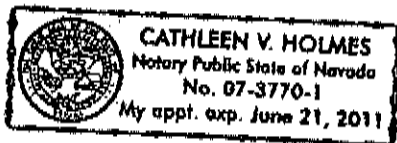
Clara M. Jimenez, being duly sworn deposes and says: that at all times herein affiant was and is a citizen of the United States, over 18 years of age, licensed to serve civil process in the state of Nevada under license #389, and not a party to or interested in the proceeding in which this affidavit is made. The affiant received on Monday March 02 2009; 1 copy(ies) of the:

## SUMMONS, COMPLAINT

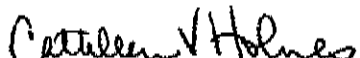
I served the same on Wednesday March 11 2009 at 08:34PM by:


Serving the Defendant, Vincent W. Hesser, an individual

Substituted Service, by leaving the copies with or in the presence of: OFFICER WHITE, GATE GUARD / PURSUANT TO NRS 14.090 WHO REFUSED ENTRY INTO THE COMMUNITY. Authorized Agent. at the Defendant's Business located at 10758 RIVENDELL AVE., LAS VEGAS, NV 89135.



SUBSCRIBED AND SWORN to before me on this  
Thursday March 12 2009

  
Cathleen V. Holmes  
Notary Public

  
Affiant: Clara M. Jimenez  
LEGAL WINGS, INC. - NV LIC #389  
1118 FREMONT STREET  
Las Vegas, NV 89101  
(702) 384-0305, FAX (702) 384-8638

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VH000021

ORIGINAL

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FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

APR 29 8 23 AM '09

KENNEDY FUNDING, INC., a New Jersey  
corporation,

Plaintiff,

v.

ONECAP PARTNERS MM, INC, a Nevada  
corporation; VINCENT W. HESSER, an  
individual; DOE INDIVIDUALS I through X;  
and ROE CORPROATIONS I through X,

Defendants.

*E. J. Smith*  
CLERK OF THE COURT

CASE NO. A582746  
DEPT NO. XI

09A582746  
77453



**COMMISSIONER'S AMENDED DECISION**  
**ON REQUEST FOR EXEMPTION**

NATURE OF ACTION: Collection

DATE OF FILING REQUEST FOR EXEMPTION: March 31, 2009

EXEMPTION FILED BY: Plaintiff OPPOSITION: No

ATTORNEY FOR PLAINTIFF: Ogonna M. Atamoh, Esq., Santoro, Driggs, Walch,

Kearney, Holley & Thompson

ATTORNEY FOR DEFENDANTS: Harold P. Gewerter, Esq.

**FINDINGS**

DECISION: EXEMPTION GRANTED XX

EXEMPTION DENIED       

DATED this 28th day of April, 2009.

*[Signature]*  
ADR COMMISSIONER

CLERK OF THE COURT

RECEIVED

APR 29 2009

ADR  
COMMISSIONER  
EIGHTH JUDICIAL  
DISTRICT COURT

VH000029 2

**NOTICE**

Pursuant to Nevada Arbitration Rule 5(D), you are hereby notified you have five (5) days from the date you are served with this document within which to file written objections with the Commissioner at the ADR Office and serve all parties. The Commissioner's Amended Decision is deemed served three (3) days after the Commissioner's designee deposits a copy of the Decision in the U.S. Mail.

A copy of the foregoing ADR Commissioner's Amended Decision was:

✓

Mailed to the Plaintiff's/Defendant's counsel at their last known address(es) on the 29<sup>th</sup> day of April, 2009.

Harold P. Gewerter, Esq.  
HAROLD P. GEWERTER, LTD.  
2705 Airport Drive  
N. Las Vegas, NV 89032-4301  
(702) 382-1759  
(Attorney for Defendants)

\_\_\_\_\_ Mailed to Plaintiff/Defendant at the following address(es) on the \_\_\_\_\_ day of April, 2009.

By   
ADR COMMISSIONER'S DESIGNEE

1 COMS

ORIGINAL

2 DISTRICT COURT

3 CLARK COUNTY, NEVADA

FILED

APR 17 8 27 AM '09

4  
5 KENNEDY FUNDING, INC., a New Jersey  
6 corporation,

7 Plaintiff,

8 v.

9 ONECAP PARTNERS MM, INC, a Nevada  
10 corporation; VINCENT W. HESSER, an  
11 individual; DOE INDIVIDUALS I through X;  
12 and ROE CORPROATIONS I through X,

12 Defendants.

CLERK OF THE COURT

CASE NO. A582746

DEPT NO. XI

13 COMMISSIONER'S DECISION ON REQUEST FOR EXEMPTION

14 NATURE OF ACTION: Collection

15 DATE OF FILING REQUEST FOR EXEMPTION: March 31, 2009

16 EXEMPTION FILED BY: Plaintiff OPPOSITION: No

17 ATTORNEY FOR PLAINTIFF: Ogonna M. Atamoh, Esq., Santoro, Driggs, Walch,

18 Kearney, Holley & Thompson

19 ATTORNEY FOR DEFENDANTS: Harold P. Gewerter, Esq.

20 FINDINGS

21 DECISION: EXEMPTION GRANTED XX

22 EXEMPTION DENIED       

23 DATED this 15<sup>th</sup> day of April, 2009.

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ADR COMMISSIONER

ADR  
COMMISSIONER  
EIGHTH JUDICIAL  
DISTRICT COURT

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APR 17 2009

CLERK OF THE COURT

VH000022



NOTICE

Pursuant to Nevada Arbitration Rule 5(D), you are hereby notified you have five (5) days from the date you are served with this document within which to file written objections with the Commissioner at the ADR Office and serve all parties. The Commissioner's Decision is deemed served three (3) days after the Commissioner's designee deposits a copy of the Decision in the U.S. Mail.

A copy of the foregoing ADR Commissioner's Decision was:

✓

Mailed to the Plaintiff's/Defendant's counsel at their last known address(es) on the 17<sup>th</sup> day of April, 2009.

Mailed to Plaintiff/Defendant at the following address(es) on the \_\_\_\_\_ day of April, 2009.

By



ADR COMMISSIONER'S DESIGNEE

3/13/09

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FILED

2009 MAR 31 P 3:37

ADR

1 REQT  
2 RICHARD F. HOLLEY, ESQ.  
3 Nevada Bar No. 3077  
4 OGONNA M. ATAMOH, ESQ.  
5 Nevada Bar No. 7589  
6 SANTORO, DRIGGS, WALCH,  
7 KEARNEY, HOLLEY & THOMPSON  
8 400 South Fourth Street, Third Floor  
9 Las Vegas, Nevada 89101  
10 Telephone: 702/791-0308  
11 Facsimile: 702/791-1912

12 *Attorneys for Kennedy Funding, Inc.*

13 DISTRICT COURT

14 CLARK COUNTY, NEVADA

15 KENNEDY FUNDING, INC., a New Jersey  
16 corporation,

17 Plaintiff,

18 v.

19 ONECAP PARTNERS MM, INC, a Nevada  
20 corporation; VINCENT W. HESSER, an  
21 individual; DOE INDIVIDUALS I through X;  
22 and ROE CORPORATIONS I through X,

23 Defendants.

Case No.: A582746  
Dept. No.: XI

24 PLAINTIFF'S REQUEST FOR EXEMPTION FROM ARBITRATION

25 Plaintiff hereby requests that the above-entitled matter be exempted from arbitration  
26 pursuant to Nevada Arbitration Rules 3 and 5, as this case:

27 \_\_\_\_\_ presents a significant issue of public policy;

28 X involves an amount in controversy in excess of \$50,000, exclusive of interest  
and costs;

\_\_\_\_\_ presents unusual circumstances which constitute good cause for removal from  
the program.

29 I. FACTUAL HISTORY

30 Plaintiff requests exemption from arbitration because the amount in controversy will  
31 exceed \$50,000.

1 On June 15, 2006, OneCap Partners MM, Inc., a Nevada corporation ("OneCap") and  
2 Kennedy Funding, Inc., a New Jersey corporation ("Plaintiff" or "Kennedy Funding") entered  
3 into a Loan and Security Agreement ("Loan Agreement"), pursuant to which Kennedy Funding  
4 made the Loan to OneCap to facilitate the purchase of real property (the "Property"). The Loan  
5 is evidenced by a Promissory Note dated June 15, 2006 in the original principal sum of Twelve  
6 Million and 00/100 Dollars (\$12,000,000.00) ("Note"), from Lender to Borrower. As further  
7 security for the Loan, Borrower executed and delivered to Lender that certain Deed of Trust with  
8 Security Agreement, Financing Statement for Fixture Filing and Assignment of Rents (the "Deed  
9 of Trust") against the Property dated June 15 2006, and recorded on June 15, 2006, with the  
10 Clark County Recorder's Office ("Recorder") as Instrument No. 20060615-0005324.

11 On June 15, 2006, Kennedy Funding, Gary Owen II, LLC ("Option Holder"), and  
12 OneCap executed that certain Subordination and Attornment Agreement ("Subordination  
13 Agreement") dated June 15, 2006. Under the Option Agreement, the Option Holder agreed to  
14 subordinate its limited option to purchase the Property for \$30,000,000 pursuant to that certain  
15 First Amended Purchase and Sale Agreement dated June 9, 2006, to Kennedy Funding's Deed of  
16 Trust. As security for the Loan, Borrower executed and delivered to Lender that certain  
17 Assignment of Leases and Rents on the Property dated June 14, 2006, and recorded on June 15,  
18 2006, with the Recorder as Instrument No. 20060615-0005325.

19 To further secure payment of the Note, on June 14, 2006, Vincent W. Hesser and OneCap  
20 Partners MM, Inc. (the "Guarantors") executed personal unconditional guaranties of the Note to  
21 Kennedy Funding (the "Guaranty"). OneCap granted a properly perfected security interest to  
22 Kennedy Funding by way of that certain UCC-1 Financing Statement ("UCC-1") filed with the  
23 Recorder on June 15, 2006 as Instrument No. 20060615-0005326.

24 OneCap defaulted under the Loan and Deed of Trust, including, but not limited to,  
25 OneCap's failure to make monthly installment payment under the Note in the amount of  
26 \$250,000 due April 1, 2008. OneCap is also in default for failure to timely pay its tax obligations  
27 relating to the Property. State and County Taxes are outstanding for the fiscal period 2008 to  
28 2009 in the total amount of \$25,086.45 on the Property. OneCap is also in default for the

1 apparent unauthorized transfer of OneCap's assets to Nevada Ueno Mita, LLC and/or name  
2 change from OneCap to Nevada Ueno Mita, LLC ("Nevada Ueno Mita, LLC"), purportedly  
3 effectuated pursuant to an Amendment to the Articles of Incorporation of OneCap.

4 One Cap is in default under the Loan and Deed of Trust. As of February 12, 2009, a total  
5 of \$14,644,898.45 in principal, accrued interest and other charges are due and payable by  
6 OneCap to Kennedy Funding, and now the Guarantors, consisting of \$12,000,000.00,  
7 representing principal due under the Note; \$2,600,000.00, representing interest accrued under the  
8 Note at the default rate as of April 1, 2008; \$18,000.00, representing late charges accrued under  
9 the Note from October 2007; \$24,142.95, representing a foreclosures costs and appraisal costs  
10 incurred as of February 12, 2009; and \$2,755.50, representing attorney's fees and costs.

11 Based upon the foregoing, Plaintiff contends that its damages will exceed \$50,000.

12 On February 13, 2009, Plaintiff filed a complaint against ONECAP PARTNERS MM,  
13 INC, a Nevada corporation and VINCENT W. HESSER ("Defendants").

14 On March 3, 2009, Defendant OneCap Partners MM, Inc. was served with the Summons  
15 and Complaint, and on March 11, 2009, Defendant Vincent W. Hesser was served with the  
16 Summons and Complaint. On or about March 11, 2009, Defendants filed an answer to the  
17 Complaint.

18 Pursuant to NAR 5(A), Plaintiff timely files this request for exemption from arbitration  
19 within twenty (20) days of Defendants filing their answer to the Complaint.

20 The undersigned counsel does hereby certify pursuant to N.R.C.P. 11 that this case is  
21 within the exemption marked above included in one of the categories of exempt cases listed  
22 under Nevada Arbitration Rule 3(A), and is aware of the sanctions which may be imposed

23 ...

24 ...

25 ...

26 ...

27 ...

28 ...

1 against any attorney or party who, without good cause or justification, attempts to remove a case  
2 from the arbitration process.

3 DATED this 31<sup>st</sup> day of March, 2009.

4 SANTORO, DRIGGS, WALCH,  
5 KEARNEY, HOLLEY & THOMPSON

6  
7   
8 RICHARD F. HOLLEY, ESQ.

9 Nevada Bar No. 3077

10 OGOMNA M. ATAMOH, ESQ.

11 Nevada Bar No. 7589

12 400 South Fourth Street, Third Floor

13 Las Vegas, Nevada 89101

14 *Attorneys for Kennedy Funding, Inc.*

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

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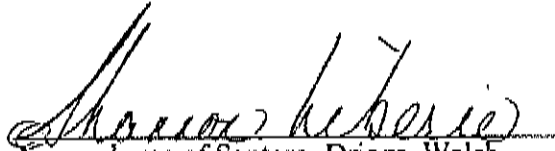


CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 31<sup>st</sup> day of March, 2009 and pursuant to NRC  
5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing  
PLAINTIFF'S REQUEST FOR EXEMPTION FROM ARBITRATION, postage prepaid and  
addressed to:

Harold P. Gewerter  
Harold P. Gewerter, Esq., Ltd.  
5440 West Sahara Avenue  
Third Floor  
Las Vegas, NV 89146

*Attorneys for Defendants*

  
An employee of Santoro, Driggs, Walch,  
Kearney, Holley & Thompson

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JCCR  
RICHARD F. HOLLEY, ESQ.  
Nevada Bar No. 3077  
OGONNA M. ATAMOH, ESQ.  
Nevada Bar No. 7589  
SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

FILED

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Erin D. Smith  
CLERK OF THE COURT

Attorneys for Kennedy Funding, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

KENNEDY FUNDING, INC., a New Jersey  
corporation,

Plaintiff,

v.

ONECAP PARTNERS MM, INC, a Nevada  
corporation; VINCENT W. HESSER, an  
individual; DOE INDIVIDUALS I through X;  
and ROE CORPORATIONS I through X,

Defendants.

Case No: A582746  
Dept. No.: XI

09A582746  
249764



JOINT CASE CONFERENCE REPORT

DISCOVERY PLANNING/DISPUTE  
CONFERENCE REQUESTED:

YES \_\_\_\_\_ NO X

I.

PROCEEDINGS PRIOR TO CASE CONFERENCE REPORT

A. DATE OF FILING OF COMPLAINT: February 13, 2009. Amended Complaint  
filed March 6, 2009.

B. DATE OF FILING OF ANSWER BY EACH DEFENDANT:

Answer was filed on March 13, 2009 on behalf of all Defendants.

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06209-09/447233

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KEARNEY, HOLLEY & THOMPSON

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CLERK OF THE COURT

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1 C. DATE THAT EARLY CASE CONFERENCE WAS HELD AND WHO  
2 ATTENDED:

3 Early case conference was held on April 23, 2009. Ogonna M. Atamoh, Esq., of the law  
4 firm of Santoro, Driggs, Walch, Kearney, Holley & Thompson, attended on behalf of Plaintiff.  
5 Harold P. Gewerter, Esq., of the law firm of Harold P. Gewerter, Esq., Ltd., attended on behalf  
6 of the Defendants.

7 II.

8 A BRIEF DESCRIPTION OF THE NATURE OF THE ACTION AND EACH  
9 CLAIM FOR RELIEF OR DEFENSE: [16.1 (c) (1)]

10 A. Description of the action:

11 Breach of contract claim for breach of guaranties of Vincent W. Hesser and OneCap  
12 Partners MM, Inc. for guarantying the obligation of Nevada Ueno Mita, LLC, formerly known as  
13 OneCap Partners 2, LLC, owing to Kennedy Funding under the Promissory Note dated June 15,  
14 2006 in the amount of principal amount of \$12,000,000.00.

15 B. Claims for relief:

- 16 1. Breach of Contract – Against Vincent W. Hesser for Guaranty;  
17 2. Breach of Contract – Against OneCap Partners MM, Inc. for Guaranty.

18 C. Defenses:

- 19 1. Failure to state a claim which relief can be granted.  
20 2. Affirmative defenses pursuant to NRCP 11.  
21 3. Knowingly and intentionally waived all claims against Defendants  
22 because Plaintiff violated Nevada's One-Action rule.

23 4. This Court is without jurisdiction because sole jurisdiction lies with U.S.  
24 Bankruptcy Court Case No. BK-S-08-25487-BAM, now pending in the District of Nevada.

25 ...

26 ...

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III.

LIST OF ALL DOCUMENTS, DATA COMPILATIONS AND TANGIBLE THINGS IN THE POSSESSION, CUSTODY OR CONTROL OF EACH PARTY WHICH WERE IDENTIFIED OR PROVIDED AT THE EARLY CASE CONFERENCE OR AS A RESULT THEREOF: [16.1 (a) (1) (B) and 16.1 (c) (4)]

A. Plaintiff:

1. Voluntary Petition of Debtor filed in the United States Bankruptcy Court, District of Nevada, Case No. 08-25487, on December 26, 2008 (Bates Nos. KF00001 – KF00009).

2. Organizational Chart submitted by Debtor at 341 Meeting of Creditors on February 12, 2009 (Bates Nos. KF00010 – KF00016).

3. Coversheet and indices to Closing Binder containing Loan between OneCap Partners 2, LLC and Kennedy Funding, Inc. dated June 15, 2006 (Bates Nos. KF00017 – KF00019).

4. Loan Closing Statements (Bates Nos. KF00020 – KF00024).

5. Loan and Security Agreement between OneCap Partners 2, LLC and Kennedy Funding, Inc. dated June 15, 2006 (Bates Nos. KF00025 – KF00065).

6. Promissory Note for \$12,000,000.00 for OneCap Partners 2, LLC, executed on June 14, 2006 (Bates Nos. KF00066 – KF00073).

7. Recorded Deed of Trust with Security Agreement, Financing Statement for Fixture Filing and Assignment of Rents to OneCap Partners 2, LLC, dated June 15, 2006 (Bates Nos. KF00074 – KF00127).

8. Assignment of Leases and Rents made by OneCap Partners 2, LLC and Kennedy Funding, Inc., recorded June 15, 2006 (Bates Nos. KF00128 – KF00137).

9. Loan Guaranty executed by Vincent Hesser and OneCap Partners MM, Inc. on June 14, 2006 (Bates Nos. KF00138 – KF00149).

10. Environmental Indemnity Agreement executed by Vincent Hesser on June 15, 2006 (Bates Nos. KF00150-KF00162).

...

11. Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and Reports from OneCap Partners 2, LLC to Kennedy Funding, Inc. dated June 15, 2006 (Bates Nos. KF00163 – KF00171).

12. Document Re-Execution Agreement made by Kennedy Funding, Inc. and executed by Vincent Hesser on June 15, 2006 (Bates Nos. KF00172 – KF00175).

13. Subordination and Attornment Agreement executed by Kennedy Funding, Inc., OneCap Partners 2, LLC and Garry Owen II, LLC on June 15, 2006 (Bates Nos. KF00176 – KF00185).

14. Recorded UCC-1 Financing Statements for OneCap Partner 2, LLC filed with the Recorder on June 15, 2006 as Instrument No. 20060615-0005326 (Bates Nos. KF00186 – KF00195).

15. Certificate of Insurance for OneCap Partners 2, LLC dated June 13, 2006 (Bates Nos. KF00196 – KF00197).

16. Closing Instruction Letter from Jon Kelty to Nevada Title Company dated June 14, 2006 (Bates Nos. KF00198 – KF00226).

17. Opinion letter to Kennedy Funding, Inc. from OneCap Partners 2, LLC's counsel, Harold P. Gewerter, dated June 15, 2006 (Bates Nos. KF00227 – KF00232).

18. Opinion letter to Kennedy Funding, Inc. from OneCap Partners 2, LLC's local counsel, Clifford Ramundo, dated June 15, 2006 (Bates Nos. KF00233 – KF00238).

19. Opinion letter to Kennedy Funding, Inc. from Cole, Shotz, Miesal, Foreman & Leonard P.A., dated June 15, 2006 (Bates Nos. KF00239 – KF00242).

20. Commonwealth Land Title Insurance Company Proforma Policy (Bates Nos. KF00243 – KF00270).

21. Market Value Appraisal of 99.25 Net Acres of Vacant Land along east side of Casino Drive, South of Harrah's Laughlin Hotel and Casino, prepared by Integra Realty Resources Nevada on February 7, 2008 (Bates Nos. KF00271 – KF00344)

22. Amended Articles of Organization of Nevada Ueno Mita, LLC, dated July 25, 2007 (Bates Nos. KF00345 – KF00348).

1 B. Defendant:

2 1. Voluntary Petition of Debtor filed in the Unites States Bankruptcy Court, District  
3 of Nevada, Case No. 08-25487, on December 26, 2008 (Bates Nos. KF00001 – KF00009).

4 2. Organizational Chart submitted by Debtor at 341 Meeting of Creditors on  
5 February 12, 2009 (Bates Nos. KF00010 – KF00016).

6 3. Coversheet and indices to Closing Binder containing Loan between OneCap  
7 Partners 2, LLC and Kennedy Funding, Inc. dated June 15, 2006 (Bates Nos. KF00017 –  
8 KF00019).

9 4. Loan Closing Statements (Bates Nos. KF00020 – KF00024).

10 5. Loan and Security Agreement between OneCap Partners 2, LLC and Kennedy  
11 Funding, Inc. dated June 15, 2006 (Bates Nos. KF00025 – KF00065).

12 6. Promissory Note for \$12,000,000.00 for OneCap Partners 2, LLC, executed on  
13 June 14, 2006 (Bates Nos. KF00066 – KF00073).

14 7. Recorded Deed of Trust with Security Agreement, Financing Statement for  
15 Fixture Filing and Assignment of Rents to OneCap Partners 2, LLC, dated June 15, 2006 (Bates  
16 Nos. KF00074 – KF00127).

17 8. Assignment of Leases and Rents made by OneCap Partners 2, LLC and Kennedy  
18 Funding, Inc., recorded June 15, 2006 (Bates Nos. KF00128 – KF00137).

19 9. Loan Guaranty executed by Vincent Hesser and OneCap Partners MM, Inc. on  
20 June 14, 2006 (Bates Nos. KF00138 – KF00149).

21 10. Environmental Indemnity Agreement executed by Vincent Hesser on June 15,  
22 2006 (Bates Nos. KF00150-KF00162).

23 11. Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and  
24 Reports from OneCap Partners 2, LLC to Kennedy Funding, Inc. dated June 15, 2006 (Bates  
25 Nos. KF00163 – KF00171).

26 12. Document Re-Execution Agreement made by Kennedy Funding, Inc. and  
27 executed by Vincent Hesser on June 15, 2006 (Bates Nos. KF00172 – KF00175).

28 ...

1           13. Subordination and Attornment Agreement executed by Kennedy Funding, Inc.,  
2 OneCap Partners 2, LLC and Garry Owen II, LLC on June 15, 2006 (Bates Nos. KF00176 –  
3 KF00185).

4           14. Recorded UCC-1 Financing Statements for OneCap Partner 2, LLC filed with the  
5 Recorder on June 15, 2006 as Instrument No. 20060615-0005326 (Bates Nos. KF00186 –  
6 KF00195).

7           15. Certificate of Insurance for OneCap Partners 2, LLC dated June 13, 2006 (Bates  
8 Nos. KF00196 – KF00197).

9           16. Closing Instruction Letter from Jon Kelty to Nevada Title Company dated June  
10 14, 2006 (Bates Nos. KF00198 – KF00226).

11           17. Opinion letter to Kennedy Funding, Inc. from OneCap Partners 2, LLC's counsel,  
12 Harold P. Gewerter, dated June 15, 2006 (Bates Nos. KF00227 – KF00232).

13           18. Opinion letter to Kennedy Funding, Inc. from OneCap Partners 2, LLC's local  
14 counsel, Clifford Ramundo, dated June 15, 2006 (Bates Nos. KF00233 – KF00238).

15           19. Opinion letter to Kennedy Funding, Inc. from Cole, Shotz, Miesal, Foreman &  
16 Leonard P.A., dated June 15, 2006 (Bates Nos. KF00239 – KF00242).

17           20. Commonwealth Land Title Insurance Company Proforma Policy (Bates Nos.  
18 KF00243 – KF00270).

19           21. Market Value Appraisal of 99.25 Net Acres of Vacant Land along east side of  
20 Casino Drive, South of Harrah's Laughlin Hotel and Casino, prepared by Integra Realty  
21 Resources Nevada on February 7, 2008 (Bates Nos. KF00271 – KF00344)

22           22. Amended Articles of Organization of Nevada Ueno Mita, LLC, dated July 25,  
23 2007 (Bates Nos. KF00345 – KF00348).

24           23. There may be other documents, the identity of which are presently unknown to  
25 the Defendants. Discovery is continuing in this matter. The Defendants reserve the right to  
26 supplement this document list as additional documents become known.

27 ...

28 ...

24. The Plaintiff herein incorporates and adopts by reference any and all documents identified by the Defendants prior to and at the time of the Early Case Conference, and any supplements thereto.

IV.

LIST OF PERSONS IDENTIFIED BY EACH PARTY AS LIKELY TO HAVE  
INFORMATION DISCOVERABLE UNDER RULE 26(b), INCLUDING IMPEACHMENT  
OR REBUTTAL WITNESSES: [16.1 (a) (1) (A) and 16.1 (c) (3)]

1. PMK of Kennedy Funding, Inc.  
c/o Santoro, Driggs, Walch, Kearney, Holley & Thompson  
Attention: Richard F. Holley, Esq.  
400 S. Fourth Street, 3<sup>rd</sup> Floor  
Las Vegas, NV 89101  
(702) 791-0308
2. Vincent W. Hesser  
c/o Harold P. Gewerter, Esq.  
Harold P. Gewerter, Esq., LTD  
2705 Airport Drive  
North Las Vegas, Nevada 89032  
(702) 382-1714
3. Michael Hesser ~ President of Nevada Ueno Mita MM, Inc.  
Nevada UENO Mita, LLC  
5440 West Sahara Avenue, Third Floor  
Las Vegas, Nevada 89146
4. PMK of OneCap Partners 2, LLC  
c/o Harold P. Gewerter, Esq.  
Harold P. Gewerter, Esq., LTD  
2705 Airport Drive  
North Las Vegas, Nevada 89032  
(702) 382-1714
5. Shelli L. Lowe  
Integra Realty Resources-Nevada  
8367 West Flamingo Road, Suite 100  
Las Vegas, Nevada 89147  
(702) 869-0442

1 B. Defendant:

- 2 1. PMK of OneCap Partners MM, Inc.  
3 c/o Harold P. Gewerter, Esq., Ltd.  
4 2705 Airport Drive  
5 North Las Vegas, Nevada 89032  
6  
7 2. Vincent Hesser  
8 c/o Harold P. Gewerter, Esq., Ltd.  
9 2705 Airport Drive  
10 North Las Vegas, Nevada 89032

11 V.

12 DISCOVERY PLAN [16.1 (b) (2) and 16.1 (c) (2)]

13 A. What changes, if any, should be made in the timing, form of requirements for  
14 disclosures under 16.1 (a):

- 15 1. Plaintiff's view: None  
16  
17 2. Defendant's view: None.

18 When disclosures under 16.1 (a) (1) were made or will be made:

- 19 1. Plaintiff's disclosures: April 23, 2009  
20 enter calendar date  
21  
22 2. Defendant's disclosures: May 6, 2009  
23 enter calendar date

24 B. Subjects on which discovery may be needed:

- 25 1. Plaintiff's view: All claims and defenses  
26  
27 2. Defendant's view: All issues involving liability of the Plaintiff and  
28 damages incurred by the Defendants.

29 C. Should discovery be conducted in phases or limited to or focused upon particular  
30 issues?

- 31 1. Plaintiff's view: No.  
32  
33 2. Defendant's view: No.

1 D. What changes, if any, should be made in limitations on discovery imposed under  
2 these rules and what, if any, other limitations should be imposed?

3 1. Plaintiff's view: None.

4 2. Defendant's view: None.

5 E. What, if any, other orders should be entered by court under Rule 26 (c) or Rule 16  
6 (b) and (c):

7 1. Plaintiff's view: None.

8 2. Defendant's view: None.

9 F. Estimated time for trial:

10 1. Plaintiff's view: 2 days  
(number of court days)

11 2. Defendant's view: 2 days  
(number of court days)

13 VI.

14 DISCOVERY AND MOTION DATES [16.1 (c) (5) - (8)]

15 A. Dates agreed by the parties:

16 1. Close of discovery: November 13, 2009  
enter calendar date

17  
18 2. Final date to file motions to amend pleadings or add parties without a  
19 further court order): August 14, 2009  
enter calendar date  
(Not later than 90 days before  
20 close of discovery)

21 3. Final dates for expert disclosures:

22 i. initial disclosure: August 14, 2009  
enter calendar date  
(Not later than 90 days before  
23 discovery cut-off date)

24  
25 ii. rebuttal disclosures: September 14, 2009  
enter calendar date  
(Not later than 30 days after  
26 initial disclosure date)

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## 4. Final date to file dispositive motions:

December 14, 2009enter calendar date  
(Not later than 30 days after  
discovery cut-off date)B. In the event the parties do not agree on dates, the following section must be  
completed:

## 1. Plaintiff's suggested close of discovery:

n/a

enter calendar date

## Defendant's suggested close of discovery:

n/a

enter calendar date

## 2. Final date to file motions to amend pleadings

n/a

enter calendar date

or add parties (without a further court order):

(Not later than 90 days before  
close of discovery)

## Plaintiff's suggested:

## Defendant's suggested:

n/a

enter calendar date

(Not later than 90 days before  
close of discovery)

## 3. Final dates for expert disclosures:

## i. Plaintiff's suggested initial

n/a

enter calendar date

disclosure:

(Not later than 90 days before  
discovery cut-off date)

## Defendant's suggested initial disclosure:

n/a

enter calendar date

(Not later than 90 days before  
discovery cut-off date)

## ii. Plaintiff's suggested rebuttal disclosures:

n/a

enter calendar date

(Not later than 30 days after  
initial disclosure of experts)

...



Defendant's suggested rebuttal disclosures:

n/a  
enter calendar date  
(Not later than 30 days after  
initial disclosure of experts)

4. Final date to file dispositive motions:

Plaintiff's suggested:

n/a  
enter calendar date  
(Not later than 30 days after  
discovery cut-off date)

Defendant's suggested:

n/a  
enter calendar date  
(Not later than 30 days after  
discovery cut-off date)

Failure to agree on the calendar dates in this subdivision shall result in a discovery planning conference.

VII.

JURY DEMAND [16.1 (c) (10)]

A jury demand has been filed: No  
(Yes/No)

VIII.

INITIAL DISCLOSURES/OBJECTIONS [16.1 (a) (1)]

If a party objects during the Early Case Conference that initial disclosures are not appropriate in the circumstances of this case, those objections must be stated herein. The Court shall determine what disclosures, if any, are to be made and shall set the time for such disclosure.

This report is signed in accordance with rule 26(g)(1) of the Nevada Rules of Civil Procedure.

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SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

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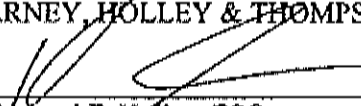
Each signature constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the disclosures made by the signer are complete and correct as of this time.


Dated: July 14, 2009

Dated: \_\_\_\_\_

SANTORO, DRIGGS, WALCH  
KEARNEY, HOLLEY & THOMPSON

HAROLD P. GEWERTER, ESQ., LTD.

By   
Richard F. Holley, ESQ.  
Nevada Bar No. 3077  
Ogoma M. Atamoh, ESQ.  
Nevada Bar No. 7589  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
ATTORNEY FOR PLAINTIFF

By   
Harold P. Gewerter, Esq  
Nevada Bar No. 499  
2705 Airport Drive  
North Las Vegas, Nevada 89032  
ATTORNEY FOR DEFENDANTS

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

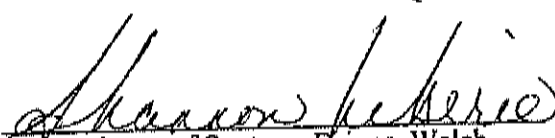


CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 14th day of July, 2009 and pursuant to NRCP 5(b),  
I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing JOINT CASE  
CONFERENCE REPORT, postage prepaid and addressed to:

Harold P. Gewerter  
Harold P. Gewerter, Esq., Ltd.  
2705 Airport Drive  
North Las Vegas, Nevada 89032

*Attorneys for Defendants*

  
An employee of Santoro, Driggs, Walch,  
Kearney, Holley & Thompson

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*E. J. [Signature]*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

KENNEDY FUNDING INC., a New  
Jersey corporation,

Plaintiff,

v.

CASE NO. A582746

DEPT NO. XI

ONECAP PARTNERS MM, INC., a  
Nevada corporation; VINCENT W.  
HESSER, an individual; DOE  
INDIVIDUALS I through X; and  
ROE CORPORATIONS I through X,

Defendants.

09A582746  
380503



**SCHEDULING ORDER**

(Discovery/Dispositive Motions/Motions to Amend or Add Parties)

NATURE OF ACTION: Breach of contract

DATE OF FILING JOINT CASE CONFERENCE REPORT(S): 7/14/09

TIME REQUIRED FOR TRIAL: 2 days

Counsel for Plaintiff:

Ogonna M. Atamoh, Esq., Santoro, Driggs, Walch, Kearney,  
Holly & Thompson

Counsel for Defendants:

Harold P. Gewertex, Esq.

Counsel representing all parties have been heard and after  
consideration by the Discovery Commissioner,

IT IS HEREBY ORDERED:

1. all parties shall complete discovery on or before

11/13/09.

CLERK OF THE COURT

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DISCOVERY  
COMMISSIONER  
EIGHTH JUDICIAL  
DISTRICT COURT

VH000044

1 2. all parties shall file motions to amend pleadings or  
2 add parties on or before 8/14/09.

3 3. all parties shall make initial expert disclosures  
4 pursuant to N.R.C.P. 16.1(a)(2) on or before 8/14/09.

5 4. all parties shall make rebuttal expert disclosures  
6 pursuant to N.R.C.P. 16.1(a)(2) on or before 9/14/09.

7 5. all parties shall file dispositive motions on or before  
8 12/14/09.

9  
10 Certain dates from your case conference report(s) may have  
11 been changed to bring them into compliance with N.R.C.P. 16.1.

12 Within 60 days from the date of this Scheduling Order, the  
13 Court shall notify counsel for the parties as to the date of  
14 trial, as well as any further pretrial requirements in addition  
15 to those set forth above.

16 Unless otherwise directed by the court, all pretrial  
17 disclosures pursuant to N.R.C.P. 16.1(a)(3) must be made at least  
18 30 days before trial.

19 Motions for extensions of discovery shall be made to the  
20 Discovery Commissioner in strict accordance with E.D.C.R. 2.35.  
21 Discovery is completed on the day responses are due or the day a  
22 deposition begins.

23 . . .

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1 Unless otherwise ordered, all discovery disputes (except  
2 disputes presented at a pre-trial conference or at trial) must  
3 first be heard by the Discovery Commissioner.

4 Dated this 8 day of September, 2009.

5  
6   
7 \_\_\_\_\_  
8 DISCOVERY COMMISSIONER

9 CERTIFICATE OF SERVICE

10 I hereby certify that on the date filed, I placed a copy of  
11 the foregoing DISCOVERY SCHEDULING ORDER in the folder(s) in the  
12 Clerk's office or mailed as follows:

13 Ogonna M. Atamoh, Esq.  
14 Harold P. Gewerter, Esq.

15   
16 \_\_\_\_\_  
17 COMMISSIONER DESIGNEE  
18  
19  
20  
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FILED

SEP 22 2009

CLERK OF COURT

DECL  
RICHARD F. HOLLEY, ESQ.  
Nevada Bar No. 3077  
OGONNA M. ATAMOH, ESQ.  
Nevada Bar No. 7589  
SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

Attorneys for Kennedy Funding, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

KENNEDY FUNDING, INC., a New Jersey  
corporation,

Plaintiff,

v.

ONECAP PARTNERS MM, INC, a Nevada  
corporation; VINCENT W. HESSER, an  
individual; DOE INDIVIDUALS I through X;  
and ROE CORPORATIONS I through X,

Defendants.

Case No.: A582746  
Dept. No.: XI

09A582746  
412145



DECLARATION OF KEVIN WOLFER

STATE OF NEW JERSEY )  
 )ss.  
COUNTY OF BERGEN \_ )

I, Kevin Wolfer, do hereby swear under penalty of perjury that the following assertions  
are true to the best of my knowledge and belief.

1. I am Chief Executive Officer of Kennedy Funding, Inc. (alternatively "Kennedy  
Funding" or "Lender").

2. I have personal knowledge of the matters set forth below based upon my personal  
review of the books and records maintained by Kennedy Funding in the ordinary course of  
business and based upon my involvement in monitoring the history of the transaction giving rise  
to the Motion for Summary Judgment against Defendant in connection with the loan guarantied

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SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

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CLERK OF THE COURT

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1 for Nevada Ueno Mita, LLC, formerly known as OneCap Partners 2, LLC ("Nevada Ueno").  
2 With respect to matters based upon information and belief, I believe the statements made to be  
3 true and correct.

4 3. As part of my duties at Kennedy Funding, I monitor the performance of loans,  
5 such as that certain loan extended by Kennedy Funding to OneCap, subsequently assigned to  
6 Nevada Ueno, in connection with that certain \$12 million Promissory Note and first deed of trust  
7 on real property dated June 15, 2006 (the "Loan"). In that capacity I am personally familiar with  
8 the manner in which Kennedy Funding's documents, books, files and records are prepared and  
9 maintained.

10 4. It is Kennedy Funding's practice and procedure to maintain records and to record  
11 transactions, acts, conditions and events concerning Kennedy Funding and its various loans,  
12 including the Loan, at or about the time such transactions, acts, conditions, or events occur.  
13 Kennedy Funding relies upon these records in connection with its business dealings with  
14 borrowers.

15 5. I am competent to testify to the matters contained in this declaration, and if called,  
16 could and would so testify.

17 6. I have personally reviewed the business records of Kennedy Funding concerning  
18 the Loan made by Kennedy Funding to OneCap.

19 7. I have personal knowledge of the matters set forth below, except as to those  
20 matters based upon information and belief. With respect to the matters based upon information  
21 and belief, I believe the assertions to be true and correct.

22 8. Kennedy Funding is a New Jersey corporation that is located and headquartered in  
23 New Jersey.

24 9. On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or  
25 "OneCap") and Kennedy Funding, as agent of the lenders, entered into a Loan and Security  
26 Agreement ("Loan Agreement"), pursuant to which Kennedy Funding made a \$12 million loan  
27 to OneCap to facilitate the purchase of unimproved real property consisting of 78.74± acres of  
28 raw land located along Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark



1 County Assessor Parcel Numbers 264-25-101-001 and 264-25-201-001 (the "Property"). A true  
2 and correct copy of the Loan Agreement is attached as **Exhibit "1"**.

3 10. The loan is evidenced by a Promissory Note dated June 15, 2006 in the original  
4 principal sum of \$12 million ("Note"), made by OneCap to pay to the order of Kennedy Lending,  
5 as agent of the lenders. A true and correct copy of the Note is attached as **Exhibit "2"**.

6 11. Under the Note, OneCap promised to pay Kennedy Funding monthly interest only  
7 payments at a rate of 11.5% per annum, to accrue from July 1, 2006 to June 1, 2007. Ex. 2, p.2  
8 (§ b). Beginning August 1, 2007, OneCap promised to pay Kennedy Funding monthly interest  
9 only payments at a rate of 18% per annum, to accrue from July 1, 2007 through to the maturity  
10 date of June 30, 2009. Ex. 2, p.2 (§ d).

11 12. OneCap agreed to pay all principal, interest and other sums due under the Note in  
12 full on the maturity date of June 30, 2009. Ex. 2, p.1.

13 13. In the event of a late payment under the Note, OneCap agreed to pay a late charge  
14 equal to 10% of the overdue payment. Ex. 2, p.1.

15 14. In the event of a default under the Note, OneCap agreed to pay a default rate of  
16 25% per annum. Ex. 2, p.1.

17 15. As security for the Note, OneCap executed and delivered to Kennedy Funding a  
18 Deed of Trust with Security Agreement, Financing Statement for Fixture Filing and Assignment  
19 of Rents ("Deed of Trust") against the Property, which was recorded on June 15, 2006 with the  
20 Clark County Recorder's Office as Instrument No. 20060615-0005324. A true and correct copy  
21 of the Deed of Trust is attached as **Exhibit "3"**.

22 16. On June 15, 2006, Kennedy Funding, Gary Owen II, LLC ("Option Holder"), and  
23 OneCap executed a Subordination and Attornment Agreement ("Subordination Agreement") in  
24 which the Option Holder agreed to subordinate its limited option to purchase the Property to  
25 Kennedy Funding's Deed of Trust. A true and correct copy of the Subordination Agreement is  
26 attached as **Exhibit "4"**.

27 17. As additional security for the loan, OneCap executed and delivered to Kennedy  
28 Funding, as agent for the lenders, an Assignment of Leases and Rents, dated June 14, 2006, and

1 recorded June 15, 2006, with the Clark County Recorder's Office as Instrument No. 20060615-  
2 0005325, and an Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings  
3 and Report, dated June 15, 2006 ("Assignment of Licenses"). A true and correct copy of the  
4 Assignment of Leases and Rents is attached as **Exhibit "5"**. A true and correct copy of the  
5 Assignment of Licenses is attached as **Exhibit "6"**.

6 18. To further secure payment of the Note, on June 14, 2006, Defendant Vincent  
7 Hesser ("Hesser") and Defendant OneCap Partners MM, Inc. ("OneCap MM" and together with  
8 Hesser, the "Defendants") executed personal unconditional guaranties of the loan to Kennedy  
9 Funding ("Guaranty"). At the time of the transaction between OneCap and Kennedy Funding,  
10 Hesser was the President of OneCap and OneCap MM. A true and correct copy of the Guaranty  
11 is attached as **Exhibit "7"**.

12 19. OneCap also granted a properly perfected security interest to Kennedy Funding  
13 by way of a UCC-1 Financing Statement ("UCC-1") filed with the Clark County Recorder's  
14 Office on June 15, 2006 as Instrument No. 20060615-0005326. A true and correct copy of the  
15 UCC-1 is attached as **Exhibit "8"**.

16 20. Finally, OneCap and Defendants executed an Environmental Indemnity  
17 Agreement in favor of Kennedy Funding, under which they agreed to indemnify Kennedy  
18 Funding for noncompliance of environmental laws. A true and correct copy of the  
19 Environmental Indemnity Agreement is attached as **Exhibit "9"**.

20 21. Kennedy Funding received all money to fund the loan in New Jersey, and  
21 disbursed those funds from New Jersey. Kennedy Funding also received all payments made by  
22 OneCap on the loan in New Jersey, and disbursed those payments to lenders from New Jersey.

23 22. Kennedy Funding fully performed under the Loan, and OneCap received all of the  
24 funds agreed to under the Note and used the same to purchase the Property.

25 **OneCap Defaults**

26 23. On April 1, 2008, OneCap defaulted under the Note and Deed of Trust by failing  
27 to make its monthly installment payment of \$250,000 under the Note.

28 ...

1           24. In addition, OneCap is in default under the Deed of Trust for failure to provide  
2 Kennedy Funding with current proof of liability insurance, and for failure to timely pay its tax  
3 obligations relating to the Property. Ex. 3, § 3.01(b), (c). State and County Taxes are  
4 outstanding for the fiscal period 2008 to 2009 in the total amount of \$41,093.18 on the Property.

5           25. Based on those defaults, Kennedy Funding accelerated the Note and instituted  
6 foreclosure proceedings on the Property. The Notice of Breach and Election to Sell Under Deed  
7 of Trust was recorded with the Clark County Recorder's Office on August 20, 2008 as  
8 Instrument No. 20080820-00597; and the Notice of Trustee's Sale, with a sale date of December  
9 29, 2008, was recorded on December 8, 2008 as Instrument No. 20081208-00882.

10           26. On December 26, 2008, three days before the foreclosure sale, Nevada Ueno  
11 Mita, LLC ("Nevada Ueno"), filed a Chapter 11 Bankruptcy Petition in the United States  
12 Bankruptcy for the District of Nevada, Case No. BK-S-08-25487-BAM (the "Bankruptcy  
13 Petition").

14           27. Based upon information obtained from the Bankruptcy Petition, OneCap had  
15 transferred its interest in the Property to Nevada Ueno.

16           28. Under the Deed of Trust and Loan Agreement, OneCap's transfer of the Property  
17 to Nevada Ueno was a default. Ex. 3, Art. II, § 2.20; Art. III, §§ 3.01(o), (p), (v), (w); Ex. 1, ¶  
18 10(e).

