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# MODEL INTERCREDITOR AGREEMENT

## MODEL INTERCREDITOR AGREEMENT (AMONG A LENDERS, B LENDERS, AND SWAP PROVIDER)

*By Joshua Stein**

Any commercial real estate borrower (a "Borrower"[1]) usually wants to borrow as much money as possible, as inexpensively as possible. To help accomplish that goal, loan originators will sometimes structure a single large mortgage loan (a "Loan") as two smaller loans — an "A" loan, *i.e.*, a senior tranche, and a "B" loan, *i.e.*, a junior tranche or "first loss piece" of the larger Loan. The originator may sell interests in the A loan and the B loan[2] to various mortgage investors (each, a "Lender"). Each



* *The author, a commercial real estate and finance partner with Latham & Watkins LLP, has published extensively on a wide range of commercial real estate topics. To contact the author, read his articles, learn about his books, or request an editable version of this Model Agreement, visit http://www.real-estate-law.com. Consent is granted to use this Model Agreement in transactions. Anyone doing so is asked to send the author a copy of the final negotiated document, so the author can perhaps improve and update this Model Agreement.*

1. Definitions in this Model Agreement apply both in these introductory comments and in all footnotes in this article. For convenience, the introductory comments repeat many of these definitions.

2. An originator can also create a "C" loan and other subordinate tranches as well, typically in connection with securitizing the "A" loan or conceivably other senior tranches. The securitization market insists, however, that the various levels of Lenders make decisions and take actions quickly. This means the "first loss" position (*i.e.*, the most subordinate tranche) will often call the shots to the exclusion of more senior tranches. Although this reallocation of control is "market standard" in securitizationland, portfolio lenders buying the affected tranches (*e.g.*, the "C" tranche even when the "J" tranche controls decisions) need to accept the resulting loss of control. Under these circumstances, an investment in a tranche of a larger Loan becomes very different from an investment in a single Loan, hence very different from the investments these portfolio lenders usually make.

Lender prefers the risk/return combination that its particular interest in the Loan delivers.

The process of severing an individual Loan into separate interests amounts to a mini-securitization of a single Loan.[3] By doing it, the Loan originator can deliver more financing at a lower all-in cost to a Borrower than otherwise. Hence the originator can better meet a Borrower's capital needs.[4]

To define the relative rights and obligations between the two groups of Lenders that hold the "A" and "B" pieces of the Loan, the originator of the Loan will enter into an intercreditor agreement (an "A/B Intercreditor Agreement"), which will bind all Lenders. The model document after these introductory comments (the "Model Agreement") represents the author's attempt to define a "model" A/B Intercreditor Agreement for transactions of this type.

*Summary of Issues.* An A/B Intercreditor Agreement will raise a short list of issues, the resolution of which somehow often creates more negoti-

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3. Unlike the case in a securitization, however: (1) the value of the parts will usually equal the value of the whole; and (b) the outcome of the transaction will depend entirely on the performance of a single loan, without the tremendous diversity of credit exposures built into a typical securitization.