19           **Defendants Default on the Guaranty**

20           29. Because of OneCap's default under the Note, including failure to make timely  
21 payments, OneCap's improper transfer and Nevada Ueno's bankruptcy petition, which halted the  
22 foreclosure action, Kennedy Funding demanded performance from Defendants under the  
23 Guaranty.

24           30. However, Defendants have failed and refused to perform under the Guaranty.

25           **Damages**

26           31. As of July 24, 2009, the outstanding balance owed to Kennedy Funding under the  
27 Loan Agreement and Note is \$16,046,147.65 consisting of the following:  
28

Description	Amount
Principal	\$12,000,000.00
Accrued Interest	\$3,968,000.00
Late Fees accrued	\$18,000.00
Foreclosure costs and appraisal fees	\$29,046.50
Attorney's fees and costs	\$31,101.15
TOTAL:	\$16,046,147.65

A true and correct copy of the Account Summary is attached as Exhibit "10".

32. I am over the age of eighteen (18) and have personal knowledge of and am competent to testify as to each of the matters set forth herein.

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

Executed this 22 day of July, 2009, in Hackensack, New Jersey.

  
Kevin Wolfer



# **EXHIBIT "1"**

VH000054

**LOAN AND SECURITY AGREEMENT**

**Between**

**ONECAP PARTNERS 2, LLC**  
**a Nevada limited liability company**  
**as Borrower,**

**AND**

**KENNEDY FUNDING, INC.**  
**as Agent for the**  
**lenders named herein**

**Date: as of June 15, 2006**

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- Schedule A - Description of the Collateral
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## LOAN AND SECURITY AGREEMENT

THIS LOAN AND SECURITY AGREEMENT ("Agreement"), dated as of June 15, 2006, between ONECAP PARTNERS 2, LLC, a Nevada limited liability company, having an address at 5440 W. Sahara Avenue, Third Floor, Las Vegas, Nevada 89146 ("Borrower"), and KENNEDY FUNDING, INC. ("Agent"), a New Jersey corporation having an address at Two University Plaza, Suite 402, Hackensack, New Jersey 07601, as agent for the lenders identified on Schedule D attached hereto and incorporated herein by reference, in each case having an address care of Kennedy Funding, Inc., Two University Plaza, Suite 402, Hackensack, New Jersey 07601 (the aforesaid Agent and lenders are hereinafter collectively referred to as "Lender").

### WITNESSETH

WHEREAS, Borrower has requested that Lender make a loan to Borrower in the amount of TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS (the "Loan"), subject to and upon the terms and conditions hereinafter contained, which Loan shall be evidenced by a Promissory Note as of even date herewith from Borrower to Lender (the "Note");

WHEREAS, the Loan is to be secured by certain instruments, agreements and documents, including, but not limited to, those items identified in the Principal Loan Documents as set forth on Schedule B hereto and made a part hereof, and payment and performance of the Loan is to be guaranteed pursuant to that certain guaranty of even date herewith from Guarantor (as hereinafter defined) to Lender ("Guaranty");

WHEREAS, capitalized terms not otherwise defined herein shall have those meanings assigned to them in the Loan Documents (as hereinafter defined); and

WHEREAS, Lender has agreed to make the Loan to Borrower on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the foregoing and of the covenants and conditions hereinafter set forth, Borrower and Lender hereby agree as follows:

1. Definitions. As used herein:

(a) "Account" or "Accounts Receivable" means, in addition to the definition of account as contained in the Uniform Commercial Code, the right of Borrower to receive payment for goods sold or leased or for services rendered which are not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.

(b) "Account Debtor" means, in addition to the definition of account debtor as contained in the Uniform Commercial Code, the person or persons obligated to Borrower on an Account, or who is represented by Borrower to be so obligated.

(c) "Affiliate" of any Person (as hereinafter defined) shall mean any other Person which, directly or indirectly, controls or is controlled by, or is under common control with such Person. For the purposes of this definition, "controls" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or by contract or otherwise.

(d) "Business Day" shall mean any day upon which banks located in the State of New Jersey generally are open to conduct regular banking business.

(e) "Closing Date" shall mean the date on which this Agreement is executed by the parties hereto and the conditions set forth in Paragraph 5 are fulfilled to the satisfaction of Lender.

(f) the "Collateral" shall mean the Real Property Collateral, the Collateral described in Paragraph 4 hereof, any other collateral described in any Loan Document and any other property of Borrower and/or Guarantor now or hereafter subject to a security agreement, mortgage, pledge, assignment or other document granting Lender a security interest therein and/or securing the Loan.

(g) the "Default Rate" shall have the meaning ascribed thereto in the Note.

(h) "Dollar" or "\$" or "dollar" or any other terms of similar import shall mean United States Dollars, it being understood and agreed that all advances of the Loan shall be made in U.S. Dollars and repaid or reimbursed in U.S. Dollars without reduction for currency exchange fluctuation.

(i) "Environmental Laws" shall mean a collective reference when and as applicable to (i) the Comprehensive Environmental Response, Compensation & Liability Act, as amended, 42 U.S.C. Section 9601 et seq., (ii) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 6901 et seq., and (iii) any and all other federal, state and local statutes, laws, rules, ordinances, regulations and executive orders pertaining to environmental matters applicable to the Borrower's business and/or properties, as the same may be amended or supplemented from time to time.

(j) "Governmental Authority" or "Governmental Authorities" shall mean any federal, state, county or municipal governmental agency, board, commission,

officer, official or entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government and having jurisdiction over Borrower, the Guarantor (as hereinafter defined) or the Collateral.

(k) the "Guarantor" shall mean collectively Vincent Hesser ("Hesser") and OneCap Partners MM, Inc., a Nevada corporation.

(l) the "Indemnified Party" and "Indemnified Parties" shall mean Agent and Lender as well as their directors, officers, trustees, partners, employees, agents, attorneys and shareholders.

(m) the "Loan Documents" shall mean this Agreement, the Note, the Mortgage (as hereinafter defined), the Guaranty and any other documents or agreements given to Lender by Borrower or the Guarantor in connection with the Loan whether or not specifically set forth herein.

(n) "Mortgage" shall mean that certain Deed of Trust and Security Agreement, given by Borrower, as Trustor, in trust unto Nevada Title Company, as Trustee, for the benefit of Lender in connection with the Mortgaged Property, which Mortgage is given as security for the due payment of Borrower's obligations under the Note.

(o) "Person" or "Persons" shall mean any one or more individuals, partnerships, corporations (including a business trust), joint stock companies, limited liability company, trusts, unincorporated associations, joint ventures or other entities, or a foreign state or political subdivision thereof or any agency of such state or subdivision.

(p) "Personalty" shall mean all Accounts, Accounts Receivable, Equipment, Inventory, Goods (as such terms are defined in the Uniform Commercial Code) and other personal property of the Borrower, as more particularly described herein.

(q) "Real Property Collateral" or "Mortgaged Property" shall mean that certain real property owned or leased by Borrower, situated in Laughlin, Nevada as more particularly described in Schedule A attached hereto and made a part hereof.

(r) "Uniform Commercial Code" shall mean the Uniform Commercial Code, as enacted in the State of Nevada and amended from time to time.

## **2. The Loan.**

(a) Provided that no default shall have occurred and be continuing hereunder, Lender agrees, subject to the terms and conditions hereinafter set forth, to advance to Borrower up to TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS.

(b) Subject to a final closing statement prepared by Lender's counsel and executed by Borrower (the "Closing Statement"), the Loan proceeds shall be disbursed as follows and used only for the following purposes:

(1) The sum of Two Hundred Forty Thousand and 00/100 (\$240,000.00) Dollars shall be disbursed on behalf of Borrower on the Closing Date and simultaneously paid to Lender as a fully earned, non-refundable fee (the "Fee") in consideration of Lender's commitment to make the Loan on the terms and conditions stated herein. In no event shall the Fee be applied or credited in reduction of any principal, interest or other sum payable hereunder; and

(2) The sum of One Hundred Eighty Thousand and 00/100 (\$180,000) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to Lender as the balance of the commitment fee ("Commitment Fee") due to Lender pursuant to the loan commitment letter entered into by and between Borrower and Lender, dated June 6, 2006;

(3) The sum of Fifty Five Thousand and 00/100 (\$55,000) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to Cole, Schotz, Meisel, Forman & Leonard, P.A., in payment of its legal fees;

(c) The foregoing disbursements may be made, notwithstanding contrary directions from Borrower, and for such purpose Borrower agrees that:

A. The foregoing constitutes an irrevocable direction or authorization to so disburse the funds (said authorization being coupled with an interest) and no further direction or authorization from Borrower shall be necessary to warrant any such disbursements; and

B. All such disbursements shall satisfy the obligations of Lender to advance funds to Borrower notwithstanding any other agreement or document to the contrary and shall be secured by the Mortgage as fully as if made by Borrower, regardless of the disposition by the party to whom such disbursements are so made.

3. **The Note.** The obligation of the Borrower to repay all monies advanced by Lender to Borrower in connection with the Loan shall be evidenced by this Agreement and the Note. The Loan shall bear interest at the rate(s) set forth in the Note and shall be payable as provided in the Note with final payment due on the Maturity Date (as defined in the Note). All of Borrower's obligations hereunder and under the Note are secured by the Mortgage and the other Loan Documents. Should the principal of or interest on the Loan become due and payable on a day other than a Business Day, the maturity thereof shall be extended to the next succeeding Business Day and, in the case of principal,

interest shall be payable thereon at the rate per annum specified in the Note during such extension.

4. Grant of Security Interest.

(a) Borrower hereby assigns and pledges to Lender, and hereby grants to Lender a security interest in all property of the following types, wherever located and whether now owned or hereafter owned or acquired by Borrower, whether or not affixed to the Mortgaged Property, in all proceeds (including, without limitation, amounts payable under any policies of insurance with respect thereto), and Products (as such term is defined in the Uniform Commercial Code) thereof in any form, in all parts, accessories, attachments, special tools, additions, replacements, substitutions and accessions thereto or therefor, and in all increases or profits received therefrom:

(1) all Accounts, to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(2) all Equipment (as such term is defined in the Uniform Commercial Code), and in all of Borrower's machinery and equipment of every kind, nature and description, as well as trucks and vehicles of every kind and description, including, but not limited to, trailers, cranes and hoisting equipment, whether presently owned by Borrower or hereafter acquired, and wherever located to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(3) all Inventory (as such term is defined in the Uniform Commercial Code);

(4) all General Intangibles (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(5) all deposit accounts of Borrower with Lender, now or hereafter existing, and all money, instruments, securities, documents, chattel paper, credits, claims, performance bonds, payment bonds, all other forms of surety to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, and other property of Borrower now or hereafter in the possession or custody of Lender or any of its agents;

(6) all Chattel Paper (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, including, but not limited to, all such Chattel Paper now or hereafter left in the possession of Lender for any purpose;

(7) all Instruments (as such term is defined in the Uniform Commercial Code), including any negotiable instruments or a securities, or any other

writing which evidences a right to the payment of money and is of the type which is, in the ordinary course of business, transferred by delivery with any necessary endorsement or assignment whether presently owned by Borrower or hereafter acquired, to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, including, but not limited to, all such Instruments now or hereafter left in the possession of Lender for any purpose;

(8) all Documents (as such term is defined in the Uniform Commercial Code);

(9) all Goods (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property whether presently owned by Borrower or hereafter acquired; and

(10) all books and records, including, without limitation, customer lists, credit files, computer programs, print-outs and other computer materials and records of Borrower pertaining to all of the Collateral.

(b) Borrower will perform any and all steps requested by Lender to create and maintain in Lender's favor a first and valid lien on and security interest in the Collateral or pledges of Collateral, including, without limitation, the execution, delivery, filing and recording of financing statements and continuation statements, supplemental security agreements, notes, filings with federal government offices and any other documents necessary, in the opinion of Lender, to protect its interest in the Collateral which liens shall be exclusive except for those liens expressly permitted elsewhere herein. Lender and its designated officer are hereby appointed Borrower's attorney-in-fact to do all acts and things which Lender may deem necessary to perfect and continue perfected the security interests and Liens provided for in this Agreement, including, but not limited to, executing financing statements on behalf of Borrower.

5. Conditions Precedent to Lender's Obligations. Lender shall not be obligated to make the Loan hereunder unless Lender shall have received the following, all in form and substance satisfactory to the Lender in all respects:

- (a) the Note, duly executed by Borrower;
- (b) the Mortgage, duly executed by Borrower;
- (c) this Agreement, duly executed by Borrower;
- (d) the Guaranty, duly executed by Guarantor;
- (e) the Assignment of Leases and Rents, duly executed by Borrower;

(f) the Assignment of Licenses, Contracts, Plans, etc., duly executed by Borrower;

(g) the Environmental Indemnity Agreement, duly executed by Borrower and Guarantor;

(h) the Document Re-Execution Agreement, duly executed by Borrower and Guarantor;

(i) the Closing Statement, duly executed by Borrower;

(j) certificates of insurers, or other evidence satisfactory to Lender, indicating that Borrower and Guarantor have obtained the policies of insurance as are required under the terms of the Mortgage;

(k) a paid title insurance policy (without survey exception) in the full amount of the Loan issued by a title insurance company acceptable to Lender and insuring the Mortgage as a valid first lien on the Mortgaged Property, with such endorsements as Lender shall require and subject to the Permitted Exceptions identified in the Mortgage;

(l) UCC-1 financing statements required to evidence or perfect Lender's security interest in the personal property now or hereafter owned by the Borrower and located on or used in connection with the Mortgaged Property and UCC-1 financing statements required to perfect Lender's security interest in the Collateral;

(m) an appraisal of the Mortgaged Property;

(n) financial statements and tax returns for Borrower, and the Guarantor;

(o) evidence of a search of the public records which discloses no conditional sales contracts, chattel mortgages, leases of personalty, financing statements or title retention agreements filed or recorded against the Borrower or the Mortgaged Property;

(p) a survey of the Mortgaged Property prepared in accordance with the "Minimum Standard Detail Requirements for ALTA and ACSM Land Title Surveys" jointly established by ALTA and ACSM in 2005, as updated, and certified to Lender by a registered land surveyor acceptable to the Lender ("Survey");

(q) copies of all permits or approvals required by Governmental Authorities to such date with respect to Borrower or the Mortgaged Property, to the extent the same are necessary and appropriate to operate and develop the Mortgaged Property.

(r) an environmental audit of the Mortgaged Property (Phase I and, if necessary Phase II);

(s) the operating agreement of Borrower certified by the Manager of Borrower;

(t) an incumbency certificate of Borrower which shall certify the names and titles of the members of the limited liability company authorized to sign, in the name and on behalf of Borrower this Agreement and each other Loan Document to be delivered pursuant to this Agreement by Borrower, together with the true signatures of such officers, upon which certificate the Lender may conclusively rely;

(u) consents of the limited liability company authorizing the transactions to be entered into by Borrower in connection with this Agreement;

(v) evidence that the Mortgaged Property is not located in a federal or state flood hazard area;

(w) certification regarding debts and liens, executed by the owner of the Mortgaged Property;

(x) payment of the Short Interest, the Fee (as such terms are defined herein and in the Note) and other fees and expenses required to be paid to or on behalf of Lender in connection with the Loan;

(y) opinions of legal counsel to the Borrower with respect to such matters as the Lender may reasonably request including, but not limited to, opinions from Borrower's local Nevada counsel and Borrower's New Jersey counsel;

(z) an opinion of legal counsel to the Guarantor with respect to such matters as the Lender may reasonably request including, but not limited to, opinions from Guarantor's local Nevada counsel and Guarantor's New Jersey counsel; and

(aa) evidence of the appointment of a New Jersey agent to accept service of process on behalf of the Borrower and Guarantor, pursuant to the requirements of the Loan Documents;

(bb) evidence demonstrating current full compliance with all applicable zoning, health, environmental and safety laws, ordinances and regulations (including, without limitation, approval of local, private or public sewage or water utility);

(cc) certification from Borrower that Borrower is not a party to any existing or pending or threatened litigation, except as previously disclosed to Lender; and



(dd) evidence demonstrating receipt of all appropriate approvals meeting all applicable requirements of all Governmental Authorities having jurisdiction including, but not limited to, subdivision and site plan approvals, potable water supply, sewage discharge and sewage connection, use of septic tanks or alternatives.

(ee) satisfactory evidence that all roads and utilities necessary for the full utilization of the Collateral for its intended purposes have been completed or the presently installed and proposed roads and utilities will be sufficient for the full utilization of Collateral for its intended purposes.

(ff) such other agreements, certificates or other documents as Lender or Title Insurance Company may reasonably request;

6. **Representations and Warranties of Borrower.** To induce Lender to make the Loan pursuant to this Loan Agreement, Borrower hereby represents and warrants to Lender as follows:

(a) By its acceptance of Lender's funds and execution of the Loan Documents, Borrower acknowledges, agrees and confirms that it has no defense, offset or counterclaim for any occurrence in relation to this Loan and Borrower acknowledges that Lender has complied with all of its obligations under the Loan Documents as of the date hereof.

(b) Borrower is a limited liability company, duly organized under the laws of the State of Nevada and has all requisite power and authority and legal right to own its property, to carry on its business as it is now being conducted, to enter into this Agreement and the other Loan Documents entered into by it and to perform all of its obligations hereunder and thereunder.

(c) The execution and delivery by Borrower of the Loan Documents, and the performance of its obligations thereunder, have been duly authorized by all necessary action, corporate or otherwise, and do not and will not: (i) require any further action, consent or approval on the part of the members of Borrower; (ii) violate any provision of law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having applicability to Borrower, or the members of Borrower; or (iii) result in any breach of or constitute a default under any indenture or loan or credit agreement or any other agreement, lease or instrument to which the Borrower is a party or by which the Borrower or its properties may be bound or affected, and the Borrower is not in default under any such law, rule, regulation, order, writ, judgment, injunction, decree, determination or award or any such indenture, agreement, lease or instrument.

(d) The Loan Documents have been duly executed and delivered by Borrower and are legal, valid and binding obligations of Borrower, enforceable against Borrower in accordance with their respective terms.

(e) Except as previously disclosed to Lender, there is no material action, suit, proceeding, inquiry or investigation, at law or in equity, or before any court, governmental instrumentality, public board or arbitrator pending or threatened against or affecting Borrower or any of its properties or rights, wherein an unfavorable decision, ruling or finding would (i) to the extent not covered by insurance as to which the insurer has not disclaimed coverage, result in any material adverse change in the financial condition, business, properties or operations of Borrower; (ii) materially or adversely effect the transactions evidenced by the Loan Documents; (iii) materially impair the right of either to carry on its business substantially as now conducted; or (iv) adversely effect the validity or enforceability of the Loan Documents.

(f) To the best of Borrower's knowledge, Borrower is in compliance with all laws applicable to Borrower or its properties or assets.

(g) Borrower is a pre-existing limited liability company and is actively engaged in the operation of its business. The proceeds of the Loan will be used by Borrower for the purposes set forth in Paragraph 6(o) in connection with the operation of Borrower's business, and the proceeds of the Loan will not be paid over or diverted by Borrower to any member, manager, officer, director, trustee, shareholder of Borrower, any Guarantor or any other person.

(h) The following persons constitute the members of Borrower and their respective ownership units:

Ascendant Universal Fund 1, LLC	25 Units
Namale Limited Partnership	74 Units
OneCap Partners MM Inc.	1 Unit

(i) There has been no material adverse change in the condition, financial or otherwise, of Borrower or the Guarantor since the date of its financial statements furnished to Lender.

(j) Borrower's properties and assets reflected on its financial statements referred to above, and all such properties and assets are free and clear of all mortgages, pledges, liens, charges or other encumbrances, except as reflected on such financial statements which have been previously provided to Agent.

(k) Borrower and the Guarantor have each filed all federal, state and other income or franchise tax returns which are required to be filed and have paid all

taxes due or which may become due pursuant to such returns or pursuant to any assessment received by it.

(l) All timely authorizations, permits, approvals and consents of Governmental Authorities which may be required in connection with the valid execution and delivery of this Agreement and the other Loan Documents and the carrying out or performance of any of the activities or transactions required or contemplated hereunder or thereunder have been obtained (and remain in full force and effect).

(m) All financial statements, information and other financial data furnished by Borrower and the Guarantor to Lender in connection with the Agreement (i) were true, correct and complete in all material respects, as of the date of said financial statements, information and other data, (ii) such financial statements present fairly the financial condition of Borrower and the Guarantor at the respective dates thereof and the results of operations and changes in financial position for the periods to which they apply, and (iii) there have been no material adverse changes in the financial condition of Borrower or any Guarantor since the delivery by Borrower or the Guarantor, as the case may be, to Lender of the most recent financial statements.

(n) Borrower's assets, at a fair valuation, exceed Borrower's liabilities (including, without limitation, contingent liabilities). Borrower is paying its debts as they become due and Borrower anticipates the continuing ability to pay its debts as they become due. Borrower has capital and assets sufficient to carry on its business.

(o) Proceeds from the Loan shall be used only as set forth in this Agreement, the Closing Statement, and for other proper corporate/limited liability company purposes. No part of the proceeds of the Loan shall be used, directly or indirectly, for the purpose of purchasing or carrying any margin stock within the meaning of Regulation U of the Board of Governors of the Federal Reserve System, or for the purpose of purchasing or carrying or trading in any stock under such circumstances as to involve Borrower in a violation of Regulation U of the Board of Governors of the Federal Reserve System. In particular, without limitation of the foregoing, no part of the proceeds from the Loan are intended to be used to acquire any publicly-held stock of any kind. As used in this subparagraph (o), the terms "margin stock" and "purpose of purchasing or carrying" shall have the meanings assigned to them in the aforesaid Regulation U, and the term "publicly-held," in respect to securities, shall have the meaning assigned to it in Section 220.7(a) of Regulation T of the Board of Governors of the Federal Reserve System.

(p) Borrower is not in violation of or in default under (nor on the Closing Date is there any waiver in effect which, if not in effect, would result in a violation or default under) any provision of Borrower's bylaws/operating agreement, or under any provision of any agreement, indenture, evidence of indebtedness, loan or financing agreement, certificate, lease or other instrument to which it is a party, or by

which it is bound, or of any law, governmental order, rule or regulation, in any such case under this subparagraph (p) so as to affect adversely in any material manner its business, assets or financial conditions.

(q) All statements, representations and warranties made by Borrower or any other person in this Agreement, any other Loan Document and any other agreement, document, certificate or instrument previously furnished or to be furnished by said person to Lender under this Agreement or in connection with the Loan: (i) are and shall be true, correct and complete in all material respects at the time they were made and, in the case of those made prior to the Closing Date, on and as of the Closing Date, (ii) do not and shall not contain any untrue statement of a material fact at the time made, and (iii) do not and shall not omit to state a material fact at the time made necessary in order to make the information contained herein or therein not misleading or incomplete. Borrower understands that all such statements, representations and warranties shall be deemed to have been relied upon by Lender as a material inducement to provide the Loan.

(r) No person is entitled to receive from Borrower any brokerage commission, finder's fee or similar fee or payment in connection with the consummation of the transactions contemplated by this Agreement except as provided in Section 2 of this Agreement. No brokerage or other fee, commission or compensation is to be paid by Lender by reason of any act, alleged act or omission of Borrower with respect to the transaction contemplated hereby.

(s) Borrower has no knowledge of any of the following:

(i) The release or threatened release of any hazardous substance, pollutant or contaminant as each such term is presently defined in any applicable Environmental Laws resulting from any activity by or on behalf of Borrower or any predecessor in interest to the Mortgaged Property, including, without limitation, the generation, handling, storage, treatment, transportation or disposal of any hazardous substance, pollutant or contaminant at any of the past or present business locations and facilities of Borrower; or

(ii) Any past or future action taken or to be taken by any federal, state, county or municipal Governmental Authority or by any other person under any applicable Environmental Laws concerning the release of any hazardous substance, pollutant or contaminant into the soil, air, surface or subsurface water or the environment in general from any of the past or present business locations and facilities of Borrower; or

(iii) Any claims or actions brought or which are threatened to be brought by any Person against Borrower for damages occurring at or outside of any of the past or present business locations and facilities of Borrower resulting from the alleged release or threatened release of any hazardous substance, pollutant or contaminant by

Borrower or any predecessor in interest, including, without limitation, claims for health effects to Persons, property damage and/or damage to natural resources.

(t) (A) Borrower's address set forth above is the location of Borrower's chief executive office, and is the only location where Borrower keeps its records concerning its Accounts, and its inventory and equipment. (B) Within four (4) months of the date of this Agreement, none of Borrower's assets have been moved from any jurisdiction or other locations than the present location of assets set forth above except for inventory or equipment purchased or sold by Borrower in the ordinary course of business from persons or entities customarily selling such inventory or equipment. (C) As of the date hereof, no inventory is now stored with a bailee, warehouseman or similar party. (D) As of the date hereof, Borrower does not hold any goods belonging to third parties or in which other parties have an interest, including any goods sold on a bill and hold basis. (E) Borrower does not presently purchase or otherwise hold goods on a consignment basis. (F) None of Borrower's inventory is of a nature that contains any labels, trademarks, trade names, or other identifying characteristics which are the properties of third parties, and the use of which by Borrower is in violation of the rights of such third parties or under license, royalty or similar agreements with any third parties. (G) No persons hold any goods of Borrower. (H) Borrower has not purchased any inventory or equipment except in the ordinary course of business for value and from persons customarily in the business of selling such inventory or equipment. (I) Borrower does not hold any instrument or chattel paper connected with any Account. (J) Borrower does not own any trademarks, trade names, patents or copyrights. (K) No surety bonds have been issued on behalf of Borrower with respect to any contracts or purchase orders out of which Accounts Receivable have arisen or are expected to arise.

(u) Borrower is the owner and the operator of the Mortgaged Property.

7. Survival of Representations and Warranties. The foregoing representations and warranties shall survive the execution of this Loan Agreement and the closing of the Loan.

8. Affirmative Covenants. To induce Lender to make the Loan pursuant to this Agreement, Borrower hereby covenants and agrees that so long as the Loan shall remain outstanding hereunder, Borrower shall comply with the following covenants:

(a) Borrower shall keep and maintain complete and accurate books, accounts and records. Borrower shall permit access thereto and examination thereof by Lender and any authorized representatives of Lender, at all reasonable times and places during normal business hours (including the right to make copies thereof at the cost and expense of Borrower).

(b) Borrower shall comply in all material respects with all applicable federal, state, county and municipal laws, rules, regulations and orders of any

Governmental Authority having jurisdiction over Borrower, subject to the limitations expressly set forth in the Mortgage, except to the extent contested in good faith and by proper proceedings or where the failure to so comply would not have a material adverse effect on Borrower, including, without limitation, all Environmental Laws and health and safety laws.

(c) Borrower shall promptly notify Lender of the occurrence of any Event of Default or an event which, with the giving of notice or passage of time or both, would constitute an Event of Default and of the occurrence of any event or the commencement of any action, suit or proceeding which, if adversely determined, would adversely affect the condition, financial or otherwise, of Borrower or Guarantor.

(d) Borrower shall indemnify, protect, defend and save harmless the Indemnified Parties from and against (i) any and all losses, damages, expenses or liabilities of any kind or nature and from any suits, claims, or demands, by third parties including reasonable counsel fees incurred in investigating or defending such claim, suffered by any of them and caused by, relating to, arising out of, resulting from, or in any way connected with the Loan and the transactions contemplated herein, and (ii) any and all losses, damages, expenses or liabilities sustained by Lender in connection with any environmental sampling or cleanup relating to any properties or assets owned or otherwise used by Borrower in the operation of its business, or mandated by any Environmental Law; provided, however, Borrower shall not be obligated to indemnify, protect, defend and save harmless an Indemnified Party, if the loss, damage, expense or liability was caused by or resulted from the gross negligence or willful misconduct of that Indemnified Party. In case any action shall be brought against an Indemnified Party based upon any of the above and in respect to which indemnity may be sought against Borrower, the Indemnified Party against whom such action was brought, shall promptly notify Borrower in writing, and Borrower shall assume the defense thereof, including the employment of counsel selected by Borrower and reasonably satisfactory to the Indemnified Party, the payment of all costs and expenses and the right to negotiate and consent to settlement. Upon reasonable determination made by the Indemnified Party, the Indemnified Party shall have the right to employ separate counsel in any such action and to participate in the defense thereof at the Indemnified Party's cost and expense. Borrower shall not be liable for any settlement of any such action effected without its consent, but if settled with Borrower's consent, or if there be a final judgment for the claimant in any such action, Borrower agrees to indemnify and save harmless said Indemnified Party against whom such action was brought from and against any loss or liability by reason of such settlement or judgment. The provisions of this subparagraph (d) shall survive the termination of this Agreement and the final repayment of the Loan.

(e) If Lender shall so require, Borrower agrees to establish and maintain at a banking institution of Lender's choice a lockbox, in accordance with Lender's standard lockbox agreement in effect from time to time, and to direct all Account Debtors

to make remittances on all Accounts to said lockbox. Any and all remittances received in said lockbox may be applied to the Obligations of Borrower to Lender in accordance with Paragraph (g) hereof.

(f) If, notwithstanding the notices to Account Debtors to remit payments on Accounts to the lockbox referred to above, Borrower receives any payments on Accounts or other Collateral, Borrower agrees to receive any and all payments and remittances on Accounts and Inventory and other Collateral, including cash, checks, drafts, notes, acceptances or other forms of payment in trust for Lender and to deliver such payments in the identical form in which they were received, together with collection reports in form satisfactory to Lender.

(g) All proceeds of any Account(s) and inventory and other Collateral which are delivered to or otherwise received by Lender for application to the Loan provided for herein shall be deemed received as of the date of actual receipt by Lender, and shall be applied by Lender on account of the Obligations upon Lender's receipt of same; provided, however, that no checks, drafts, or other Instruments received by Lender shall constitute payment to Lender unless and until such item of payment has actually been collected by Lender. For the sole purpose of calculation of interest due to Lender from Borrower, all such proceeds and other payments on account of the Loan provided for in this Agreement, irrespective of the type or form of payment thereof shall not be considered applied on account of the Obligations until actual clearance of such funds.

(h) Borrower shall maintain all of its property in good working condition, ordinary wear and tear excepted (including obsolete and abandoned property).

(i) Borrower shall, within ten (10) days of the end of each month, deliver to Lender an aging of its Accounts and report of its inventory, and an aging of its accounts payable in such form as may be reasonably acceptable to Lender, and within thirty (30) days of the end of each month, a duly completed accounts receivable reconciliation report in such form as may be reasonably acceptable to Lender.

(j) Borrower will continue to hold all necessary licenses and permits for the operations of their business, including but not limited to contract vendor registrations and account numbers.

(k) Lender (by any of its officers, employees and agents) shall have the right, at any time or times during Borrower's usual business hours (provided reasonable prior notice is given except if an Event of Default has occurred and is continuing), to inspect the Collateral, all records related thereto (and to make extracts from such records) and the premises upon which any of the Collateral is located, to discuss Borrower's affairs and finances with any person and to verify the amount, quality, quantity, value and condition of, or any other matter relating to, the Collateral.

(l) (A) Lender shall have the right at any time and from time to time, without notice, to notify Account Debtors to make payments to Lender, to endorse all items of payment which may come into its hands payable to Borrower, to take control of any cash or non-cash proceeds of Accounts and of any returned or repossessed goods; to compromise, extend or renew any Account or deal with it as it may deem advisable, and to make exchanges, substitutions or surrenders of Collateral, to notify the postal authorities, after an Event of Default, to deliver all mail, correspondence or parcels addressed to Borrower to Lender at such address as Lender may choose. (B) Borrower herewith appoints Lender or its designee as Attorney-in-Fact to endorse Borrower's name on any checks, notes, acceptances, drafts or any other instrument or document requiring said endorsement and to sign Borrower's name on any invoice or bills of lading relating to any Account, or drafts against its customers, or schedules or confirmatory assignment on Accounts, or notices of assignment, financing statements under the Uniform Commercial Code, and other public records, and in verification of Accounts and in notices to Account Debtors. (C) Lender shall have no obligation to preserve any rights against any Person obligated on any Account, chattel paper, instrument or other item of Collateral. Lender shall not be permitted to exercise the rights granted to it under the foregoing clauses (A) and (B) prior to an Event of Default.

(m) Borrower will furnish Lender with at least ten (10) days' prior written notice of any change in location of or addition to its chief executive office, the office where it keeps its records concerning its Accounts, its location of Inventory, Equipment and other assets, and other business locations.

(n) Pay and discharge, and require its subsidiaries to pay and discharge, when due, all taxes, assessments or other governmental charges imposed on them or any of their respective properties, unless the same are currently being contested in good faith by appropriate proceedings and adequate reserves are maintained therefor.

(o) Operate its properties, and cause those of its subsidiaries to be operated in compliance with all applicable orders, rules and regulations promulgated by the jurisdictions and agencies thereof where such properties are located and duly file or cause to be filed such reports and/or information returns as may be required or appropriate under applicable orders, regulations or law.

(p) Permit the Lender's representatives and/or agents full and complete access to any or all of the Borrower's and its subsidiaries' properties and financial records, to make extracts from and/or audit such records and to examine and discuss the Borrower's properties, business, finances and affairs with the Borrower's officers and outside accountants.

(q) Obtain lien releases and lien waivers, in a statutory standard form, as and when Borrower pays contractors, materialmen, laborers providing labor, equipment, or materials to the Mortgaged Property and submit copies of the same to Lender.



(r) Hesser shall retain and exercise management and control of OneCap Partners MM, Inc., the Manager of Borrower and OneCap Partners MM, Inc. shall continue to be the Manager of Borrower.

(s) Borrower and/or Guarantor shall, no later than June 30, 2006, provide Lender with evidence to Lender's sole satisfaction, that The Corporation Trust Company has been appointed as Guarantor's New Jersey Agent for service of process.

9. Negative Covenants of Borrower. To induce Lender to make the Loan pursuant to this Agreement, Borrower hereby covenants and agrees that so long as the Loan shall remain outstanding, Borrower shall not:

(a) Except for Permitted Encumbrances as set forth in the Mortgage, at any time: (i) create, incur, assume or suffer to exist any mortgage, deed of trust, pledge, security interest, encumbrance, lien or charge of any nature upon or with respect to Borrower's assets and properties or (ii) sign or file under the Uniform Commercial Code of any jurisdiction a financing statement which names Borrower as a debtor or (iii) sign any security agreement authorizing any secured party thereunder to file such financing statement. Borrower further covenants and agrees not to grant any similar negative pledge to any other lender.

(b) Except as to the sale or disposition of assets which are obsolete or worn out and are no longer used or useful in the conduct of its business, convey, sell, lease, assign, transfer, hypothecate or otherwise dispose of any of its now or hereafter acquired property, business or assets.

(c) Create, incur, suffer to exist, assume, guaranty, endorse, become a surety, or otherwise become liable for the debt or other obligations of any other Person whether directly or indirectly, or make or incur any advance, purchase commitment, other obligation or loan for the direct or indirect purpose of paying or discharging any such obligations.

(d) Make any advance, loan, extension of credit or capital contribution to, or purchase any stock, bonds, notes, debentures or other securities of or any assets constituting a business unit of, or make any other investment income, any Person.

(e) Enter into any merger or consolidation or liquidate or wind-up or dissolve itself (or suffer any liquidation or dissolution) or convey, sell, lease, assign, transfer or otherwise dispose (directly or indirectly) of all or substantially all of its property, business or assets or make any material change in its present method of conducting business or permit any corporate guarantor to do any of the foregoing.

(f) Materially change, amend, alter or modify the bylaws/operating agreement or other governing documents of Borrower or permit any corporate guarantor to do any of the foregoing.

(g) Enter into or permit any Guarantor to enter into any transaction, including, without limitation, the purchase, sale or exchange of property or the rendering of any service, with any officer, director, shareholder or partner of Borrower or any Guarantor or Affiliate of any of the foregoing.

(h) Declare or pay any dividends on, distributions on or make any payment on account of, or set apart assets or a sinking fund for the purchase, redemption, defeasance, retirement or other acquisition of, any interest, shares or any class of stock or any warrant or option to purchase any such stock whether now or hereafter outstanding or make any other distribution in respect thereof, directly or indirectly whether in cash or property or obligations.

(i) Create, incur, suffer to exist any indebtedness, except (i) indebtedness in respect of the Loan; and (ii) indebtedness, if any, outstanding as of the date of this Agreement and shown on the financial statements previously delivered to Lender.

(j) Transfer, sell, lease or otherwise convey (directly or indirectly) any interest or shares of capital stock or membership or ownership interest in any guarantor.

(k) Purchase any Inventory or Equipment except in the ordinary course of business from persons customarily in the business of selling such Inventory or Equipment.

(l) Without prior written consent of Lender, remove the Collateral from its present location, except for the removal of Inventory upon its sale.

(m) Sell or transfer any Inventory to any Affiliate or subsidiary of Borrower except on arms length terms in the ordinary course of business.

(n) Sell, lease or transfer any of its equipment (except for abandoned or obsolete equipment) or other assets without the prior written consent of Lender except for sales of inventory in the ordinary course of business to good faith purchasers for value.

(o) Allow its existence of as a corporation/limited liability company to be other than in good standing and will not, without the prior written consent of Lender, dissolve or liquidate, or merge or consolidate with or acquire or affiliate with any other business entity or form any subsidiary.

(p) Change its name without furnishing to Lender at least ten (10) days' prior written notice thereof.

(q) Utilize any trade name, and will not in the future utilize any trade name without furnishing to Lender at least ten (10) days prior written notice thereof.

(r) Change the nature of its business.

(s) Sell, assign, transfer or dispose of any of its accounts or notes receivable, with or without recourse, except to the Lender.

(t) Except after notice to Lender and with Lender's prior written consent, partition or subdivide the Mortgaged Property.

10. **Events of Default.** The occurrence of any of the following shall constitute an Event of Default hereunder:

(a) failure of Borrower to make any payment of any installment of principal or interest when due under the Note;

(b) failure of Borrower to pay any other sum when due hereunder or under the Note or any other Loan Document;

(c) any representation or warranty of Borrower or the Guarantor made herein or in any other Loan Document or in any other writing given to Lender in connection with the Loan shall have been incorrect in any material respect as of the time when the same shall have been made or is not accurate when a further disbursement is to be made to Borrower;

(d) the occurrence of an Event of Default under the Mortgage or any other Loan Document;

(e) the sale, conveyance, assignment, transfer or other disposition or divestiture of Borrower's title to any of the Collateral, or the mortgage or other conveyance of a security interest in, or other encumbrance on any of the Collateral or any interest therein, whether voluntary or involuntary, except as provided herein;

(f) any merger, consolidation, liquidation or dissolution, or the sale or transfer of all or substantially all of the assets, of the Borrower;

(g) the transfer (directly or indirectly) of any of the stock or other ownership interest of Borrower, provided, however, that such transfer shall not constitute an Event of Default if it does not change the control, management or majority ownership of Borrower.

(h) any default in the performance or observance of any term, covenant or agreement to be performed by Borrower or Guarantor in this Loan Agreement or in any Loan Document;

(i) the use of proceeds of the Loan for any purpose other than the purpose described in Paragraph 6(o);

(j) any Loan Documents for any reason shall cease to be in full force and effect, the liens on the Collateral purported to be created thereby shall cease to be or are not valid and perfected liens having priority over all other liens except any encumbrances specifically permitted under such Loan Documents, or any Guarantor shall assert that it has no liability under the Guaranty to which it is a party;

(k) one or more judgments or decrees shall be entered against Borrower or any Guarantor (not paid or fully covered by insurance) and all such judgments or decrees shall not have been vacated or discharged, stayed or bonded pending appeal within sixty (60) days from the entry thereof;

(l) if Borrower or any Guarantor becomes insolvent;

(m) if Borrower or any Guarantor generally does not pay its debts as they become due and Borrower has failed to make any payment to Lender required by the Loan Documents;

(n) if Borrower or any Guarantor makes an assignment for the benefit of creditors;

(o) if Borrower or any Guarantor calls or causes to be called a meeting of creditors for the composition of debts;

(p) if there shall be filed by or with the consent or authorization of Borrower or any Guarantor a petition in bankruptcy for liquidation or for reorganization, or a custodian, receiver or agent is appointed or authorized to take charge of its properties, or Borrower or any Guarantor authorizes any such action;

(q) if there shall be filed against Borrower or any Guarantor a petition in bankruptcy, for liquidation, or for reorganization, or a custodian, receiver, or agent is appointed or authorized to take charge of its properties and Borrower or any Guarantor, as the case may be, has not consented to or authorized such action and such action is not dismissed within sixty (60) days; and

(r) if any license, permit, registration, vendor account or other approval required for the normal operation of Borrower's business or any of the Collateral shall be suspended or shall cease to be in full force and effect.

#### 11. Remedies.

(a) Upon the occurrence of an Event of Default and at any time thereafter during the continuance of such Event of Default, in addition to any remedies

available to Lender under applicable law, Lender may take one or more of the following remedial steps in any order of priority:

(i) Declare immediately due and payable the outstanding principal balance of the Note, together with all accrued and unpaid interest, fees and other sums or expenses payable thereunder and hereunder and accordingly accelerate payment thereof without presentment, demand, notice of intention to accelerate, notice of acceleration or notice of any other kind, all of which are expressly waived;

(ii) Take any action at law or in equity against Borrower or the Guarantor (a) to collect the payments then due and thereafter to become due under the Loan Documents, or (b) to enforce performance and observance of any obligation, agreement or covenant of Borrower or such other parties under the Loan Documents;

(iii) Exercise any and all rights and remedies provided for in the other Loan Documents as they relate to Borrower or any Guarantor.

(iv) Proceed with or without judicial process to take possession of all or any part of the Collateral provided for herein not already in the possession of Lender and Borrower agrees that upon receipt of notice of Lender's intention to take possession of all or any part of said Collateral, Borrower will do everything reasonably necessary to assemble the Collateral and make same available to Lender at a place to be designated by Lender. Borrower hereby waives any and all rights it may have, by statute, constitution or otherwise to notice from Lender, for Lender to obtain possession, by Court proceedings or otherwise, of the Collateral provided for in this or in any other agreement with Lender;

(v) So long as Lender acts in a commercially reasonable manner, assign, transfer and deliver at any time or from time to time the whole or any portion of the Collateral or any rights or interest therein in accordance with the Uniform Commercial Code, and without limiting the scope of Lender's rights thereunder, Lender may sell the Collateral at public or private sale, or in any other manner, at such price or prices as Lender may deem best, and either for cash or credit, or for future delivery, at the option of Lender, in bulk or in parcels and with or without having the Collateral at the sale or other disposition. Lender shall have the right to be the purchaser at any public sale. Lender shall have the right to conduct such sales on Borrower's premises or elsewhere and shall have the right to use Borrower's premises without charge for such sales for such time or times as Lender may see fit. Lender is hereby granted license or other right to use, without charge, Borrower's labels, patents, copyrights, rights of use of any name, trade secrets, trade names, trademarks and advertising matter, or any property of a similar nature, as it pertains to the collateral, in advertising for sale and selling any collateral and Borrower's rights under all licenses and franchise agreements shall inure to Lender's benefit. Borrower agrees that a reasonable means of disposition of Accounts shall be for Lender to hold and liquidate any and all Accounts. In the event of a sale of

the Collateral, or any other disposition thereof, Lender shall apply all proceeds first to all costs and expenses of disposition, including reasonable attorneys' fees, and then to the Obligations of Borrower to Lender;

(vi) Elect to retain the Collateral or any part thereof in satisfaction of all Obligations due from Borrower to Lender upon notice of such proposed election to Borrower and any other party as may be required by the Uniform Commercial Code; and

(vii) Lender shall have the right immediately, and without notice or other action to set-off against any of any Borrower's Obligations to Lender any sum owed by Lender in any capacity to any Borrower whether due or not, and Lender shall be deemed to have exercised such right of set-off and to have made a charge against any such sum immediately upon the occurrence of a Default, even though the actual book entries may be made at some time subsequent thereto.

(b) No remedy conferred in this Agreement or the other Loan Documents is intended to be exclusive of any other remedy, and each and every such remedy shall be cumulative and shall be in addition to every other remedy conferred herein or now or hereafter existing at law or equity or by statute or otherwise.

## **12. Payment of Expenses.**

(a) Borrower agrees that it shall pay, within five (5) days after demand, all out-of-pocket expenses incurred by Lender in connection with this transaction including, without limitation, fees and expenses for any title searches required hereunder, recording and filing fees, and reasonable attorneys' fees incurred by Lender in connection with the Loan (including any amendments and waivers), the preparation of the Loan Documents, the administration of the Loan, inspection of the Mortgaged Property during the course of the Project and the enforcement Lender's rights and remedies under the Loan Documents.

(b) If Borrower should fail to perform or observe, or to cause to be performed or observed, any covenant or obligation under this Agreement or any of the other Loan Documents, then the Lender, may (but shall be under no obligation to) take such steps as are necessary to remedy any such nonperformance or nonobservance and provide for payment thereof, if any (which shall include, without limitation, steps necessary to cure any defaults of Borrower under any lease).

(c) All amounts expended or advanced by the Lender pursuant to this Paragraph 12 shall become part of the outstanding principal balance of the Loan and the Note, shall be secured by, among other things, the Mortgage, shall become due and payable by the Borrower upon demand by Lender, and shall bear interest at the Default Rate (such interest to be calculated from the date of such advance by Lender to the date of repayment thereof by Borrower).

13. **Lender's Right to Assign.** Lender shall have the right to sell, assign, transfer or dispose of all or any part of its interest in the Loan without the consent or approval of Borrower or Guarantor.

14. **Default Interest Rate.** All sums advanced and all expenses incurred by Lender pursuant to any provision of this Agreement or of the other Loan Documents which are not paid when due shall bear interest at the Default Rate set forth in the Note from the date such sum was due until such sum is paid in full and shall be secured by the Mortgage.

15. **Usury Savings.** Notwithstanding anything to the contrary contained herein, under no circumstances shall the aggregate amount paid or agreed to be paid hereunder or under the Note exceed the highest lawful rate permitted under applicable usury law (the "Maximum Rate") and the payment obligations of Borrower under this Agreement and the Note are hereby limited accordingly. If under any circumstances, whether by reason of advancement or acceleration of the maturity of the unpaid principal balance hereof or otherwise, the aggregate amounts paid hereunder or under the Note shall include amounts which by law are deemed interest and which would exceed the Maximum Rate, Borrower stipulates that payment and collection of such excess amounts shall have been and will be deemed to have been the result of a mistake on the part of both Borrower and Lender or the holder of the Note, and the party receiving such excess payments shall promptly credit such excess (only to the extent such payments are in excess of the Maximum Rate) against the unpaid principal balance hereof and any portion of such excess payments not capable of being so credited shall be refunded to Borrower.

16. **Notices.** All notices, consents, approvals and requests required or permitted hereunder or under any other Loan Document shall be given in writing and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, return receipt requested or (b) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, and by telecopier (with answer back acknowledged), addressed as follows (or at such other address and a person as shall be designated from time to time by any party hereto, as the case may be, in a written notice to the other parties hereto in the manner provided for in this Section):

If to Lender: Kennedy Funding, Inc.  
Two University Plaza, Suite 402  
Hackensack, New Jersey 07601  
Attention: \_\_\_\_\_  
Facsimile No. (201) 342-8373

With a copy to: Cole, Schotz, Meisel, Forman & Leonard P.A.  
25 Main Street  
Hackensack, New Jersey 07602-0800

Attention: Michael R. Leighton, Esq.  
Facsimile No.: (201) 489-1536

If to Borrower: OneCap Partners 2, LLC  
5440 W. Sahara Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89146  
Attn: Mr. Vincent Hesser

With a copy to: Harold Gewerter, Esq.  
5440 W. Sahara Ave., Suite #202  
Las Vegas, NV 89146  
Facsimile No. (702) 382-1759

A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery; in the case of registered or certified mail, when delivered or the first attempted delivery on a business day; or in the case of expedited prepaid delivery and telecopy, upon the first attempted delivery on a business day.

17. **No Waiver.** No course of dealing between Borrower and Lender or any failure or delay on the part of Lender in exercising any rights or remedies hereunder shall operate as a waiver of any rights or remedies of Lender and no single or partial exercise of any rights or remedies hereunder shall operate as a waiver or preclude the exercise of any other rights or remedies hereunder. In the event any agreement contained in this Agreement or the other Loan Documents should be breached and thereafter waived by Lender, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder or thereunder.

18. **Failure to Exercise Rights.** Nothing herein contained shall impose upon Lender any obligation to enforce any terms, covenants or conditions contained in this Agreement and the other Loan Documents. Failure of Lender, in any one or more instances, to insist upon strict performance of any terms, covenants or conditions of this Agreement and the other Loan Documents, shall not be considered or taken as a waiver or relinquishment by Lender of its right to insist upon and to enforce in the future, by injunction or other appropriate legal or equitable remedy, strict compliance with all the terms, covenants and conditions of this Agreement and the other Loan Documents. The consent of Lender to any act or omission by Borrower shall not be construed to be a consent to any other or subsequent act or omission or a waiver of the requirement for Lender's consent to be obtained in any future or other instance.

19. **Prohibition Against Exercise of Rights Applicable Only to Individual Lenders.** Borrower is hereby prohibited from exercising against Lender or Agent any right or remedy which it might otherwise be entitled to exercise against any one or more



(but less than all) of the individual parties constituting Lender, including, without limitation, any right of set-off or any defense.

20. Miscellaneous.

(a) Choice of Law. THE LOAN WAS NEGOTIATED IN THE STATE OF NEW JERSEY, THIS AGREEMENT WAS NEGOTIATED IN THE STATE OF NEW JERSEY, WAS EXECUTED AND DELIVERED BY BORROWER AND ACCEPTED BY LENDER IN THE STATE OF NEW JERSEY, AND THE PROCEEDS OF THE NOTE WERE DISBURSED FROM THE STATE OF NEW JERSEY, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE. THIS AGREEMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW JERSEY APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES THE PROVISIONS FOR THE CREATION, PERFECTION, PRIORITY, ENFORCEMENT AND FORECLOSURE OF THE LIENS AND SECURITY INTERESTS CREATED IN THE REAL PROPERTY COLLATERAL UNDER THE LOAN DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE JURISDICTION IN WHICH THE REAL PROPERTY COLLATERAL IS LOCATED, IT BEING UNDERSTOOD THAT, TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH JURISDICTION, THE LAW OF THE STATE OF NEW JERSEY SHALL GOVERN THE VALIDITY AND ENFORCEABILITY OF ALL LOAN DOCUMENTS, AND THE DEBT OR OBLIGATIONS ARISING HEREUNDER.

(b) Jurisdiction. AT LENDER'S ELECTION, TO BE ENTERED IN ITS SOLE DISCRETION, ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST BORROWER OR LENDER ARISING OUT OF OR RELATING TO THIS NOTE OR THE OTHER LOAN DOCUMENTS SHALL BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN NEW JERSEY, AND BORROWER WAIVES ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. BORROWER DOES HEREBY DESIGNATE AND APPOINT THE CORPORATION TRUST COMPANY, HAVING AN ADDRESS AT 820 BEAR TAVERN ROAD, WEST TRENTON, NEW JERSEY 08628, AS ITS

**AUTHORIZED AGENT TO RECEIVE AND FORWARD ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW JERSEY, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE MAILED OR DELIVERED TO BORROWER IN THE MANNER PROVIDED IN THE MORTGAGE, SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON BORROWER IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW JERSEY. BORROWER (1) SHALL GIVE PROMPT NOTICE TO THE LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (2) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW JERSEY (WHICH OFFICE SHALL BE DESIGNATED AS THE ADDRESS FOR SERVICE OF PROCESS), AND (3) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW JERSEY OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR.**

(c) Borrower and/or Guarantor (as applicable) agrees if Borrower and/or Guarantor is required to make any deduction or withholding of foreign taxes (or taxes imposed because Borrower and/or Guarantor is a foreign person or entity) from any payment due to Lender herein, then the amount payable to Lender upon which such deduction or withholding is based, shall be increased to the extent necessary to ensure that, after all deductions or withholdings, Lender is paid a net amount equal to the amount Lender would have been paid in the absence of such deduction or withholding. At Lender's request, Borrower and/or Guarantor shall provide Lender with documentation adequate to demonstrate payment of such deduction or withholding by Borrower and/or Guarantor under this provision.

(d) No modification or waiver of any provision of the Note or of this Agreement and no consent by Lender to any departure therefrom by the Borrower shall be effective unless such modification or waiver shall be in writing and signed by a duly authorized officer of Lender, and the same shall then be effective only for the period and on the conditions provided therein.

(e) Any condition of this Agreement or any other Loan Document which requires the submission of evidence of the existence or non-existence of a specified fact or facts implies as a condition the existence or non-existence, as the case may be, of such fact or facts, and Lender shall, at all times, be free independently to establish to its reasonable satisfaction and in its absolute discretion such existence or non-existence.

(f) Borrower and each Guarantor, as the case may be, shall execute and deliver, or cause to be executed and delivered to Lender, all other instruments, certificates

and agreements as Lender or Lender's counsel may reasonably require, including, but not limited to, estoppel certificates stating that the Loan is in full force and effect and that there are no defenses or offsets thereto, to effect, confirm or assure the rights, remedies and liens intended to be granted or conveyed to Lender under this Agreement or any other Loan Document.

(g) A determination that any portion of this Agreement or any of the Loan Documents is unenforceable or invalid shall not affect the enforceability or validity of any other provision, and any determination that the application of any provisions of this Agreement or any Loan Document to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provisions it may apply to other persons or circumstances.

(h) Without the consent of, or notice to Borrower, Lender may add one or more additional co-agents to this Loan.

**21. Successors and Assigns.**

(a) Borrower may not assign its rights under this Agreement without the prior written consent of Lender. Any such attempted assignment in violation of this Agreement shall be void and of no effect.

(b) All covenants and agreements in this Agreement shall bind and inure to the benefit of the respective permitted successors and assigns of the parties hereto and any holder or holders of the Note or any portion thereof.

**22. Waiver of Jury Trial. BORROWER AND LENDER AGREE THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT BY BORROWER OR LENDER ON OR WITH RESPECT TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT OR THE DEALINGS OF THE PARTIES WITH RESPECT HERETO OR THERETO, SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. BORROWER AND LENDER EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING. FURTHER, BORROWER WAIVES ANY RIGHT IT MAY HAVE TO CLAIM OR RECOVER, IN ANY SUCH SUIT, ACTION OR PROCEEDING, ANY SPECIAL, EXEMPLARY, PUNITIVE, CONSEQUENTIAL OR OTHER DAMAGES OTHER THAN, OR IN ADDITION TO, ACTUAL DAMAGES. BORROWER ACKNOWLEDGES AND AGREES THAT THIS SECTION IS A SPECIFIC AND MATERIAL ASPECT OF THIS AGREEMENT AND THAT LENDER WOULD NOT EXTEND CREDIT TO BORROWER (AS APPLICABLE) IF THE WAIVERS SET FORTH IN THIS SECTION WERE NOT A PART OF THIS AGREEMENT.**

23. Releases of Collateral.

(a) The Lender may release, regardless of consideration, the obligation of any Person or Persons liable for payment of any of the Obligations secured hereby, or may release any part of the Mortgaged Property or any other collateral now or hereafter given to secure the payment of the Obligations or any part thereof, without impairing, reducing or affecting the obligations of the Borrower or Guarantors under the Loan Documents.

(b) Within thirty (30) days of Borrower's request, provided: (i) Borrower is not in default hereunder or under any other Loan Document(s); and (ii) no event has occurred which with the passage of time and/or the giving of notice would constitute a default hereunder or under any other Loan Document(s), Lender shall release portions of the Mortgaged Property from the lien created by this Mortgage ("Released Property") subject to: (i) Borrower's payment to Lender of the Release Price (as hereinafter defined) for the Released Property and (ii) Borrower's delivery to Lender of documentation evidencing an arms length transaction for the sale of the Released Property. The Release Price for the Released Property shall be equal to the greater of: (i) Eighty percent (80.0%) of the net sale price of the Released Property (subject to reasonable and customary closing adjustments and sales commissions [to be approved by Lender in Lender's reasonable discretion]); (ii) Seventy-Five percent (75.0%) of the gross sale price of the Released Property; and (iii) the minimum Release Price acceptable to Lender in its sole discretion.

24. Publicity.

(a) Lender shall have the right to issue news releases, and publicize and/or advertise the fact that it has provided financing with respect to the project and/or the Mortgaged Property and in connection therewith Lender shall have the right to photograph and use pictures of the Mortgaged Property in any such advertisements, brochures, print, media and other copy.

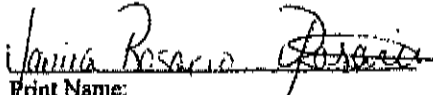
(b) At Lender's request, Borrower, at Lender's cost and expense, shall erect a suitable sign or signs at the Mortgaged Property in a location which is clearly visible to the public and otherwise reasonably acceptable to Lender. The Sign shall be prepared by Lender and may contain, among other things, that financing for the Mortgaged Property is being provided by Lender and otherwise publicize Lender's role in the financing. Lender shall coordinate the placement and maintenance of such signs on the Mortgaged Property with Borrower.

25. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be effective only upon delivery and thereafter shall be deemed an original, and all of which shall be taken to be one and the same instrument, for the same effect as if all parties hereto had signed the same signature page. Any signature

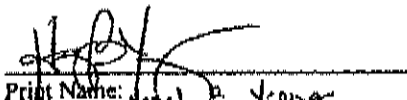
page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures thereon and may be attached to another counterpart of this Agreement identical in form hereto but having attached to it one or more additional signature pages.

IN WITNESS WHEREOF, the undersigned have executed this Loan and Security Agreement as of the day and year first set forth above.

WITNESS:

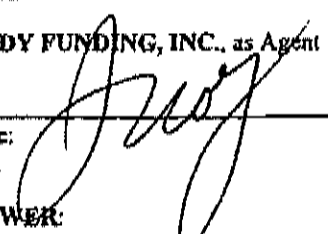
  
Print Name: Janina Rosario

WITNESS:

  
Print Name: Michael B. Young

LENDER:

KENNEDY FUNDING, INC., as Agent

By:   
Name:  
Title:

BORROWER:

OneCap Partners 2, LLC  
a Nevada limited liability company

By: OneCap Partners MM, Inc., its  
Manager

By:   
Name: Vincent Hesser  
Title: President

IN WITNESS WHEREOF, the undersigned have executed this Loan and Security Agreement as of the day and year first set forth above.

WITNESS:

LENDER:

KENNEDY FUNDING, INC., as Agent

Print Name: \_\_\_\_\_

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

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

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

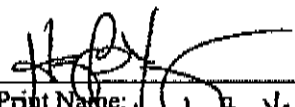
WITNESS:

BORROWER:

OneCap Partners 2, LLC,  
a Nevada limited liability company

By: OneCap Partners MM, Inc., its  
Manager

Print Name: \_\_\_\_\_

  
Daniel B. Young

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

Name: Vincent Hesser

Title: President

STATE OF NEW JERSEY)

) ss.:  
COUNTY OF BERGEN )

I certify that on June 16, 2006, Tilley Wolff personally came before me and this person acknowledged under oath, to my satisfaction, that he:

(a) executed the attached Loan and Security Agreement; and

(b) was authorized to and did execute the attached Loan and Security Agreement on behalf of and as Pres. of Kennedy Funding, Inc., the entity named in this instrument, by virtue of authority granted by its bylaws and board of directors.

K. V. [Signature]

~~Notary Public~~  
Notary Public of New Jersey  
ID # 2198182  
My Commission Expires 2/26/08

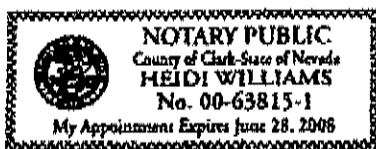
STATE OF Nevada )  
) ss.:  
COUNTY OF Clark )

I certify that on June 14, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

(a) made the attached instrument; and

(b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc. the Manager of OneCap Partners 2, LLC, a Nevada limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.

Heidi Williams  
NOTARY PUBLIC





STATE OF NEW JERSEY )

) ss.:

COUNTY OF BERGEN )

I certify that on \_\_\_\_\_, 2006, \_\_\_\_\_ personally came before me and this person acknowledged under oath, to my satisfaction, that he:

(a) executed the attached Loan and Security Agreement; and

(b) was authorized to and did execute the attached Loan and Security Agreement on behalf of and as \_\_\_\_\_ of Kennedy Funding, Inc., the entity named in this instrument, by virtue of authority granted by its bylaws and board of directors.

\_\_\_\_\_  
NOTARY PUBLIC

STATE OF *Nevada* )

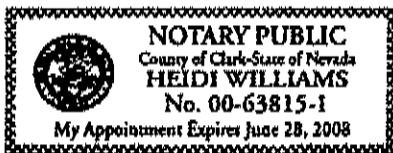
) ss.:

COUNTY OF *Clark* )

I certify that on June 14, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

(a) made the attached instrument; and

(b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc. the Manager of OneCap Partners 2, LLC, a Nevada limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.



*Heidi Williams*  
\_\_\_\_\_  
NOTARY PUBLIC

SCHEDULE A

DESCRIPTION OF THE COLLATERAL

A-1

31392/0400-1438005v3

VH000090KF00061

EXHIBIT "A"  
LEGAL DESCRIPTION

PARCEL ONE (1):

LOT TWO (2) AS SHOWN ON THAT CERTAIN PARCEL MAP IN FILE 53 OF PARCEL MAPS, PAGE 93, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

PARCEL TWO (2):

THE SOUTH 1000 FEET OF THE NORTH 2000 FEET (MEASURED AT A RIGHT ANGLE TO THE NORTH LINE) OF SECTION 25, TOWNSHIP 32 SOUTH, RANGE 66 EAST, M.D.B.&M.

**SCHEDULE B**

**PRINCIPAL LOAN DOCUMENTS**

1. Loan Commitment dated June 6, 2006;
2. Loan and Security Agreement dated as of the date hereof;
3. Promissory Note dated as of the date hereof;
4. Mortgage and Security Agreement dated as of the date hereof;
5. Document Re-Execution Agreement dated as of the date hereof;
6. Environmental Indemnity Agreement dated as of the date hereof;
7. Assignment of Leases and Rents dated as of the date hereof;
8. Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and Reports dated as of the date hereof;
9. Guaranty dated as of the date hereof;
10. Loan Closing Statement dated as of the date hereof;
11. UCC-1 Financing Statements.

B-1

31392/0400-1438005v3

VH000092 KF00063

**SCHEDULE C**  
**INTENTIONALLY OMITTED**

313920400-1438005v3

C-1

VH000093KF00064

**SCHEDULE D**

**LENDERS**

The Simes Family Limited Partnership  
M&M Funding, Inc.  
TLC Funding, Inc.  
Josh Duitz  
CB&M Funding, LLC  
Lawton Enterprises, Inc. M/P/P  
STC Funding, Inc. M/P/P  
Bruce Berger  
Solomon Berger  
Charles Ira Epstein  
Jeffrey A. Mayer  
Howard Brown  
Presidential Investments, Inc.  
G&C Investment, Inc.  
Evergreen CMF Funding, LLC  
The Hampshire Generational Fund, LP  
JWJ Financial, Inc.  
Flug Funding, Inc.  
MMR Funding, LP  
M.L. Beer Investments, Inc.  
Wilson Kaplen  
The Kaplen Foundation  
Valley National Bank



## **EXHIBIT “2”**

VH000096



**PROMISSORY NOTE**

\$12,000,000

June 15, 2006

FOR VALUE RECEIVED, the undersigned, **ONECAP PARTNERS 2, LLC**, a Nevada limited liability company, having an address at 5440 W. Sahara Avenue, Third Floor, Las Vegas, Nevada 89146 (the "**Borrower**"), promises to pay to the order of **KENNEDY FUNDING, INC.** ("**Agent**"), with an office at Two University Plaza, Suite 402, Hackensack, New Jersey 07601, as agent for the lenders identified on Schedule A annexed hereto (Agent and the lenders identified on Schedule A are hereinafter collectively referred to as "**Lender**"), the principal sum of **TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS**, or so much thereof as may be advanced by Lender to Borrower from time to time (the "**Principal Amount**"), together with interest on the unpaid Principal Amount thereof computed from the date advanced (the "**Commencement Date**"), at the rates provided herein until June 30, 2009 or such earlier date on which the Principal Amount becomes due and payable as provided herein (the "**Maturity Date**"); provided, however, that from and after (i) the Maturity Date, whether upon stated maturity, acceleration or otherwise, or (ii) the date on which the interest rate hereunder is increased to the Default Rate (as hereinafter defined) as provided herein, such additional interest shall be computed at the Default Rate.

As used herein, the term "**Default Rate**" shall mean a rate of interest of twenty-five percent (25.0%) per annum, but in no event shall the Default Rate be in excess of the Maximum Rate (as hereinafter defined).

If any payment of interest is not paid within five (5) days after the due date for such payment, a late charge equal to the lesser of ten percent (10%) of such overdue payment or the maximum amount permitted by applicable law shall automatically become due to the holder of this promissory note (the "**Note**"), subject, however, to the limitation that late charges may be assessed only once on each overdue payment. Said late charges do not constitute interest and shall constitute compensation to the holder of this Note for collection and co-lender administration costs incurred hereunder. In addition, if any payment of principal or interest is not paid when due, the holder of this Note shall have the right, upon notice to Borrower, to increase the rate of interest per annum on all amounts outstanding to the Default Rate and, upon said notice, such rate increase shall be effective retroactively as of the date from which the interest component of such overdue payment began to accrue and shall remain in force and effect for so long as such default shall continue. This paragraph shall not be construed as an agreement or privilege to extend the due date of any payment, nor as a waiver of any other right or remedy accruing to the holder of this Note by reason of any default.

Principal and interest hereunder shall be payable as follows:

(a) From the Commencement Date, interest on the Principal Amount outstanding hereof shall accrue at the rate of Eleven and One Half (11 1/2%) percent per annum, for the period beginning on and including the Commencement Date to the last day of the month in which the Commencement Date occurs ("Short Interest"), and shall be payable at the closing (the "Closing") of the Loan.

(b) Interest only at the rate of Eleven and One Half (11 1/2%) percent per annum on the Principal Amount outstanding hereof shall accrue from July 1, 2006 through June 1, 2007 and be paid monthly at an amount equal to (1) the product of (y) the principal balance of the loan outstanding on the last day of the month prior to when the interest rate is due (assuming no prepayment of principal has occurred in such month) and (z) Eleven and One Half (11 1/2%) percent; (2) divided by Twelve (12), in arrears, commencing on August 1, 2006 and continuing on the first day of each month thereafter through and including July 1, 2007.

(c) Interest only at the rate of (i) Eighteen (18.0%) percent per annum, or (ii) the Prime Rate (as defined below), as adjusted from time to time, plus Ten Percent (10%) per annum, whichever is greater, on the Principal Amount outstanding hereof shall accrue from July 1, 2007 through the Maturity Date and be paid monthly, in arrears, in an amount as determined by Lender equal to one-twelfth (1/12<sup>th</sup>) of the annual interest payment for such period commencing on August 1, 2007 and continuing on the first day of each month thereafter until the Maturity Date.

(d) All principal, interest and other sums due hereunder shall be due and payable in full on the Maturity Date.

(e) Prepaid Interest (as defined in the Loan and Security Agreement of even date herewith, hereinafter, the "Loan Agreement"), if any, shall be utilized in accordance with the terms of the Loan Agreement.

For purposes of this Note, "Prime Rate" shall mean the rate of interest published in The Wall Street Journal from time to time as the "Prime Rate." If more than one "Prime Rate" is published in The Wall Street Journal for a day, the average of such "Prime Rate" shall be used, and such average shall be rounded up to the nearest one-eighth of one percent (0.125%). If The Wall Street Journal ceases to publish the "Prime Rate," the Agent shall select an equivalent publication that publishes such "Prime Rate," and if such "Prime Rate" is no longer generally published or is limited, regulated or administered by a governmental or quasi-governmental body, then Agent shall elect a comparable interest rate index.

Each payment hereunder shall be credited first to Lender's collection expenses, next to late charges, next to unpaid interest, and the balance, if any, to the reduction of the Principal Amount. The interest on this Note shall be calculated on the basis of a 30-day month and a 360-day year.

This Note may be prepaid in whole or in part at any time, without penalty or premium, it being understood and agreed that, except as expressly provided herein, Borrower shall not be entitled, by virtue of any prepayment or otherwise, to a refund of the Fee (as defined in the Loan Agreement), interest, any other fees, points, charges and the like paid by Borrower to Lender in connection with the loan hereunder (the "Loan") and for fees and expenses incurred by Lender in making the Loan, all of which payments shall be retained by Lender from and after the date each such payment is made hereunder.

Borrower and each surety, endorser and guarantor hereof hereby waive all demands for payment, presentations for payment, notices of intention to accelerate maturity, notices of acceleration of maturity, demand for payment, protest, notice of protest and notice of dishonor, to the extent permitted by law. Borrower further waives trial by jury. No extension of time for payment of this Note or any installment hereof, no alteration, amendment or waiver of any provision of this Note and no release or substitution of any collateral securing Borrower's obligations hereunder shall release, modify, amend, waive, extend, change, discharge, terminate or affect the liability of Borrower under this Note.

Any forbearance by the holder of this Note in exercising any right or remedy hereunder or under any other agreement or instrument in connection with the Loan or otherwise afforded by applicable law, shall not be a waiver or preclude the exercise of any right or remedy by the holder of this Note. The acceptance by the holder of this Note of payment of any sum payable hereunder after the due date of such payment shall not be a waiver of the right of the holder of this Note to require prompt payment when due of all other sums payable hereunder or to declare a default for failure to make prompt payment.

If this Note is placed in the hands of an attorney for collection, Borrower shall pay all costs incurred and reasonable attorneys' fees for legal services in the collection effort, whether or not suit be brought.

At the election of the holder of this Note, all payments due hereunder may be accelerated, and this Note shall become immediately due and payable without notice or demand, upon the occurrence of any of the following events (each an "Event of Default"): (1) Borrower fails to pay on or before the date due, any amount payable hereunder; (2) Borrower fails to perform or observe any other term or provision of this Note with respect to payment; (3) Borrower fails to perform or observe any other term or provision of this Note; or (4) there exists a default under the Mortgage (as hereinafter defined), a default under any Guaranty (as hereinafter defined) or a default under or misrepresentation contained in any other agreement, document or certificate of Borrower or any Guarantor (as hereinafter defined) in connection with the Loan, which default is not cured within any grace period expressly provided therefor in such document. In addition to the rights and remedies provided herein, the holder of this Note may exercise any other right or remedy in any other document, instrument or agreement evidencing, securing or otherwise relating to the indebtedness evidenced hereby in accordance with

the terms thereof, or under applicable law, all of which rights and remedies shall be cumulative.

If this Note is transferred in any manner, the right, option or other provisions herein shall apply with equal effect in favor of any subsequent holder hereof.

Notwithstanding anything to the contrary contained herein, under no circumstances shall the aggregate amount paid or agreed to be paid hereunder exceed the highest lawful rate permitted under applicable usury law (the "Maximum Rate") and the payment obligations of Borrower under this Note are hereby limited accordingly. If under any circumstances, whether by reason of advancement or acceleration of the maturity of the unpaid principal balance hereof or otherwise, the aggregate amounts paid on this Note shall include amounts which by law are deemed interest and which would exceed the Maximum Rate, Borrower stipulates that payment and collection of such excess amounts shall have been and will be deemed to have been the result of a mistake on the part of both Borrower and the holder of this Note, and the party receiving such excess payments shall promptly credit such excess (to the extent only of such payments in excess of the Maximum Rate) against the unpaid principal balance hereof and any portion of such excess payments not capable of being so credited shall be refunded to Borrower.

This Note is secured by, among other things, that certain Deed of Trust and Security Agreement (the "Mortgage"), an assignment of leases and rents ("Assignment"), an assignment of licenses, contracts, plans, specifications, surveys, drawings and reports (the "Assignment of Licenses"), all of the foregoing being of even date herewith and a first lien on the certain real estate collateral (the "Collateral") identified in the Mortgage, and is entitled to the benefits and security thereof. Reference is made to the Mortgage, Assignment and Assignment of Licenses for descriptions of the respective rights and obligations of the Borrower and Lender thereunder. This Note is guaranteed by the separate guaranty of even date herewith (the "Guaranty") of Vincent Hesser and OneCap Partners MM, Inc., a Nevada corporation (collectively, the "Guarantor") and reference is made to the Guaranty for the respective rights of the parties thereunder. Borrower hereby agrees to indemnify, defend and hold harmless Lender from and against any and all claims, loss, cost, damage or expense (including, without limitation, reasonable attorneys' fees) which may be incurred by Lender in connection with or as a result of any default (following notice and the opportunity to cure provided for in such document) by Borrower or Guarantor under the Mortgage, Assignment, or Assignment of Licenses, or by the Guarantor (following notice and the opportunity to cure provided for in such document) under the Guaranty, or a default (following notice and the opportunity to cure provided for in such document) under or misrepresentation contained in any other agreement, document or certificate of Borrower or any Guarantor executed or delivered in connection with the Loan (collectively, the "Loan Documents").

All payments of principal and interest hereunder are payable in lawful money of the United States of America and shall be made by wire transfer to the account of Agent at Valley National Bank, pursuant to wiring instructions to be provided to Borrower at Closing or to such other accounts as may be instructed by Agent.

Borrower is hereby prohibited from exercising against Lender (as a group) or Agent, any right or remedy which it might otherwise be entitled to exercise against any one or more (but less than all) of the parties constituting Lender, including, without limitation, any right of setoff or any defense. Any other claim that Borrower may have, arising from or related to the transaction evidenced by this Note and the other Loan Documents shall be asserted only against the Agent and not against any of the individual parties constituting Lender.

This Note shall be binding on the parties hereto and their respective heirs, legal representatives, executors, successors and assigns.

This Note shall be construed without any regard to any presumption or rule requiring construction against the party causing such instrument or any portion thereof to be drafted.

This Note shall be governed by the laws of the State of New Jersey without regard to choice of law consideration. Borrower hereby irrevocably consents to the jurisdiction of the courts of the State of New Jersey and of any federal court located in such State in connection with any action or proceeding arising out of or relating to this Note or the other Loan Documents. Borrower and Guarantor hereby designate The Corporation Trust Company, located at 820 Bear Tavern Road, West Trenton, New Jersey 08628, as their duly appointed agent to accept service of process within the State of New Jersey on their behalf.

This Note may not be changed or terminated orally.

A determination that any portion of this Note is unenforceable or invalid shall not affect the enforceability or validity of any other provision, and any determination that the application of any provision of this Note to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provision to the extent legally permissible and otherwise as it may apply to other persons or circumstances.

**JURY TRIAL WAIVER. BORROWER AGREES THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT BY BORROWER OR THE HOLDER OF THIS NOTE ON OR WITH RESPECT TO THIS NOTE OR ANY OTHER LOAN DOCUMENT OR THE DEALINGS OF THE PARTIES WITH RESPECT HERETO OR THERETO, SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. BORROWER AND LENDER EACH HEREBY KNOWINGLY, VOLUNTARILY AND**

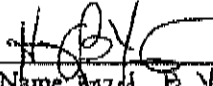
INTENTIONALLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING. BORROWER ACKNOWLEDGES AND AGREES THAT AS OF THE DATE HEREOF THERE ARE NO DEFENSES OR OFFSETS TO ANY AMOUNTS DUE IN CONNECTION WITH THE LOAN. FURTHER, BORROWER WAIVES ANY RIGHT IT MAY HAVE TO CLAIM OR RECOVER, IN ANY SUCH SUIT, ACTION OR PROCEEDING, ANY SPECIAL, EXEMPLARY, PUNITIVE, CONSEQUENTIAL OR OTHER DAMAGES OTHER THAN, OR IN ADDITION TO, ACTUAL DAMAGES. BORROWER ACKNOWLEDGES AND AGREES THAT THIS PARAGRAPH IS A SPECIFIC AND MATERIAL ASPECT OF THIS NOTE AND THAT LENDER WOULD NOT EXTEND CREDIT TO BORROWER IF THE WAIVERS SET FORTH IN THIS PARAGRAPH WERE NOT A PART OF THIS NOTE.


IN WITNESS WHEREOF, the undersigned has executed this Note this 14<sup>th</sup> day of June, 2006.

WITNESS:

OneCap Partners 2, LLC,  
a Nevada limited liability company

By: OneCap Partners MM, Inc., its Manager

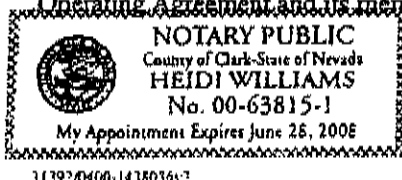
  
Name: Hazel B. Young

  
Name: Vincent Hesser  
Title: President

STATE OF Nevada )  
 ) ss.:  
COUNTY OF Clark )

I certify that on June 14, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

- (a) made the attached instrument; and
- (b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc. the Manager of OneCap Partners 2, LLC, a Nevada limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.



**SCHEDULE A**

**LENDERS**

The Simes Family Limited Partnership  
M&M Funding, Inc.  
TLC Funding, Inc.  
Josh Duitz  
CB&M Funding, LLC  
Lawton Enterprises, Inc. M/P/P  
STC Funding, Inc. M/P/P  
Bruce Berger  
Solomon Berger  
Charles Ira Epstein  
Jeffrey A. Mayer  
Howard Brown  
Presidential Investments, Inc.  
G&C Investment, Inc.  
Evergreen CMF Funding, LLC  
The Hampshire Generational Fund, LP  
JWJ Financial, Inc.  
Flug Funding, Inc.  
MMR Funding, LP  
M.L. Beer Investments, Inc.  
Wilson Kaplen  
The Kaplen Foundation  
Valley National Bank





**EXHIBIT “3”**

VH000105

**Receipt/Conformed Copy**

Requestor:

NEVADA TITLE COMPANY

06/15/2006 14:05:45 T20060106320

Book/Instr: 20060615-0005324

Trust Deed Page Count: 53

Fees: \$66.00 N/C Fee: \$0.00

APN: 264-25-101-001  
264-25-201-001

#06-06-0235-BB

WHEN RECORDED, RETURN TO:

Cole, Schotz, Meisel, Forman & Leonard, P.A.  
Court Plaza North  
25 Main Street  
P.O. Box 800  
Hackensack, New Jersey 07602-0800  
Attention: Michael R. Leighton, Esq.

Frances Deane  
Clark County Recorder

**DEED OF TRUST WITH SECURITY  
AGREEMENT, FINANCING STATEMENT FOR FIXTURE  
FILING AND ASSIGNMENT OF RENTS**

THIS DEED OF TRUST, made as of the 15<sup>th</sup> day of June, 2006, by ONECAP PARTNERS 2, LLC, a Nevada limited liability company, having an address at 5440 W. Sahara Avenue, Third Floor, Las Vegas, Nevada 89146 ("Trustor"), in consideration of the debt and trust hereinafter mentioned does hereby GRANT, BARGAIN, SELL, TRANSFER, ASSIGN and CONVEY and WARRANT in trust unto NEVADA TITLE COMPANY, Trustee (as hereinafter defined), with Power of Sale, located at 2500 N. Buffalo Drive, Suite 150, Las Vegas Nevada 89128, the following described property (all of which is sometimes referred to collectively herein as the "Property") for the benefit of KENNEDY FUNDING, INC., a New Jersey corporation, having an office at Two University Plaza, Hackensack, New Jersey 07601, and their respective successors and assigns, as agent for the lenders identified in the Note defined hereinbelow, in each case having an address in care of the above identified agent (all such lenders being collectively referred to herein as "Beneficiary"):

(i) the real property situated in the County of Clark, State of Nevada (the "State"), which is more particularly described in Exhibit A attached hereto and made a part hereof for all purposes the same as if set forth herein verbatim, together with all right, title and interest Trustor may have or acquire in and to (a) all streets, roads, alleys, easements, rights-of-way, licenses, rights of ingress and egress, vehicle parking rights and public places, existing or proposed, abutting, adjacent, used in connection with or pertaining to the real property or the Improvements (as hereinafter defined); (b) any strips or gores between the real property and abutting or adjacent properties; and (c) all water and water rights, timber, crops and mineral interests pertaining to the real property (such real estate and other rights, titles and interests being hereinafter sometimes called the "Land");

(ii) all buildings, structures and other improvements (such buildings, structures and other improvements being hereinafter sometimes called the "Improvements") now or hereafter situated on the Land;

(iii) all fixtures, systems, and articles of personal property, of every kind and character, now owned or hereafter acquired by Trustor (Trustor's successors or assigns), which are now or hereafter attached to the Land or the Improvements, or used in or necessary to the complete and proper planning, development, use, occupancy or operation thereof, or acquired (whether delivered to the Land or stored elsewhere) for use or installation in or on the Land or the Improvements, and all renewals and replacements of substitutions for and additions to the foregoing, including, but without limiting the foregoing, all of the following items now owned or hereafter acquired by Trustor, any and all fixtures, systems, heating, ventilating, air conditioning, refrigerating, plumbing, sewer, lighting, generating, cleaning, storage, incinerating, waste disposal, sprinkler, fire extinguishing, communications, transportation (of people or things, including, but not limited to, stairways, elevators, escalators and conveyors), data processing, security and alarm, laundry, food or drink preparation, storage or serving, gas, electrical and electronic, water, and recreational uses or purposes; all tanks, pipes, wiring, conduits, ducts, doors, partitions, rugs and other floor coverings, wall coverings, windows, drapes, window screens and shades, awnings, fans, motors, engines and boilers; decorative items and art objects; and files, records and books of account (all of which are herein sometimes referred to together as the "Accessories");

(iv) all (a) plans and specifications for the Improvements; (b) contracts relating to the Land or the Improvements or the Accessories or any part thereof; (c) deposits including, but not limited to, Trustor's rights in tenants' security deposits (if any), deposits with respect to utility services to the Land or the Improvements or the Accessories or any part thereof, and any deposits or reserves hereunder or under any other Loan Document (as hereinafter defined) for taxes, insurance or otherwise, funds, accounts, contract rights, instruments, documents, commitments, general intangibles, notes and chattel paper used in connection with or arising from or by virtue of any transactions related to the Land or the Improvements or the Accessories or any part thereof; (d) permits, licenses, franchises, certificates and other rights and privileges obtained in connection with the Land or the Improvements or the Accessories or any part thereof; (e) leases, rents, royalties, bonuses, issues, profits, revenues and other benefits of the Land, the Improvements and the Accessories; and (f) other properties, rights, titles and interests, if any, specified in any Section or any Article of this Deed of Trust as being part of the Property;

(v) all proceeds, products, consideration, compensation and recoveries, direct or consequential, cash and noncash, of or arising from, as the case may be, (a) the properties, rights, titles and interests referred to above in paragraphs (i), (ii), (iii) and (iv); (b) any sale, lease or other disposition thereof, subject, however, to paragraph 2.20(d)

hereof; (c) each policy of insurance relating thereto (including premium refunds); (d) the taking thereof or of any rights appurtenant thereto by eminent domain or sale in lieu thereof for public or quasi-public use under any law; and (e) any damage thereto whether caused by such a taking (including change of grade of streets, curb cuts or other rights of access) or otherwise caused; and

(vi) other interests of every kind and character, and proceeds thereof, which Trustor now has or hereafter acquires in, to or for the benefit of the properties, rights, titles and interests referred to above in paragraphs (i), (ii), (iii), (iv), and (v) and all property used or useful in connection therewith, including, but not limited to, remainders, reversions and reversionary rights or interests.

TO HAVE AND TO HOLD the Property, unto Trustee and Trustee's successors, substitutes or assigns, in trust and for the uses and purposes herein set forth, forever, together with all rights, privileges, hereditaments and appurtenances in anywise appertaining or belonging thereto, subject only to the Permitted Exceptions (herein so called) listed on Exhibit B attached hereto to the extent that the same are valid, subsisting and affect the Property), and Trustor, for Trustor and Trustor's successors, hereby agrees to warrant and forever defend, all and singular, the Property unto Trustee and Trustee's successors or substitutes in this trust against the claim or claims of all persons claiming or to claim the same or any part thereof, subject, however, as aforesaid.

#### **ARTICLE I** **THE OBLIGATION**

Section 1.01. Deed of Trust. The expression "this Deed of Trust," as used herein, shall mean this Deed of Trust, With Security Agreement and Financing Statement for Fixture Filing and Assignment of Rents, and all rights, title, interest, liens, security interests, powers and privileges created hereby or arising by virtue hereof. This Deed of Trust is given to secure payment and performance of the Obligation (as hereinafter defined), including the indebtedness described in Section 1.2.

Section 1.02. Obligation. The word "Obligation," as used herein, shall mean all of the indebtedness, obligations and liabilities described as follows:

(a) the indebtedness, obligations and liabilities of the Trustor arising under that certain Promissory Note of even date herewith ("Note") in the principal amount of TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS, executed by Trustor (sometimes also hereinafter referred to as "Borrower") and payable to Beneficiary, evidencing a loan in that principal amount (the "Loan") that Beneficiary has made to Trustor, bearing interest as therein specified, containing an attorneys' fee clause, interest and principal being payable as therein specified, or arising under this Deed of Trust or under any document identified in the Schedule of Principal Loan Documents annexed

hereto or under any other documents evidencing, securing or now or hereafter executed in connection with the Loan (each a "Loan Document;" collectively, "Loan Documents");

(b) all other and additional indebtedness, liabilities and obligations, of every kind and character, of Trustor now or hereafter existing in favor of Beneficiary, regardless of whether they are direct, indirect, primary, secondary, joint, several, joint and several, liquidated, unliquidated, fixed or contingent, and regardless of whether the same may, prior to their acquisition by Beneficiary, be or have been payable to some other person or entity, it being the intention and contemplation of Trustor and Beneficiary that future advances may be made to Trustor by Beneficiary for a variety of purposes, that Trustor may guarantee the obligations of others to Beneficiary, and that Beneficiary may, from time to time, acquire from others obligations of Trustor to such others, or that Trustor may otherwise hereafter be or become further indebted to Beneficiary, and that payment and repayment of all of the foregoing are intended to and shall be part of the indebtedness secured hereby up to a principal amount of TWELVE MILLION and 00/100 DOLLARS (\$12,000,000). Trustor grants to Beneficiary the right to record notice that this Deed of Trust is security for additional amounts and obligations not specifically mentioned herein but that constitute indebtedness or obligations of the Trustor for which Beneficiary may claim this Deed of Trust as security. This provision is to be governed by NRS 106.300 to 106.400 as amended or supplemented; and

(c) any and all renewals, replacements, modifications, rearrangements, amendments or extensions of all or any part of the indebtedness, obligations and liabilities described or referred to in Subsections 1.2(a) and 1.2(b) preceding.

Trustor, and each party at any time claiming an interest in or lien or encumbrance against the Property, agrees that all advances made by Beneficiary from time to time under any of the Loan Documents, and all other portions of the Obligation herein referred to, shall be secured by this Deed of Trust with priority as if all of the same had been advanced, had arisen or become owing or performable on the date of this Deed of Trust, no reduction of the outstanding principal balance under the Loan Agreement shall extinguish, release or subordinate any rights, titles, interests, liens, security interests, powers or privileges intended, created or arising hereunder or under any other Loan Document, and this Deed of Trust shall remain in full force and effect as to any subsequent advances or subsequently arising portions of the Obligation without loss of priority until the Obligation is fully paid, performed and satisfied, all agreements and obligations, if any, of Beneficiary for further advances have been terminated and this Deed of Trust has been released of record by Beneficiary.

**ARTICLE II**  
**CERTAIN REPRESENTATIONS, WARRANTIES**  
**AND COVENANTS OF TRUSTOR**

Section 2.01. Payment and Performance of Obligations. The Trustor shall pay and perform the Obligations when due in accordance with the provisions of the Loan Documents; and if any Default (hereinafter defined) shall be made in the performance of any of the Obligations, the Beneficiary shall have the remedies granted to the Beneficiary under the Loan Documents and under applicable law.

Section 2.02. Indebtedness Secured. This Deed of Trust has been given and is intended to secure the full and prompt payment and performance of each and all of the Obligations. This Deed of Trust shall remain in full force and effect with respect to all of the Property until all the Obligations shall have been paid and performed in full. If the Trustor shall well and truly pay and perform the Obligations at the time and times, and in the manner mentioned in the Loan Documents and shall well and truly abide by and comply with each and every term, covenant and condition set forth in the Loan Documents, then this conveyance shall be and become null and void and shall be released and reconveyed at the expense of the Trustor but if there shall be any Default, then the Obligations shall become immediately due and payable at the option of the Beneficiary, without any notice to Trustor or any other party (other than notice of intention to accelerate as set forth in the Note), all of which notices of Default, intent to accelerate or acceleration hereby are waived.

Section 2.03. Title to Property.

(a) The Trustor represents and warrants that: (i) it has an indefeasible estate in fee simple in the Land and Improvements and Accessories (subject to the Permitted Exceptions); (ii) it has the good and unrestricted right, full power and lawful authority to mortgage the Property; (iii) it has obtained any and all consents and approvals necessary or required for the making of this Deed of Trust; and (iv) the making of this Deed of Trust will not violate any contract or agreement to which the Trustor is a party.

(b) The Trustor does hereby and shall forever warrant and defend its title to and fee simple interest in the Property (subject to the Permitted Exceptions) and the validity and priority of the lien of this Deed of Trust to the Beneficiary and its successors and assigns, against all claims and demands whatsoever of any Person (hereinafter defined). There are no defenses or offsets to this Deed of Trust or to any of the Obligations as of the date hereof.

(c) The Trustor represents and warrants to the Beneficiary that any building hereafter constructed on the Land (while such Land is owned by Trustor and remains subject to this Deed of Trust) shall be in compliance with all applicable zoning and

building codes, ordinances and regulations, shall lie wholly within the boundaries of the Land, and shall be an independent and self-contained operating unit.