4. Once upon a time borrowers could achieve the same result by closing multiple mortgages secured by the same real property. That technique has fallen out of favor for many good reasons. *See, e.g.,* Joshua Stein, *Subordinate Mortgage Financing: The Perils of the Senior Lender*, Real Estate Review, Fall 1997, at 3 (reprinted at www.real-estate-law.com, under "Lending"). If, however, a borrower closes a senior and a junior mortgage and the two mortgagees enter into an intercreditor agreement like the one offered here (sufficient to fully supplant whatever legal principles, issues, and theories would otherwise apply), then the arrangement becomes nothing more than a typical A/B lending structure and perfectly benign, at least in the author's opinion. The arrangement would need to include appointment of a single agent to enforce both mortgages; otherwise, enforcement of the first mortgage could be deemed a violation of the "automatic stay" if the holder of the second mortgage had itself filed bankruptcy (transfer restrictions could mitigate that risk). How the rating agencies might feel about a two-mortgage structure – even with a strong intercreditor agreement – is an issue outside the scope of this paper. As another cousin to A/B loans, an originator can simultaneously originate a "mezzanine" loan secured by a pledge of direct or indirect equity interests in Borrower or backed by preferred equity within a Borrower constituent entity. Those arrangements also require intercreditor agreements, raising many issues like those in this Model Agreement, but with a different flavor because the two lenders do not share collateral. That particular intercreditor relationship will usually be documented by a variation on the industry standard mortgage/mezzanine intercreditor agreement, available at: Commercial Mortgage Securities Association, Intercreditor Agreement, http://www.cmbs.org/standards/Intercreditor_Agreement.pdf. Anyone using the industry standard mortgage/mezzanine intercreditor agreement should note that it lacks a jury trial waiver. No one has ever added one to the model in the years since the model was promulgated. Anyone using that model in a transaction should repair the omission. The standard mortgage/mezzanine intercreditor agreement sometimes provides a starting point for an A/B intercreditor agreement, particularly if the originator intends to securitize the A Loan. This Model Agreement started from a different point.

ation, verbiage, and redrafts of documents than one might intuitively expect. The issues boil down to these:[5]

- *Cure Rights.* How many times, and how often, may B Lenders "cure" Borrower defaults under the Loan to prevent A Lenders from precipitating a foreclosure?
- *Defaults and Workouts.* If the Loan goes into default, how long and under what conditions can B Lenders control decision-making?
- *Decisions Generally.* What other decisions about the Loan require Lender approval? What percentage vote of the Lenders does each decision require?
- *Option Timing.* Although B Lenders will universally have an option to buy the A Loan, when does the option period start and end?
- *Option Pricing.* If B Lenders exercise their purchase option, does the purchase price include A Lenders' share of any breakage, default interest, late charges, prepayment premium, yield maintenance payment, and similar items that Borrower might need to pay to prevent foreclosure? How will the parties treat nonreimbursible expenses that A Lenders incurred?
- *Out of the Money.* What rights do B Lenders lose if they are "out of the money" — *i.e.*, if a hypothetical liquidation of the collateral securing the Loan (the "Collateral") would leave B Lenders with little or nothing?
- *Transfers.* How freely can Lenders transfer their interests in the Loan? Can they transfer to hedge funds or other categories of investor that might have an agenda different from traditional real estate lenders?

Any A/B Intercreditor Agreement will memorialize the answers to these and other questions. Although the issues in an A/B Intercreditor Agreement are neither monumental nor unwieldy, the process of negotiating them often becomes a grueling ordeal, sometimes even more so than negotiating the Loan Documents with the Borrower.

An A/B Intercreditor Agreement will often blur the lines between "legal" and "business" issues, more than in most other loan documents. Any "legal" issue can become a "business" issue at any time. And the "business" issues in these documents tend to relate to complex confluences of hypotheticals rather than to fundamental economic issues, all of which can typically be expressed in numbers. Moreover, given market pressures, including pressures on timing and costs, business people and lawyers who negotiate A/B Intercreditor Agreements must understand and know how

5. Some of these issues also arise in any syndicated or other multiple-lender loan. Outside of real estate, any intercreditor discussion might also raise a few more questions, such as the following: Which Collateral secures which Lender? (In real estate financing, all Collateral typically secures all Lenders.) Who gets paid first under which circumstances? (In real estate financing, the Waterfall in this Model Agreement is widely accepted and requires little negotiation.)

to quickly handle both "business" and "legal" issues. Clients can't tell their counsel to "go deal with the legal issues," and counsel can't tell their clients to "go deal with the business issues." All become intertwined. Therefore, this Model Agreement represents "recommended reading" not only for lawyers who work in this area, but also for their clients.