(d) The Trustor shall execute, acknowledge and deliver to the Beneficiary any documents and instruments which the Beneficiary may reasonably request from time to time for the better-assuring, conveying, assigning, transferring, confirming or perfecting the Beneficiary's security and rights under this Deed of Trust.

Section 2.04. Liens. The Trustor shall not, directly or indirectly, create or suffer or permit to be created, or to stand, against the Property or any portion thereof, or against the rents, issues and profits therefrom, any lien, charge, mortgage, deed of trust, adverse claim or other encumbrance (herein collectively referred to as a "lien"), whether senior or junior in lien to this Deed of Trust, other than the lien of this Deed of Trust and the Permitted Exceptions; provided, however, that nothing contained in this Paragraph 2.04 shall require the Trustor to pay any real estate taxes or other Impositions (as hereinafter defined) prior to the time when same are required to be paid under this Deed of Trust. The Trustor will keep and maintain the Property free from all liens arising in connection with the supply of labor or materials relating to the construction, alteration, modification or repair of the Improvements or the Property. The Trustor agrees to discharge the same of record by payment or bond within thirty (30) days after the filing thereof. Notwithstanding anything to the contrary contained herein, in no event shall the Trustor do or permit to be done, or omit to do or permit the omission of, any act or thing, where such act or omission would impair the security of this Deed of Trust.

Section 2.05. Impositions. The Trustor shall pay, at least five days before the date due, all real estate taxes, personal property taxes, assessments, water and sewer rates and charges, license fees, all charges which may be imposed for the use of vaults, chutes, arcas and other space beyond the lot line and abutting the public sidewalks in front of or adjoining the Land, and all other governmental levies and charges (collectively, the "Impositions"), of every kind and nature whatsoever, general and special, ordinary and extraordinary, foreseen and unforeseen, which shall be assessed, levied, confirmed, imposed or become a lien upon or against the Property or any part thereof, or which shall become payable with respect thereto. The Trustor shall deliver to the Beneficiary, within twenty (20) days after the due date of each payment in connection with the Impositions or any assessment for local improvements ("Assessment"), the original or a true photostatic copy of the official receipt evidencing such payment or other proof of payment satisfactory to the Beneficiary.

Section 2.06. Insurance.

(a) The Trustor shall provide, at its sole cost and expense, and keep in force for the benefit of itself and the Beneficiary, with respect to the Land, Improvements and Accessories: (i) comprehensive general liability insurance against claims for bodily injury, death or property damage; (ii) workers' compensation insurance as required by

law; and (iii) special form property insurance (including loss of rents for a minimum period of one year) and endorsements for coverages for flood, earthquake, windstorm, earth movement, sinkholes, demolition, increased cost of construction and contingent operation of building laws coverages, on a replacement cost basis to cover the full insurable value of the Improvements, Accessories and other insurable improvements; and (iv) such other insurance with respect to the Property or any part thereof or any replacements or substitutions therefor, as the Beneficiary may reasonably require.

(b) The policies of insurance required by Subparagraph 2.06(a) hereof shall be with companies, in forms and amounts, and for such reasonable periods as the Beneficiary shall require from time to time, and shall insure the respective interests of the Trustor and the Beneficiary. The full amount of the proceeds of any insurance covering real property or tangible personal property subject to a lien or security interest in favor of the Beneficiary granted pursuant to any of the Loan Documents in the case of each separate loss in excess of \$10,000 (a "Major Loss") required under clause (iii) of Subparagraph 2.06(a) hereof, shall be payable to the Beneficiary pursuant to a non-contributing loss payee endorsement satisfactory to the Beneficiary. Certificates of Insurance and true photocopies of the original policies and renewals thereof covering the risks required to be insured against in accordance with this Deed of Trust, bearing satisfactory evidence of payment of all premiums thereon for the succeeding one year period, shall be delivered to and held by the Beneficiary, and within five (5) days of demand by the Beneficiary the Trustor shall deliver to the Beneficiary the original policies and renewals, replacements or endorsements thereof and shall assign to the Beneficiary said policies of insurance as additional security for the indebtedness and other obligations secured hereby. At least twenty (20) days prior to the expiration of each policy required to be provided by the Trustor, the Trustor shall deliver Certificates of Insurance evidencing renewal or replacement thereof along with true photocopies of any endorsements or any renewal or replacement policies to the Beneficiary with satisfactory evidence of payment of all premiums thereon.

(c) All insurance policies required in accordance with this Deed of Trust shall: (1) include effective waivers by the insurer of all rights of subrogation against the Trustor, the Beneficiary, any lessee or other occupant of all or any part of the Property, or any other Person which controls, is controlled by or is under common control with any of the foregoing; (2) provide that the full amount of the proceeds of such insurance (other than the proceeds from the insurance required under clause (iii) of Subparagraph 2.06(a) hereof) shall, in the case of each separate Major Loss, be payable notwithstanding: (A) any act, failure to act or negligence of or violation of warranties, declarations or conditions contained in such policy by any named insured; (B) the occupation or use of the Improvements or the Land for purposes more hazardous than permitted by the terms thereof; (C) any foreclosure or other action or proceeding taken by the Beneficiary pursuant to any provision of this Deed of Trust; or (D) any change in title to or ownership of the Property; (3) provide that no cancellation, reduction in amount or material change



in coverage thereof shall be effective until at least thirty (30) days after receipt by the Beneficiary of written notice thereof; and (4) be reasonably satisfactory to the Beneficiary in all other respects. The Trustor shall not permit any condition to exist with respect to the Property which would wholly or partially invalidate any of the insurance thereon.

(d) The Beneficiary shall have the right but not the obligation, on behalf of the Trustor, to adjust and compromise any claims under such insurance in the case of a Major Loss, collect and receive the proceeds thereof and execute and deliver all proofs of loss, receipts, vouchers, checks, drafts, releases and other documents in connection with such claims. The Beneficiary is hereby irrevocably appointed attorney-in-fact for the Trustor (which appointment is coupled with an interest) for such purposes, and the Trustor shall, upon request of the Beneficiary, promptly execute any proofs of loss, receipts, vouchers, checks, drafts, releases, and other documents in connection with such claims.

(e) The Beneficiary may deduct from the proceeds of the insurance required to be obtained by the Trustor pursuant to Subparagraph 2.06(a) hereof, other than the insurance required under clauses (i) and (ii) thereof, any expenses (including, without limitation, reasonable attorneys' fees and disbursements) incurred by it in connection with obtaining such proceeds, and the Beneficiary may, at its option, release the balance of such proceeds to the Trustor for the restoration of the Property ("Restoration") or apply the balance of such proceeds in reduction or satisfaction of all or part of the Obligations, whether or not then due and payable (in such order of priority as is stipulated in the Note). Upon the occurrence of any Default all of the Trustor's right, title and interest in and to all such policies, including unearned premiums thereon, shall be deemed assigned to the Beneficiary. The application of such insurance proceeds toward the payment or performance of the Obligations shall not be deemed a waiver by the Beneficiary of its right to receive payment or performance of the remainder of the Obligations and the interest thereon in accordance with the provisions of the Loan Documents.

(f) In the event of a sale, transfer or other disposition by the Beneficiary of any of the property of the Trustor, the purchaser, assignee or transferee of such property shall succeed to all of the rights of the Trustor, including any right to unearned premiums, in and to all policies of insurance which the Trustor is required to maintain under this Paragraph 2.06 and to all proceeds of such insurance.

(g) The Trustor's policies of insurance may be maintained under "blanket policies" insuring the Property and other property owned by the Trustor, provided that such blanket policies shall: (i) separately set forth the amount of the insurance applicable to the Property (except as to the insurance required under clauses (i) and (ii) of Subparagraph 2.06(a) hereof), (ii) otherwise comply with the provisions of this Paragraph 2.06, and (iii) afford the same protection to the Beneficiary as, in the

Beneficiary's judgment, would be provided by policies individually applicable to the Property.

(h) Trustor shall not obtain or permit to be obtained separate insurance concurrent in form or contributing in the event of loss with the insurance the Trustor is required to maintain under the provisions of this Paragraph 2.06.

Section 2.07. Condemnation.

(a) The Trustor shall give notice to the Beneficiary immediately upon the Trustor's learning of the commencement of any action or proceeding to take all or any part of the Property by exercise of the right of condemnation or eminent domain or of any action or proceeding to close or to alter the grade of any street on or adjoining the Land. The Beneficiary may participate together with the Trustor in any such actions or proceedings in the name of the Beneficiary or, whenever necessary, in the name of the Trustor, and the Trustor shall deliver to the Beneficiary such instruments as the Beneficiary shall request to permit such participation. The Trustor shall not settle any such action or proceeding or agree to accept any award or payment without the prior consent of the Beneficiary (which consent Beneficiary may deny in its sole discretion), and the total of all awards made or allowed with respect to all right, title and interest in and to the Property or the portion or portions thereof taken or affected by such condemnation or eminent domain proceeding and any interest thereon (hereinafter collectively called the "Award") is hereby assigned to and shall be paid to the Beneficiary and the amount received shall be retained and applied as provided in Subparagraph 2.07(b) hereof.

(b) The Obligations may be accelerated at the option of the Beneficiary after giving notice of intention to accelerate as set forth in the Note as a result of the exercise of the right of condemnation or eminent domain (sometimes hereinafter referred to as a "Taking"): (I) in respect of any part of the Property that causes any of the results described in the next sentence hereof or (II) in respect of all of the Property. With respect to a partial Taking, the right of acceleration described in the preceding sentence shall be applicable if as a result of such partial Taking so much of the balance of the Property is taken as will, in the Beneficiary's reasonable opinion, materially and adversely affect the extent to which the Collateral (defined in the Loan Agreement) secures the Obligations, in which event the Beneficiary shall retain and apply the Award toward payment and performance of the Obligations (in such order of priority as is stipulated in the Note); provided, however, that to the extent that the net amount of the Award actually received by the Beneficiary shall exceed the amount required to satisfy in full the then total amount of the Obligations, the Beneficiary shall pay over to the Trustor the amount of such excess and provided, further, that until Beneficiary actually receives payment of the net amount of the Award in an amount equal to the then total amount of the Obligations, the Obligations shall continue unimpaired. If there is a Taking of a portion of the Property in any such proceeding and the Beneficiary does not accelerate the Obligations,

then at the option of the Beneficiary, the Award shall be: (i) retained and applied by the Beneficiary toward the payment of the Obligations in such order of priority as is stipulated in the Note; or (ii) disbursed by the Beneficiary, in accordance with the Project Completion Reserve disbursement provisions set forth in the Loan Agreement, to pay the cost to restore any Improvements existing on the portion of the Property not Taken as nearly as practicable to the condition that existed prior to such Taking. In no event shall the Beneficiary be required to discharge this Deed of Trust and reconvey the Property until the Obligations are fully paid and the Beneficiary shall not be required to release from the lien of this Deed of Trust until the Obligations are fully paid any portion of the Property so Taken until the Beneficiary receives the entire amount of Award for the portion so Taken.

(c) The application of the Award toward payment of the Obligations or restoration of Improvements shall not be deemed a waiver by the Beneficiary of its right to receive payment or performance of the balance of the Obligations in accordance with the provisions of the Loan Documents. The Beneficiary shall have the right, but shall be under no obligation, to question the amount of the Award, and the Beneficiary may accept same without prejudice to the rights that the Beneficiary may have to question such amount. In any such condemnation or eminent domain action or proceeding the Beneficiary may be represented by attorneys selected by the Beneficiary, and all sums paid by the Beneficiary in connection with such action or proceeding (including, without limitation, reasonable attorneys' fees and disbursements) shall, on demand, be immediately due from the Trustor to the Beneficiary and the same shall be added to the Obligations and shall be secured by this Deed of Trust.

(d) Notwithstanding any Taking by condemnation or eminent domain, closing of, or alteration of the grade of, any street or other injury to or decrease in value of the Property by any public or quasi-public authority or corporation, the Obligations shall continue to bear interest at the rate payable pursuant to the Note until the Award shall have been actually received by the Beneficiary, and any reduction in the Obligations resulting from the application by the Beneficiary of the Award shall be deemed to take effect only on the date of such receipt.

Section 2.08. Restoration. If: (a) the Property includes Improvements or Accessories (whether now existing or hereafter made), and such Improvements or Accessories shall be damaged or destroyed, in whole or in part, by fire or other casualty, or by any Taking in condemnation proceedings or the exercise of any right of eminent domain; and (b) the Beneficiary releases or agrees to release to the Trustor the proceeds of any insurance payable to the Beneficiary or the proceeds of the Award, less any expenses (including, without limitation, reasonable attorneys' fees and disbursements) incurred by the Beneficiary in obtaining same, and upon conditions satisfactory to the Beneficiary; then the Trustor shall promptly restore, replace or rebuild the same to as nearly as possible the value, quality and condition they were in immediately prior to such

fire or other casualty or Taking, with such alterations or changes as may be approved in writing by the Beneficiary. The Trustor shall give immediate notice to the Beneficiary of any damage or destruction to the Property by fire or other casualty.

Section 2.09. Deposits for Impositions and Insurance. Notwithstanding anything to the contrary contained in any of the Loan Documents, upon demand by the Beneficiary at any time and from time to time, the Trustor shall deposit with the Beneficiary on the first day of each month an amount equal to one twelfth (1/12th) of the sum of (collectively, the "Annual Payments"): (i) the aggregate annual payments for the Impositions; (ii) the annual insurance premiums on the policies of insurance required to be obtained and kept in force by the Trustor under this Deed of Trust; and (iii) all other periodic charges (other than interest and principal under the Note) arising out of the ownership of the Property or any portion thereof which are or with notice or the passage of time or both will become a lien against the Property or any part thereof. In addition, upon demand by the Beneficiary at any time and from time to time, the Trustor shall deposit with the Beneficiary such sum of money which, together with such monthly installments, shall be sufficient to pay all of the Annual Payments at least forty-five (45) days prior to the due date thereof. If the amount of any of the Annual Payments are not ascertainable at the time any deposit is required to be made, the deposit shall be made on the basis of the Beneficiary's estimate thereof, which the Beneficiary may change from time to time. The funds so deposited with the Beneficiary shall, provided that no Default shall have occurred under this Deed of Trust, be applied in payment of all of the Annual Payments when due to the extent that the Trustor shall have deposited funds with the Beneficiary for such purpose. In the event of any Default the funds deposited with the Beneficiary may, at the option of the Beneficiary, be retained and applied toward the payment of any or all of the Obligations, in such order of priority as is stipulated in the Note, but no such application shall be deemed to have been made by operation of law or otherwise until actually made by the Beneficiary. The whole of the Obligations shall become due and payable at the option of the Beneficiary after the giving of notice of intention to accelerate as set forth in the Note and the failure of the Trustor to deliver payment of any of such deposits or after the failure of the Trustor to deliver to the Beneficiary, within ten (10) days after request by the Beneficiary, a statement certified by an authorized officer of the Trustor, specifying the current amounts of all of the Annual Payments. At any time when deposits are required to be made under this Paragraph 2.09, the Trustor shall furnish the Beneficiary with a bill for each of the Annual Payments and/or such other documents necessary for their payment at least twenty (20) days prior to the date they first become due. Upon an assignment of this Deed of Trust, the Beneficiary shall have the right to pay over the balance of such deposits in its possession which have not been applied to the Obligations to the assignee, and thereupon the Beneficiary shall be completely released from all liability with respect to such deposits and the Trustor shall look solely to the assignee in reference thereto. The provisions of the preceding sentence shall apply to each and every assignment or transfer of such deposits to a new assignee.

Beneficiary agrees not to exercise its rights under this Section 2.09 provided that no Default has occurred and provided that Trustor has at all times fully, faithfully and timely complied with all of the provisions of Sections 2.05 and 2.06 of this Deed of Trust. Nothing contained herein shall be deemed to extend the Maturity Date for the Loan established in the Note.

Section 2.10. Maintenance and Alterations.

(a) If the Property includes Improvements and Accessories (whether now existing or hereafter made), the Trustor shall put, keep and maintain such Improvements and Accessories in the same or better order, condition and repair as they were in upon original installation, and the Trustor shall make or cause to be made, as and when the same shall become necessary, all structural and non-structural repairs, whether exterior or interior, ordinary or extraordinary, foreseen or unforeseen in a good and workmanlike manner. The Trustor shall not commit or suffer any waste or abandonment of the Land, the Improvements or Accessories, and shall not demolish or remove or permit the demolition or removal of the Improvements or Accessories, or any part thereof, without the prior written consent of the Beneficiary in each instance.

(b) The Trustor shall not make any alterations to all or any part of the Improvements or Accessories, or construct additions to all or any part of the Improvements or construct any new or additional buildings on the Property without the prior written consent of the Beneficiary in each instance, which consent shall not be unreasonably withheld or delayed, and then only upon terms and conditions satisfactory to the Beneficiary.

Section 2.11. Compliance with Laws.

(a) The Trustor shall promptly comply with, or cause to be complied with, all present and future laws, statutes, ordinances, rules, regulations and other requirements of all governmental authorities whatsoever having jurisdiction of or relating to all or any part of the Property and the sidewalks, curbs and alleys adjoining or abutting the Land, and the condition, repair, maintenance, use and occupation thereof if non-compliance therewith would result in imposition of any fine, penalty, lien or criminal liability on Trustor or the Property, or would result in commencement of proceedings for foreclosure or forfeiture of Trustor's interest in the Property; and the Trustor shall promptly make, or cause to be made, all changes, alterations and improvements to the Property necessary to comply with all such present and future laws, statutes, ordinances, rules, regulations and other requirements to the extent aforesaid. Except as otherwise set forth in the next sentence hereof, the Trustor shall not initiate, support, assist or acquiesce in any change in the zoning classification of the Property or any part thereof without the prior written consent of the Beneficiary.

(b) The Trustor shall promptly perform and observe, or cause to be performed and observed, all of the terms, covenants and conditions of all instruments of record affecting the Property, non-compliance with which may affect the security of this Deed of Trust, or shall impose any duty or obligation upon the Trustor, and the Trustor shall do or cause to be done all things necessary to preserve intact and unimpaired any and all easements, appurtenances and other interests and rights in favor, or of constituting any portion of, the Property.

(c) Notwithstanding anything to the contrary contained herein, the Trustor shall not use or permit the use of the Property in any manner which would impair or adversely affect the value or utility of the Property or increase the risk of fire or other casualty.

Section 2.12. Leasing.

(a) The Trustor shall not, without the prior written approval of the Beneficiary in each instance, which approval shall not be unreasonably withheld or delayed: (i) enter into or change, amend or modify, in any manner whatsoever, any Lease; (ii) terminate or cancel, or accept a surrender or suffer or permit any cancellation, termination or surrender of, any Lease, in any manner whatsoever or (iii) receive, collect or accept, or permit the receipt, collection or acceptance of, any prepayment of rent or other charges under any Lease for more than one month, except that the Trustor may, at the time of the execution of any Lease, accept rent security deposits, which shall be held by the Trustor in accordance with Subparagraph 2.12(b) hereof.

(b) The Trustor shall at all times fully and promptly comply with, keep and perform all of the terms, covenants, provisions and conditions of any and all Leases on the part of the landlord thereunder to be complied with, kept and performed, and will not do or permit anything to be done which will constitute a breach of any of the terms, covenants, provisions and conditions of any of such Leases. The Trustor shall enforce the performance and observance of each and every term, covenant, provision and condition of each and every Lease to be performed or observed on the part of the tenant thereunder. The Trustor shall give prompt notice to the Beneficiary of: (i) any notice received by the Trustor of any default by the landlord under any Lease; (ii) the commencement of any action or proceeding by any tenant the purpose of which shall be the cancellation of any Lease or a diminution or abatement of the rent payable thereunder; or (iii) the interposition by any tenant of any defense or counterclaim in any action or proceeding brought by the Trustor against such tenant; and the Trustor will cause a copy of any process, pleading or notice received or served by the Trustor in reference to any such action, defense or claim to be promptly delivered to the Beneficiary. The Trustor shall hold in trust all security deposits and advance rent given on account of any Lease, and deposit such security in a bank or trust company and shall not mingle such funds with other funds. The Trustor shall repay or apply such funds only in accordance with the provisions of the applicable Leases.

**Section 2.13. Assignment of Rents.** The Trustor hereby absolutely and unconditionally assigns to the Beneficiary the rents, issues and profits of the Property as further security for the payment and performance of the Obligations, and the Trustor grants to the Beneficiary the right to enter the Property for the purpose of collecting the same and to let the Property, or any part thereof, and to apply said rents, issues and profits, after payment of all necessary charges and expenses, on account of the Obligations. This assignment and grant shall continue in effect until the Obligations are fully paid and performed. The Beneficiary hereby waives the right to enter the Property for the purpose of collecting said rents, issues and profits, and the Trustor shall be entitled to collect, receive and use said rents, issues and profits, until the occurrence of a Default under this Deed of Trust. The Trustor shall, from time to time upon request by the Beneficiary, execute, acknowledge and deliver to the Beneficiary, in form satisfactory to the Beneficiary, separate assignments confirming the foregoing assignment. The Beneficiary shall not be obligated to perform or discharge any obligation or duty to be performed or discharged by the Trustor under any Lease or other agreement affecting all or any part of the Property, and the Trustor hereby agrees to indemnify the Beneficiary for and save it harmless from, any and all liability arising from any such Lease or other agreement or any assignments thereof, and no assignment of any such Lease or other agreement shall place the responsibility for the control, care, management or repair of all or any part of the Property upon the Beneficiary, nor make the Beneficiary liable for any negligence in the management, operation, upkeep, repair or control of all or any part of the Property resulting in injury, death or property damage. The Beneficiary or the receiver shall be liable to account only for rents and profits actually received by the Beneficiary or the receiver as the case may be. Concurrently herewith, Trustor has executed and delivered an Assignment of Leases and Rents in favor of Beneficiary, identified in the Schedule of Principal Loan Documents attached hereto, with respect to the Property. The terms of such Assignment of Leases and Rents shall control in the event of any conflict with the terms of this Paragraph 2.13.

**Section 2.14. No Claims Against Beneficiary.**

(a) Nothing contained in this Deed of Trust shall constitute any consent or request by the Beneficiary, express or implied, for the performance of any labor or services or the furnishing of any materials or other property in respect of the Property or any part thereof, or be construed to permit the making of any claim against the Beneficiary in respect of labor or services or the furnishing of any materials or other property or any claim that any lien based on the performance of such labor or services or the furnishing of any such materials or other property is prior to the lien of this Deed of Trust.

(b) If the Trustor shall request the Beneficiary's approval or consent to any matter and the Beneficiary shall fail or refuse to give such consent or approval, the Trustor shall not be entitled to any damages for any withholding or delay of such.

approval or consent by the Beneficiary, it being intended that the Trustor's sole remedy shall be an action for injunction or specific performance and that such remedy shall be available only in those cases where the Beneficiary shall have expressly agreed in writing not to unreasonably withhold its consent or approval or where as a matter of law the Beneficiary may not unreasonably withhold its consent or approval.

Section 2.15. Beneficiary's Right to Perform Trustor's Covenants.

(a) If the Trustor shall fail to fully and promptly pay, perform or observe any of the Obligations prior to the expiration of any applicable grace period, then, in any such event, the Beneficiary may, at its option, but without any obligation to do so, and without waiving or releasing the Trustor from any of the Obligations, pay any Obligation or cost or perform any Obligation or act or take such action as the Beneficiary deems necessary or desirable in order to cause such Obligation to be paid, performed or observed, as the case may be. The Trustor hereby expressly grants to the Beneficiary, and agrees that the Beneficiary shall have, the absolute and immediate right to enter in and upon the Property or any part thereof to such extent and as often as the Beneficiary, in its sole discretion, deems necessary or desirable for such purpose. The Beneficiary may pay and expend such sums of money as the Beneficiary, in its sole discretion, deems necessary or desirable for any such purpose, and the Trustor hereby agrees to pay to the Beneficiary, on demand, all such sums so paid or expended by the Beneficiary, together with interest thereon from the date of each such payment or expenditure at the Default Rate established in the Note (hereinafter, the "Default Rate"). Any interest which has been paid by the Trustor to the Beneficiary pursuant to this Paragraph 2.15 in excess of the maximum interest rate permitted by law shall be deemed payment in reduction of the principal amount of the Obligations. All sums paid or expended by the Beneficiary pursuant to this Paragraph 2.15, and the interest thereon, shall be added to and included in the Obligations and shall be secured by the lien of this Deed of Trust.

(b) The Trustor hereby irrevocably appoints the Beneficiary its true and lawful attorney-in-fact in its name or otherwise, to do any and all acts and to execute any and all documents which may be reasonably necessary or, in the opinion of the Beneficiary, desirable to preserve any rights of the Trustor in, to or under the Leases or to effectuate any rights of the Beneficiary under this Paragraph 2.15 or contained elsewhere in this Deed of Trust. The foregoing power of attorney is coupled with an interest.

Section 2.16. Certificates of Trustor. The Trustor, upon request of the Beneficiary, shall certify to the Beneficiary or to any proposed assignee of this Deed of Trust, by an instrument in form satisfactory to the Beneficiary, duly acknowledged, the amount then owing on the obligations, the date to which any interest thereon has been paid, and whether any offsets or defenses exist against payment thereof or performance of any Obligation, within five (5) days if the request is personally delivered, or within seven (7) days if the request is made by mail. The Beneficiary and any proposed assignee of this Deed of Trust shall have the right to rely on such certification.



Section 2.17. Inspection and Financial Reports. The Beneficiary and its authorized agents and employees shall have the right, at the Beneficiary's option, to enter into the Property at all reasonable times for the purpose of inspecting the same. The Trustor will furnish to the Beneficiary, within thirty (30) days after a request therefor, but not more than once a year, a detailed statement in writing, covering the period of time specified in such request, showing all income derived from the operation of the Property, and all disbursements made in connection therewith, and containing a list of the names of all tenants and occupants of the Property, the portion or portions of the Property occupied by each such tenant and occupant, the rent and other charges payable under the terms of their leases or other agreements and the period covered by such leases or other agreements.

Section 2.18. Accounting and Other Information. The Trustor will keep books and records of account in accordance with generally accepted accounting principles, consistently applied, in which full, true and correct entries shall be made of all dealings and transactions relative to the Trustor and the Property. Upon request of Beneficiary made from time to time, a copy of said books and records of account, certified by a general partner of Trustor, Trustor shall make available to the Beneficiary, at an office of the Beneficiary within the State of New Jersey, and the originals of such books and records shall be open to the inspection of the Beneficiary and its accountants and its other duly authorized representatives at Trustor's principal place of business within the state in which the Property is located during regular business hours. The Trustor further covenants that it will, within a reasonable time after any request by the Beneficiary, furnish or cause to be furnished to the Beneficiary such other information with respect to the Trustor or the Property as the Beneficiary may from time to time reasonably request.

Section 2.19. Assignment. This Deed of Trust is assignable by the Beneficiary without notice to the Trustor, and any assignment of the same by the Beneficiary shall operate to vest in such assignee the same right, title and interest as was vested in the Beneficiary and all rights and powers herein conferred.

Section 2.20. Due on Sale.

(a) To the extent permitted by law, except as otherwise set forth in Paragraph 2.20(d) and in Paragraph 2.20(e) below, the Property shall not be sold, transferred or conveyed, in whole or in part, whether voluntarily or involuntarily, by operation of law or otherwise, or lease the entire premises, without, in each instance, the prior written consent of Beneficiary. No mortgage, deed of trust, lien or other encumbrance shall be made or filed against or with respect to the Property, without the prior written consent of Beneficiary. In the event any such mortgage, deed of trust, lien or other encumbrance shall be made or filed and Beneficiary elects not to accelerate, such forbearance may be predicated on such terms and conditions as Beneficiary may, in its sole discretion, require, including, but not limited to, Beneficiary's approval of the transferee's creditworthiness and management ability, the execution and delivery to Beneficiary by

transferee prior to the sale, transfer, assignment, lease or conveyance of a written assumption agreement containing such terms as Beneficiary may require, including, but not limited to, a payment of a part of the principal amount of the Obligation, an increase in the rate of interest payable on the Obligation, the payment of an assumption fee, a modification of the terms of the Obligation and such other terms as Beneficiary may require, or Beneficiary may require any of such modifications of the terms of the Obligation without requiring an assumption thereof by the transferee. Should the Property be sold, traded, transferred, assigned, exchanged, leased or otherwise disposed of without the prior written consent of Beneficiary and should payment of any portion of the Obligation thereafter be accepted by Beneficiary, such acceptance shall not be deemed a waiver of the requirement of Beneficiary's consent in writing thereto or with respect to any other sale, trade, transfer, assignment, exchange, lease or other disposition. No conditional bill of sale or chattel mortgage shall be made or filed against any Accessories without the prior written consent of Beneficiary. If any such conditional bill of sale or chattel mortgage is made or filed with or without Beneficiary's prior written consent, then after the occurrence of a Default all right, title and interest of Trustor in and to all deposits and payments made thereon are hereby assigned to Beneficiary.

(b) If the Trustor enters into an installment sale contract or sells, conveys, alienates, assigns, mortgages or transfers the Property, or any part thereof or interest therein in any manner, or leases all or substantially all of the Property or the Improvements, whether voluntary or involuntary, or by operation of law or otherwise, then the Beneficiary shall have the right, at its option, at any time thereafter to declare the Obligations immediately due and payable. No waiver of this right or delay in the exercise thereof shall operate as a waiver thereof unless the Beneficiary shall have executed and delivered to the Trustor a written waiver of such right. Trustor shall give Beneficiary monthly reports summarizing in reasonable detail all Builder Contracts entered into during the preceding month.

(c) Any sale, assignment, lease, transfer, pledge, or other disposition, whether voluntary or involuntary, by operation of law or otherwise, of any partnership, membership or other ownership interest or shares of stock in the Trustor, shall be deemed to be a transfer of the Property for the purposes of this Section 2.20; provided, however, that Trustor shall be permitted to sell, assign or transfer any membership or other ownership interest in the Trustor if such sale, assignment or transfer does not change the control, management or majority ownership of Trustor.

**ARTICLE III**  
**RESPECTING DEFAULTS AND REMEDIES OF BENEFICIARY**

Section 3.01. Default. The term "Default," as used herein, shall mean the occurrence of any one or more of the following events:

- (a) a default in the payment of any installment of principal or interest when due under the Note; or
- (b) a default in the payment of any other sum when due hereunder or under the Note or any other Loan Document; or
- (c) default in (i) keeping in force the insurance which the Trustor is required to maintain under Paragraph 2.06 hereof or (ii) delivering or assigning the insurance policies or renewals or certificates thereof, or in reimbursing the Beneficiary for premiums paid by it on such insurance; or
- (d) upon the actual or threatened waste, removal, alteration or demolition of any part of the Property; or
- (e) default in complying with Trustor's obligations under Paragraph 2.12 hereof or upon the assignment by the Trustor of any Lease or of the whole or any part of the rents, income or profits arising from the Property without the prior written consent of the Beneficiary; or
- (f) if the Trustor or any guarantor of all or part of the Obligations (a "Guarantor") becomes insolvent; or
- (g) if the Trustor or any Guarantor generally does not pay its debts as they become due; or
- (h) if the Trustor or any Guarantor makes an assignment for the benefit of creditors; or
- (i) if the Trustor or any Guarantor calls or causes to be called a meeting of creditors for the composition of debts; or
- (j) if there shall be filed by or with the consent or authorization of the Trustor or any Guarantor a petition in bankruptcy for liquidation or for reorganization, or a custodian, receiver or agent is appointed or authorized to take charge of its properties, or the Trustor or any Guarantor authorizes any such action; or
- (k) if there shall be filed against the Trustor or any Guarantor a petition in bankruptcy, for liquidation, or for reorganization, or a custodian, receiver, or agent is appointed or authorized to take charge of its properties and the Trustor or such Guarantor,

as the case may be, has not consented to or authorized such action and such action is not dismissed within sixty (60) days; or

(l) the exercise of the right of condemnation or eminent domain in respect of all of the Property or so much of the Property as gives Trustee the right of acceleration as set forth in Paragraph 2.07(b) hereof; or

(m) upon the Trustor directly or indirectly creating, suffering or permitting to be created or to stand against the Property or any portion thereof or against the rents, issues and profits therefrom, any other lien (other than any mechanic's or materialmen's liens that are discharged within the time and in accordance with Section 2.04 hereof), charge, mortgage, deed of trust or other encumbrance (other than the Permitted Exceptions), without in each instance obtaining the Beneficiary's prior written consent thereto; or

(n) upon the filing of a lien by the United States so as to affect all or any part of the Property and such lien not being discharged (by bond or otherwise) within ten (10) days after Trustor receives notice of the filing thereof; or

(o) upon the merger, consolidation, liquidation or dissolution or sale or lease or transfer of all or substantially all of the assets of the Trustor or any Guarantor or the filing of any notice of intention to do so; or

(p) upon the Trustor entering into an installment sales contract or selling, conveying, transferring, mortgaging, leasing or otherwise alienating or encumbering the Property or any portion thereof or any interest therein in any manner, whether voluntary or involuntary or by operation of law or otherwise, without the prior written consent of the Beneficiary, except as otherwise provided in Paragraph 2.20(d), or upon the title or equity of redemption in the Property being acquired, in whole or in part, by voluntary or involuntary transfer, grant or assignment by any person, firm, corporation or entity other than the Trustor or the Beneficiary; or

(q) if any representation or warranty of the Trustor set forth in this Deed of Trust or in any other Loan Document or in any other writing given to the Beneficiary in connection with the Obligations shall have been incorrect in any material respect as of the time when the same shall have been made; or

(r) default in the performance of the Trustor's obligations under Paragraph 2.16 hereof; or

(s) upon the occurrence of an Event of Default under the Loan Agreement or any other Loan Document; or

(t) upon the failure of Trustor or any Guarantor to comply with, satisfy or perform or observe any other term, covenant, condition or agreement of such party

contained in the Note or any other Loan Document within the applicable cure period, if any, provided therefor in such document; or

(u) upon the failure of Trustor to comply with, satisfy, perform or observe any other term, covenant, condition or agreement of Trustor herein (i.e., any term, covenant, condition or agreement not referred to in any other subparagraph of this Paragraph 3.01), and such failure continues without cure for thirty (30) days after Trustee gives Trustor notice thereof, or if such failure, by its nature, cannot be cured within thirty (30) days, Trustor fails to commence such cure within thirty (30) days after Trustee gives Trustor notice thereof and thereafter to diligently prosecute cure to completion within sixty (60) days.

(v) Vincent Hesser ceases to be the sole shareholder of, or ceases to retain and exercise management and control of OneCap Partners MM Inc., the Manager of Trustor or any transfer of any ownership interest (directly or indirectly) in Trustor occurs in violation of Paragraph 2.20(c) hereof;

(w) OneCap Partners MM Inc. ceases to be the Manager of Trustor; or

(x) any material breach or acceleration or commencement of proceedings (whether non-judicial, judicial, public or private) to foreclose any other lien upon the Property, whether or not such lien is permitted or unpermitted hereunder or prior or subordinate to the lien of this Deed of Trust.

Section 3.02. Beneficiary's Remedies Upon Default. Upon a default, Beneficiary may, at Beneficiary's option, do any one or more of the following:

(a) If Trustor has failed to keep or perform any covenant whatsoever contained in this Deed of Trust, Beneficiary may, but shall not be obligated to any person to do so, perform or attempt to perform said covenant, and any payment made or expense incurred in the performance or attempted performance of any such covenant shall be and become a part of the Obligation, and Trustor promises, upon demand, to pay to Beneficiary, at the place where the Obligation is payable, all sums so advanced or paid by Beneficiary, with interest from the date when paid or incurred by Beneficiary at the rate provided in the Loan Agreement, the Note or the Guaranty for past due payment. No such payment by Beneficiary shall constitute a waiver of any default. In addition to the liens and security interests hereof, Beneficiary shall be subrogated to all rights, titles, liens and security interests securing the payment of any debt, claim, tax or assessment for the payment of which Beneficiary may make an advance, or which Beneficiary may pay.

(b) Beneficiary may, without notice, demand, presentment, notice of nonpayment or nonperformance, protest, notice of protest, notice of intent to accelerate (except as otherwise expressly provided in the Note), notice of acceleration or any other notice or any other action, all of which are hereby waived by Trustor and all other parties

obligated in any manner whatsoever on the Obligation, declare the entire unpaid balance of the Obligation immediately due and payable, and upon such declaration, the entire unpaid balance of the Obligation shall be immediately due and payable.

(c) Irrespective of whether Beneficiary exercises the right provided in Paragraph 3.02(b) above, Beneficiary in person or by agent or by court-appointed receiver may enter upon, take possession of, manage and operate the Property or any part thereof and do all things necessary or appropriate in Beneficiary's sole discretion in connection therewith, including without limitation making and enforcing, and if the same be subject to modification or cancellation, modifying or canceling Leases upon such terms or conditions as Beneficiary deems proper, obtaining and evicting tenants, and fixing or modifying Rents, contracting for and making repairs and alterations, and doing any and all other acts which Beneficiary deems proper to protect the security thereof, including taking any remedial measures resulting from the actual or threatened release of Hazardous Substances on the Property, in which event the decision of Beneficiary as to whether there exists an actual or threatened release of Hazardous Substances shall be deemed reasonable and conclusive; and either with or without so taking possession, in its own name or in the name of Trustor, sue for or otherwise collect and receive the rents, issues and profits including those past due and unpaid, and apply the same less costs and expenses of operation and collection, including reasonable attorneys' fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine. Upon request of Beneficiary, Trustor shall assemble and make available to Beneficiary at the site of the real property encumbered hereby any of the Property which has been removed therefrom. The entering upon and taking possession of the Property, or any part thereof, and the collection of any rents, issues and profits and the application thereof as aforesaid shall not cure or waive any default theretofore or thereafter occurring or affect any notice or default hereunder or invalidate any act done pursuant to any such default or notice. Notwithstanding continuance in possession of the Property or any part thereof by Beneficiary, Trustor or a receiver, and notwithstanding the collection, receipt and application of the Rents, Beneficiary shall be entitled to exercise every right provided for in this Deed of Trust, any other Loan Document or by law or in equity upon or after the occurrence of a Default, including without limitation the right to exercise the power of sale. Any of the actions referred to in this Paragraph 3.02(c) may be taken by Beneficiary irrespective of whether any notice of default or election to sell has been given hereunder and without regard to the adequacy of the security for the indebtedness hereby secured.

(d) Beneficiary may bring an action in any court of competent jurisdiction to foreclose this instrument or to enforce any of the covenants and agreements hereof.

(e) Beneficiary shall have the right, with the irrevocable consent of Trustor hereby given and evidenced by the execution of this Deed of Trust, to appoint itself as receiver or to obtain appointment of a receiver by any court of competent jurisdiction without further notice to Trustor, which receiver shall be authorized and empowered to

enter upon and take possession of the Property, including all personal property used upon or in connection with the real property herein conveyed and all bank accounts encumbered by this Deed of Trust or the Loan Documents and containing funds associated with the Property, to let the Property, to receive all the rents, issues and profits due or to become due, and apply the rents, issues and profits after payment of all necessary charges and expenses to reduction of the Obligation. Trustor hereby assigns the rents, issues and profits to Beneficiary as additional security for the Obligation, together with the Leases and all other documents evidencing the rents, issues and profits bank accounts, and any and all deposits held as security under the Leases. At the option of Beneficiary, the receiver shall accomplish such entry and taking possession of the Property by actual entry and possession or by notice to Trustor. The receiver so appointed by a court of competent jurisdiction shall be empowered to issue receiver's certificates for funds advanced by Beneficiary for the purpose of protecting the value of the Property as security for the Obligation. The amounts evidenced by receiver's certificates shall bear interest at the Default Rate specified in the Note and may be added to the cost of redemption if the owners of the Property, Trustor, or a junior lienholder redeems at the Trustee's Sale.

(f) If any Event of Default occurs, Beneficiary is authorized and empowered, without further notice, to execute or cause the Trustee to execute a written notice of default and of election to cause the Property to be sold as required by law or as otherwise provided herein, and the Trustee shall file such notice for record in each county wherein the Property or any part thereof is situated. After such filing, the Trustee may lawfully foreclose and shall foreclose the lien of this Deed of Trust, and sell and dispose of the Property in masse or in separate parcels (as Beneficiary may elect) and all the right, title, and interest of Trustor therein, at a public auction at any place then authorized by law as may be specified in the notice of such sale, for the price permitted by law (the "Trustee's Sale"), legally required public notice having previously been given of the time and place of such sale. The Trustee, without demand on Trustor, shall sell the Property on the date and at the time and place designated in the notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such Property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient in accordance with applicable law, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given as required by law. Trustee shall execute and deliver to the purchaser its deed conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorneys' fees; (2) cost of any evidence of title procured in connection with such sale; (3)

all sums expended under the terms hereof, not then repaid, with accrued interest as provided herein from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

(g) Upon the occurrence of a Default, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable upon notice of intent to accelerate as set forth in the Note, and to foreclose this Deed of Trust in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including reasonable attorneys' fees in such amount as shall be fixed by the court. Trustor hereby waives all rights to the marshalling of Trustor's assets encumbered by this Deed of Trust to the fullest extent permitted by law, including the Property, and all rights to require the Property to be sold in several parcels. The proceeds or avails of such a sale pursuant to the foreclosure of this Deed of Trust as a mortgage shall first be applied to pay all reasonable fees, charges, costs of conducting such sale and advertising the Property, and attorneys' fees as herein provided, second to pay to Beneficiary the then outstanding amount of the Obligation with interest at the rate set forth in the Note, and third to the person so entitled, subject to applicable law. Beneficiary may purchase all or any part of the Property at such sale. Any purchaser at such sale shall not be responsible for the application of the purchase money. During any redemption period subsequent to the such sale, the amount of Beneficiary's bid entered at such sale shall bear interest at the maximum lawful rate of interest.

(h) Upon the occurrence of an Event of Default as a result of any of the representations or warranties concerning Hazardous Substances set forth in the Loan Agreement or any other Loan Document being untrue, Beneficiary may commence and maintain an action or actions in any court of competent jurisdiction for breach of contract, whether commenced prior to foreclosure of the Property or after foreclosure of the Property, and to seek the recovery of any and all costs, damages, expenses, fees, penalties, fines, judgments, indemnification payments to third parties, and other out-of-pocket costs or expenses actually incurred by Beneficiary (the "Environmental Costs") incurred or advanced by Beneficiary relating to the cleanup, remediation or other response action required by any applicable law relating to Hazardous Substances or to which Beneficiary believes necessary to protect the Property, it being conclusively presumed between Beneficiary and Trustor that all such Environmental Costs incurred or advanced by Beneficiary relating to the cleanup, remediation or other response action of or to the Property were made by Beneficiary in good faith. All Environmental Costs incurred by Beneficiary under this Section (including without limitation court costs, consultant fees and attorneys' fees, whether incurred in litigation or not and whether before or after judgment) shall be considered Obligation and shall bear interest at the Default Rate established in the Note from the date of expenditure until paid in full.



Beneficiary shall have the right to bid, at the sale of the Property held under Section 6.6 the amount of the Environmental Costs, plus interest at the Default Rate established in the Note, in addition to any other amounts comprising the Obligation.

(i) If this Deed of Trust is foreclosed by the Trustee, the Trustee shall allow a reasonable amount of attorneys' fees for services rendered in the supervision of such foreclosure proceedings as a part of the cost of foreclosure. If the foreclosure proceedings are made through court proceedings, attorneys' fees in an amount determined by the court to be reasonable shall be taxed by the court as a part of the cost of such foreclosure proceedings.

(j) Trustor, for itself and for all persons hereafter claiming through or under it or who may at any time hereafter become holders of liens junior to the lien of this Deed of Trust, hereby expressly waives and releases all rights to direct the order in which any of the Property shall be sold and to have the Property and any other property now or hereafter constituting security for the Obligation marshaled upon any foreclosure of the lien of this Deed of Trust. Beneficiary shall have the right to sell the Property as a whole or in separate parcels.

(k) Each right, power, and remedy herein conferred upon Beneficiary or the Trustee is cumulative of every other right or remedy of Beneficiary or the Trustee, whether conferred herein or by law, and may be enforced concurrently.

(l) Beneficiary may, or Trustee may upon written request of Beneficiary, proceed by suit or suits, at law or in equity, to enforce the payment and performance of the Obligation in accordance with the terms hereof and of the Loan Documents, to foreclose the liens and security interests of this Deed of Trust as against all or any part of the Property, and to have all or any part of the Property sold under the judgment or decree of a court of competent jurisdiction.

(m) After notification, if any, hereafter provided in this Subsection, Beneficiary may sell, lease or otherwise dispose of, at the office of Beneficiary or on the Land or elsewhere, as chosen by Beneficiary, all or any part of the Accessories, in their then condition, or following any commercially reasonable preparation or processing, and each Sale (as used in this Subsection, the term "Sale" means any sale, lease, or other disposition made pursuant to this Subsection) may be as a unit or in parcels, by public or private proceedings, and by way of one or more contracts, and, at any Sale it shall not be necessary to exhibit the Accessories or part thereof being sold. The Sale of any part of the Accessories shall not exhaust Beneficiary's power of sale, but Sales may be made from time to time until the Obligation is paid and performed in full. Reasonable notification of the time and place of any public Sale pursuant to this Subsection, or reasonable notification of the time after which any private Sale is to be made pursuant to this Subsection, shall be sent to Trustor and to any other person entitled under the Code (as hereinafter defined) to notice; provided that if the Accessories or part thereof being

sold are perishable, or threaten to decline rapidly in value, or are of a type customarily sold on a recognized market, Beneficiary may sell, lease or otherwise dispose of the Accessories, or part thereof, without notification, advertisement or other notice of any kind. It is agreed that notice sent or given not less than five (5) calendar days prior to the taking of the action to which the notice relates, is reasonable notification and notice for the purposes of this Subsection.

(n) INTENTIONALLY OMITTED.

(o) Beneficiary may retain the Accessories in satisfaction of the Obligation whenever the circumstances are such that Beneficiary is entitled to do so under the Code.

(p) Beneficiary may buy the Property or any part thereof at any public sale or judicial sale.

(q) Beneficiary may buy the Accessories or any part thereof at any private sale, if the Accessories or part thereof being sold are a type customarily sold in a recognized market or a type subject to widely distributed standard price quotations.

(r) If any payment under this Deed of Trust shall not be received by Beneficiary when due, a late charge of ten cents for each dollar of such payment shall become due to the Beneficiary. Such charge shall be payable with the payment next due and shall be added to the Obligations and be secured by this Deed of Trust.

(s) Beneficiary shall have and may exercise any and all other rights and remedies which Beneficiary may have at law or in equity, or by virtue of any Loan Document, or under the Code, or otherwise.

Section 3.03. Beneficiary as Purchaser. If Beneficiary is the purchaser of the Property or any part thereof, at any sale thereof, whether such sale be under the power of sale hereinabove vested in Trustee or upon any other foreclosure of the liens and security interests hereof, or otherwise, Beneficiary shall, upon any such purchase, acquire good title to the Property so purchased, free of the liens and security interests hereof.

Section 3.04. Other Rights of Beneficiary. Should any part of the Property come into the possession of Beneficiary, whether before or after Default, Beneficiary may use or operate the Property for the purpose of preserving it or its value, pursuant to the order of a court of appropriate jurisdiction or in accordance with any other rights held by Beneficiary in respect of the Property. Trustor covenants promptly to reimburse and pay to Beneficiary on demand, at the place where the Obligation is payable, the amount of all reasonable expenses (including the cost of any insurance, taxes or other charges) incurred by Beneficiary in connection with Beneficiary's custody, preservation, use or operation of the Property, together with interest thereon from the date incurred by Beneficiary at the rate provided in the Note for past-due principal, and all such expenses, costs, taxes,

interest and other charges shall be and become a part of the Obligation. It is agreed, however, that the risk of loss or damage to the Property is on Trustor, and Beneficiary shall have no liability whatsoever for decline in value of the Property, for failure to obtain or maintain insurance, or for failure to determine whether insurance in force is adequate as to amount or as to the risks insured.

Section 3.05. Possession After Foreclosure. If the liens or security interests hereof shall be foreclosed by power of Trustee's sale, by judicial action or otherwise, the purchaser at any such sale shall receive, as an incident to Trustee's ownership, immediate possession of the property purchased, and if Trustor or Trustor's successors shall hold possession of said property or any part thereof, subsequent to foreclosure, Trustor and Trustor's successors shall be considered as tenants at sufferance of the purchaser at foreclosure sale (without limitation of other rights or remedies, at a reasonable rental per day, due and payable daily, based upon the value of the portion of the Property so occupied), and anyone occupying such portion of the Property after demand is made for possession thereof shall be guilty of forcible detainer and shall be subject to eviction and removal, forcible or otherwise, with or without process of law, and all damages by reason thereof are hereby expressly waived.

Section 3.06. Application of Proceeds. The proceeds from any sale, lease or other disposition made pursuant to this Article, or any rental collected by Beneficiary from the Property, or sums received pursuant to Section 5.01 hereof, or proceeds from insurance which Beneficiary elects to apply to the Obligation, shall be applied by Trustee, or by Beneficiary, as the case may be, as follows: first, to the payment of all expenses of advertising, selling and conveying the Property or part thereof, including reasonable attorneys' fees and reasonable fees and expenses of the Trustee commission; second, to repay any sums expended by Beneficiary or Trustee pursuant to the terms hereof, with interest at the applicable rate hereunder; third, to late charges; fourth, to accrued interest on the Obligation; fifth, to principal on the matured portion of the Obligation; fifth, to prepayment of the unmatured portion, if any, of the Obligation applied to installments of principal in inverse order of maturity; and seventh, the balance, if any, remaining after the full and final payment and performance of the Obligation to the person or persons legally entitled thereto.

Section 3.07. Abandonment of Sale. In the event a foreclosure hereunder is commenced by Trustee in accordance with Subsection 3.02(c) hereof, Beneficiary may, at any time before the sale, direct Trustee to abandon the sale, and (to the extent thereon permitted under then applicable law) may then institute suit for the collection of the Obligation and for the foreclosure of the liens and security interests hereof. If Beneficiary should institute a suit for the collection of the Obligation and for a foreclosure of the liens and security interests hereof, Beneficiary may, at any time before the entry of a final judgment in said suit, dismiss the same and require Trustee to sell the Property or any part thereof in accordance with the provisions of this Deed of Trust.

Section 3.08. Payment of Fees. If any part of the Obligation shall be collected or enforced by legal proceedings, whether through a probate or bankruptcy court or otherwise, or shall be placed in the hands of an attorney for collection after maturity, whether matured by the expiration of time or by an option given to the Beneficiary to mature same, or if Beneficiary becomes a party to any suit where this Deed of Trust or the Property or (to the extent thereon permitted under then applicable law) any part thereof is involved, Trustor agrees to pay Beneficiary's reasonable attorneys' and collection fees, and such fees shall be and become a part of the Obligation.

Section 3.09. Indemnification of Trustee. Except for gross negligence or willful misconduct, Trustee shall not be liable for any act or omission or error of judgment. Trustee may rely on any document believed by Trustee in good faith to be genuine. All money received by Trustee shall, until used or applied as herein provided, be held in trust, but need not be segregated (except to the extent required by law), and Trustee shall not be liable for interest thereon. Trustor shall indemnify Trustee against all liability and expenses which Trustee may incur in the performance of Trustee's duties hereunder.

Section 3.10. Substitute Trustee. Beneficiary may appoint a substitute Trustee (a) if Trustee herein named or any substitute Trustee shall die, resign, or fail, refuse or be unable, for any reason, to make any such sale or to perform any of the trusts herein declared; or (b) at the option of Beneficiary from time to time as often and whenever Beneficiary prefers and with or without any reason or cause. Each appointment shall be in writing, but without the necessity of recordation, notice to Trustor, or any other action or formality. Each substitute Trustee so appointed shall thereupon by such appointment become Trustee and succeed to all the estates, titles, rights, powers, trusts and duties of predecessor Trustee. Any such appointment may be executed by Beneficiary or any authorized representative of Beneficiary, and such appointment shall be presumed conclusively to have been executed with due and proper authority. Without limiting the generality of the foregoing, if Beneficiary is a corporation, bank or association, of any type or character, such appointment may be executed in its behalf by any officer of Beneficiary and shall be presumed conclusively to have been executed with due and proper authority without necessity of proof of any action by the board of directors or any superior officer. Wherever herein the word "Trustee" is used, the same shall mean the duly appointed trustee or substitute trustee hereunder at the time in question. Trustee may resign by written notice to Beneficiary.

Section 3.11. INTENTIONALLY OMITTED.

Section 3.12. Release of Collateral. The Beneficiary may release regardless of consideration, the obligation of any Person or Persons liable for payment of any of the Obligations secured hereby, or may release any part of the Property or any other collateral now or hereafter given to secure the payment of the Obligations or any part thereof, without impairing, reducing or affecting the obligations of the Trustor under the

Loan Documents, the remainder of the security of this Deed of Trust or the priority of the rights created by this Deed of Trust.

Section 3.13. Partial Foreclosure. The Beneficiary may from time to time, to the extent permitted by law, take action to recover any sums, whether interest, principal or any other sums required to be paid under the Loan Documents, as the same become due, without prejudice to the right of the Beneficiary thereafter to bring an action of foreclosure, or any other action, for a Default or Defaults by the Trustor existing when such earlier action was commenced. The Beneficiary may, to the extent permitted by law, at the Mortgage's option, cause this Deed of Trust to be foreclosed for any portion of the Obligations or any other sums secured hereby which are then due and payable subject to the continuing lien of this Deed of Trust for the balance of the secured Obligations not then due.

#### ARTICLE IV SECURITY AGREEMENT

Section 4.01. Security Agreement. This Deed of Trust is also a security agreement between Trustor, as debtor, and Beneficiary, as secured party. Trustor hereby grants to Beneficiary and Beneficiary's successors and assigns, a security interest in those portions of the Property which constitute Accessories and each and every part thereof, and in all proceeds from the sale, lease or other disposition thereof, and in all sums, proceeds, funds and reserves described or referred to in Sections 2.06 and 2.07 hereof. However, the grant of a security interest in proceeds shall not be deemed to authorize any action otherwise prohibited herein. The security interest created hereby is specifically intended to cover and include all leases of the Property, if any, presently existing or hereafter entered into (herein, together with all amendments and supplements thereto made as provided therein, called the "Leases"), between Trustor (or parties acting on behalf of Trustor), as lessor or as successor to or assignee from the lessor, and tenants which occupy the Property under the Leases, including all extended terms and all extensions and renewals of the terms thereof, as well as any amendments to or replacements of said Leases, together with all the right, title and interest of Trustor, as lessor thereunder, including, without limiting the generality of the foregoing, the present and continuing right to make claim for, collect, receive and receipt for any and all of the rents, income, revenues, issues and profits and moneys payable as damages or in lieu of rent and moneys payable as the purchase price of the Property or any part thereof or of awards or claims for money and other sums of money payable or receivable thereunder howsoever payable, and to bring actions and proceedings thereunder or for the enforcement thereof, and to do any and all things which Trustor or any lessor is or may become entitled to do under the Leases, provided, that this provision shall not impair or diminish any obligation of Trustor under the Leases, nor shall any obligation be imposed upon Beneficiary. In addition to Beneficiary's rights hereunder or otherwise, Beneficiary shall have all of the rights of a secured party under the Uniform Commercial Code of the State, (the "Code").

Trustor, from time to time, upon each request of Beneficiary, promptly shall (a) execute and deliver to Beneficiary all financing statements as required by Beneficiary in order to establish or maintain the validity, perfection or priority of the security interest with respect to the Accessories or fixtures; (b) pay to Beneficiary on demand all costs of preparation and filing of financing statements pursuant hereto and all costs of Code searches reasonably required by Beneficiary; and (c) give to Beneficiary a certificate in form satisfactory to Beneficiary listing all trade names of Trustor and under which Trustor operates or intends to operate the Property or any part thereof, and give to Beneficiary advance written notice of any proposed change of any such trade name and of any change of name (or trade name or assumed name), identity or structure of Trustor. A carbon, photographic or other reproduction of this Deed of Trust or of a financing statement executed pursuant hereto is sufficient as a financing statement. This Deed of Trust is, without limitation, intended to be a financing statement filed as a fixture filing with respect to the portions of the Property which are or are to become fixtures, and as a mineral and timber filing. The address of Trustor (debtor) is set forth on the first page hereof and the address of Beneficiary (secured party) from whom information concerning the security interest may be obtained, is set forth on the first page hereof. Trustor is the record owner of the Land, the Improvements and the Accessories.

#### ARTICLE V SPECIAL PROVISIONS

Section 5.01. Subordinate Financing. In the event of consent by Beneficiary to the granting of a subordinate mortgage, or in the event the above-described right of Beneficiary to declare the Obligation to be immediately due and payable upon the granting of a subordinate mortgage without the prior written consent of Beneficiary is determined by a court of competent jurisdiction to be unenforceable under the provisions of any applicable law, Trustor will not execute or deliver any subordinate mortgage unless (i) it shall contain express covenants to the effect: (a) that the subordinate mortgage is in all respects unconditionally subject and subordinate to the lien and security interest evidenced by this Deed of Trust and each term and provision hereof; (b) that if any action or proceeding shall be instituted to foreclose the subordinate mortgage (regardless of whether the same is a judicial proceeding or pursuant to a power of sale contained therein), no tenant of any portion of the Property will be named as a party defendant, nor will any action be taken with respect to the Property which would terminate any occupancy or tenancy of the Property without the prior written consent of Beneficiary; (c) that the rents and profits, if collected through a receiver or by the holder of the subordinate mortgage, shall be applied first to the obligations secured by this Deed of Trust, including principal and interest due and owing on or to become due and owing under the Loan Agreement and the other indebtedness secured hereby, and then to the payment of maintenance, operating charges, taxes, assessments, and disbursements incurred in connection with the ownership, operation and maintenance of the Property; and (d) that if any action or proceeding shall be brought to foreclose the subordinate

mortgage (regardless of whether the same is a judicial proceeding or pursuant to a power of sale contained therein), written notice of the commencement thereof will be given to Beneficiary contemporaneously with the commencement of such action or proceeding; and (ii) a copy thereof shall have been delivered to Beneficiary not less than ten (10) days prior to the date of the execution of such subordinate mortgage.

**Section 5.02. Change in Taxation.** Upon passage after the date of this Deed of Trust of any law applicable to this Deed of Trust, the Property or the Beneficiary, deducting from the value of real property or from the value of a lien on real property for the purposes of taxation or lien any indebtedness secured by mortgages or changing in any way the laws for the taxation or mortgages or debts secured by mortgages for State or local purposes or the manner of the collection of any such taxes, and imposing a tax, either directly or indirectly, on this Deed of Trust or all or any part of the sum secured hereby or the interest thereon, the Beneficiary may declare the whole of the Obligations and the interest accrued thereon, due on a date to be specified by not less than sixty (60) days' written notice to the Trustor, but such declaration shall be ineffective if the Trustor is permitted by law to pay such tax in addition to all other payments required hereunder, without any penalty or charge thereby accruing to the Beneficiary, and if the Trustor pays such tax within such sixty (60) day period.

**Section 5.03. Taxes Imposed on Beneficiary.** The Trustor shall pay any taxes (except any federal, state, or local income taxes measured by the income of Beneficiary from all sources) imposed on the Beneficiary by reason of its ownership of this Deed of Trust and the Note.

**Section 5.04. Recording, Filing and Other Fees.** The Trustor shall pay all recording and filing fees, all recording taxes and all other costs and expenses in connection with the preparation, execution and recordation and other manner of perfection of the Loan Documents, and shall reimburse the Beneficiary on demand for all costs and expenses of any kind incurred by the Beneficiary in connection therewith (including, without limitation, attorneys' fees). The Trustor will, at any time on request of the Beneficiary, execute or cause to be executed financing statements, continuation statements, security agreements, or the like, in respect of any Accessories. The Trustor shall pay all filing fees, including fees for filing continuation statements, in connection with such financing statements.

**Section 5.05. No Release.** The Trustor and any other Person now or hereafter obligated for the payment or performance of all or any part of the Obligations shall not be released from paying and performing such Obligations and the lien of this Deed of Trust shall not be affected by reason of: (a) the failure of the Beneficiary to comply with any request of Trustor, or of any other Person so obligated, to take action to foreclose this Deed of Trust or otherwise enforce any of the provisions of this Deed of Trust or of any of the Obligations secured by this Deed of Trust; (b) the release, regardless of consideration, of the obligations of any Person or Persons liable for payment or

performance of the Obligations or any part thereof; or (c) any agreement or stipulation extending the time of payment or modifying the terms of the Note, and in the event of such agreement or stipulation, the Trustor and all such other Persons shall remain liable under the Loan Documents, as amended by such agreement or stipulation unless expressly released and discharged in writing by the Beneficiary.

**Section 5.06. Interest After Maturity.** The principal amount of the Obligations and any other amounts secured by this Deed of Trust and, to the extent permitted by law, any accrued interest thereon, shall bear interest from and after maturity of the Obligations, whether or not resulting from acceleration, at the Default Rate, but this shall not constitute an extension of time for payment of the Obligations or such other amounts or accrued interest.

**Section 5.07. Indemnification Against Liabilities.** To the extent not caused by the gross negligence or willful misconduct of Beneficiary, the Trustor will protect, indemnify, save harmless and defend the Beneficiary from and against any and all liabilities, obligations, claims, damages, penalties, causes of action, costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) imposed upon or incurred by or asserted against Beneficiary by reason of: (a) any accident or injury to or death of Persons or loss of or damage to or loss of the use of property occurring on or about the Property or any part thereof or the adjoining sidewalks or curbs, if any, streets, alleys or ways; (b) any use, non-use or condition of the Property or any part thereof or the adjoining sidewalks or curbs, if any, streets, alleys or ways; (c) any failure on the part of the Trustor to perform or comply with any of the terms of the Mortgage; (d) performance of any labor or services or the furnishing of any materials or other property in respect of the Property or any part thereof made or suffered to be made by or on behalf of the Trustor; (e) any negligence or tortious act on the part of the Trustor or any of its agents, contractors, lessees, licensees or invitees; or (f) any work in connection with any alterations, changes, new construction or demolition of the Property. The Trustor will pay and save Beneficiary harmless against any and all liability with respect to any intangible personal property tax or similar imposition of the Governing Jurisdiction or any subdivision or authority thereof now or hereafter in effect, to the extent that the same may be payable by Beneficiary in respect of this Deed of Trust, the Note or the indebtedness secured thereby. All amounts payable to Beneficiary under this Paragraph 5.10 shall be payable on demand and shall be deemed indebtedness secured by this Deed of Trust and any such amounts which are not paid within ten (10) days after demand therefor by the Beneficiary shall bear interest at the Default Rate from the date of such demand. If any action, suit or proceeding is brought against Beneficiary by reason of any such occurrences, the Trustor, upon request of Beneficiary, will, at the Trustor's expense, resist and defend such action, suit or proceeding or cause the same to be resisted or defended by counsel designated by the Trustor and approved by the Beneficiary, as the case may be.



Section 5.08. Notice of Acceleration. Whenever the Beneficiary in this Deed of Trust is given the option to accelerate the maturity of all or part of the Obligation upon a Default, the Beneficiary may, to the extent permitted by law, do so without prior notice or demand to or upon the Trustor except for notice of intention to accelerate as set forth in the Note.

Section 5.09. Trustor's Representations. The Trustor represents and warrants that: (a) it is duly organized, validly existing and in good standing under the laws of the State of Nevada, and is duly authorized to do business and is in good standing under the laws of the State of Nevada, and has the right and power and has obtained all necessary authorization to execute and deliver this Deed of Trust and the Note and other Loan Documents to which it is a party and to perform its obligations thereunder in accordance with the terms thereof; (b) the consent of any governmental body, agency or entity is not required (or if required has been obtained) in connection with the execution and delivery of this Deed of Trust; (c) the execution, delivery, and performance by the Trustor of the Loan Documents does not: (i) violate: (A) any existing provision of law, rule, or regulation; (B) Trustor's certificate of formation or limited partnership agreement; (C) any provision of any indenture, agreement or other instrument of which the Trustor is a party or by which it or the Property is bound; or (D) any order of any court or other agency of government binding upon the Trustor; or (ii) result in the creation of any lien, charge, or encumbrance other than the lien created by this Deed of Trust; and (d) the Obligations are not also secured, directly or indirectly, by "margin securities" or "stock" as defined, respectively, in Regulation G and Regulation U issued by the Board of Governors of the Federal Reserve System.

Section 5.10. After Acquired Property. To the extent permitted by law, all personal property and appurtenances to the Property now or hereafter attached to, adjoining or used for or in connection with the Property or any part thereof which is acquired by the Trustor on or after the date hereof shall, immediately upon the acquisition thereof by the Trustor, and without any further mortgage, conveyance, assignment, security agreement or transfer, become subject to the lien of this Deed of Trust. The Trustor shall execute, acknowledge and deliver to the Beneficiary any documents and instruments which the Beneficiary may reasonably request from time to time for better assuring, conveying, assigning, transferring, confirming or perfecting the Beneficiary's security and rights under this Deed of Trust.

Section 5.11. Further Assurances. The Trustor will, at its sole cost and expense, within ten (10) days of a request by the Beneficiary for the same, do, execute, acknowledge and deliver and appropriately file and record, all and every such further acts, conveyances, mortgages, assignments, financing statements, supplemental mortgages, notices, estoppel certificates and assurances as the Beneficiary shall, from time to time, reasonably require for accomplishing the purposes of this Deed of Trust and shall pay the expenses of the filing or recording of the same and reimburse the

Beneficiary for its reasonable legal expenses incurred in connection with the preparation or review thereof. In default of any such execution, acknowledgement, delivery, filing or recording, the Beneficiary may, without limitation, exercise the rights conferred upon it in Paragraph 2.15 hereof to execute, acknowledge and file or record any such instrument for and on behalf of the Trustor, as attorney-in-fact of the Trustor (which appointment is coupled with an interest and irrevocable), and shall be entitled to reimbursement for its reasonable expenses in connection therewith.

#### ARTICLE VI MISCELLANEOUS

Section 6.01. Release and Reconveyance. If all of Trustor's obligations under the Loan Documents are paid in full in accordance with the terms of the Loan Documents, no Default then exists hereunder and no Event of Default then exists under any other Loan Document, and if Trustor shall well and truly perform all of Trustor's covenants contained herein, then this conveyance shall become null and void and be released, and the Property (or so much thereof not previously released pursuant to Paragraph 2.20(d) hereof) shall be reconveyed to Trustor, at Trustor's request and expense.

Section 6.02. Rights Cumulative. Beneficiary shall have all rights, remedies and recourses granted in the Loan Documents and available at law or in equity (including, without limitation, those granted by the Code and applicable to the Property or any portion thereof), and the same (a) shall be cumulative and concurrent; (b) may be pursued separately, successively or concurrently against Trustor or others obligated for the Obligation or any part thereof, or against any one or more of them, or against the Property, at the sole discretion of Beneficiary; (c) may be exercised as often as occasion therefor shall arise, it being agreed by Trustor that the exercise, discontinuance of the exercise of or failure to exercise any of the same shall in no event be construed as a waiver or release thereof or of any other right, remedy or recourse; and (d) are intended to be, and shall be, nonexclusive. All rights and remedies of Beneficiary hereunder and under the other Loan Documents shall extend to any period after the initiation of foreclosure proceedings, judicial or otherwise, with respect to the Property.

Section 6.03. Waiver. Any and all covenants in this Deed of Trust may, from time to time, by instrument in writing signed by Beneficiary and delivered to Trustor, be waived to such extent and in such manner as Beneficiary may desire, but no such waiver shall ever affect or impair Beneficiary's rights, remedies, powers, privileges, liens, titles and security interests hereunder except to the extent so specifically stated in such written instrument. No waiver of any Default on the part of Trustor or a breach of any of the provisions of this Deed of Trust or of any Loan Document shall be considered a waiver of any other or subsequent Default or breach, and no delay or omission in exercising or enforcing the rights and powers herein granted shall be construed as a waiver of such rights and powers, and likewise no exercise or enforcement of any rights or powers hereunder shall be held to exhaust such rights and powers, and every such right and

power may be exercised from time to time. No notice to or demand on Trustor in any case shall of itself entitle Trustor to any other or further notice or demand in similar or other circumstances. The granting of any consent or approval by Beneficiary shall be limited to the specific instance and shall not waive or exhaust the requirement of consent or approval in any other instance. Except as otherwise specified herein, in any instance hereunder where Beneficiary's approval or consent is required or the exercise of Beneficiary's judgment is required, the granting or denial of such approval or consent and the exercise of such judgment shall be within the sole discretion of Beneficiary, and Beneficiary shall not for any reason or to any extent, be required to grant such approval or consent or exercise such judgment in any particular manner regardless of the reasonableness of the request or of Beneficiary's judgment.

Section 6.04. Payments. Remittances in payment of any part of the Obligation other than in the required amount in funds immediately available at the place where the Obligation is payable shall not, regardless of any receipt or credit issued therefor, constitute payment until the required amount is actually received by Beneficiary in funds immediately available at the place where the Obligation is payable (or such other place as Beneficiary, in Beneficiary's sole discretion, may have established by delivery of written notice thereof to Trustor) and shall be made and accepted subject to the condition that any check or draft may be handled for collection in accordance with the practice of the collecting bank or banks. Acceptance by Beneficiary of any payment in an amount less than the amount then due shall be deemed an acceptance on account only, and the failure to pay the entire amount then due shall be and continue to be a Default.

Section 6.05. INTENTIONALLY OMITTED.

Section 6.06. Change of Security. Any part of the Property may be released, regardless of consideration, by Beneficiary from time to time without impairing, subordinating or affecting in any way the lien, security interest and other rights hereof against the remainder. The lien, security interest and other rights granted hereby shall not be affected by any other security taken for the Obligation or any part thereof. The taking of additional security, or the extension, renewal or rearrangement of the Obligation or any part thereof, shall not release or impair the lien, security interest and other rights granted hereby, or affect the liability of any endorser or guarantor or improve the right of any junior lienholder; and this Deed of Trust, as well as any instrument given to secure any renewal, extension or rearrangement of the Obligation or any part thereof, shall be and remain a first and prior lien, except as otherwise provided herein, on all of the Property not expressly released until the Obligation is fully paid and performed.

Section 6.07. Controlling Agreement. The parties hereto intend to conform strictly to the applicable usury laws. All agreements between Trustor (and any other party liable for any part of the Obligation) and Beneficiary, whether now existing or hereafter arising and whether written or oral, are expressly limited so that in no event whatsoever, whether by reason of acceleration of the maturity of the Obligation or

otherwise, shall the interest contracted for, charged or received by Beneficiary hereunder or otherwise exceed the maximum amount permissible under applicable law. If from any circumstances whatsoever interest would otherwise be payable to Beneficiary in excess of the maximum lawful amount, the interest payable to Beneficiary shall be reduced automatically to the maximum amount permitted under applicable law. If Beneficiary shall ever receive anything of value deemed interest under applicable law which would apart from this provision be in excess of the maximum lawful amount, the amount which would have been excessive interest shall be applied to the reduction of the principal amount owing on the Obligation and not to the payment of interest, or if such amount which would have been excessive interest exceeds the unpaid principal balance of the Obligation, such excess shall be refunded to Trustor, or to the maker of the Note or other evidence of indebtedness if other than Trustor. All interest paid or agreed to be paid to Beneficiary shall, to the extent permitted by applicable law, be amortized, prorated, allocated and spread throughout the full stated term, including any renewal or extension, of such indebtedness so that the amount of interest on account of such indebtedness does not exceed the maximum permitted by applicable law. The terms and provisions of this Section shall control and supersede every other provision of all existing and future agreements between Trustor, the maker of the Note or other evidence of indebtedness if other than Trustor, and Beneficiary.

Section 6.08. Effect of Transfer on Trustor's Liability. If the ownership (legal or beneficial) of the Property or any part thereof becomes vested in a person other than Trustor, or in the event of a change in ownership (legal or beneficial) (except as expressly permitted by and in compliance with Section 2.20(e) hereof) of any Trustor other than an individual, Beneficiary may, without notice to or consent of Trustor or Trustor's successors, deal with such successor or successors in interest with reference to this Deed of Trust and the Obligation either by way of forbearance on the part of Beneficiary, or extension of time of payment of the Obligation, or release of all or any part of the Property or any other property securing payment of the Obligation, or otherwise, without in any way modifying or affecting Beneficiary's rights and liens hereunder or the liability of Trustor or any other party liable for payment of the Obligation, in whole or in part.

Section 6.09. Waiver of Right to Marshal. Trustor hereby waives all rights of marshaling in event of any foreclosure of the liens and security interests hereby created.

Section 6.10. Subrogation. To the extent that proceeds of the Obligation are used to renew, extend or pay any outstanding debt or to perform any obligation, such proceeds have been advanced by Beneficiary at Trustor's request, and Beneficiary shall be subrogated to all liens, security interests, rights, priorities, powers, titles, equities and interests owned or held by any owner or holder of such outstanding debt or obligation, however remote, irrespective of whether the same are released of record, and all of the same are recognized as valid and subsisting and are renewed, continued and preserved in force to secure the Obligation; provided, however, that if and to the extent Beneficiary

desires in each case, the terms and provisions hereof and of the other Loan Documents shall govern the rights and remedies of Beneficiary and shall supersede the terms, provisions, rights, and remedies under any lien, security interest, charge or other encumbrance to which Beneficiary is subrogated hereunder.

**Section 6.11. Covenant to Perform.** Trustor and each subsequent owner of the Property, or any part thereof, covenants and agrees that Trustor and any subsequent owner will perform or cause to be performed, each and every condition, term, provision and covenant of this Deed of Trust.

**Section 6.12. Notices.** All notices, consents, approvals and requests required or permitted hereunder or under any other Loan Document shall be given in writing and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, return receipt requested or (b) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, and by telcopier (with answer back acknowledged), addressed as follows (or at such other address and a person as shall be designated from time to time by any party hereto, as the case may be, in a written notice to the other parties hereto in the manner provided for in this Section):

<b>If to Beneficiary:</b>	Kennedy Funding, Inc. Two University Plaza, Suite 402 Hackensack, New Jersey 07601 Attention: Jeffrey Wolfer Facsimile No. (201) 342-8373
<b>With a copy to:</b>	Cole, Schotz, Meisel, Forman & Leonard P.A. 25 Main Street Hackensack, New Jersey 07602-0800 Attention: Michael R. Leighton, Esq. Facsimile No.: (201) 489-1536
<b>If to Trustor:</b>	OneCap Partners 2, LLC 5440 W. Sahara Avenue, 3 <sup>rd</sup> Floor Las Vegas, Nevada 89146 Attn: Mr. Vincent Hesser
<b>With a copy to:</b>	Harold Gewerter, Esq. 5440 W. Sahara Ave., Suite #202 Las Vegas, NV 89146 Facsimile No. (702) 382-1759

A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery; in the case of registered or certified mail, when delivered or the first attempted delivery on a business day; or in the case of expedited prepaid delivery and telecopy, upon the first attempted delivery on a business day.

Section 6.13. No Representations by Beneficiary. By accepting or approving anything required to be observed, performed or fulfilled, or to be given to the Beneficiary pursuant to this Deed of Trust, including, without limitation, any certificate, balance sheet, statement of profit and loss or other financial statement, survey, appraisal or insurance policy, the Beneficiary shall not be deemed to have warranted or represented the sufficiency, legality, effectiveness or legal effect of the same, or of any term, provision or condition thereof, and such acceptance or approval thereof shall not be or constitute any warranty or representation with respect thereto by the Beneficiary.

Section 6.14. Certain Definitions. The following terms shall, for all purposes of this Deed of Trust, have the respective meanings herein specified unless the context otherwise requires:

(a) the "Trustor" shall mean the Trustor herein named any and subsequent owner or owners of the Property and its or their respective heirs, legal representatives, successors and assigns;

(b) the "Beneficiary" shall mean the Beneficiary herein named and any subsequent holder or holders of this Deed of Trust, and its or their respective heirs, legal representatives, successors and assigns;

(c) "Person" (whether or not capitalized) shall mean an individual, corporation, limited liability company, partnership, joint venture, trust, unincorporated organization or government, or any agency or political subdivision thereof, or any business or legal entity; and

(d) "Lease" shall mean every lease, license or occupancy agreement for the use or hire of all or any portion of the Property which shall be in effect at the date hereof, or which shall hereafter be entered into by or on behalf of the Trustor. Capitalized terms used herein but not defined herein shall have the meaning ascribed thereto in the Loan Agreement.

Section 6.15. Miscellaneous.

(a) This Deed of Trust and its provisions cannot be changed, waived, discharged or terminated orally but only by an agreement in writing, signed by the party against whom enforcement of the change, waiver, discharge or termination is sought, and the same shall then be effective only for the period and on the conditions and for the specific instances and purposes specified in such writing. No notice to or demand on the

Trustor in any case shall entitle the Trustor to any other or further notice or demand in similar or other circumstances. No course of dealing between the Trustor and Beneficiary or any failure or delay on the part of the Beneficiary in exercising any rights or remedies hereunder shall operate as a waiver of any rights or remedies of the Beneficiary and no single or partial exercise of any rights or remedies hereunder shall operate as a waiver or preclude the exercise of any other rights or remedies hereunder.

(b) Wherever pursuant to this Deed of Trust, the Beneficiary exercises any right given to it to approve or disapprove, or any arrangement or term is to be satisfactory to the Beneficiary, the decision of the Beneficiary to approve or disapprove or to decide that arrangements or terms are satisfactory or not satisfactory shall, except as otherwise set forth herein, be in the sole discretion of the Beneficiary and shall be final and conclusive.

(c) This Deed of Trust shall be construed without any regard to any presumption or rule requiring construction against the party causing such instrument or any portion thereof to be drafted.

(d) All terms and words used in this Deed of Trust, regardless of the number or gender in which they are used, shall be deemed to include any other number and any other gender as the context may require.

(e) The section and paragraph headings in this Deed of Trust are for convenience of reference only and shall not limit or otherwise affect any of the terms hereof.

(f) If any words or phrases in this Deed of Trust have been stricken out or otherwise eliminated, this Deed of Trust shall be construed as if the words or phrases so stricken out or otherwise eliminated were never included in this Deed of Trust and no implication or inference shall be drawn from the fact that said words or phrases were so stricken out or otherwise eliminated.

(g) The words "herein," "hereby," "hereunder," and words of similar import shall be construed to refer to this Deed of Trust as a whole, and not to any particular Paragraph, unless expressly so stated.

(h) All covenants contained herein shall run with the Property until the Obligations have been, satisfied.

(i) The Trustor is hereby prohibited from exercising against the Beneficiary any right or remedy which it might otherwise be entitled to exercise against any one or more (but less than all) of the individual parties constituting the Beneficiary, including, without limitation, any right of set-off or any defense.

Section 6.16. Trustor's Waivers. The Trustor, for itself and its successors and assigns, hereby irrevocably waives and releases to the extent permitted by law, and whether now or hereafter in force, (a) the benefit of any and all valuation and appraisal laws; (b) any right of redemption after the date of any sale of the Property upon foreclosure, whether statutory, common law or otherwise, in respect of the Property; (c) all exemption laws whatsoever and all moratoriums, extensions or stay laws or rules, or orders of Court in the nature of any one or more of them; and (d) any right to have the Property marshaled upon any foreclosure of this Deed of Trust.

Section 6.17. Intentionally Omitted.

Section 6.18. Environmental Matters.

(a) Trustor represents and warrants that there are no Hazardous Substances (hereinafter defined) in or on the Property other than such as may have been disclosed to Beneficiary in writing prior to the date hereof.

(b) Without Beneficiary's prior written consent which may be granted or withheld in Beneficiary's sole discretion, Trustor shall make or permit no use of the Property that would involve the generation, storage, treatment, discharge, handling, refining, release or disposal of any Hazardous Substances (as defined below).

(c) At its sole cost and expense, Trustor shall, and shall cause any tenant or occupant of the Property to, comply with all applicable federal, state and local laws, rules, regulations and orders with respect to the discharge, generation, removal, transportation, storage, treatment and handling of Hazardous Substances, including but not limited to the federal Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended by the Superfund Amendment and Reauthorization Act of 1986, the federal Resource Conservation and Recovery Act, as amended, the federal Water Pollution Control Act, the federal Clean Air Act, the federal regulations promulgated pursuant to any of the foregoing, together with all rules and regulations promulgated thereunder, as amended from time to time, pay immediately when due the cost of removal of Hazardous Substances, and keep the Property free and clear of any lien imposed pursuant to such laws, rules, regulations or orders. In the event Trustor fails to do so, Beneficiary may declare this Deed of Trust to be in Default.

(d) Trustor shall indemnify Beneficiary and hold Beneficiary harmless from and against all loss, cost, damage and expense (including, without limitation, reasonable attorneys' fees and costs incurred in the investigation, defense and settlement of claims) that Beneficiary may incur as a result of or in connection with the assertion against Beneficiary or the Property of any claim relating to the presence or removal of any hazardous waste or substance referred to in this paragraph, or compliance with any federal, state or local laws, rules, regulations or orders relating thereto unless such claim arises solely from Beneficiary's gross negligence or willful misconduct.



(e) The term "Hazardous Substances" as used in this Deed of Trust shall include, without limitation, gasoline, petroleum products, explosives, radioactive materials, polychlorinated biphenyls or related or similar materials, or any other substance or material defined as a hazardous or toxic substance or material by any federal, state or local law, ordinance, rule, or regulation.

(f) Trustor shall notify Beneficiary immediately in writing upon learning of:

(i) any spill, discharge or release of any Hazardous Substances on or near the Property that may involve a cleanup cost of One Thousand and 00/100 (\$1,000.00) Dollars or more;

(ii) any circumstances that may result in a violation of this Section 6.18;

(iii) any governmental inquiry or inspection is undertaken or notice issued by any governmental agency or any source whatsoever with respect to Hazardous Substances on, from, affecting, or used, stored or discharged by any occupant of, the Property.

(g) If any investigation, environmental report or governmental investigation or order indicates that there may exist any damage or risk to the Property, or any liability of Trustor relating to any Hazardous Substances, or other environmental conditions with respect to the Property, then unless the holder of the Prior Mortgage, if any, has made a similar demand which Trustor has complied with, and has supplied Beneficiary with evidence of said compliance, Beneficiary may require Trustor to furnish immediately an indemnity bond in an amount determined by Beneficiary, in its discretion, to be sufficient to pay all actual and estimated cleanup costs and to protect against any liens that may arise with respect to such potential cleanup costs. Beneficiary's demand that Trustor post any bond or other security shall not be a waiver of any Default or of any other right or remedy available to Beneficiary.

(h) The obligations and liabilities of Trustor under this Paragraph 6.18 shall survive any entry of a judgment of foreclosure or the delivery of a deed in lieu of foreclosure of this Deed of Trust.

#### Section 6.19. Asbestos.

(a) Trustor represents and warrants that, to the actual knowledge of Trustor, there is no friable asbestos or any material containing asbestos and deemed hazardous by federal, state or local laws, rules, regulations or orders respecting such material ("Asbestos") on the Property.

(b) Trustor shall not install or permit to be installed Asbestos in the Property. With respect to any such material currently present in the Property, Trustor shall promptly comply with such federal, state or local laws, rules, regulations or orders at

Trustor's sole cost and expense. If Trustor shall fail to comply with any such law, rule, regulation or order such failure shall constitute a Default.

(c) Trustor (x) shall protect, defend, indemnify and hold Beneficiary harmless from and against all loss, cost, damage and expense (including, without limitation, reasonable attorneys' fees and costs incurred in the investigation, defense and settlement of claims) that Beneficiary may incur as a result of or in connection with the assertion against Beneficiary or the Property of any claim relating to (i) the presence or removal of any asbestos or asbestos containing substance, including, without limitation, the cost of such removal, or (ii) compliance with any federal, state or local laws, rules, regulations or orders relating thereto, and (y) guarantees to Beneficiary the payment of all costs and expenses which may be incurred by Beneficiary in performing any Asbestos remedial action not performed (or caused to be performed) by Trustor as required under this Deed of Trust.

(d) The obligations and liabilities of Trustor under this Paragraph 6.19 shall survive any entry of a judgment of foreclosure or the delivery of a deed in lieu of foreclosure of this Deed of Trust.

Section 6.20. Modifications. This Deed of Trust, the Note and all other Obligations are subject to Modification (as defined below). To the extent permitted by law, this Deed of Trust secures all Modifications from the date upon which this Deed of Trust was originally recorded, including future loans and extensions of credit and changes in the interest rate, due date, amount or other terms and conditions of any Obligations.

"Modification" shall have the meaning set forth in N.J.S.A. 46:9-8.2 et seq., which statute relates, inter alia, to changes in the interest rate, due date or other terms or conditions of a "mortgage loan", or future advances pursuant to a "line of credit", as defined in that statute.

Section 6.21. No Cooperative or Condominium. Trustor shall not operate the Property, or permit same to be operated as a cooperative or condominium building(s) in which the tenants or occupants participate in the ownership, control, or management of the Property or any part thereof, as tenants, stockholders or otherwise.

Section 6.22. Severability. If any provision of this Deed of Trust or the application thereof to any person or circumstance shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Deed of Trust nor the application of such provision to any other person or circumstances shall be affected thereby, but rather the same shall be enforced to the greatest extent permitted by law. If the rights and liens created by this Deed of Trust shall be held by a court of competent jurisdiction to be invalid or unenforceable as to any part of the Obligation, the portion of the Obligation which as the result of such invalidity or unenforceability is no longer

secured by the liens and security interests herein granted shall be completely paid prior to the payment of the portion, if any, of the Obligation which shall continue to be secured hereunder, and all payments made on the Obligation shall be considered to have been paid on and applied first to the complete payment of the unsecured portion of the Obligation.

Section 6.23. Binding Effect. The covenants herein contained shall bind, and the benefits and advantages shall inure to, the respective heirs, executors, administrators, personal representatives, successors, and assigns of the parties hereto and shall be covenants running with the Land. The term "Trustor" shall include in their individual capacities and jointly all parties hereinabove named a Trustor. The duties, covenants, conditions, obligations, and warranties of Trustor in this Deed of Trust shall be joint and several obligations of Trustor and, if more than one, of each party named a Trustor hereinabove, and each such party's heirs, personal representatives, successors and assigns. Each party who executes this Deed of Trust and each subsequent owner of the Property, or any part thereof (other than Beneficiary), covenants and agrees that it will perform, or cause to be performed, each term, provision, covenant and condition of this Deed of Trust.

Section 6.24. Counterparts. This Deed of Trust has simultaneously been executed in a number of identical counterparts, each of which, for all purposes, shall be deemed an original. If any Trustor is a corporation, this instrument is executed, acknowledged and delivered by Trustor's officers hereunto duly authorized.

Section 6.25. Choice of Law. THE LOAN SECURED BY THIS DEED OF TRUST WAS NEGOTIATED IN THE STATE OF NEW JERSEY, THIS DEED OF TRUST WAS NEGOTIATED IN THE STATE OF NEW JERSEY, WAS EXECUTED AND DELIVERED BY TRUSTOR AND ACCEPTED BY BENEFICIARY IN THE STATE OF NEW JERSEY, AND THE PROCEEDS OF THE NOTE WERE DISBURSED FROM THE STATE OF NEW JERSEY, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE. THIS DEED OF TRUST AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW JERSEY APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE, WITHOUT REGARD TO CONFLICTS OF LAWS CONSIDERATIONS AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES THE PROVISIONS FOR THE CREATION, PERFECTION, PRIORITY, ENFORCEMENT AND FORECLOSURE OF THE LIENS AND SECURITY INTERESTS CREATED HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE,

IT BEING UNDERSTOOD THAT, TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH STATE, THE LAW OF THE STATE OF NEW JERSEY SHALL GOVERN THE VALIDITY AND ENFORCEABILITY OF ALL LOAN DOCUMENTS, AND THE DEBT OR OBLIGATIONS ARISING HEREUNDER, AND THAT THIS SECTION SHALL IN NO EVENT BE CONSTRUED TO PROVIDE THAT THE SUBSTANTIVE LAW OF THE STATE SHALL APPLY TO THE INDEBTEDNESS SECURED BY THIS DEED OF TRUST, OR EVIDENCED BY THE NOTE, THE LOAN AGREEMENT OR THE OTHER LOAN DOCUMENTS, INCLUDING THE CHARGING AND COLLECTION OF INTEREST UNDER THE NOTE OR WITH RESPECT TO THE OTHER OBLIGATIONS AND TO THE ENFORCEMENT OF ALL RIGHTS UNDER THE GUARANTY, WHICH ARE AND SHALL CONTINUE TO BE GOVERNED BY THE SUBSTANTIVE LAW OF THE STATE OF NEW JERSEY. THE PARTIES FURTHER AGREE THAT TRUSTEE AND BENEFICIARY MAY ENFORCE ITS RIGHTS UNDER THE NOTE, THIS DEED OF TRUST, AND THE OTHER LOAN DOCUMENTS INCLUDING ITS RIGHTS TO SUE TRUSTOR TO COLLECT ANY OUTSTANDING INDEBTEDNESS OR TO OBTAIN A JUDGMENT FOR ANY DEFICIENCY FOLLOWING FORECLOSURE IN ACCORDANCE WITH NEW JERSEY LAW AND TRUSTOR HEREBY WAIVES TO THE MAXIMUM EXTENT PERMITTED BY LAW ANY RIGHTS WHICH IT MAY HAVE WITH RESPECT THERETO.