*Real Estate Finance vs. Other Finance.* Multiple-lender structures similar to "A/B loans" also appear in financing markets outside of real estate (*e.g.*, corporate finance), particularly in periods of high liquidity, low interest rates, low default rates, and high optimism, such as the years that preceded late Summer 2007. For example, bank finance transactions often include "B loans" or "junior tranches" similar to the A/B real estate loan described in any A/B Intercreditor Agreement.

The intricacies of multiple-tranche lending transactions vary, however, between real estate finance and corporate finance. In the former market, Borrower owns only a single asset and that asset represents the "main event" (usually the only event) for the Loan. In the latter market, different asset types may support different types of financing on different terms. For example, corporate finance Lenders may analyze, to a varying extent, a Borrower's overall business prospects, as opposed to just the Collateral. In some cases, subordinate lenders will act much more like equity investors, expecting to take equity risks and potentially receive equity rewards.

In typical real estate A/B loans, however, Lenders focus almost exclusively on the Collateral. Intercreditor provisions for these loans therefore do the same.

Corporate finance transactions may establish a wider range of priority structures than real estate lending. For example, corporate finance lenders may agree that the first dollars a Borrower pays will be applied to pay debt service under a senior tranche – but, after a default, all dollars the Borrower pays must be spread *pari passu* across all tranches. Typical real estate lenders would never agree to such a structure, because holders of senior tranches always expect to be paid first after a default. Corporate ownership structures also create more platforms for debt — a property owning company vs. an operating company vs. a holding company — with structural subordination based on the tiers of Borrower's ownership. And Borrowers may own multiple categories of asset, each supporting a different type of financing.

For those and other reasons, this Model Agreement (for commercial real estate loans) will not necessarily make sense for ordinary corporate financing, though some of the same issues will arise in both financial markets.

*What's Market?* In any multiple-lender financing, the parties often try to resolve issues by asking "what's market?" They assume that if "everyone else does it this way," then they may as well do it the same way. That approach saves time and has merit and logic. But different people will have different views of "what's market," depending on what they've seen

in the last deals that crossed their desk. This Model Agreement nevertheless makes a valiant effort to capture "what's market" based on the experience of the author and a handful of other attorneys who reviewed this document in draft.

*Overcomplexity.* Whatever may be the "market" intercreditor relationship between holders of real estate "A" loans and "B" loans, the A/B Intercreditor Agreements that govern such relationships have grown quite verbose and complex, inspired perhaps by the nearly incomprehensible prose and structure of a typical pooling and servicing agreement in a securitization.[6]

The author seeks to respond to that trend by offering this Model Agreement as a template for an A/B Intercreditor Agreement for portfolio loans. This template is both comprehensive and comprehensible, though unfortunately not as compact as one might wish. This Model Agreement collects in one place today's industry expectations (at least as the author and his reviewers perceive them) for the relationship between A Lenders and B Lenders, assuming neither Lender plans to securitize its piece of the Loan.

The introductory notes and footnotes do not seek to address every issue every time it arises, but typically only once, subject to plenty of exceptions. Therefore, anyone seeking to understand the issues this Model Agreement raises should read all the introductory notes and footnotes. They demonstrate, among other things, that any lawyer who practices in this area will benefit by actually reading cases and even a few statutes, an activity that most transactional lawyers regard with dread or at best as a fond but ancient memory.

*Starting Point.* This Model Agreement assumes as its "base case": (1) a single substantial commercial real estate Loan, governed by a single loan agreement between a Borrower and the Lender group (the "Loan Agreement") and (2) an administrative agent acting for the Lender group (the "Administrative Agent"), so that Borrower never interacts directly with any Lender(s).[7] This Model Agreement assumes the Loan Agreement it-

6. If the originator intends to securitize the A Loan, the pooling and servicing agreement for the securitization will govern many important pieces of the relationship between A Lender and B Lender, all with an eye toward assuring the best possible execution of the A Loan's securitization. These agreements cover an ever-increasing and never-decreasing range of hypothetical eventualities, typically as complicatedly as possible, often defying comprehension by mere mortals. Of course, the rules of entropy dictate that the facts will unfold in whatever way the parties never imagined, thus producing a longer document next time. When A and B Lenders intend to maintain their "A" and "B" loans in their portfolio, they worry less (or not at all) about much of the "securitization agenda." They can craft a reasonable business deal between themselves, using the ordinary language of mere mortals. This Model Agreement considers only the latter type of A/B intercreditor relationship.