Section 6.26. Jurisdiction. AT BENEFICIARY'S ELECTION, TO BE EXERCISED IN ITS SOLE DISCRETION, ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST TRUSTOR OR BENEFICIARY ARISING OUT OF OR RELATING TO THIS DEED OF TRUST (OTHER THAN AN ACTION FOR JUDICIAL FORECLOSURE OR TO APPOINT A RECEIVER), THE NOTE AND THE OTHER LOAN DOCUMENTS SHALL BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN NEW JERSEY, AND TRUSTOR WAIVES ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND TRUSTOR HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. TRUSTOR DOES HEREBY DESIGNATE AND APPOINT THE CORPORATION TRUST COMPANY, HAVING AN ADDRESS AT 820 BEAR TAVERN ROAD, WEST TRENTON, NEW JERSEY 08628, AS ITS AUTHORIZED AGENT TO ACCEPT AND ACKNOWLEDGE ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW JERSEY, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE OF TRUSTOR MAILED OR DELIVERED TO TRUSTOR IN THE MANNER PROVIDED IN THE DEED OF TRUST, SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON TRUSTOR IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW JERSEY. TRUSTOR SHALL GIVE

PROMPT NOTICE TO THE BENEFICIARY OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW JERSEY (WHICH OFFICE SHALL BE DESIGNATED AS THE ADDRESS FOR SERVICE OF PROCESS), AND SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW JERSEY OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR. NOTHING CONTAINED HEREIN SHALL BE DEEMED TO RESTRICT IN ANY MANNER OR IMPOSE ANY CONDITIONS UPON GRANTEE'S OR BENEFICIARY'S RIGHT TO COMMENCE ANY LEGAL SUIT, ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS DEED OF TRUST, THE NOTE OR THE OTHER LOAN DOCUMENTS IN THE FEDERAL OR STATE COURTS LOCATED IN THE STATE OF NEVADA.

Section 6.27. Waiver Of Jury Trial. TRUSTOR AND GRANTEE AGREE THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT BY TRUSTOR OR GRANTEE ON OR WITH RESPECT TO THIS DEED OF TRUST OR ANY OTHER LOAN DOCUMENT OR THE DEALINGS OF THE PARTIES WITH RESPECT HERETO OR THERETO, SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. GRANTEE AND TRUSTOR EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING. FURTHER, TRUSTOR WAIVES ANY RIGHT IT MAY HAVE TO CLAIM OR RECOVER, IN ANY SUCH SUIT, ACTION OR PROCEEDING, ANY SPECIAL, EXEMPLARY, PUNITIVE, CONSEQUENTIAL OR OTHER DAMAGES OTHER THAN, OR IN ADDITION TO, ACTUAL DAMAGES. TRUSTOR ACKNOWLEDGES AND AGREES THAT THIS SECTION IS A SPECIFIC AND MATERIAL ASPECT OF THIS DEED OF TRUST AND THAT GRANTEE WOULD NOT EXTEND CREDIT TO TRUSTOR IF THE WAIVERS SET FORTH IN THIS SECTION WERE NOT A PART OF THIS DEED OF TRUST.

#### ARTICLE VII SPECIAL STATE PROVISIONS

In the event of any conflict between the terms and provisions of this Article and any other provision of this Deed of Trust, the terms and provisions of this Article shall govern and control.

Section 7.01. Instrument. This Deed of Trust shall be deemed to be and shall be enforceable as a deed of trust, leasehold deed of trust, security agreement and financing statement.

Section 7.02. Foreclosure. Upon the occurrence of any Default, Beneficiary may request Trustee to proceed with foreclosure under the power of sale which is hereby

conferred, such foreclosure to be accomplished in accordance with the following provisions:

(a) Public Sale. Trustee is hereby authorized and empowered, and it shall be Trustee's special duty, upon such request of Beneficiary to sell the Property, or any part thereof, at public auction to the highest bidder for cash, with or without having taken possession of same. Any such sale (including notice thereof) shall comply with the applicable requirements, if any, governing sales of Nevada real property under powers of sale, conferred by deeds of trust. If there is no statute in force at the time of the sale governing sales of Nevada real property under powers of sale conferred by deeds of trust, such sale shall comply with applicable law, at the time of the sale governing sales of Nevada real property under powers of sale conferred by deeds of trust.

(b) Right to Require Proof of Financial Ability and/or Cash Bid. At any time during the bidding, the Trustee may require a bidding party: (A) to disclose its full name, state and city of residence, occupation, and specific business office location, and the name and address of the principal the bidding party is representing (if applicable), and (B) to demonstrate reasonable evidence of the bidding party's financial ability (or, if applicable, the financial ability of the principal of such bidding party), as a condition to the bidding party submitting bids at the foreclosure sale. If any such bidding party (the "Questioned Bidder") declines to comply with the Trustee's requirement in this regard, or if such Questioned Bidder does respond but the Trustee, in Trustee's sole and absolute discretion, deems the information or the evidence of the financial ability of the Questioned Bidder (or, if applicable, the principal of such bidding party) to be inadequate, then the Trustee may continue the bidding with reservation; and in such event (1) the Trustee shall be authorized to caution the Questioned Bidder concerning the legal obligations to be incurred in submitting bids, and (2) if the Questioned Bidder is not the highest bidder at the sale, or if having been the highest bidder the Questioned Bidder fails to deliver the cash purchase price payment promptly to the Trustee, all bids by the Questioned Bidder shall be null and void. The Trustee may, in Trustee's sole and absolute discretion, determine that a credit bid may be in the best interest of the Trustor and Beneficiary, and elect to sell the Property for credit or for a combination of cash and credit; provided, however, that the Trustee shall have no obligation to accept any bid except an all cash bid. In the event the Trustee requires a cash bid and cash is not delivered within a reasonable time after conclusion of the bidding process, as specified by the Trustee, but in no event later than 3:45 p.m. local time on the day of sale, then said contingent sale shall be null and void, the bidding process may be recommenced, and any subsequent bids or sale shall be made as if no prior bids were made or accepted.

(c) Sale Subject to Unmatured Obligation. In addition to the rights and powers of sale granted under the preceding provisions of this subsection, if default is made in the payment of any installment of the Obligation, Beneficiary may, at Beneficiary's option, at once or at any time thereafter while any matured installment remains unpaid, without

declaring the entire Obligation to be due and payable, orally or in writing direct Trustee to enforce this trust and to sell the Property subject to such unmatured Obligation and to the rights, powers, liens, security interests, and assignments securing or providing recourse for payment of such unmatured Obligation in the same manner, all as provided in the preceding provisions of this subsection. Sales made without maturing the Obligation may be made hereunder whenever there is a default in the payment of any installment of the Obligation, without exhausting the power of sale granted hereby, and without affecting in any way the power of sale granted under this subsection, the unmatured balance of the Obligation or the rights, powers, liens, security interests, and assignments securing or providing recourse for payment of the Obligation.

(d) Partial Foreclosure. Sale of a part of the Property shall not exhaust the power of sale, but sales may be made from time to time until the Obligation is paid in full. It is intended by each of the foregoing provisions of this subsection that Trustee may, after any request or direction by Beneficiary, sell not only the Land and the Improvements, but also the Accessories and other interests constituting a part of the Property or any part thereof, along with the Land and the Improvements or any part thereof, as a unit and as a part of a single sale, or may sell at any time or from time to time any part or parts of the Property separately from the remainder of the Property. It shall not be necessary to have present or to exhibit at any sale any of the Property.

(e) Trustee's Deeds. After any sale under this subsection, Trustee shall make good and sufficient deeds, assignments, and other conveyances to the purchaser or purchasers thereunder in the name of Trustor, conveying the Property or any part thereof so sold to the purchaser or purchasers with general warranty of title by Trustor. It is agreed that in any deeds, assignments or other conveyances given by Trustee, any and all statements of fact or other recitals therein made as to the identity of Beneficiary, the occurrence or existence of any Default, the notice of intention to accelerate, or acceleration of, the maturity of the Obligation, the request to sell, notice of sale, time, place, terms and manner of sale, and receipt, distribution, and application of the money realized therefrom, the due and proper appointment of a substitute trustee, and without being limited by the foregoing, any other act or thing having been duly done by or on behalf of Beneficiary or by or on behalf of Trustee, shall be taken by all courts of law and equity as prima facie evidence that such statements or recitals state true, correct and complete facts and are without further question to be so accepted, and Trustor does hereby ratify and confirm any and all acts that Trustee may lawfully do in the Property by virtue hereof.

Section 7.03. Receiver. Beneficiary, as a matter of right and without regard to the sufficiency of the security for repayment of the Obligation and performance and discharge of the obligations hereunder, without notice to Trustor and without any showing of insolvency, fraud, or mismanagement on the part of Trustor, and without the necessity of filing any judicial or other proceeding other than the proceeding for

appointment of a receiver, shall be entitled to the appointment of a receiver or receivers of the Property or any part thereof, and of the Rents, and Trustor hereby irrevocably consents to the appointment of a receiver or receivers. Any receiver appointed pursuant to the provisions of this subsection shall have the usual powers and duties of receivers in such matters.

Section 7.04. INTENTIONALLY DELETED.

Section 7.05. Entire Agreement. THIS DEED OF TRUST AND THE OTHER LOAN DOCUMENTS EMBODY THE FINAL, ENTIRE AGREEMENT AMONG THE PARTIES HERETO AND SUPERSEDE ANY AND ALL PRIOR COMMITMENTS, AGREEMENTS, REPRESENTATIONS AND UNDERSTANDINGS, WHETHER WRITTEN OR ORAL, RELATING TO THE SUBJECT MATTER HEREOF AND THEREOF AND MAY NOT BE CONTRADICTED OR VARIED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OR DISCUSSIONS OF THE PARTIES HERETO. THERE ARE NO ORAL AGREEMENTS AMONG THE PARTIES HERETO.

Section 7.06. Notice of Indemnification. TRUSTOR ACKNOWLEDGES THAT THIS DEED OF TRUST PROVIDES FOR INDEMNIFICATION OF BENEFICIARY BY TRUSTOR.

Section 7.07. Maturity Date. The original stated Maturity Date of the Note is June 30, 2009.

Section 7.08. Due on Sale. The entire Obligation shall be due and payable in full in the event of any sale, conveyance, alienation, Deed of Trust, encumbrance, pledge or other transfer of the Property (or any part thereof) unless expressly permitted by the terms of this Deed of Trust or otherwise consented to in writing by Beneficiary.

Section 7.09. Covenants of NRS 107.030. When not inconsistent with the above, covenant numbers 1, 2 (full replacement value), 3, 4 (Note rate), 5, 6, 7 (a reasonable percentage), 8, and 9 of NRS 107.030 are hereby adopted and made a part of this Deed of Trust.



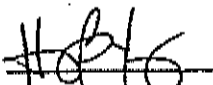
TRUSTOR HEREBY ACKNOWLEDGES THAT IT HAS RECEIVED  
WITHOUT CHARGE A TRUE COPY OF THIS DEED OF TRUST.

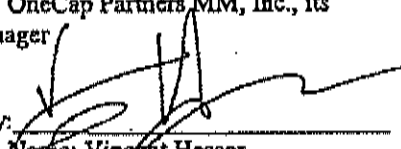
EXECUTED as of the date first above written.

WITNESS:

OneCap Partners 2, LLC,  
a Nevada limited liability company

By: OneCap Partners MM, Inc., its  
Manager

  
Hazel B. Yeung

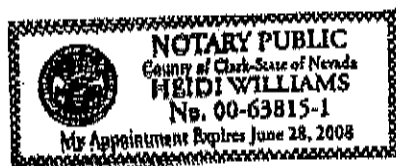
By:   
Name: Vincent Hesser  
Title: President

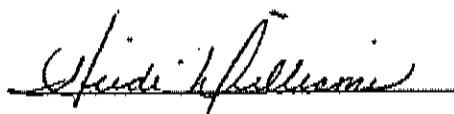
STATE OF *Nevada* )  
                                  ) ss.:  
COUNTY OF *Clark* )

I certify that on June 14, 2006, Vincent Hesser came before me in person and  
stated to my satisfaction that he:

(a) made the attached instrument; and

(b) was authorized to and did execute this instrument on behalf of and as  
President of OneCap Partners MM, Inc. the Manager of OneCap Partners 2, LLC, a  
Nevada limited liability company (the "Company"), the entity named in this instrument,  
as the free act and deed of the Company, by virtue of the authority granted by its  
Operating Agreement and its members.





NOTARY PUBLIC

**EXHIBITS:**

- A - Property Description
- B - Permitted Exceptions
- C - Leases

**SCHEDULES:**

Schedule of Principal Loan Documents

EXHIBIT "A"

PROPERTY DESCRIPTION

PARCEL ONE (1):

LOT TWO (2) AS SHOWN ON THAT CERTAIN PARCEL MAP IN FILE 53 OF  
PARCEL MAPS, PAGE 93, IN THE OFFICE OF THE COUNTY RECORDER OF  
CLARK COUNTY, NEVADA.

APN No.: 264-25-101-001

PARCEL TWO (2):

THE SOUTH 1000 FEET OF THE NORTH 2000 FEET (MEASURED AT A RIGHT  
ANGLE TO THE NORTH LINE) OF SECTION 25, TOWNSHIP 32 SOUTH,  
RANGE 66 EAST, M.D.B. & M.

APN No.: 264-25-201-001

EXHIBIT "B"

PERMITTED EXCEPTIONS

Those items listed in Schedule B, Section II of the title commitment/proforma issued by  
Commonwealth Land Title Insurance Company under Escrow No. 06-06-0235-BB.

B-1

31392/0400-1438033v3

VH000156 00125

EXHIBIT "C"

LEASES

None.

C-1

31392/0400-1438033 v3

VH000154F00126

**SCHEDULE OF PRINCIPAL LOAN DOCUMENTS**

1. Loan Commitment dated June 6, 2006;
2. Loan and Security Agreement dated as of the date hereof;
3. Promissory Note dated as of the date hereof;
4. Deed of Trust and with Security Agreement, Financing Statement for Fixture Filing and Assignment of Rents dated as of the date hereof;
5. Document Re-Execution Agreement dated as of the date hereof;
6. Affidavit and Indemnity of Borrower and Guarantors dated as of the date hereof;
7. Assignment of Leases and Rents dated as of the date hereof;
8. Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and Reports dated as of the date hereof;
9. Guaranty dated as of the date hereof; and
10. UCC-1 Financing Statements dated as of the date hereof; and
11. Closing Statement dated as of the date hereof.



**EXHIBIT “4”**

VH000160



## SUBORDINATION AND ATTORNMENT AGREEMENT

THIS SUBORDINATION AND ATTORNMENT AGREEMENT (this "Agreement") made as of the 15<sup>th</sup> day of June, 2006, by and among KENNEDY FUNDING, INC. ("Lender"), GARRY OWEN II, LLC, an Arizona limited liability company ("Option Holder") and ONECAP PARTNERS 2, LLC, a Nevada limited liability company ("Borrower").

### WITNESSETH:

WHEREAS, Lender has agreed to make a loan (the "Loan") of up to Twelve Million (\$12,000,000) Dollars to Borrower;

WHEREAS, the Loan will be evidenced by a Promissory Note (the "Note") of even date herewith made by Borrower to order of Lender and will be secured by, among other things, a Deed of Trust, Assignment of Leases and Rents and Security Agreement (the "Deed of Trust") of even date herewith made by Borrower to Lender covering the land (the "Land") described on Exhibit A attached hereto and all improvements (the "Improvements") now or hereafter located on the land (the Land and the Improvements hereinafter collectively referred to as the "Property"); and

WHEREAS, by a First Amended to Purchase and Sale Agreement dated as of June 9, 2006 (which purchase agreement, as the same may have been amended and supplemented, is hereinafter called the "Purchase Agreement"), the Borrower has granted to the Option Holder a limited option to purchase the Land for \$30,000,000 ("Option"); and

WHEREAS, the parties hereto desire to make the Option subject and subordinate to the Deed of Trust.

NOW, THEREFORE, the parties hereto, in consideration of the covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby agree as follows:

The Option, as the same may hereafter be modified, amended or extended, and all of Option Holder's right, title and interest in and under the Option, are and shall be unconditionally subject and subordinate to the Deed of Trust and the lien thereof, to all the terms, conditions and provisions of the Deed of Trust, to each and every advance made or hereafter made under the Deed of Trust, and to all renewals, modifications, consolidations, replacements, substitutions and extensions of the Deed of Trust; provided, however, and Lender agrees, that so long as (A) no event has occurred and no condition exists, which would entitle Borrower to terminate the Purchase Agreement and/or the Option or would cause, without further action of Borrower, the termination of the Purchase Agreement and/or the Option, (B) the Purchase Agreement and the Option shall

be in full force and effect and shall not have been otherwise modified or supplemented in any way without Lender's prior written consent, (C) Option Holder attorns to Lender, which attornment is hereby acknowledged by Option Holder as effective and self-operative, without the execution of any other instruments, and (D) neither Lender nor its successors or assigns shall be liable under any representation, warranty or covenant contained in the Purchase Agreement or the Option; then, and in such event the Option shall be acknowledged by Lender and Lender will accept the attornment of the Option Holder.

If Lender succeeds to the interest of Borrower or any successor to Borrower (such event, whether a foreclosure, deed-in-lieu of foreclosure or other acquisition, being referred to herein as a "Foreclosure"), in no event shall Lender (i) have any liability for any act or omission of Borrower under the Purchase Agreement or the Option which occurs prior to the date Lender succeeds to the rights of Borrower, nor any liability for claims, offsets or defenses which Option Holder might have had against Borrower, or (ii) be bound by any modification, amendment, extension or cancellation of the Purchase Agreement or the Option not consented to in writing by Lender; and further provided, that nothing herein shall negate the right of Lender after a Foreclosure to exercise the rights and remedies of Borrower under the Purchase Agreement and/or Option. Option Holder further agrees with Lender that Option Holder will not voluntarily subordinate the Purchase Agreement or the Option to any lien or encumbrance without Lender's prior written consent.

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute and be construed as one and the same instrument. This Agreement shall be interpreted and construed in accordance with and governed by the laws of the State of Nevada.

All notices to be given under this Agreement shall be in writing and shall be deemed served upon receipt by the addressee if served personally or, if mailed, upon the first to occur of receipt or the refusal of delivery as shown on a return receipt, after deposit in the United States Postal Service certified mail, postage prepaid, addressed to the address of Borrower, Option Holder or Lender appearing below, or, if sent by telegram, when delivered by or refused upon attempted delivery by the telegraph office. Such addresses may be changed by notice given in the same manner. If any party consists of multiple individuals or entities, then notice to any one of same shall be deemed notice to such party.

If to Lender: Kennedy Funding, Inc.  
Two University Plaza, Suite 402  
Hackensack, New Jersey 07601  
Attention: Jeffrey Wolfer

Facsimile No. (201) 342-8373

With a copy to: Cole, Schotz, Meisel, Forman & Leonard P.A.  
25 Main Street  
Hackensack, New Jersey 07602-0800  
Attention: Michael R. Leighton, Esq.  
Facsimile No.: (201) 489-1536

If to Borrower: OneCap Partners 2, LLC  
5440 W. Sahara Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89146  
Attn: Mr. Vincent Hesser

With a copy to: Harold Gewerter, Esq.  
5440 W. Sahara Ave., Suite #202  
Las Vegas, NV 89146  
Facsimile No. (702) 382-1759

If to Option Holder: Garry Owen II, LLC  
c/o Arizona Land Advisors, LLC  
6710 North Scottsdale Road, Suite 210  
Scottsdale, Arizona 85253  
Attn: Susan Lundquist for David W. Lords  
Facsimile No. (480) 483-0000

With a copy to: Jim Valletta, Esq.  
Warner Angle Hallam Jackson & Formanek PLC  
3550 North Central Avenue, Suite 1500  
Phoenix, Arizona 85012-2113  
Facsimile No. (602) 234-0419

This Agreement shall apply to, bind and inure to the benefit of the parties hereto and their respective successors and assigns. As used herein "Lender" shall include any subsequent holder of the Deed of Trust.

Option Holder acknowledges that Borrower has assigned to Lender its right, title and interest in and to the rents, issues and profits of the Property pursuant to the Deed of Trust and an Assignment of Leases and Rents executed simultaneously therewith, and that Landlord has been granted the license to collect such rents provided no Event of Default has occurred under, and as defined in, the Deed of Trust.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first above written.

**LENDER:**

KENNEDY FUNDING, INC., a New Jersey corporation

By: 

Print Name: Jeffrey W. Linder

Print Title: President & CO-CEO

**BORROWER:**

OneCap Partners 2, LLC, a Nevada limited liability company

By: OneCap Partners MM Inc., its Manager

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

Name: Vincent Hesser

Title: President

**OPTION HOLDER:**

Garry Owen II, LLC, an Arizona limited liability company

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

Print Name: David W. Lords

Print Title: President

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement  
as of the day and year first above written.

**LENDER:**


KENNEDY FUNDING, INC., a New Jersey  
corporation

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

**BORROWER:**

OneCap Partners 2, LLC, a Nevada limited  
liability company

By: OneCap Partners MM Inc., its Manager

By:   
Name: Vincent Hesser  
Title: President

**OPTION HOLDER:**

Garry Owen II, LLC, an Arizona limited  
liability company

By: \_\_\_\_\_  
Print Name: David W. Lords  
Print Title: President

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first above written.

**LENDER:**

KENNEDY FUNDING, INC., a New Jersey corporation

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

**BORROWER:**

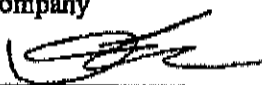
OneCap Partners 2, LLC, a Nevada limited liability company

By: OneCap Partners MM Inc., its Manager

By: \_\_\_\_\_  
Name: Vincent Hesser  
Title: President

**OPTION HOLDER:**

Garry Owen II, LLC, an Arizona limited liability company

By:  \_\_\_\_\_  
Print Name: David W. Lords  
Print Title: President

STATE OF NEW JERSEY )

)SS.:

COUNTY OF BERGEN )

I CERTIFY that on June 15, 2006, Jeffrey Walter personally came before me and this person acknowledged under oath, to my satisfaction, that he:

(a) executed the attached Subordination and Attornment Agreement;  
and

(b) was authorized to and did execute the attached Subordination and Attornment Agreement on behalf of and as President of Kennedy Funding, Inc., the entity named in this instrument, by virtue of authority granted by its bylaws and board of directors.

  
Notary Public

Dawni M. Furlong  
Notary Public of New Jersey  
ID # 2297497  
My Commission Expires 03/05/08

STATE OF )

): ss.:

COUNTY OF )

I certify that on June \_\_\_\_, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

(a) executed the attached Subordination and Attornment Agreement; and

(b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc. the Manager of OneCap Partners 2, LLC, a Nevada limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.

\_\_\_\_\_  
Notary Public

STATE OF NEW JERSEY )  
 )SS.:  
COUNTY OF BERGEN )

I CERTIFY that on June \_\_, 2006, \_\_\_\_\_ personally came before me and this person acknowledged under oath, to my satisfaction, that he:

(a) executed the attached Subordination and Attornment Agreement;  
and

(b) was authorized to and did execute the attached Subordination and Attornment Agreement on behalf of and as \_\_\_\_\_ of Kennedy Funding, Inc., the entity named in this instrument, by virtue of authority granted by its bylaws and board of directors.

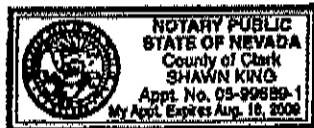
\_\_\_\_\_  
Notary Public

STATE OF *Nevada* )  
 ) ss.:  
COUNTY OF *Clark* )

I certify that on June 15, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

(a) executed the attached Subordination and Attornment Agreement;  
and

(b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc. the Manager of OneCap Partners 2, LLC, a Nevada limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.



\_\_\_\_\_  
Notary Public



STATE OF Arizona )  
COUNTY OF Mohave )SS.:

I certify that on June 15, 2006, David W. Lords came before me in person and stated to my satisfaction that he:

- (a) executed the attached Subordination and Attornment Agreement; and
- (b) was authorized to and did execute this instrument on behalf of and as President of Garry Owen II, LLC, an Arizona limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its members and operating agreement.



Archibeque  
Notary Public



**EXHIBIT "5"**

VH000171

**ASSIGNMENT OF LICENSES,  
CONTRACTS, PLANS, SPECIFICATIONS,  
SURVEYS, DRAWINGS AND REPORTS**

THIS ASSIGNMENT ("Assignment"), made as of the 15<sup>th</sup> day of June, 2006, from **ONECAP PARTNERS 2, LLC**, a Nevada limited liability company, having an address at 5440 W. Sahara Avenue, Third Floor, Las Vegas, Nevada 89146 (the "Borrower" or "Assignor"), to **KENNEDY FUNDING, INC.**, a New Jersey corporation, having an address at Two University Plaza, Suite 402, Hackensack, New Jersey 07601 (hereinafter "Lender" or "Assignee").

**W I T N E S S E T H**

WHEREAS, Lender has agreed to lend **TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS** (the "Loan") to Borrower.

WHEREAS, the Loan is evidenced by that certain Promissory Note (the "Note"), of even date hereof, in the principal amount of **TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS** with interest thereon, and is secured by, among other things, that certain Deed of Trust and Security Agreement (the "Mortgage") of even date herewith from Assignor to Lender, upon certain real and personal property located on and more particularly described in the Mortgage (the "Mortgaged Property"). The Loan is guaranteed by the separate guaranty (the "Guaranty") of even date herewith, of Vincent Hesser and OneCap Partners MM, Inc., a Nevada corporation (collectively, the "Guarantor") to Assignee. The Note, Mortgage, the Guaranty and any and all other documents executed and delivered in connection with the Loan, are hereinafter sometimes collectively referred to as the "Loan Documents." Unless otherwise specified herein, capitalized terms used herein shall have the same meanings as defined in the Loan Documents.

WHEREAS, Lender is unwilling to lend funds to Borrower or to accept the Note, the Mortgage and the other Loan Documents, unless this Assignment is executed by Borrower and delivered to Lender.

NOW, THEREFORE, in consideration of the Loan, and intending to be legally bound, Assignor does hereby agree, as follows:

1) Assignor hereby assigns, transfers and sets over unto Lender all of Assignor's right, title, privileges and interest in and to the Additional Collateral (as hereinafter defined) and all rights and benefits therefrom as security for the full, timely and faithful repayment by Assignor of the principal, interest and any and all other sums due under the Loan Documents and performance by Assignor of all of its obligations under the Loan Documents, to the fullest extent permitted by law and by the terms of the Additional Collateral.

2) The following constitute the "Additional Collateral" hereby assigned, transferred and set over to Lender:

(a) All licenses, permits, approvals, certificates and agreements with or from all boards, agencies, departments, governmental or quasi-governmental, relating directly or indirectly to the ownership, use, operation and maintenance of the Mortgaged Property and the construction, use, development, renovation and installation of improvements to the Mortgaged Property, whether heretofore or hereafter issued or executed (collectively the "Licenses"); said boards, agencies, departments, governmental or otherwise being hereinafter collectively referred to as "Governmental Authorities."

(b) All contracts, subcontracts, agreements, service agreements, rights, warranties and purchase orders which have heretofore been or will hereinafter be executed by or on behalf of Assignor, or which have been or will hereafter be assigned to Assignor, as well as all promotional, sales and/or marketing materials, products or documents in connection with or relating to the current or future development, construction, renovation or improvement of the Mortgaged Property or to the use, access, operation, sale and maintenance of the Mortgaged Property. All of the contracts, agreements and other items referred to in subparagraphs (b), (c), (d) and (f) and (g) of this Paragraph are hereinafter referred to as the "Contracts," and the parties with whom or to whom such Contracts have been or are given are hereinafter collectively referred to as the "Contractors."

(c) All other contracts now or hereafter entered into, including, but without limitation, those certain architects' agreements, engineers' agreements, development agreements and management agreements, if any.

(d) All and any agreements of purchase and sale between Assignor and a bona fide third party, now existing or hereafter made, for all or any portion or portions of the Mortgaged Property, as said agreements of purchase and sale may have been, or may from time to time be hereafter, modified or extended.

(e) All rights necessary to provide the Mortgaged Property with utility services including, but not limited to sewer, water, electricity and gas services as approved by those governmental authorities having jurisdiction thereof.

(f) All other agreements now or in the future with respect to the management, maintenance and operation of the Mortgaged Property and the business conducted thereon.

(g) All plans, specifications, surveys, drawings, and reports between the Assignor and any other party, existing as of the date hereof or entered into or created in the future with respect to the Mortgaged Property.

3) Until the occurrence of an Event of Default hereunder or under the Loan Documents as defined therein, Assignor may retain, use and enjoy Assignor's benefits of the Additional Collateral. After the occurrence of an Event of Default as aforesaid, Lender may enforce this Assignment immediately following notice to Assignor subject to any applicable notice and grace provisions herein or under the Loan Documents. The affidavit or written statement of an officer, agent or attorney of Lender stating that there has been an Event of Default shall constitute sufficient evidence thereof, and any of the Governmental Authorities and Contractors or any other person are authorized and directed to rely thereon.

4) Assignor agrees faithfully to observe and perform all of the obligations and agreements imposed upon it under the Licenses and Contracts. From and after the date hereof, no Contract or License may be materially altered, amended or canceled, except by its terms or upon a default thereunder by a party other than Assignor, except with the prior written approval of Assignee and no new Contract may be entered into except with the prior written approval of Lender and as provided for in the Loan Agreement.

5) Lender will not be deemed in any manner to have assumed any of the Additional Collateral, nor shall Lender be liable to Governmental Authorities or Contractors by reason of any default by any party under the Licenses or Contracts unless and until Lender expressly in writing assumes an obligation or obligations. Assignor agrees to indemnify and to hold Lender harmless from and against any and all loss or damage which it may or might incur by reason of any claims or demands against Lender on Lender's alleged assumption or Assignor's duties or obligations to perform and discharge the terms, covenants and agreements in said Licenses and Contracts.

6) (a) After the occurrence of an Event of Default, Lender may elect to exercise any and all of the rights and remedies of Assignor under the Additional Collateral, without any interference or objection from Assignor, and Assignor shall cooperate in causing the Contractors to comply with all the terms conditions of the Contract.

(b) After the occurrence of an Event of Default, if and to the extent permitted by law, Lender may, with or without entry upon the Mortgaged Property, at its option, take over and enjoy the benefits of any one or more of the Licenses and Contracts, exercise the rights of Assignor under the Additional Collateral, and perform all acts in the same manner and to the same extent as Assignor might do. In connection with any and all of the foregoing powers, and without limiting the same, Lender may effect new Contracts and Licenses, cancel or surrender existing Contracts and Licenses, alter and amend the terms of and renew existing contracts and Licenses, and make concessions to Governmental Authorities and Contractors. Assignor hereby releases any and all claims which it has or might have against Lender arising out of such performance by Lender, unless arising from a willful default or violation under such Contract or License caused by Lender.

7) All of the foregoing powers herein granted Lender shall be liberally construed. Lender need not expend its own funds in the exercise of power, but if it does, such amounts shall be considered as advances for and on behalf of Assignor evidenced and secured by the Note, Mortgage and other Loan Documents. Any amounts so advanced shall bear interest at the default rate prescribed in the Note.

8) In addition to the deliveries made at the closing of the Loan, Assignor shall, within fifteen (15) days of any request by Lender, furnish Lender with a complete list of all Contracts and Licenses entered into or obtained by it. Further, Assignor shall, within fifteen (15) days of any request by Lender, deliver to Lender executed or certified copies of all Contracts and Licenses and other written agreements, correspondence and memoranda between Assignor and Contractors and Governmental Authorities setting forth the contractual arrangements between them. To the extent that Assignor does not have executed or certified copies of the foregoing in its possession, it shall deliver copies of those of the foregoing which are in its possession, with a certification that to the best of its knowledge and belief, the documents actually delivered are true and correct copies of the aforesaid original documents. Such requests may be made at any time.

9) Nothing herein contained shall be construed as making Lender a mortgagee in possession, or as constituting a waiver of suspension by Lender of its right to enforce payment of the debts under the terms of the Loan Documents. Lender is not the agent, partner, or joint venturer of Assignor or of any of the Contractors or Governmental Authorities.

10) This Assignment may be enforced from time to time by Lender in its discretion, with or without order of any court and with or without appointment of a receiver, as Lender shall determine, provided an Event of Default has occurred. Lender may also at any time cease to enforce this Assignment. Any failure on the part of Lender promptly to exercise any option hereby given or reserved shall not prevent the exercise of such option hereunder or under any Loan Document at any time thereafter. Lender may pursue and enforce any remedy or remedies accorded it herein independently of, in conjunction or concurrently with, or subsequent to its pursuit and enforcement of any remedy or remedies which it may have under the Loan Documents.

11) In furtherance of this Assignment, Assignor shall cause its Contractors to execute and deliver to Lender the letters substantially in the form annexed hereto as Exhibit A.

12) It shall be an Event of Default hereunder if:

(a) Assignor shall default in the performance of any of its covenants or agreements hereunder after Lender has given notice in writing of such default to Assignor and Assignor has failed to cure such default within ten (10) days of such notice;

(b) Assignor has made or hereafter makes a material misrepresentation under this Agreement; or

(c) There shall be an Event of Default under any of the Loan Documents. Any Event of Default hereunder shall constitute an Event of Default under the Loan Documents.

13) Assignor warrants and represents:

(a) that it has the right to execute and deliver this Assignment;

(b) that it has made no prior assignments of the Additional Collateral;

(c) that to the best of its knowledge and belief, after due inquiry, all Additional Collateral are in full force and effect on the date hereof, subject to no defenses, set-offs or counterclaim whatsoever; and

(d) as of the date hereof, there exists no event, condition or occurrence which constitutes, or which with notice and/or the passage of time would constitute, a breach of or default under any term or condition of any of the Additional Collateral. Assignor also hereby covenants and agrees not to do any act which would destroy or impair the security to Lender of this Assignment.

14) This Assignment and Lender's and Assignor's rights, liabilities, duties and disabilities hereunder shall be governed and construed in accordance with the laws of the State of New Jersey without regard to choice of law considerations. Assignor consents to the jurisdiction of the courts of the State of New Jersey or the United States District Court for the District of New Jersey in any action brought to enforce any of the rights granted to the Lender hereunder. Assignor waives the right to trial by jury. Assignor agrees that service of process in any such action or proceeding may be duly effected upon it by service at the address set forth herein by the United States Certified or Registered Mail, Return Receipt Requested, postage prepaid.

15) Notices. All notices, consents, approvals and requests required or permitted hereunder or under any other Loan Document shall be given in writing and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, return receipt requested or (b) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, and by telecopier (with answer back acknowledged), addressed as follows (or at such other address and a person as shall be designated from time to time by any party hereto, as the case may be, in a written notice to the other parties hereto in the manner provided for in this Section):

If to Lender: Kennedy Funding, Inc.  
Two University Plaza, Suite 402



Hackensack, New Jersey 07601  
Attention: Jeffrey Wolfer  
Facsimile No. (201) 342-8373

With a copy to: Cole, Schotz, Meisel, Forman & Leonard P.A.  
25 Main Street  
Hackensack, New Jersey 07602-0800  
Attention: Michael R. Leighton, Esq.  
Facsimile No.: (201) 489-1536

If to Borrower: OneCap Partners 2, LLC  
5440 W. Sahara Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89146  
Attn: Mr. Vincent Hesser

With a copy to: Harold Gewerter, Esq.  
5440 W. Sahara Ave., Suite #202  
Las Vegas, NV 89146  
Facsimile No. (702) 382-1759

A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery; in the case of registered or certified mail, when delivered or the first attempted delivery on a business day; or in the case of expedited prepaid delivery and telecopy, upon the first attempted delivery on a business day.

16) A determination that any portion of this Assignment is unenforceable or invalid shall not affect the enforceability or validity of any other provision, and any determination that the application of any provision of this Assignment to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provision as it may apply to other persons or circumstances.

17) This Assignment shall terminate and be null and void without further action upon payment in full or other satisfaction in full of the Loan. Notwithstanding the foregoing, the affidavit, certificate, letter or statement of any officer, agent or attorney of the Assignee, showing any part of the Loan to remain unpaid shall be and constitute conclusive evidence of the validity, effectiveness and continuing force of this Assignment and any person may and is hereby authorized to rely thereon.

18) The Assignee may take or release other security for the repayment of Loan; may release any party primarily or secondarily liable thereon and may apply any other security held by it to the satisfaction of the Loan without prejudice to any of its rights under this Assignment.

19) In case of any conflict between the terms of this Assignment and the terms of the Mortgage, the terms of the Mortgage shall prevail.

20) This Assignment together with the covenants and warranties herein contained, shall inure to the benefit of the Assignee and any subsequent holder of the Note and the Mortgage and shall be binding upon the Assignor, its successors and assigns and any subsequent owner of the Mortgaged Property.

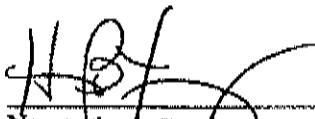
IN WITNESS WHEREOF, Borrower has caused this Assignment to be executed on the day and year first above written.

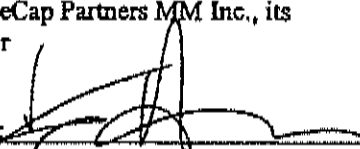
WITNESS:

BORROWER:

OneCap Partners 2, LLC,  
a Nevada limited liability company

By: OneCap Partners MM Inc., its  
Manager

  
Name: H. B. Co. - g

  
By: \_\_\_\_\_  
Name: Vincent Hesser  
Title: President

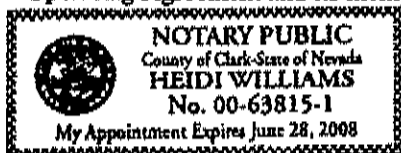
**ACKNOWLEDGEMENT**

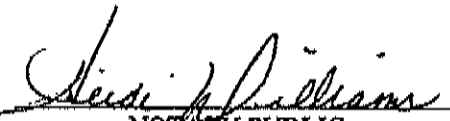
STATE OF Nevada )  
 ) ss.:  
COUNTY OF Clark )

I certify that on June 14, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

(a) made the attached instrument; and

(b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc. the Manager of OneCap Partners 2, LLC, a Nevada limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.



  
NOTARY PUBLIC

**EXHIBIT A**

**CONSENT TO ASSIGNMENT OF LICENSES,  
CONTRACTS, PLANS AND SPECIFICATIONS,  
SURVEYS, DRAWINGS AND REPORTS**

The Undersigned hereby consents to the above assignment and agrees that, in the event of default by Borrower under the terms of this Assignment or any other Loan Documents referred to herein, the Undersigned will continue, at the request of Kennedy Funding, Inc., to perform all of its/his obligations under said Contracts from and after any such default, provided all sums coming due under the terms of such contracts for work performed by the Undersigned after such request shall be paid by Lender. The Undersigned further consents to the unrestricted use by Lender of all plans, specifications and construction drawings in the event of a default as aforesaid.

DATED: \_\_\_\_\_, 200\_\_\_\_\_

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

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



## **EXHIBIT “6”**

VH000181

**Receipt/Conformed Copy**

Requestor:

NEVADA TITLE COMPANY

06/15/2006 14:05:45 T20060106320

Book/Instr: 20060615-0005325

Assignment Page Count: 9

Fees: \$22.00 N/C Fee: \$0.00

APN: 264-25-101-001

264-25-201-001

#06-06-0235-BB

To be Recorded in

Clark County, Nevada

RECORDING REQUESTED BY  
AND, WHEN RECORDED, RETURN TO:

Frances Deane

Clark County Recorder

Cole, Schotz, Meisel, Forman & Leonard, P.A.  
Court Plaza North  
25 Main Street  
Hackensack, New Jersey 07601  
Attention: Michael R. Leighton, Esq.

**ASSIGNMENT OF LEASES AND RENTS**

THIS ASSIGNMENT OF LEASES AND RENTS (the "Assignment") made as of June 15, 2006, by ONECAP PARTNERS 2, LLC, a Nevada limited liability company, having an address at 5440 W. Sahara Avenue, Third Floor, Las Vegas, Nevada 89146 ("Assignor"), and KENNEDY FUNDING, INC., a New Jersey corporation, having an office at Two University Plaza, Suite 402, Hackensack, New Jersey 07601, as agent for the lenders identified on Schedule A of that certain promissory note of even date herewith ("Assignee").

**WITNESSETH**

FOR VALUE RECEIVED, Assignor does hereby irrevocably grant, sell, assign, transfer, set over and deliver unto Assignee all of the leases covering or affecting all or any part of that certain real property more particularly described in Schedule "A", annexed hereto and made a part hereof, together with the improvements now or hereafter located thereon (hereinafter collectively referred to as the "Property"), together with the immediate and continuing right to collect and receive all of the rents, income, receipt and revenues arising from those certain leases the Property;

TOGETHER WITH all other leases and other rental agreements now or hereafter made covering the Property or any portion thereof, together with any extension or renewal of same, and all present and future leases and present and future rental agreements and rents, income and profits arising therefrom (hereinafter collectively referred to as the "Leases"), being effective without further or supplemental assignment;

TOGETHER WITH all rents, room and occupancy charges, income and profits arising from the leases and renewals thereof and together with all rents, income and

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VH000185F00129

profits for the use, enjoyment and occupation of the Property (hereinafter collectively referred to as the "Rents").

This Assignment is intended, and shall be construed and enforced as an absolute, present assignment of the Leases and Rents, not merely as an assignment for security, subject only to the license granted to Assignor in the next paragraph hereof.

Until notice from Assignee, Assignor shall have the right under a temporary, revocable license granted hereby to collect upon all of said Rents arising from or out of the Leases or any renewals or extensions thereof, and Assignor shall receive said Rents, and shall hold same, as a trust fund to be applied in the following priority, and Assignor hereby covenants to so apply same, (1) first, to the payment of all taxes and assessments upon said Property; (2) then, to the payment of the entire cost of all insurance and maintenance and repairs for said Property; (3) then, to the satisfaction of all obligations under the Leases; and (4) then, to the payment (in such order as Assignee determines) of late charges, interest and principal and all other amounts and other obligations becoming due on the Promissory Note from Assignor to Assignee in the principal amount of **TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS** dated the date hereof (the "Note") and under that certain Deed of Trust and Security Agreement (the "Mortgage") of even date (together with this Assignment and all other agreements, instruments and documents executed and delivered in connection therewith, collectively, the "Loan Documents") before using any part of the same for any other purpose; and (5) then, the balance, if any, to Assignor's use and enjoyment.

**ASSIGNOR WARRANTS** that (i) Assignor is the sole owner of the entire Lessor's interest in the Leases; (ii) to the best of Assignor's knowledge, the Leases are valid and enforceable and have not been altered, modified or amended in any manner whatsoever except as herein set forth; (iii) to the best of Assignor's knowledge, none of the Rents reserved in the Leases have been assigned or anticipated; (iv) to the best of Assignor's knowledge, no Rents have been collected more than one (1) month in advance; (v) Assignor has full power and authority to execute and deliver this Assignment and the execution and delivery of this Assignment has been duly authorized and does not conflict with or constitute a default under any law, judicial order or other agreement affecting Assignor or the Property; (vi) Assignor is not in default of its obligation under the Leases; and (vii) to the best of Assignor's knowledge, there exist no offsets or defenses to the payment of any portion of the Rents.

**ASSIGNOR COVENANTS** with Assignee that Assignor (a) shall observe and perform all the obligations imposed upon the lessor under the Leases and shall not do or permit to be done anything to impair the security thereof; (b) shall not collect any of the Rents more than one (1) month in advance; (c) shall not execute any other assignment of Lessor's interest in the Leases or the Rents; (d) shall not alter, modify or change the terms of the Leases to reduce the rentals earned thereby or Assignee's rights expressed therein without the prior written consent of Assignee, or cancel or terminate the Leases or

accept a surrender thereof, or convey or transfer or suffer or permit a conveyance or transfer of the Property or of any interest therein; (e) shall not alter, modify or change the terms of any guaranty of the Leases or cancel or terminate such guaranty without the prior written consent of Assignee; (f) shall not consent to any assignment of or subletting under the Leases not in accordance with its terms, without the prior written consent of Assignee; (g) shall execute and deliver at the request of Assignee all such further assurances, confirmations and assignments in connection with the Property as Assignee shall from time to time require; (h) shall not enter into any new leases without prior written approval from Assignee and except on a form of lease approved by Assignee. With respect to each of the Leases, Assignor shall (A) fulfill or perform in timely fashion each and every provision thereof on the part of the lessor thereunder to be fulfilled or performed; (B) promptly send copies to Assignee of all notices of default which Assignor shall send or receive thereunder; and (C) enforce all of the terms, covenants and conditions contained in the Leases upon the part of the lessor thereunder to be observed or performed, short of termination thereof.

THIS ASSIGNMENT is made on the following terms, covenants and conditions:

1. Upon the occurrence of an Event of Default (hereinafter defined), Assignee may, at its option, upon notice, terminate and revoke the license granted hereunder and, either in person or by agent, with or without bringing any action or proceeding, or by a receiver appointed by a court, take immediate and unconditional possession of the Property and have, hold, manage, lease and operate the Property on such terms and for such period of time as Assignee may deem proper and either with or without taking possession of the Property in its own name, demand, sue for or otherwise collect and receive all Rents, including those past due and unpaid with full power to make from time to time all alterations, renovations, repairs or replacements thereto or thereof as may seem proper to Assignee and apply the Rents to the payment of the following in such order and proportion as Assignee in its sole discretion may determine, any law, custom or use to the contrary notwithstanding: (a) all reasonable expenses of managing and securing the Property, including, without being limited thereto, the salaries, fees and wages of a managing agent and such other employees or agents as Assignee may deem necessary or desirable and all expenses of operating and maintaining the Property, including, without being limited thereto, all taxes, charges, claims, assessments, water charges, sewer rents and any other liens, and premiums for all insurance which Assignee may deem necessary or desirable, and the cost of all alterations, renovations, repairs or replacements, and all expenses incident to taking and retaining possession of the Property; and (b) the payment of the principal sum, interest and all other sums (hereinafter collectively referred to as the "Debt") evidenced by or arising under the Note and/or other Loan Documents, together with all costs and reasonable attorneys' fees. The aforesaid notice shall be effective retroactively as of the date on which the Event of Default occurs. In addition to the rights which Assignee may have herein, upon the occurrence of a default under the Mortgage or an Event of Default under any other Loan Document ("Event of Default"), Assignee, at



its option, may require Assignor to pay monthly in advance to Assignee, 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 in possession of Assignor or, at Assignee's option, in lieu thereof may require Assignor to vacate and surrender possession of the Property to Assignee or to such receiver and, in default thereof, Assignor may be evicted by summary proceedings or otherwise (Assignor remaining liable for such use and occupancy charges incurred after an Event of Default and prior to surrender of possession). For purposes of this Paragraph 1, Assignor grants to Assignee its irrevocable power of attorney, coupled with an interest, to take any and all of the aforementioned actions and any or all other actions designated by Assignee for the proper management and preservation of the Property. The exercise by Assignee of the option granted it in this Paragraph 1 and the collection of the Rents and the application thereof as herein provided shall not be considered a waiver of any default by Assignor under this Assignment, the Note or any other Loan Document or the Leases. The rights and remedies reserved to Assignee herein are in addition to all other rights and remedies available to Assignee hereunder or under the other Loan Documents or applicable law or equitable principles and all such rights and remedies may, at Assignee's option, be exercised concurrently.

2. Assignee shall not be liable for any loss sustained by Assignor resulting from Assignee's failure to let the Property after an Event of Default or from any other act or omission of Assignee in managing the Property after default unless such loss is caused by the gross negligence, willful misconduct or bad faith of Assignee. So long as Assignor's license hereunder remains in effect, Assignee shall not be obligated to perform or discharge any obligation, duty or liability under the Leases or under or by reason of this Assignment and Assignor shall, and hereby agrees, to indemnify Assignee for, and to hold Assignee harmless from, any and all liability, loss or damage which may or might be incurred under the Leases or under or by reason of this Assignment and from any and all claims and demands whatsoever, including the defense of any such claims or demands which may be asserted against Assignee by reason of any alleged obligations and undertakings on its part to perform or discharge any of the terms, covenants or agreements contained in the Leases. Should Assignee incur any such liability, Assignor shall reimburse Assignee the amount thereof, including costs, expenses and reasonable attorneys' fees, immediately upon demand and upon the failure of Assignor so to do Assignee may, at its option, declare all sums evidenced by the Note immediately due and payable. This Assignment shall not operate to place any obligation or liability for the control, care, management or repair of the Property upon Assignee, nor for the carrying out of any of the terms and conditions of the Leases; nor shall it operate to make Assignee responsible or liable for any waste committed on the Property by the tenants or any other parties, or for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee or stranger.

3. Upon payment in full of the Debt and satisfaction of all Assignor's obligations to Assignee hereunder, this Assignment shall become and be void and of no effect but the affidavit, certificate, letter or statement of any officer, agent or attorney of Assignee showing any part of the Debt to remain unpaid or any obligation of Assignor hereunder not fully satisfied shall be conclusive evidence of the validity, effectiveness and continuing force of this Assignment and any person may, and is hereby authorized to, rely thereon. Assignor hereby authorizes and directs the lessees named in the Leases or any other or future lessee or occupant of the Property, upon receipt from Assignee of written notices, to pay over to Assignee all Rents and to continue so to do until otherwise notified by Assignee.

4. Nothing contained in this Assignment and no act done or omitted by Assignee pursuant to the power and rights granted to Assignee hereunder shall be deemed to be a waiver by Assignee of its rights and remedies under the Note or the other Loan Documents and this Assignment is made and accepted without prejudice to any of the rights and remedies possessed by Assignee under the terms thereof. The right of Assignee to collect the Debt may be exercised by Assignee either prior to, simultaneously with, or subsequent to any action taken by it hereunder. In the event of any conflict between this Assignment and the Mortgage, the terms of this Assignment shall take precedence and control.

5. Nothing herein contained shall be construed as constituting Assignee a "mortgagee in possession" in the absence of the taking of actual possession of the Property by Assignee pursuant to the provisions herein contained. In the exercise of the powers herein granted Assignee, no liability shall be asserted or enforced against Assignee, all such liability being expressly waived and released by Assignor.

6. This Assignment may not be modified, amended, changed, discharged or terminated orally, but only in writing signed by the person against whom the enforcement of the modification, amendment, change, discharge or termination is sought.

7. Unless the context clearly indicates a contrary intent or unless otherwise specifically provided herein, words used in this Assignment shall be used interchangeably in singular or plural form and the word "Assignor" shall mean "each Assignor and/or any subsequent owner or owners of the Property or any part thereof or interest therein," the word "Assignee" shall mean "Assignee or any subsequent holder of the Note," the word "Note" shall mean "the Note or any other evidence of indebtedness," the word "person" shall include an individual, corporation, limited liability company, partnership, joint venture, trust, unincorporated association, government, governmental authority, or other entity, the word "Property" shall include any portion of the Property or interest therein, and the word "Debt" shall mean the principal balance of the Note with interest thereon as provided in the Note and all other sums due pursuant to the Note, this Assignment and the other Loan Documents; 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.

8. The failure of Assignee to insist upon strict performance of any term hereof shall not be deemed to be a waiver of any term of this Assignment. Assignor shall not be relieved of Assignor's obligations hereunder by reason of (i) failure of Assignee to comply with any request of Assignor or any other party to take any action to enforce any of the provisions hereof or of the Note or the Loan Documents, or (ii) any agreement or stipulation by Assignee extending the time of payment or otherwise modifying or supplementing the terms of this Assignment, the Note or the other Loan Documents. Assignee may take any action to recover the Debt, or any portion thereof, or to enforce any covenant hereof without prejudice to the right of Assignee thereafter to enforce its rights under this Assignment. The rights of Assignee under this Assignment shall be separate, distinct and cumulative and none shall be given effect to the exclusion of the others. No act of Assignee shall be construed as an election to proceed under any one provision herein to the exclusion of any other provision.

9. If any term, covenant or condition of this Assignment is held to be invalid, illegal or unenforceable in any respect, this Assignment shall be construed without such provision.

10. This Assignment may be executed in any number of duplicate originals and each such duplicate original shall be deemed to constitute but one and the same instrument.

11. This Assignment shall be governed and construed in accordance with the laws of the State of New Jersey without regard to choice of law considerations. This Assignment shall be construed without regard to any presumption or rule requiring construction against the party causing the Assignment or any portion hereof to be drafted.

THIS ASSIGNMENT, together with the covenants and warranties herein contained, shall inure to the benefit of Assignee and any subsequent holder of the Note and the Loan Documents and shall be binding upon Assignor, its successors and assigns and any subsequent owner of the Property.

**JURY TRIAL WAIVER. ASSIGNOR AGREES THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT BY ASSIGNOR OR ASSIGNEE ON OR WITH RESPECT TO THIS ASSIGNMENT OR THE DEALINGS OF THE PARTIES WITH RESPECT HERETO, SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. ASSIGNEE AND ASSIGNOR EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING. FURTHER, ASSIGNOR WAIVES ANY RIGHT IT MAY HAVE TO CLAIM OR RECOVER, IN ANY SUCH SUIT,**

ACTION OR PROCEEDING, ANY SPECIAL, EXEMPLARY, PUNITIVE, CONSEQUENTIAL OR OTHER DAMAGES OTHER THAN, OR IN ADDITION TO, ACTUAL DAMAGES. ASSIGNOR ACKNOWLEDGES AND AGREES THAT THIS SECTION IS A SPECIFIC AND MATERIAL ASPECT OF THIS ASSIGNMENT AND THAT ASSIGNEE WOULD NOT EXTEND CREDIT TO ASSIGNOR IF THE WAIVERS SET FORTH IN THIS PARAGRAPH WERE NOT A PART OF THIS ASSIGNMENT.

SIGNATURE PAGE TO FOLLOW.

IN WITNESS WHEREOF, Assignor has executed this Assignment on the date first above set forth.

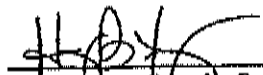
ASSIGNOR HEREBY ACKNOWLEDGES THAT IT HAS RECEIVED A TRUE COPY OF THIS ASSIGNMENT WITHOUT CHARGE.

WITNESS:

BORROWER:

OneCap Partners 2, LLC,  
a Nevada limited liability company

By: OneCap Partners MM Inc., its  
Manager

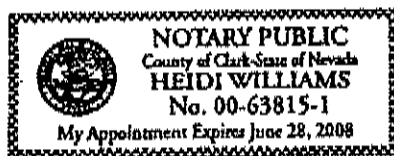
  
Print Name: Heidi B. Young

By:   
Name: Vincent Hesser  
Title: President

STATE OF Nevada )  
): ss.:  
COUNTY OF Clark )

I certify that on June 14, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

- (a) made the attached instrument; and
- (b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM Inc. the Manager of OneCap Partners 2, LLC, a Nevada limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.



  
NOTARY PUBLIC

SCHEDULE "A"

LEGAL DESCRIPTION OF THE PROPERTY

PARCEL ONE (1):

LOT TWO (2) AS SHOWN ON THAT CERTAIN PARCEL MAP IN FILE 53 OF  
PARCEL MAPS, PAGE 93, IN THE OFFICE OF THE COUNTY RECORDER OF  
CLARK COUNTY, NEVADA.

APN No.: 264-25-101-001

PARCEL TWO (2):

THE SOUTH 1000 FEET OF THE NORTH 2000 FEET (MEASURED AT A RIGHT  
ANGLE TO THE NORTH LINE) OF SECTION 25, TOWNSHIP 32 SOUTH,  
RANGE 66 EAST, M.D.B. & M.

APN No.: 264-25-201-001



## **EXHIBIT “7”**

VH000192



## GUARANTY

\$12,000,000

June 15, 2006

WHEREAS, ONECAP PARTNERS 2, LLC, a Nevada limited liability company, having an address at 5440 W. Sahara Avenue, Third Floor, Las Vegas, Nevada 89146 (the "Borrower"), has requested from KENNEDY FUNDING, INC., a New Jersey corporation, having its principal place of business at Two University Plaza, Suite 402, Hackensack, New Jersey 07601 ("Agent"), as agent for lenders identified in Schedule A annexed to the Note (as hereinafter defined) (Agent and Lenders identified in Schedule A are hereinafter collectively referred to as "Lender"), a loan in the principal sum of TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS (the "Loan"), which Loan will be evidenced by a promissory note (the "Note") from Borrower to Lender, and secured by, among other things, that certain Loan and Security Agreement (the "Loan Agreement") and that certain Deed of Trust and Security Agreement (the "Mortgage") from Borrower to Lender, all of the foregoing being of even date herewith. All capitalized terms used herein but not defined shall have the meaning ascribed to such terms in the Loan Agreement;

WHEREAS, Lender is willing to make the Loan to Borrower only if, among other things, the undersigned (sometimes referred to herein as the "Guarantor") executes and delivers this Guaranty of Payment ("Guaranty") and guarantees payment to Lender of the Debt (as hereinafter defined) in the manner provided herein; and

WHEREAS, the undersigned expects to derive benefit from the Loan.

NOW, THEREFORE, in order to induce Lender to make the Loan to Borrower, the undersigned hereby guarantees absolutely and unconditionally to Lender the payment of the Debt and covenants and agrees with Lender as follows:

1. Recitals. The recitals set forth above are incorporated herein by reference.
2. Guaranty Clause. The Guarantor hereby absolutely, irrevocably and unconditionally guarantees to Lender the full, prompt and unconditional payment of the Debt, when and as the same shall become due, whether at the stated maturity date, by acceleration or otherwise, and the full, prompt and unconditional performance of each and every term and condition of every transaction to be kept and performed by Borrower under the Note. This Guaranty is a primary obligation of Guarantor and shall be a continuing inexhaustible guaranty. Lender may require Guarantor to pay and perform any or all of the Guarantor's liabilities and obligations under this Guaranty and may proceed immediately against Guarantor without being required or obligated to bring any proceeding or take any action against Borrower, any other guarantor or any other person, entity or property prior thereto. The liability of the Guarantor hereunder is joint and several with all other guarantors, and is independent of and separate from the liability of

Borrower, any other guarantor, person or entity, and is independent of the availability of any collateral security for and/or under any documents granting Lender security for the Loan.

(a) The term "Debt" as used in this Guaranty shall mean the principal sum evidenced by the Note and secured by the Mortgage, together with interest thereon at the rate of interest specified in the Note and all other sums which may or shall become due and payable pursuant to the provisions of the Note, Mortgage, Loan Agreement, or any other agreement, document or certificate executed and/or delivered by Borrower to Lender in connection with the Loan, including any and all modifications, amendments, and ratifications thereto (collectively the "Loan Documents").

(b) The undersigned agrees that, upon demand, the undersigned will reimburse Lender, to the extent that such reimbursement is not made by Borrower, for all expenses (including reasonable counsel fees) incurred by Lender in connection with the collection of the Debt or any portion thereof, including any expenses incurred in any post-judgment proceedings to collect and enforce such judgment. This provision is separate and several and shall survive the merger of this Guaranty into any judgment on this Guaranty.

(c) All moneys available to Lender for application in payment or reduction of the Debt may be applied by Lender in such manner and in such amounts and at such time or times and in such order and priority as Lender may see fit to the payment or reduction of such portion of the Debt or other obligations of Borrower as Lender may elect.

(d) This Guaranty is an absolute, continuing, unconditional and unlimited guaranty of payment and not merely of collection and Lender shall be entitled to payment from the undersigned without first commencing any action against Borrower or resorting to any security or to any credit on the books of Lender in favor of Borrower. The undersigned acknowledges and agrees that this Guaranty and any or all other guaranties made to Lender in connection with this Loan are joint and several guaranties.

3. Lender's Rights. The undersigned hereby consents that from time to time, before or after any default by Borrower, with or without further notice to or assent from the undersigned, (i) any security at any time held by or available to Lender for any obligation of Borrower, (ii) any security at any time held by or available to Lender for any obligation of any other person or party secondarily or otherwise liable for all or any portion of the Debt, and/or (iii) any obligation arising under any other guaranty to Lender made in connection with the Loan, may be exchanged, surrendered or released and any obligation of Borrower may be changed, altered, renewed, extended, continued, surrendered, compromised, waived or released in whole or in part, or any default with respect thereto waived, and Lender may fail to set off and may release, in whole or in part, any balance of any credit on its books in favor of Borrower, and may extend further

credit in any manner whatsoever to Borrower, and generally deal with Borrower or any such security or obligation and the undersigned shall remain bound under this Guaranty notwithstanding any such exchange, surrender, release, change, alteration, renewal, extension, continuance, compromise, waiver, inaction, extension of further credit or other dealing. No invalidity, irregularity or unenforceability of all or any part of the Debt or the impairment or loss of security or obligation therefor, whether caused by any action or inactions of Lender or otherwise, shall affect or impair this Guaranty.

4. Guarantor Waivers. The undersigned hereby waives and agrees not to assert or take advantage of any defense based upon:

- (a) Notice of acceptance of this Guaranty and of the making of the Loan by Lender to Borrower;
- (b) Presentment and demand for payment of the Debt or any portion thereof;
- (c) Protest and notice of dishonor or default to the undersigned with respect to the Debt or any portion thereof;
- (d) Notice of intent to accelerate, notice of acceleration and all other notices to which the undersigned might otherwise be entitled;
- (e) Any demand for payment under this Guaranty;
- (f) The incapacity, lack of authority, death or disability of Borrower or any other person or entity;
- (g) The failure of Lender to commence an action against Borrower and/or Guarantor or to proceed against or exhaust any security held by Lender at any time, or to pursue any other remedy whatsoever at any time;
- (h) Any duty on the part of Lender to disclose to the undersigned any facts Lender may now or hereafter know regarding Borrower, regardless of whether Lender has reason to believe (i) that any such facts materially increase the risk beyond that which the undersigned intends to assume, or (ii) that such facts are unknown to the undersigned, the undersigned acknowledging that he, she or it is fully responsible for being and keeping informed of the financial condition and affairs of Borrower;
- (i) Lack of notice of default, demand of performance or notice of acceleration to Borrower or any other party with respect to the Loan or Borrower's obligations guaranteed hereby;
- (j) The consideration for this Guaranty (or lack or inadequacy thereof);

(k) Any acts or omissions of Lender which vary, increase or decrease the risk on the undersigned;

(l) Any rights or defenses based upon an offset by the undersigned against any obligation now or hereafter owed to the undersigned by Borrower;

(m) Any statute of limitations affecting the liability of the undersigned hereunder, the liability of Borrower or Guarantor under the Loan Documents or the enforcement hereof, to the extent permitted by law;

(n) The application by Borrower of the proceeds of the Loan for purposes other than the purposes represented by Borrower to Lender and the undersigned or intended or understood by Lender or the undersigned;

(o) An election of remedies by Lender, including any election to proceed against any collateral by judicial or nonjudicial foreclosure, whether real property or personal property, or by deed in lieu thereof, and whether or not every aspect of any foreclosure sale is commercially reasonable, and whether or not any such election of remedies destroys or otherwise impairs the subrogation rights of the undersigned or the rights of the undersigned to proceed against Borrower or any guarantor by way of subrogation or for reimbursement or contribution, or all such rights;

(p) Any statute or rule of law which provides that the obligation of a surety must be neither larger in amount nor in any other aspects more burdensome than that of the principal obligor;

(q) Lender's election, in any proceeding instituted under Title 11 of the United States Code (the "Bankruptcy Code"), of the application of Section 1111(b)(2) of the Bankruptcy Code or any successor statute; and

(r) Any borrowing or any grant of a security interest under Section 364 of the Bankruptcy Code.

THIS IS AN UNCONDITIONAL AND IRREVOCABLE WAIVER OF ANY RIGHTS AND DEFENSES THE UNDERSIGNED MAY HAVE BECAUSE BORROWER'S DEBT IS SECURED BY INTERESTS IN REAL PROPERTY.

5. Collection and Enforcement.

(a) LENDER MAY COLLECT FROM THE UNDERSIGNED WITHOUT FIRST FORECLOSING ON ANY REAL OR PERSONAL PROPERTY COLLATERAL PLEDGED BY BORROWER; AND

(b) IF LENDER FORECLOSES ON ANY REAL PROPERTY COLLATERAL PLEDGED BY BORROWER:

i. THE AMOUNT OF THE DEBT MAY BE REDUCED ONLY BY THE PRICE FOR WHICH THAT COLLATERAL IS SOLD AT A FORECLOSURE SALE, EVEN IF THE COLLATERAL IS WORTH MORE THAN THE SALE PRICE; AND

ii. LENDER MAY COLLECT FROM THE UNDERSIGNED EVEN IF LENDER, BY FORECLOSING ON THE REAL PROPERTY COLLATERAL, HAS DESTROYED ANY RIGHT THE UNDERSIGNED MAY HAVE TO COLLECT FROM BORROWER.

6. Successors and Assigns. Each reference herein to Lender shall be deemed to include its successors and assigns, in whose favor the provisions of this Guaranty shall also inure. Each reference herein to the undersigned shall be deemed to include the heirs, executors, administrators, legal representatives, successors and assigns of the undersigned, all of whom shall be bound by the provisions of this Guaranty.

7. No Waiver. No delay on the part of Lender in exercising any rights hereunder or failure to exercise the same shall operate as a waiver of such rights; no notice to or demand on the undersigned shall be deemed to be a waiver of the obligation of the undersigned or of the right of Lender to take further action without notice or demand as provided herein; nor in any event shall any modification or waiver of the provisions of this Guaranty be effective unless in writing nor shall any such waiver be applicable except in the specific instance for which such waiver is given.

8. Representations and Warranties. To further induce Lender to make the Loan to Borrower, the Guarantor makes the following warranties and representations, with the knowledge that Lender will rely on the veracity thereof:

(a) The execution and delivery by the Guarantor of this Guaranty and any other document executed and/or delivered by the Guarantor to Lender in connection therewith (collectively, the "Guaranty Documents"), and the performance of the obligations thereunder, do not and will not: (a) violate any provision of law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having applicability to the Guarantor; or (b) result in any breach of or constitute any default under any indenture or loan or credit agreement or any other agreement, lease or instrument to which the Guarantor is a party or by which the Guarantor or his/her/their/its properties may be bound or affected, and the Guarantor is not in default under any such law, rule, regulation, order, writ, judgment, injunction, decree, determination or award or any such indenture, agreement, lease or instrument.

(b) There is no material action, suit, proceeding, inquiry or investigation, at law or in equity, or before any court, governmental instrumentality, public board or arbitrator pending or threatened against or affecting the Guarantor or any of his properties or rights, wherein an unfavorable decision, ruling or finding would (i) to

the extent not covered by insurance as to which the insurer has not disclaimed coverage, result in any material adverse change in the financial condition, business, properties or operations of the Guarantor; (ii) materially or adversely effect the Guaranty; or (iii) adversely effect the validity or enforceability of the Guaranty Documents.

(c) The Guarantor is in compliance with all applicable laws.

(d) Borrower is a pre-existing entity actively engaged in the operation of its business and has not been created as a vehicle to obtain the Loan. The proceeds of the Loan will be used by Borrower solely to (a) discharge or release liens upon the real property encumbered by the Mortgage (the "Property") or for other business purposes directly related to the Property, and (b) pay fees and other amounts related thereto or to the making of the Loan, and the proceeds of the Loan will not be paid over or diverted by Borrower to any member, officer, director or shareholder of Borrower, the Guarantor, any other guarantors of the Loan or any other person.

(e) On the date hereof, (i) the assets of the Guarantor exceed his liabilities, and (b) the Guarantor is paying his debts as they become due.

9. No Subrogation. Notwithstanding any payments made by the undersigned pursuant to the provision of this Guaranty, the undersigned shall have no right of subrogation in and to the Note, or any other security held by or available to Lender for the Debt or the payment thereof until the Debt has been paid in full to Lender.

10. Limitation of Remedies. The Guarantor is hereby prohibited from exercising against Lender or Agent any right or remedy which it might otherwise be entitled to exercise against any one or more (but less than all) of the individual parties constituting Lender, including, without limitation, any right of set-off or any defense.

11. Miscellaneous.

(a) Governing Law. This Guaranty is, and shall be deemed to be, a contract entered into under and pursuant to the laws of the State of New Jersey and shall be in all respects governed, construed, applied and enforced in accordance with the laws of said state without regard to conflicts of laws considerations; and this Guaranty shall be construed without regard to any presumption or rule requiring construction against the party causing such instrument or any portion thereof to be drafted; and no defense given or allowed by the laws of any other state or country shall be interposed in any action or proceeding hereon unless such defense is also given or allowed by the laws of the State of New Jersey. The undersigned agrees to submit to personal jurisdiction in the State of New Jersey in any action or proceeding arising out of this Guaranty and, in furtherance of such agreement, the undersigned hereby agrees and consents that without limiting other methods of obtaining jurisdiction, personal jurisdiction over the undersigned in any such action or proceeding may be obtained within or without the jurisdiction of any court

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

(b) Waivers. The Guarantor hereby waives any claim, right or remedy which the Guarantor may now have or hereafter acquire against Borrower that arises hereunder and/or from the performance by the Guarantor hereunder, including, without limitation, any claim, remedy or right of subrogation, reimbursement, exoneration, contribution, indemnification, or participation in any claim, right or remedy of Lender against Borrower or any security which Lender now has or hereafter acquires, whether or not such claim, right or remedy arises in equity, under contract, by statute, under common law or otherwise. The foregoing waiver by the Guarantor shall terminate and be of no further force or effect at such time as the entire Debt has been fully and indefeasibly paid to and received by Lender.

(c) Severability. A determination that any portion of this Guaranty is unenforceable or invalid shall not affect the enforceability or validity of any other provision, and any determination that the application of any provision of this Guaranty to any circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provision as it may apply to other circumstances.

(d) Notices. All notices, consents, approvals and requests required or permitted hereunder or under any other Loan Document shall be given in writing and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, return receipt requested or (b) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, and by telecopier (with answer back acknowledged), addressed as follows (or at such other address and a person as shall be designated from time to time by any party hereto, as the case may be, in a written notice to the other parties hereto in the manner provided for in this Section):

If to Lender: Kennedy Funding, Inc.  
Two University Plaza, Suite 402  
Hackensack, New Jersey 07601  
Attention: Jeffrey Wolfer  
Facsimile No. (201) 342-8373

With a copy to: Cole, Schotz, Meisel, Forman & Leonard P.A.  
25 Main Street  
Hackensack, New Jersey 07602-0800  
Attention: Michael R. Leighton, Esq.  
Facsimile No.: (201) 489-1536

If to Guarantor: Vincent Hesser  
10758 Rivendell Avenue  
Las Vegas, Nevada 89135

OneCap Partners MM, Inc.  
5440 W. Sahara Avenue, Third Floor  
Las Vegas, Nevada 89146

With a copy to: Harold Gewerter, Esq.  
5440 W. Sahara Ave., Suite #202  
Las Vegas, NV 89146  
Facsimile No. (702) 382-1759

A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery; in the case of registered or certified mail, when delivered or the first attempted delivery on a business day; or in the case of expedited prepaid delivery and telecopy, upon the first attempted delivery on a business day.

(e) Jury Trial Waiver. THE UNDERSIGNED AGREES THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT BY THE UNDERSIGNED OR LENDER ON OR WITH RESPECT TO THIS GUARANTY OR ANY OTHER LOAN DOCUMENT OR THE DEALINGS OF THE PARTIES WITH RESPECT HERETO OR THERETO, SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. LENDER AND THE UNDERSIGNED EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING. FURTHER, THE UNDERSIGNED WAIVES ANY RIGHT IT MAY HAVE TO CLAIM OR RECOVER, IN ANY SUCH SUIT, ACTION OR PROCEEDING, ANY SPECIAL, EXEMPLARY, PUNITIVE, CONSEQUENTIAL OR OTHER DAMAGES OTHER THAN, OR IN ADDITION TO, ACTUAL DAMAGES. THE UNDERSIGNED ACKNOWLEDGES AND AGREES THAT THIS PARAGRAPH IS A SPECIFIC AND MATERIAL ASPECT OF THIS GUARANTY AND THAT LENDER WOULD NOT EXTEND CREDIT TO BORROWER IF THE WAIVERS SET FORTH IN THIS PARAGRAPH WERE NOT A PART OF THIS GUARANTY.





IN WITNESS WHEREOF, the undersigned has executed this Guaranty as of the date first above set forth.

WITNESS:

**Name:**

**GUARANTOR:**

**VINCENT HESSER**

**Residence Address:**

10758 Rivendell Avenue  
Las Vegas, Nevada 89135  
Social Security Number: 560-51-5161

WITNESS:

Name:

**GUARANTOR:**

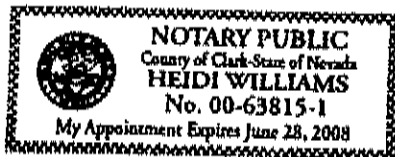
**ONECAP PARTNERS MM, INC.**

**By:**

Name: Vincent Hesser  
Title: President

STATE OF Nevada )  
 ) ss.:  
COUNTY OF Clark )

On the 14<sup>th</sup> day of June, 2006, before me personally came Vincent Hesser, who being by me duly sworn, did depose and say that he signed this instrument as his voluntary act and deed.



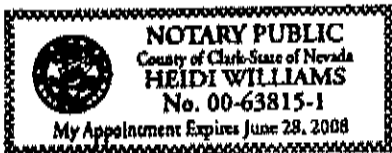
NOTARY PUBLIC

STATE OF *Nevada* )  
 ) ss.:  
COUNTY OF *Clark* )

I certify that on June *14<sup>th</sup>*, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

(a) made the attached instrument; and

(b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc., a Nevada corporation (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its by-laws and its shareholders.



*Heidi Williams*  
NOTARY PUBLIC



## **EXHIBIT “8”**

VH000205

APN: 264-25-101-001 & 264-25-201-001

Receipt/Conformed Copy

Requestor:

NEVADA TITLE COMPANY

06/15/2006 14:05:45 T20060106320

Book/Instr: 20060615-0005326

OR-UCC Page Count: 5

Fees: \$18.00 N/C Fee: \$0.00

Frances Deane

THE AB Clark County Recorder

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

Cole, Schotz, Meisel, Forman & Leonard, P.A.  
Court Plaza North  
25 Main Street  
Hackensack, New Jersey 07601  
Attn: Michael R. Leighton, Esq.  
#06-06-0235-BB

1. DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME		FIRST NAME		MIDDLE NAME	SUFFIX
OR OneCap Partners 2, LLC		1b. INDIVIDUAL'S LAST NAME		STATE	POSTAL CODE
1c. MAILING ADDRESS		CITY		STATE	POSTAL CODE
5440 W. Sahara Avenue, 3rd Floor		Las Vegas		Nevada	89146
1d. SEE INSTRUCTIONS		1e. TYPE OF ORGANIZATION		1f. JURISDICTION OF ORGANIZATION	
ADD'L INFO RE ORGANIZATION DEBTOR		Limited Liability Company		Nevada	
				1g. ORGANIZATIONAL ID#, IF ANY	
				E0417052006-8	

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME		FIRST NAME		MIDDLE NAME	SUFFIX
OR		2b. INDIVIDUAL'S LAST NAME		STATE	POSTAL CODE
2c. MAILING ADDRESS		CITY		STATE	POSTAL CODE
3d. SEE INSTRUCTIONS		2e. TYPE OF ORGANIZATION		2f. JURISDICTION OF ORGANIZATION	
ADD'L INFO RE ORGANIZATION DEBTOR				2g. ORGANIZATIONAL ID#, IF ANY	
				NONE	

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - Insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME		FIRST NAME		MIDDLE NAME	SUFFIX
OR KENNEDY FUNDING, INC.		3b. INDIVIDUAL'S LAST NAME		STATE	POSTAL CODE
3c. MAILING ADDRESS		CITY		STATE	POSTAL CODE
TWO UNIVERSITY PLAZA, SUITE 402		HACKENSACK		NJ	07601
				STATE	POSTAL CODE
					COUNTRY
					USA

4. THIS FINANCING STATEMENT covers the following collateral:

SEE SCHEDULE "A" ATTACHED HERETO AND MADE A PART HEREOF.

5. ALTERNATIVE DESIGNATION (if applicable): <input type="checkbox"/> LESSOR/LESSOR <input type="checkbox"/> CONSIGNEE/CONSIGNOR <input type="checkbox"/> BAILEE/BAILO <input type="checkbox"/> SELLER/BUYER <input type="checkbox"/> AGENT <input type="checkbox"/> NON-UCC FILING	
6. <input checked="" type="checkbox"/> THIS FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum (if applicable)	
7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) (ADDITIONAL FEE) (optional)	
8. OPTIONAL FILER REFERENCE DATA	

TO BE FILED IN Clark County, Nevada

FILING OFFICE COPY - NATIONAL UCC FINANCING STATEMENT (FORM UCC1)(REV.05/22/02)

31392/0400-1438111v1

VH000206 KF00187

# UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

## 9. NAME OR FIRST DEBTOR (1a or 1b) ON RELATED FINANCING STATEMENT

9a. ORGANIZATION'S NAME		
OR OneCap Partners 2, LLC		
9b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME, SUFFIX

10. MISCELLANEOUS:

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

## 11. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME -- Insert only one debtor name (11a or 11b) -- do not abbreviate or combine names

11a. ORGANIZATION'S NAME				
OR				
11b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX	
11c. MAILING ADDRESS		CITY	STATE	POSTAL CODE
				COUNTRY
11d. SEE INSTRUCTIONS	ADDL INFO RE ORGANIZATION DEBTOR	11e. TYPE OF ORGANIZATION	11f. JURISDICTION OF ORGANIZATION	11g. ORGANIZATIONAL ID, if any
				<input type="checkbox"/> NONE

## 12. ADDITIONAL SECURED PARTY'S or ASSIGNOR S/P'S NAME -- Insert only one name (12a or 12b)

12a. ORGANIZATION'S NAME				
OR				
12b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX	
12c. MAILING ADDRESS		CITY	STATE	POSTAL CODE
				COUNTRY

13. This FINANCING STATEMENT covers ☐ similar to be cut or ☐ as-extracted collateral, or is filed as a ☒ future filing.  
14. Description of real estate:

SEE EXHIBIT A ATTACHED HERETO AND MADE A PART HEREOF.

15. Name and address of a RECORD OWNER of above-described real estate (if Debtor does not have a record interest):

16. Additional collateral description

17. Check only if applicable and check only one box.  
Debtor is a ☐ Trust or ☐ Trustee acting with respect to property held in trust or ☐ Decedent's Estate

18. Check only if applicable and check only one box  
☐ Debtor is a TRANSMITTING UTILITY  
☐ Filed in connection with a Manufactured-Home Transaction -- effective 30 years  
☐ Filed in connection with a Public-Finance Transaction -- effective 30 years

FILING OFFICE COPY -- NATIONAL UCC FINANCING STATEMENT ADDENDUM (FORUM UCC 1A0) (REV. 05/22/02)

31392/0400-1438111v1

VH000206F00188

**SCHEDULE A TO UCC-1 FINANCING STATEMENT**

**OneCap Partners 2, LLC**  
a Nevada limited liability company, as Debtor,  
and  
**KENNEDY FUNDING, INC.**, as Secured Party

All Debtor's right, title and interest in and to:

(i) the real property situated in the County of Clark and State of Nevada, which is more particularly described in Exhibit A attached hereto and made a part hereof for all purposes the same as if set forth herein verbatim, together with all right, title, and interest of Debtor in and to (a) all streets, roads, alleys, easements, rights-of-way, licenses, rights of ingress and egress, vehicle parking rights and public places, existing or proposed, abutting, adjacent, used in connection with or pertaining to the real property or the Improvements (as hereinafter defined); (b) any strips or gores between the real property and abutting or adjacent properties; and (c) all water and water rights, timber, crops and mineral interests pertaining to the real property (such real estate and other rights, titles and interests being hereinafter sometimes called the "Land");

(ii) all buildings, structures and other improvements or any part thereof, now or hereafter situated on or under the Land and all restorations and replacements thereof ("Improvements");

(iii) all fixtures, systems, and articles of personal property, of every kind and character, now owned or hereafter acquired by Debtor (or Debtor's successors or assigns), which are now or hereafter attached to the Land or the Improvements, or which are located on the Land and used in or necessary to the complete and proper planning, development, use, occupancy or operation thereof, or acquired for use or installation in or on the Land or the Improvements, and all renewals and replacements of, substitutions for and additions to the foregoing, including, but without limiting the foregoing, all of the following items now owned or hereafter acquired by Debtor and located on the Land, any and all fixtures, systems, heating, ventilating, air conditioning, refrigerating, plumbing, sewer, lighting, generating, cleaning, storage, incinerating, waste disposal, sprinkler, fire extinguishing, communications, transportation (of people or things, including, but not limited to, stairways, elevators, escalators and conveyors), data processing, security and alarm, laundry, food or drink preparation, storage or serving, gas, electrical and electronic, water, and recreational uses or purposes; all tanks, pipes, wiring, conduits, ducts, doors, partitions, rugs and other floor coverings, wall coverings, windows, drapes, window screens and shades, awnings, fans, motors, engines and boilers; decorative items and art objects; and files, records and books of account (all of which are herein sometimes referred to together as the "Accessories");



(iv) all (a) plans and specifications for the Improvements; (b) contracts relating to the Land or the Improvements or the Accessories or any part thereof; (c) deposits including, but not limited to, Debtor's rights in tenants' security deposits (if any), deposits with respect to utility services to the Land or the Improvements or the Accessories or any part thereof, and any deposits or reserves hereunder or under any other document evidencing, securing, or now or hereafter executed in connection with that certain loan from Secured Party to Debtor in the principal sum of \$12,000,000 (the "Loan") for taxes, insurance or otherwise, funds, accounts, contract rights, instruments, documents, commitments, general intangibles, notes and chattel paper used in connection with or arising from or by virtue of any transactions related to the Land or the Improvements or the Accessories or any part thereof; (d) permits, licenses, franchises, bonds, certificates and other rights and privileges obtained in connection with the Land or the Improvements or the Accessories or any part thereof and assignable without third party consents; (e) leases, rents, room rents, royalties, bonuses, issues, profits, revenues and other benefits of the Land, the Improvements and the Accessories; and (f) other properties, rights, titles and interests, if any, specified in any section or any article of that certain Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing, dated as of June \_\_\_\_, 2006, made by Debtor in favor of Secured Party and intended to be recorded in the Public Records of Clark County, Nevada;

(v) all proceeds, products, consideration, compensation and recoveries, direct or consequential, cash and noncash, of or arising from, as the case may be, (a) the properties, rights, titles and interests referred to above in paragraphs (i), (ii), (iii) and (iv) above; (b) any sale, lease or other disposition thereof; (c) each policy of insurance relating thereto (including premium refunds); (d) the taking thereof or of any rights appurtenant thereto by eminent domain or sale in lieu thereof for public or quasi-public use under any law; and (e) any damage thereto whether caused by such a taking (including change of grade of streets, curb cuts or other rights of access) or otherwise caused; and

(vi) all other interests of every kind and character, and proceeds thereof, which Debtor now has or hereafter acquires in, to or for the benefit of the properties, rights, titles and interests referred to above in paragraphs (i), (ii), (iii), (iv), and (v) and all property used or useful in connection therewith, including, but not limited to, remainders, reversions and reversionary rights or interests.

EXHIBIT A TO UCC-1 FINANCING STATEMENT

LEGAL DESCRIPTION

PARCEL ONE (1):

LOT TWO (2) AS SHOWN ON THAT CERTAIN PARCEL MAP IN FILE 53 OF  
PARCEL MAPS, PAGE 93, IN THE OFFICE OF THE COUNTY RECORDER OF  
CLARK COUNTY, NEVADA.

APN No.: 264-25-101-001

PARCEL TWO (2):

THE SOUTH 1000 FEET OF THE NORTH 2000 FEET (MEASURED AT A RIGHT  
ANGLE TO THE NORTH LINE) OF SECTION 25, TOWNSHIP 32 SOUTH,  
RANGE 66 EAST, M.D.B. & M.

APN No.: 264-25-201-001

Document Number:

2006019509-3

Filing Date and Time:

06-19-2006 03:23 PM

**UCC FINANCING STATEMENT**

FOLLOW INSTRUCTIONS (front and back) CAREFULLY.  
B. SEND ACKNOWLEDGEMENT TO: (Name and Address)

Cole, Schotz, Meisel, Forman & Leonard, P.A.  
Court Plaza North  
25 Main Street  
Hackensack, New Jersey 07601  
Attention: Michael R. Leighton, Esq.

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME  
OR  
One Cap Partners 2, LLC

1b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

1c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY  
5440 W. Sahara Avenue, 3<sup>rd</sup> Floor Las Vegas Nevada 89146 USA

1d. SEE INSTRUCTIONS ADDL INFO RE ORGANIZATION DEBTOR 1e. TYPE OF ORGANIZATION 1f. JURISDICTION OF ORGANIZATION 1g. ORGANIZATIONAL ID#, IF ANY  
Limited Liability Company Nevada E0417052006-8

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME

OR  
2b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

2c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

2d. SEE INSTRUCTIONS ADDL INFO RE ORGANIZATION DEBTOR 2e. TYPE OF ORGANIZATION 2f. JURISDICTION OF ORGANIZATION 2g. ORGANIZATIONAL ID#, IF ANY  
☐ NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR SPI - Insert only one secured party name (3a or 3b))

3a. ORGANIZATION'S NAME  
OR  
KENNEDY FUNDING, INC.

3b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

3c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY  
TWO UNIVERSITY PLAZA, HACKENSACK NJ 07601 USA  
SUITE 402

4. THIS FINANCING STATEMENT covers the following collateral:

SEE SCHEDULE A ATTACHED HERETO AND MADE A PART HEREOF.

5. ALTERNATIVE DESIGNATION (if applicable): ☐ LESSOR/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ SALES/TAXOR ☐ SELLER/BUYER ☐ AS LIEN ☐ NON-UCC FILING

6. ☐ This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Assignment (if applicable) 7. Check to REQUEST SEARCH REPORT(S) on: ☐ All Documents ☐ Document 1 ☐ Document 2 ☐ Document 3 ☐ Document 4 ☐ Document 5 ☐ Document 6 ☐ Document 7 ☐ Document 8 ☐ Document 9 ☐ Document 10 ☐ Document 11 ☐ Document 12 ☐ Document 13 ☐ Document 14 ☐ Document 15 ☐ Document 16 ☐ Document 17 ☐ Document 18 ☐ Document 19 ☐ Document 20 ☐ Document 21 ☐ Document 22 ☐ Document 23 ☐ Document 24 ☐ Document 25 ☐ Document 26 ☐ Document 27 ☐ Document 28 ☐ Document 29 ☐ Document 30 ☐ Document 31 ☐ Document 32 ☐ Document 33 ☐ Document 34 ☐ Document 35 ☐ Document 36 ☐ Document 37 ☐ Document 38 ☐ Document 39 ☐ Document 40 ☐ Document 41 ☐ Document 42 ☐ Document 43 ☐ Document 44 ☐ Document 45 ☐ Document 46 ☐ Document 47 ☐ Document 48 ☐ Document 49 ☐ Document 50 ☐ Document 51 ☐ Document 52 ☐ Document 53 ☐ Document 54 ☐ Document 55 ☐ Document 56 ☐ Document 57 ☐ Document 58 ☐ Document 59 ☐ Document 60 ☐ Document 61 ☐ Document 62 ☐ Document 63 ☐ Document 64 ☐ Document 65 ☐ Document 66 ☐ Document 67 ☐ Document 68 ☐ 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Document 603 ☐ Document 604 ☐ Document 605 ☐ Document 606 ☐ Document 607 ☐ Document 608 ☐ Document 609 ☐ Document 610 ☐ Document 611 ☐ Document 612 ☐ Document 613 ☐ Document 614 ☐ Document 615 ☐ Document 616 ☐ Document 617 ☐ Document 618 ☐ Document 619 ☐ Document 620 ☐ Document 621 ☐ Document 622 ☐ Document 623 ☐ Document 624 ☐ Document 625 ☐ Document 626 ☐ Document 627 ☐ Document 628 ☐ Document 629 ☐ Document 630 ☐ Document 631 ☐ Document 632 ☐ Document 633 ☐ Document 634 ☐ Document 635 ☐ Document 636 ☐ Document 637 ☐ Document 638 ☐ Document 639 ☐ Document 640 ☐ Document 641 ☐ Document 642 ☐ Document 643 ☐ Document 644 ☐ Document 645 ☐ Document 646 ☐ Document 647 ☐ Document 648 ☐ Document 649 ☐ Document 650 ☐ Document 651 ☐ Document 652 ☐ Document 653 ☐ Document 654 ☐ Document 655 ☐ Document 656 ☐ Document 657 ☐ Document 658 ☐ Document 659 ☐ Document 660 ☐ Document 661 ☐ Document 662 ☐ Document 663 ☐ Document 664 ☐ Document 665 ☐ Document 666 ☐ Document 667 ☐ Document 668 ☐ Document 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**SCHEDULE A TO UCC-1 FINANCING STATEMENT**

**OneCap Partners 2, LLC**  
a Nevada limited liability company, as Debtor,  
and  
**KENNEDY FUNDING, INC., as Secured Party**

All Debtor's right, title and interest in and to:

(i) the real property situated in the County of Clark and State of Nevada, which is more particularly described in Exhibit A attached hereto and made a part hereof for all purposes the same as if set forth herein verbatim, together with all right, title and interest of Debtor in and to (a) all streets, roads, alleys, easements, rights-of-way, licenses, rights of ingress and egress, vehicle parking rights and public places, existing or proposed, abutting, adjacent, used in connection with or pertaining to the real property or the Improvements (as hereinafter defined); (b) any strips or gores between the real property and abutting or adjacent properties; and (c) all water and water rights, timber, crops and mineral interests pertaining to the real property (such real estate and other rights, titles and interests being hereinafter sometimes called the "Land");

(ii) all buildings, structures and other improvements or any part thereof, now or hereafter situated on or under the Land and all restorations and replacements thereof ("Improvements");

(iii) all fixtures, systems, and articles of personal property, of every kind and character, now owned or hereafter acquired by Debtor (or Debtor's successors or assigns), which are now or hereafter attached to the Land or the Improvements, or which are located on the Land and used in or necessary to the complete and proper planning, development, use, occupancy or operation thereof, or acquired for use or installation in or on the Land or the Improvements, and all renewals and replacements of, substitutions for and additions to the foregoing, including, but without limiting the foregoing, all of the following items now owned or hereafter acquired by Debtor and located on the Land, any and all fixtures, systems, heating, ventilating, air conditioning, refrigerating, plumbing, sewer, lighting, generating, cleaning, storage, incinerating, waste disposal, sprinkler, fire extinguishing, communications, transportation (of people or things, including, but not limited to, stairways, elevators, escalators and conveyors), data processing, security and alarm, laundry, food or drink preparation, storage or serving, gas, electrical and electronic, water, and recreational uses or purposes; all tanks, pipes, wiring, conduits, ducts, doors, partitions, rugs and other floor coverings, wall coverings, windows, drapes, window screens and shades, awnings, fans, motors, engines and boilers; decorative items and art objects; and files, records and books of account (all of which are herein sometimes referred to together as the "Accessories");

(iv) all (a) plans and specifications for the Improvements; (b) contracts relating to the Land or the Improvements or the Accessories or any part thereof; (c) deposits including, but not limited to, Debtor's rights in tenants' security deposits (if any), deposits with respect to utility services to the Land or the Improvements or the Accessories or any part thereof, and any deposits or reserves hereunder or under any other document evidencing, securing, or now or hereafter executed in connection with that certain loan from Secured Party to Debtor in the principal sum of \$12,000,000 (the "Loan") for taxes, insurance or otherwise, funds, accounts, contract rights, instruments, documents, commitments, general intangibles, notes and chattel paper used in connection with or arising from or by virtue of any transactions related to the Land or the Improvements or the Accessories or any part thereof; (d) permits, licenses, franchises, bonds, certificates and other rights and privileges obtained in connection with the Land or the Improvements or the Accessories or any part thereof and assignable without third party consents; (e) leases, rents, room rents, royalties, bonuses, issues, profits, revenues and other benefits of the Land, the Improvements and the Accessories; and (f) other properties, rights, titles and interests, if any, specified in any section or any article of that certain Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing, dated as of June \_\_\_, 2006, made by Debtor in favor of Secured Party and intended to be recorded in the Public Records of Clark County, Nevada;

(v) all proceeds, products, consideration, compensation and recoveries, direct or consequential, cash and noncash, of or arising from, as the case may be, (a) the properties, rights, titles and interests referred to above in paragraphs (i), (ii), (iii) and (iv) above; (b) any sale, lease or other disposition thereof; (c) each policy of insurance relating thereto (including premium refunds); (d) the taking thereof or of any rights appurtenant thereto by eminent domain or sale in lieu thereof for public or quasi-public use under any law; and (e) any damage thereto whether caused by such a taking (including change of grade of streets, curb cuts or other rights of access) or otherwise caused; and

(vi) all other interests of every kind and character, and proceeds thereof, which Debtor now has or hereafter acquires in, to or for the benefit of the properties, rights, titles and interests referred to above in paragraphs (i), (ii), (iii), (iv), and (v) and all property used or useful in connection therewith, including, but not limited to, remainders, reversions and reversionary rights or interests.

**EXHIBIT A TO UCC-1 FINANCING STATEMENT**

**LEGAL DESCRIPTION**

3139270400-1438109v1

VH000214KF00195



## **EXHIBIT “9”**

VH000216



## ENVIRONMENTAL INDEMNITY AGREEMENT

THIS ENVIRONMENTAL INDEMNITY AGREEMENT (the "Agreement"), made on this 15<sup>th</sup> day of June, 2006, by ONECAP PARTNERS 2, LLC, a Nevada limited liability company, having an address at 5440 W. Sahara Avenue, Third Floor, Las Vegas, Nevada 89146 (the "Borrower"), ONECAP PARTNERS MM, INC., a Nevada corporation, having an address at 5440 W. Sahara Avenue, Third Floor, Las Vegas, Nevada 89146, and VINCENT HESSER residing at 10758 Rivendell Avenue, Las Vegas, Nevada 89146 (collectively, the "Guarantor") (Borrower and Guarantor are collectively referred to herein as the "Indemnitors"), in favor of KENNEDY FUNDING, INC., a New Jersey corporation, having an address at Two University Plaza, Suite 402, Hackensack, New Jersey 07601 ("Agent"), as agent for the lenders identified on Schedule A annexed to the Note (as hereinafter defined) (Agent and the lenders identified in Schedule A are hereinafter collectively referred to as "Lender").

### WITNESSETH

WHEREAS, pursuant to a certain Promissory Note, of even date herewith, in the original principal amount of TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS (the "Note"), Lender made a loan to Borrower (the "Loan"); and

WHEREAS, on the date hereof, Lender and Borrower have executed that certain Loan and Security Agreement (the "Loan Agreement") pursuant to which Lender shall disburse the proceeds of the Loan and upon the terms and conditions set forth therein, and

WHEREAS, the Loan is secured, inter alia, by that certain Deed of Trust and Security Agreement, of even date herewith, (the "Mortgage") executed by Borrower, and more particularly described in the Loan Agreement on certain real property more particularly described on Exhibit A attached hereto and made a part hereof (the "Property"); and

WHEREAS, Guarantor has executed and delivered to Lender guaranty of the Loan, of even date herewith, (the "Guaranty") guarantying payment and performance of the Loan to Lender; and

WHEREAS, as an inducement to Lender to make the Loan to Borrower, Lender has requested that Indemnitors enter into and execute this Agreement.

NOW, THEREFORE, IN CONSIDERATION OF THE LOAN MADE TO BORROWER AND WITH KNOWLEDGE THAT LENDER WOULD NOT MAKE THE LOAN BUT FOR THE PROMISES OF INDEMNITORS HEREUNDER, INDEMNITORS JOINTLY AND SEVERALLY HEREBY ABSOLUTELY AND UNCONDITIONALLY AGREE AS FOLLOWS:

1. Defined Terms. Except as otherwise provided in this Agreement, all words and terms not defined herein shall have the respective meanings and be construed herein as provided in the Mortgage and the Loan Agreement.

2. Guaranty. Indemnitors absolutely and unconditionally guaranty to Lender that Indemnitors and all other users, as well as all operations at the Property will fully comply with all Environmental Laws and all of the terms, covenants and provisions of the Mortgage and the other Loan Documents. In the event that Indemnitors and all other users, as well as all operations at the Property do not fully comply with all Environmental Laws or the terms, covenants and provisions of the Mortgage and the other Loan Documents, Lender may, but shall be under no obligation to, comply with same. If Indemnitors do not fully comply with all Environmental Laws and all of the terms, covenants and provisions of the Mortgage or the other Loan Documents, Indemnitors shall reimburse Lender, upon demand, for all reasonable costs and expenses incurred by Lender (including, without limitation, counsel and consulting fees and expenses, investigation and laboratory fees and expenses, court costs and litigation expenses) to the extent not otherwise reimbursed to Lender by Indemnitors in connection with Lender performing Indemnitors' obligations as set forth herein or in the Mortgage or the other Loan Documents.

3. Indemnification. Indemnitors absolutely and unconditionally agree to defend, indemnify, and hold harmless Lender, its employees, agents, trustees, attorneys, officers, directors and shareholders from and against any and all claims, demands, penalties, causes of action, fines, liabilities, settlements, damages, costs or expenses of whatever kind or nature, known or unknown, foreseen or unforeseen, contingent or otherwise, incurred by Lender, its employees, agents, trustees, attorneys, officers or directors (including, without limitation, counsel and consultant fees and expenses, investigation and laboratory fees and expenses, court costs, and litigation expenses) arising out of, or in any way related to: (i) any breach by Indemnitors of the provisions of this Agreement; (ii) any breach by Indemnitors of any of the provisions of the Mortgage or any of the Loan Documents; (iii) any Hazardous Discharge or threat thereof of any Hazardous Material which is at, in, on, under, around, from or affecting the Property, including, without limitation, any violation of any Environmental Law or any damage or injury resulting from any Hazardous Material to or affecting the Property or the soil, water, air, vegetation, buildings, personal property, persons or animals located on the Property or on any other property or otherwise, whether occurring during or prior to Indemnitor's ownership of the Property; (iv) any personal injury (including wrongful death) and property damages (real or personal) arising out of or related to any such Hazardous Material; (v) any lawsuit brought or threatened, settlement reached, or order or directive of or by any Governmental Authority relating to such Hazardous Material; (vi) any remedial action undertaken by Lender in connection with any of the foregoing.

4. Survival. The obligations and liabilities of Indemnitors under this Agreement shall survive and continue in full force and effect and shall not be terminated, discharged or released, in whole or in part, irrespective of whether the indebtedness evidenced by the Note and secured by the Mortgage has been paid in full and irrespective of any foreclosure of the Mortgage, release of any collateral, sale of the Property, pursuant to the provisions of the Mortgage, or acceptance by Lender, its wholly-owned subsidiary, assignee or nominee of a deed or assignment in lieu of foreclosure or sale, and irrespective of any other fact or circumstance of any nature whatsoever.

5. Guaranty of Payment and Not Collection. This Agreement is a guaranty of payment and not merely of collection. This Agreement is a primary obligation of Indemnitors.

6. No Marshalling. Indemnitors hereby waive any right or claim of right to cause a marshalling of Borrower's assets or to cause Lender to proceed against any of the security or collateral held by Lender before proceeding against Indemnitors; and, Indemnitors hereby waive any and all legal requirements that Lender shall institute any action at law or in equity against Borrower, or anyone else with respect to the Note, or any other Loan Document, or with respect to any security held by Lender as a condition precedent to bringing any action against Indemnitors under this Agreement.

7. Representations and Warranties of Indemnitors. Each Indemnitor represents and warrants that (i) it has received adequate consideration for the execution, delivery and performance of its obligations under this Agreement; (ii) the making of the Loan to Borrower and the assumption by each Indemnitor of its liabilities and obligations hereunder has or will provide substantial benefit to such Indemnitor; and (iii) Lender would not have made the Loan to Borrower had such Indemnitor not executed and delivered this Agreement to Lender.

8. Subrogation. So long as any of the Note remains unpaid, any liabilities and obligations of Borrower exist under the Loan Documents or Indemnitors under this Agreement, Indemnitors waive any and all rights of indemnification, reimbursement, subrogation or contribution which Indemnitors may otherwise have now or hereafter as a matter of law against Borrower.

9. Obligations Absolute. The liabilities and obligations of Indemnitors hereunder shall be absolute and unconditional irrespective of (i) any lack of validity or enforceability of the Note or any other Loan Document; (ii) the insolvency of, or the voluntary or involuntary bankruptcy, assignment for the benefit of creditors, reorganization or other similar proceedings affecting Borrower any other Indemnitor or any of their's assets; or (iii) any other circumstance or claim which otherwise might constitute a defense available to, or a discharge of, Borrower with respect to its liabilities and obligations under the Loan Documents, or of Indemnitors with respect to this Agreement.

10. Dealing with Borrower and Others. Without incurring responsibility to Indemnitors and without impairing or releasing the liabilities and obligations of Indemnitors hereunder, Lender, may at any time and from time to time, without the consent of or notice to Indemnitors, upon any terms or conditions and in whole or in part shall have the right to:

(i) amend, modify or change the manner, place or terms of payment of the Note or any other Loan Document and/or change or extend the time for payment or renew or alter any liabilities and obligations of Borrower or any security therefor, and the indemnity herein made shall apply to the liabilities and obligations of Borrower as so amended, modified, changed, extended, renewed or altered;

(ii) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order, any property by whomsoever at any time pledged, assigned, mortgaged or in which a security interest is given to secure, or howsoever securing, the liabilities and obligations of Borrower;

(iii) exercise or refrain from exercising any rights against Borrower or other persons or entities (including Indemnitors) or against any security given by Borrower or other persons or entities (including Indemnitors), or otherwise act or refrain from acting;

(iv) settle or compromise any liabilities and obligations of Borrower to Lender, dispose of any security therefor, with or without consideration, or any liability incurred directly or indirectly in respect thereof or hereof, and may subordinate the payment of all or any part thereof to the payment of any liabilities and obligations of Borrower (whether due or not) to creditors of Borrower other than Lender and Indemnitors; and

(v) apply any sums by whomsoever paid and howsoever realized for the benefit of Borrower to any liabilities and obligations of Borrower, subject to the provisions of the Loan Documents.

11. No Impairment. No invalidity, irregularity or unenforceability of all or any part of any liabilities and obligations of Borrower or the impairment or loss of any security therefor, whether caused by any actions or inactions of Lender, or otherwise, shall affect, impair or be a defense to this Agreement.

12. Joint and Several Liability. The liability of each Indemnitor under this Agreement shall be joint and several with that of each and every other Indemnitor.

13. No Waiver. No delay on the part of Lender in exercising any of its rights, powers or privileges or partial or single exercise thereof under the Note, this Agreement or any other document made to or with Lender by Borrower shall operate as a waiver of

any such privileges, powers or rights. No waiver of any of its rights hereunder and no modification or amendment of this Agreement shall be deemed to be made by Lender unless the same shall be in writing, duly signed on behalf of Lender by a duly authorized officer, and each such waiver, if any, shall apply only with respect to the specific instance involved and shall in no way impair the rights of Lender or the liabilities and obligations of Indemnitors to Lender in any other respect at any other time.

14. Rights Cumulative. All rights, powers and remedies afforded to Lender by reason of this Agreement are separate and cumulative remedies, and no one of such remedies whether or not exercised by Lender shall be deemed to exclude any of the other remedies available to Lender nor prejudice the availability of any other legal or equitable remedy which Lender may have with respect to the Loan.

15. Governing Law. This Agreement shall be governed by and construed and interpreted in accordance with the substantive laws of the State of New Jersey without regard to choice of law consideration.

16. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties hereto and their respective successors and assigns.

17. Notices. All notices, consents, approvals and requests required or permitted hereunder or under any other Loan Document shall be given in writing and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, return receipt requested or (b) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, and by telecopier (with answer back acknowledged), addressed as follows (or at such other address and a person as shall be designated from time to time by any party hereto, as the case may be, in a written notice to the other parties hereto in the manner provided for in this Section):

If to Lender: Kennedy Funding, Inc.  
Two University Plaza, Suite 402  
Hackensack, New Jersey 07601  
Attention: Jeffrey Wolfer  
Facsimile No. (201) 342-8373

With a copy to: Cole, Schotz, Meisel, Forman & Leonard P.A.  
25 Main Street  
Hackensack, New Jersey 07602-0800  
Attention: Michael R. Leighton, Esq.  
Facsimile No.: (201) 489-1536

If to Indemnitors: OneCap Partners 2, LLC  
5440 W. Sahara Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89146  
Attn: Mr. Vincent Hesser

With a copy to: Harold Gewerter, Esq.  
5440 W. Sahara Ave., Suite #202  
Las Vegas, NV 89146  
Facsimile No. (702) 382-1759

A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery; in the case of registered or certified mail, when delivered or the first attempted delivery on a business day; or in the case of expedited prepaid delivery and telecopy, upon the first attempted delivery on a business day.

18. Costs and Expenses. In case of any proceedings to collect any liabilities of Indemnitors to Lender, Indemnitors shall pay all costs and expenses of every kind for collection, sale or delivery, including reasonable attorneys' fees, and after deducting such costs and expenses from the proceeds of sale or collection, Lender may apply any residue to the liabilities and obligations of Indemnitors under this Agreement, who shall continue to be liable for any deficiency, with interest at the Default Rate, if any, under the Loan Documents, or if no Default Rate is provided for, then at the interest rate provided for in the Note.

19. JURISDICTION AND VENUE. IN ANY JUDICIAL PROCEEDING INVOLVING, DIRECTLY OR INDIRECTLY, ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE RELATIONSHIP ESTABLISHED HEREUNDER, INDEMNITORS HEREBY IRREVOCABLY SUBMIT TO THE NONEXCLUSIVE JURISDICTION OF ANY STATE OR FEDERAL COURT LOCATED IN ANY COUNTY IN THE STATE OF NEW JERSEY WHERE LENDER MAINTAINS AN OFFICE AND AGREES NOT TO RAISE ANY OBJECTION TO SUCH JURISDICTION OR TO THE LAYING OR MAINTAINING OF THE VENUE OF ANY SUCH PROCEEDING IN SUCH COUNTY. INDEMNITORS AGREE THAT SERVICE OF PROCESS IN ANY SUCH PROCEEDING MAY BE DULY EFFECTED UPON THEM BY MAILING A COPY THEREOF, BY REGISTERED MAIL, POSTAGE PREPAID, TO INDEMNITORS.

20. WAIVER OF JURY TRIAL. THE PARTIES HEREBY WAIVE TRIAL BY JURY IN ANY JUDICIAL PROCEEDING INVOLVING, DIRECTLY OR INDIRECTLY, ANY MATTER (WHETHER SOUNDING IN TORT, CONTRACT OR OTHERWISE) IN ANY WAY ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE RELATIONSHIP ESTABLISHED HEREUNDER. IT IS INTENDED THAT SAID WAIVER SHALL APPLY TO ANY AND ALL DEFENSES, RIGHTS, AND/OR COUNTERCLAIMS IN ANY ACTION OR PROCEEDING. INDEMNITORS ACKNOWLEDGE THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN.

21. CONSEQUENTIAL AND PUNITIVE DAMAGES. NO CLAIM MAY BE MADE BY INDEMNITORS AGAINST LENDER OR THE AFFILIATES, DIRECTORS, OFFICERS, EMPLOYEES, ATTORNEYS OR AGENTS OF LENDER FOR ANY SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES OR, TO THE FULLEST EXTENT PERMITTED BY LAW, FOR ANY PUNITIVE DAMAGES IN RESPECT OF ANY CLAIM OR CAUSE OF ACTION (WHETHER BASED ON CONTRACT, TORT, STATUTORY LIABILITY, OR ANY OTHER GROUND) BASED ON, ARISING OUT OF, OR RELATED TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY, OR ANY ACT, OMISSION OR EVENT OCCURRING IN CONNECTION THEREWITH, AND INDEMNITORS HEREBY WAIVE, RELEASE, AND AGREE NEVER TO SUE UPON ANY CLAIM FOR ANY SUCH DAMAGES, WHETHER SUCH CLAIM NOW EXISTS OR HEREAFTER ARISES AND WHETHER OR NOT IT IS NOW KNOWN OR SUSPECTED TO EXIST IN ITS FAVOR.

22. Gender. In all references herein to any parties, persons, entities or corporations, the use of any particular gender of the plural or singular number is intended to include the appropriate gender or number as the text of the within instrument may require.

23. Severability. The invalidity or unenforceability of any one or more phrases, sentences, clauses, paragraphs or sections of this Agreement shall not affect the validity or enforceability of the remaining portions of this Agreement, or any part thereof.

24. Headings. Article, section and paragraph headings used in this Agreement are included herein for convenience of reference only and shall not constitute a part of this Agreement for any other purposes.

25. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original but such counterparts shall together constitute but one and the same instrument.

26. Interpretation. In the event of any controversy, dispute or contest over the meaning, interpretation, validity, or enforceability of this Agreement or any of this Agreement's terms or conditions, there shall be no inference, presumption, or conclusion drawn whatsoever against Lender, Guarantor, or Borrower by virtue of such party having drafted this Agreement or any portion thereof.

27. Additional Guaranty. The obligations and liabilities of Guarantor under this Agreement are in addition to the obligations and liabilities of Guarantor under the Guaranty. The discharge of any Guarantor's obligations and liabilities under the Guaranty or by reason of operation of law or otherwise, in no event or under no circumstance shall constitute or be deemed to constitute a discharge, in whole or in part, of any Guarantor's obligations and liabilities under this Agreement. Conversely, the discharge of any Guarantor's obligations and liabilities under this Agreement or by reason of operation of law or otherwise shall in no event or under any circumstance constitute or be deemed to constitute a discharge, in whole or in part, of any Guarantor's obligations and liabilities under any Agreements of Guaranty.

28. Personal Liability. No exculpatory provisions contained in the Note, the Mortgage, or in any other Loan Document with respect to the Loan in any event or under no circumstances shall be deemed or construed to modify, qualify, or affect in any manner whatsoever the personal recourse obligations and liabilities of Indemnitors under this Agreement.

[Remainder of page intentionally left blank.]



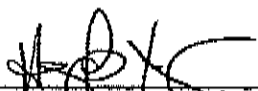
IN WITNESS WHEREOF, Indemnitors have caused this Agreement to be duly executed and delivered on the day and year first above written.

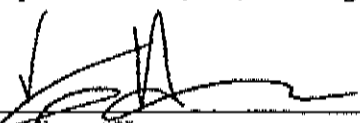
WITNESS:

**BORROWER:**

**OneCap Partners 2, LLC,**  
a Nevada limited liability company

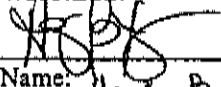
By: OneCap Partners MM, Inc., its Manager

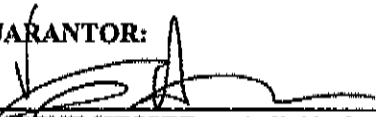
  
Name: Hazel B. Young

By:   
Name: Vincent Hesser  
Title: President

WITNESS:

**GUARANTOR:**

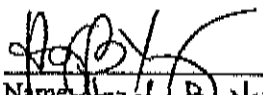
  
Name: Hazel B. Young

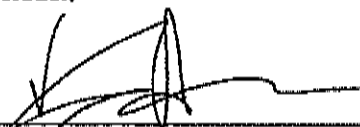
  
VINCENT HESSER, an individual

WITNESS:

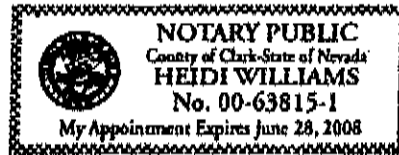
**GUARANTOR:**

**OneCap Partners MM, Inc.,** a Nevada  
corporation

  
Name: Hazel B. Young

By:   
Name: Vincent Hesser  
Title: President

STATE OF Nevada )  
 ) ss.:  
COUNTY OF Clark )



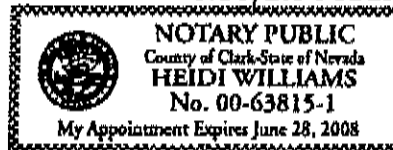
I certify that on June 14, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

(a) made the attached instrument; and

(b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc. the Manager of OneCap Partners 2, LLC, a Nevada limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.

  
NOTARY PUBLIC

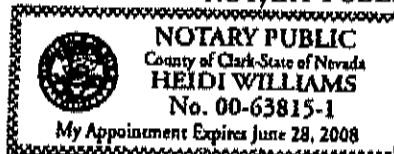
STATE OF Nevada )  
 ) ss.:  
COUNTY OF Clark )



On the 14<sup>th</sup> day of June, 2006, before me personally came Vincent Hesser, who being by me duly sworn, did depose and say that he signed this instrument as his voluntary act and deed.

  
NOTARY PUBLIC

STATE OF Nevada )  
 ) ss.:  
COUNTY OF Clark )



I certify that on June 14, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he (a) made the attached instrument; and (b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc., a Nevada corporation (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its board of directors and its shareholders.

  
NOTARY PUBLIC

EXHIBIT A

LEGAL DESCRIPTION

31392/0400-1437978v2

A-1

VH000227KF00161

**EXHIBIT "A"**  
**LEGAL DESCRIPTION**

**PARCEL ONE (1):**

LOT TWO (2) AS SHOWN ON THAT CERTAIN PARCEL MAP IN FILE 53 OF PARCEL MAPS, PAGE 93, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

**PARCEL TWO (2):**

THE SOUTH 1000 FEET OF THE NORTH 2000 FEET (MEASURED AT A RIGHT ANGLE TO THE NORTH LINE) OF SECTION 25, TOWNSHIP 32 SOUTH, RANGE 66 EAST, M.D.B.&M.



# **EXHIBIT “10”**

**EXHIBIT “10”**

**Case Editorial**

ORIGINAL

MSJD

RICHARD F. HOLLEY, ESQ.

Nevada Bar No. 3077

OGONNA M. ATAMOH, ESQ.

Nevada Bar No. 7589

SANTORO, DRIGGS, WALCH,

KEARNEY, HOLLEY & THOMPSON

400 South Fourth Street, Third Floor

Las Vegas, Nevada 89101

Telephone: 702/791-0308

Facsimile: 702/791-1912

Attorneys for Kennedy Funding, Inc.

FILED

SEP 22 2009

CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

KENNEDY FUNDING, INC., a New Jersey corporation,

Plaintiff,

v.

ONECAP PARTNERS MM, INC, a Nevada corporation; VINCENT W. HESSER, an individual; DOE INDIVIDUALS I through X; and ROE CORPORATIONS I through X,

Defendants.

Case No.: A582746

Dept. No.: XI

Date of Hearing:

Time of Hearing:

MOTION FOR SUMMARY JUDGMENT

Plaintiff KENNEDY FUNDING, INC. ("Kennedy Funding"), by and through its counsel of record, the law firm of Santoro, Driggs, Walch, Kearney, Holley & Thompson, hereby files this motion for summary judgment. Plaintiff respectfully requests that this Court grant it summary judgment on its claims for breach of contract against the Defendants.

This Motion is supported by the declaration of Kevin Wolfer, Chief Executive Officer of Kennedy Funding (the "Wolfer Decl."). This Motion is further made and based upon the pleadings and papers on file herein, the Memorandum of Points and Authorities below, and any oral argument of counsel as may be heard on this matter.

09A582746  
411993



06209-09/465733\_2

VH000232

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

CLERK OF THE COURT

SEP 22 2009

RECEIVED



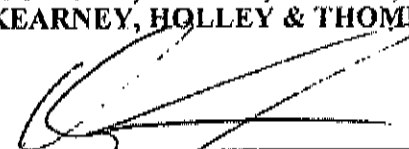
**NOTICE OF MOTION**

**TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing **MOTION FOR SUMMARY JUDGMENT**, on for hearing before the above-entitled Court in Department XI on the 27 day of Oct, 2009, at 9:00 a.m.

Dated this 22<sup>nd</sup> day of September, 2009.

**SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON**

  
\_\_\_\_\_  
RICHARD F. HOLLEY, ESQ.  
Nevada Bar No. 3077  
OGONNA M. ATAMOH, ESQ.  
Nevada Bar No. 7589  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

*Attorneys for Kennedy Funding, Inc.*

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

**Loan Documents**

1. As set forth in the Wolfer Declaration, Kennedy Funding is a New Jersey corporation that is located and headquartered in New Jersey. Wolfer Decl., ¶ 8.

2. On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or "OneCap") and Kennedy Funding, as agent of the lenders, entered into a Loan and Security Agreement ("Loan Agreement"), pursuant to which Kennedy Funding made a \$12 million loan to OneCap to facilitate the purchase of unimproved real property consisting of 78.74± acres of raw land located along Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark County Assessor Parcel Numbers 264-25-101-001 and 264-25-201-001 (the "Property"). A true and correct copy of the Loan Agreement is attached as Exhibit "1" to the Wolfer Decl.

3. The loan is evidenced by a Promissory Note dated June 15, 2006 in the original principal sum of \$12 million ("Note"), made by OneCap to pay to the order of Kennedy Lending,

1 as agent of the lenders. A true and correct copy of the Note is attached as Exhibit "2" to the  
2 Wolfer Decl.

3 4. Under the Note, OneCap promised to pay Kennedy Funding monthly interest only  
4 payments at a rate of 11.5% per annum, to accrue from July 1, 2006 to June 1, 2007. Ex. 2, p.2  
5 (§ b). Beginning August 1, 2007, OneCap promised to pay Kennedy Funding monthly interest  
6 only payments at a rate of 18% per annum, to accrue from July 1, 2007 through to the maturity  
7 date of June 30, 2009. Ex. 2, p.2 (§ d).

8 5. OneCap agreed to pay all principal, interest and other sums due under the Note in  
9 full on the maturity date of June 30, 2009. Ex. 2, p.1.

10 6. In the event of a late payment under the Note, OneCap agreed to pay a late charge  
11 equal to 10% of the overdue payment. Ex. 2, p.1.

12 7. In the event of a default under the Note, OneCap agreed to pay a default rate of  
13 25% per annum. Ex. 2, p.1.

14 8. As security for the Note, OneCap executed and delivered to Kennedy Funding a  
15 Deed of Trust with Security Agreement, Financing Statement for Fixture Filing and Assignment  
16 of Rents ("Deed of Trust") against the Property, which was recorded on June 15, 2006 with the  
17 Clark County Recorder's Office as Instrument No. 20060615-0005324. A true and correct copy  
18 of the Deed of Trust is attached as Exhibit "3" to the Wolfer Decl.

19 9. On June 15, 2006, Kennedy Funding, Gary Owen II, LLC ("Option Holder"), and  
20 OneCap executed a Subordination and Attornment Agreement ("Subordination Agreement") in  
21 which the Option Holder agreed to subordinate its limited option to purchase the Property to  
22 Kennedy Funding's Deed of Trust. A true and correct copy of the Subordination Agreement is  
23 attached as Exhibit "4" to the Wolfer Decl.

24 10. As additional security for the loan, OneCap executed and delivered to Kennedy  
25 Funding, as agent for the lenders, an Assignment of Leases and Rents, dated June 14, 2006, and  
26 recorded June 15, 2006, with the Clark County Recorder's Office as Instrument No. 20060615-  
27 0005325, and an Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings  
28 and Report, dated June 15, 2006 ("Assignment of Licenses"). A true and correct copy of the

1 Assignment of Leases and Rents is attached as **Exhibit "5"** to the Wolfer Decl. A true and  
2 correct copy of the Assignment of Licenses is attached as **Exhibit "6"** to the Wolfer Decl.

3 11. To further secure payment of the Note, on June 14, 2006, Defendant Vincent  
4 Hesser ("Hesser") and Defendant OneCap Partners MM, Inc. ("OneCap MM" and together with  
5 Hesser the "Defendants") executed personal unconditional guaranties of the loan to Kennedy  
6 Funding ("Guaranty"). At the time of the transaction between OneCap and Kennedy Funding,  
7 Hesser was the President of OneCap and OneCap MM. A true and correct copy of the Guaranty  
8 is attached as **Exhibit "7"** to the Wolfer Decl.

9 12. OneCap also granted a properly perfected security interest to Kennedy Funding  
10 by way of a UCC-1 Financing Statement ("UCC-1") filed with the Clark County Recorder's  
11 Office on June 15, 2006 as Instrument No. 20060615-0005326. A true and correct copy of the  
12 UCC-1 is attached as **Exhibit "8"** to the Wolfer Decl.

13 13. Finally, OneCap and Defendants executed an Environmental Indemnity  
14 Agreement in favor of Kennedy Funding, under which they agreed to indemnify Kennedy  
15 Funding for noncompliance of environmental laws. A true and correct copy of the  
16 Environmental Indemnity Agreement is attached as **Exhibit "9"** to the Wolfer Decl.

17 14. Kennedy Funding received all money to fund the loan in New Jersey, and  
18 disbursed those funds from New Jersey. Kennedy Funding also received all payments made by  
19 OneCap on the loan in New Jersey, and disbursed those payments to lenders from New Jersey.  
20 Wolfer Decl., ¶ 21.

21 **OneCap Defaults**

22 15. On April 1, 2008, OneCap defaulted under the Note and Deed of Trust by failing  
23 to make its monthly installment payment of \$250,000 under the Note. Wolfer Decl., ¶ 22.

24 16. In addition, OneCap is in default under the Deed of Trust for failure to provide  
25 Kennedy Funding with current proof of liability insurance, and for failure to timely pay its tax  
26 obligations relating to the Property. Ex. 3, § 3.01(b), (c). State and County Taxes are  
27 outstanding for the fiscal period 2008 to 2009 in the total amount of \$41,093.18 on the Property.  
28 Wolfer Decl., ¶ 23.

1           17. Based on those defaults, Kennedy Funding accelerated the Note and instituted  
2 foreclosure proceedings on the Property. The Notice of Breach and Election to Sell Under Deed  
3 of Trust was recorded with the Clark County Recorder's Office on August 20, 2008 as  
4 Instrument No. 20080820-00597; and the Notice of Trustee's Sale, with a sale date of December  
5 29, 2008, was recorded on December 8, 2008 as Instrument No. 20081208-00882. Wolfer Decl.,  
6 ¶ 24.

7           18. On December 26, 2008, three days before the foreclosure sale, Nevada Ueno  
8 Mita, LLC ("Nevada Ueno"), filed a Chapter 11 Bankruptcy Petition in the United States  
9 Bankruptcy for the District of Nevada, Case No. BK-S-08-25487-BAM (the "Bankruptcy  
10 Petition"). Wolfer Decl., ¶ 25.

11           19. Based upon information obtained from the Bankruptcy Petition, OneCap had  
12 transferred its interest in the Property to Nevada Ueno. Wolfer Decl., ¶ 26. A Deed from  
13 OneCap to Nevada Ueno was recorded with the Clark county Recorder's Office on November 3,  
14 2008 as Instrument No. 20081103-0002469.

15           20. Under the Deed of Trust and Loan Agreement, OneCap's transfer of the Property  
16 to Nevada Ueno was a default. Ex. 3, Art. II, § 2.20; Art. III, §§ 3.01(o), (p), (v), (w); Ex. 1, ¶  
17 10(c).

18           **Defendants Default on the Guaranty**

19           21. Because of OneCap's default under the Note, including failure to make timely  
20 payments, OneCap's improper transfer and Nevada Ueno's bankruptcy petition, which halted the  
21 foreclosure action, Kennedy Funding demanded performance from Defendants under the  
22 Guaranty. Wolfer Decl., ¶ 29.

23           22. However, Defendants have failed and refused to perform under the Guaranty.  
24 Wolfer Decl., ¶ 30.       **Damages**

25           23. As of July 24, 2009, the outstanding balance owed to Kennedy Funding under the  
26 Loan Agreement and Note is \$16,046,147.65 consisting of the following:  
27  
28

Description	Amount
Principal	\$12,000,000.00
Accrued Interest	\$3,968,000.00
Late Fees accrued	\$18,000.00
Foreclosure costs and appraisal fees	\$29,046.50
Attorney's fees and costs	\$31,101.15
TOTAL:	\$16,046,147.65

A true and correct copy of the Account Summary is attached as Exhibit "10" to the Wolfer Decl.

As a result of Defendants refusal to meet their obligations under the Guaranty, on February 13, 2009, Kennedy Funding filed the instant action against the Defendants for breach of the Guaranty. Because there exists no genuine issues of material fact regarding Defendants' breach of the Guaranty, this Court should grant summary judgment to Kennedy Funding and enter an award for Kennedy Funding in the amount of \$16,046,147.65.

## II. LEGAL ARGUMENT

### A. Legal Standard for Summary Judgment

NRCP 56(c) provides that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on 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, by affidavit or otherwise, which demonstrate the existence of a genuine issue for trial. Id. It is axiomatic that "[q]uestions of contract construction, in the absence of ambiguity or other factual issues, are suitable for determination by summary judgment." Nelson v. CSAA, 114 Nev. 345, 347, 956 P.2d 803, 805 (1988).

The facts relevant to this matter are neither voluminous nor disputed. Because Defendants have refused to meet their obligations under the Guaranty, Plaintiff is entitled to summary judgment.

**B. The Guaranty Must Be Construed Under the Laws of New Jersey**

Pursuant to paragraph 11 of the Guaranty, the parties agreed that the law of New Jersey would govern the construction and enforcement of the Guaranty, and that no defense to the Guaranty would be permitted unless permitted under the laws of New Jersey. Ex. 7, ¶ 11. In Nevada, a choice of law provision in a contract is controlling "if the parties acted in good faith and not to evade the law of the real situs of the contract." Ferdie Sievers and Lake Tahoe Land Co., Inc. v. Diversified Mortg. Investors, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979). That requires that the situs in the agreement have a substantial relationship with the transaction and that the agreement is not contrary to the public policy of the forum. *Id.*

Here, New Jersey does have a substantial relationship to the transaction, as Kennedy Funding is headquartered in New Jersey and the loan was serviced (i.e. payments received and disbursed) from that location. Wolfer Decl., ¶¶ 18, 21. Also, nothing in the Guaranty or the loan documents raises public policy concerns for Nevada. See Pentax Corp. v. Boyd, 111 Nev. 1296, 1299, 904 P.2d 1024, 1026 (1995) (holding provision in guaranty selecting Colorado law controlled when plaintiff was headquartered and shipped the goods from Colorado and nothing about litigation to collect on the guaranty raised public policy concerns). Because the choice of law provision in the Guaranty is controlling, this Court must apply New Jersey law in this matter.

**C. No Genuine Issue of Material Fact Exists As to Whether Hesser and OneCap MM Breached the Guaranty**

In New Jersey, as in Nevada, "where the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written." Karl's Sales and Service, Inc. v. Gimbel Bros., Inc., 592 A.2d 647, 650 (N.J. Super. Ct. App. Div. 1991). Where the guaranty contract contains an "unconditional" guaranty, the lender has full power and discretion to deal in any manner with the debtor's liabilities and collateral. In particular, "[u]nconditional language is normally held to permit the creditor to move against the guarantor without first proceeding either against the principal debtor or the collateral."<sup>1</sup>

<sup>1</sup> It is worth noting that, even if Nevada law did control in this matter, the "one action rule" would not apply as a defense to this action. Pursuant to NRS 40.430(4)(i), an action to enforce a surety or guaranty

1 Interchange State Bank v. Rinaldi, 696 A.2d 744, 748 (N.J. Super. Ct. App. Div. 1997) (internal  
2 quotation marks omitted).

3 Under the Guaranty, Hesser and OneCap MM granted a broad and unconditional  
4 guaranty of OneCap's obligations under the loan. The guaranty clause provides:

5 The Guarantor hereby absolutely, irrevocably and unconditionally  
6 guaranties to Lender the full, prompt and unconditional payment of  
7 the Debt, when and as the same shall become due, whether at the  
8 stated maturity date, by acceleration or otherwise, and the full,  
9 prompt and unconditional performance of each and every term and  
10 condition of every transaction to be kept and performed by  
11 Borrower under the Note. This Guaranty is the primary obligation  
12 of Guarantor and shall be a continuing inexhaustible guaranty.  
13 Lender may require Guarantor to pay and perform any or all of the  
14 Guarantor's liabilities and obligations under this Guaranty and may  
15 proceed immediately against Guarantor without being required or  
16 obligated to bring any proceeding or take any action against  
17 Borrower, any other guarantor or any other person, entity or  
18 property prior thereto. The liability of the Guarantor hereunder is  
19 joint and several with all other guarantors, and is independent of  
20 and separate from the liability of Borrower, any other guarantor,  
21 person or entity, and is independent of the availability of any  
22 collateral security for and/or under any documents granting Lender  
23 security for the Loan.

24 Ex. 7, ¶ 2. The "Debt", as defined in the Guaranty, includes all the principal, interest, or any  
25 other sums that may become due and payable under the Note, Deed of Trust, Loan Agreement or  
26 any other documents executed in connection with the loan. Ex. 7, ¶ 2(a). Defendants also  
27 expressly waived, among other things, any defense based on the failure of Kennedy Funding to  
28 first commence an action against OneCap or proceed against or exhaust any security or pursue  
any other remedy. Ex. 7, ¶ 4(g). Defendants also expressly waived any defense based upon  
Kennedy Funding's election of remedies or impairment of collateral. Ex. 7, ¶ 4(o).

It is undisputed that OneCap defaulted under the loan when it failed to make the April  
2008 payment and that OneCap has made no payments since defaulting and the entire Note is

(continued)  
is specifically excepted from the definition of "action" for purposes of the one action rule when  
"enforcement of the mortgage or other lien has been automatically stayed pursuant to 11 U.S.C. § 362 or  
pursuant to an order of a federal bankruptcy court under any other provision of the United States  
Bankruptcy Code for not less than 120 days following the mailing of notice to the surety or guarantor  
pursuant to subsection 1 of NRS 107.095."

1 now due and owing. Wolfer Decl., ¶¶ 22-24. It is also undisputed that neither Hesser or  
2 OneCap MM have made any payments in satisfaction of the Note and loan, as required by the  
3 Guaranty. Wolfer Decl., ¶ 21-22. Defendants are in breach of their obligations under the  
4 Guaranty, and based upon the broad and unambiguous language therein, they have no defenses  
5 for their breach. Accordingly, this Court should grant Kennedy Funding summary judgment on  
6 the issue of Defendants' liability for breach of the Guaranty.

7 **D. No Genuine Issue of Material Fact Exists As to the Amount of Kennedy**  
8 **Funding's Damages**

9 Under the Note, OneCap expressly promised to pay Kennedy Funding monthly interest  
10 only payments at a rate of 11.5% per annum, from July 1, 2006 to June 1, 2007, and at a rate of  
11 18% per annum, from July 1, 2007 to June 30, 2009. Ex. 2, p.2. The principal, interest and other  
12 sums due under the Note came due upon acceleration or on the maturity date of June 30, 2009.  
13 Ex. 2, p.1. In the event of a late payment under the Note, OneCap agreed to pay a late charge  
14 equal to 10% of the overdue payment. Ex. 2, p.1. The late charge is expressly not interest on the  
15 amount due, but a charge to be assessed for collection and administrative cost. Ex. 2, p.1. In the  
16 event of a default under the Note, OneCap agreed to pay a default rate of 25% per annum to be  
17 "effective retroactively as of the date from which the interest component of such overdue  
18 payment began to accrue and shall remain in force and effect for so long as such default shall  
19 continue." Ex. 2, p.1.

20 In addition, OneCap was responsible for all costs and fees, including reasonable attorney  
21 fees, incurred in collection efforts or as a result of OneCap's or the Guarantors' default under the  
22 loan.<sup>2</sup> Ex. 2, p.3, 4. Under the Guaranty, as a separate obligation, Defendants agreed to

23 <sup>2</sup> Specifically the Note provides at page 3 the following:

24 If this Note is placed in the hands of an attorney for collection, Borrower shall  
25 pay all costs incurred and reasonable attorneys' fees for legal services in the  
26 collection effort, whether or not suit be brought.

26 The Note also provides at page 4 the following:

27 Borrower hereby agrees to indemnify, defend and hold harmless Lender from  
28 and against any and all claims, loss, cost, damage or expense (including, without  
limitation, reasonable attorneys' fees) which may be incurred by Lender in  
connection with or as a result of any default by Borrower or Grantor . . .



1 reimburse Kennedy Funding "for all expenses (including reasonable counsel fees) incurred by  
2 Lender in connection with the collection of the Debt or any portion thereof . . . ." Ex. 7, ¶ 2(b).

3 It is undisputed that OneCap has been in default since April 1, 2008; thus, the default rate  
4 of 25% applies from that date forward. Also, OneCap owes a late charge of \$18,000 for its late  
5 payment of the October 1, 2007 payment and owes fees incurred in connection with Kennedy  
6 Funding's collection efforts, including the prior foreclosure proceedings, which costs and fees  
7 are now due and owing under the Note, and as a separate obligation under the Guaranty. As  
8 provided in the attached Wolfer Declaration and account summary in Exhibit 10 thereto, the  
9 amount due and owing under the loan, as of July 24, 2009, is 16,046,147.65. This amount  
10 consists of the following:

Description	Amount
Principal	\$12,000,000.00
Accrued Interest	\$3,968,000.00
Late Fees accrued	\$18,000.00
Foreclosure costs and appraisal fees	\$29,046.50
Attorney's fees and costs	\$31,101.15
TOTAL:	\$16,046,147.65

17 Accordingly, this Court should grant Kennedy Funding summary judgment on the issue  
18 of damages and award Kennedy Funding \$16,046,147.65 as a joint and several obligation of  
19 Hesser and OneCap MM.

20 ...

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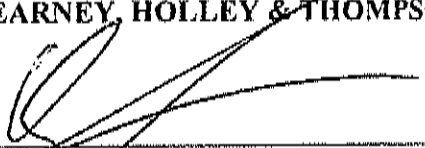
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1     **III. CONCLUSION**

2             Based on the foregoing, Kennedy Funding respectfully requests that this Court GRANT  
3     its Motion for Summary Judgment and enter a judgment for Kennedy Funding and against  
4     Hesser and OneCap MM, as a joint and several obligors, in the amount of \$16,046,147.65.

5             Dated this 22<sup>nd</sup> day of September, 2009.

6                     **SANTORO, DRIGGS, WALCH,**  
7                     **KEARNEY, HOLLEY & THOMPSON**

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9                     \_\_\_\_\_  
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FILED

SEP 23 2009

*John J. Johnson*  
CLERK OF COURT

*Attorneys for Kennedy Funding, Inc.*

DISTRICT COURT

CLARK COUNTY, NEVADA

KENNEDY FUNDING, INC., a New Jersey  
corporation,

Plaintiff,

v.

ONECAP PARTNERS MM, INC, a Nevada  
corporation; VINCENT W. HESSER, an  
individual; DOE INDIVIDUALS I through X;  
and ROE CORPORATIONS I through X,

Defendants.

Case No.: A582746

Dept. No.: XI

09A582746  
413459



CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 23<sup>rd</sup> day of September, 2009, and pursuant to NRCP  
5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the MOTION FOR  
SUMMARY JUDGMENT; and DECLARATION OF KEVIN WOLFER, postage prepaid and  
addressed to: Harold P. Gewerter, Esq., 2705 Airport Drive, North Las Vegas, NV 89032.

*Walter Wolfer*  
An employee of Santoro, Driggs, Walch,  
Kearney, Holley & Thompson

VH000243

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KEARNEY, HOLLEY & THOMPSON

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