7. The Administrative Agent will typically but not necessarily originate the entire transaction and "sell down" the various pieces either at closing or soon after. The Lender group may have the right to replace Administrative Agent in some circumstances. Lenders will sometimes fear, for example, that Administrative Agent has too chummy a relationship

self already provides for an A Loan and a B Loan, so the Borrower executed and delivered to Administrative Agent separate notes evidencing those two loans, both governed by the single Loan Agreement. If, on the other hand, the Borrower never executes two separate, distinguishable notes, then Administrative Agent could, with little trouble, synthetically create the separate A Loan and B Loan within the A/B Intercreditor Agreement. This Model Agreement offers optional language for that purpose.

*Bankruptcy Implications of Deal Structure.* The common structure in which a single note and a single mortgage evidence the entire Loan — as opposed to having Borrower enter into a separate A Loan and a separate B Loan, each with separate security — creates significant incremental risks and issues in any Borrower bankruptcy.

For example, in one litigated dispute in the bankruptcy of Eastern Airlines,[8] a single set of security documents secured three series of claimants. Each series had different priority rights to the same shared collateral. In essence, a single lien on a single bundle of collateral secured a group of A Lenders, B Lenders, and C Lenders, using today's vocabulary.

The bankruptcy court treated all three series of claimants in the aggregate as a single secured creditor. Then the court concluded that the group as a whole did not have enough collateral to cover all their claims – hence all lenders, considered as a group, were "undersecured." This meant that the group as a whole suffered various bad consequences in the bankruptcy.[9] In contrast, if the court had looked at each series of claimants separately, the A Lenders would have been "oversecured" and would not have suffered the same bad consequences. The court stated:

> [I]f the three Series held separate liens against the Collateral, then the First Series would be oversecured and would be entitled to post-petition interest, but that is not the structure of this transaction. The Debtor granted only one lien, only one secured claim, in favor of all the Certificateholders. How the rights to proceeds of the lien collateral were to be distributed under the Indenture was an intramural matter for the Collateral Trustee and the various series, not the Debtor. Accordingly, the fact that three proofs of claim were filed against the Debtor by the individual Series Trustees cannot change the number of claims that arise out of the single pool of Collateral. Thus, the Indenture provided for one secured claim against Eastern and that claim is undersecured. Eastern is not liable for post-petition interest.[10]

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with Borrower, and may not act aggressively in a default. This concern can also arise in any syndicated credit, not just an A/B Loan.

8. *In re Ionosphere Clubs, Inc.*, 134 B.R. 528 (Bankr. S.D.N.Y. 1991).

9. Correspondingly, other parties in the bankruptcy benefited. Thus, the bankruptcy court helped achieve its usual goal of making everyone, particularly the secured creditors, "share the pain," at least where any possible opportunity exists to do so. Secured creditors and their counsel usually try not to give the bankruptcy courts this type of opportunity.

10. *See Ionosphere Clubs, Inc.,* 134 B.R. at 532.

In contrast, if a single lender holds two separate loans clearly documented as two separate loans, the bankruptcy courts will treat them as separate loans. The senior loan can be oversecured or undersecured in its own right, and the courts will view the junior loan separately and independently, as if a third party held it.[11]

The bankruptcy benefits of holding two loans instead of one probably justify the extra expense of documenting the A Loan and the B Loan separately.[12] The separate documentation can directly determine how the two loans get treated in probably the only forum that really matters – bankruptcy court.[13] Nevertheless, the industry does not demand the use of separate sets of loan and security documents. A Lenders and B Lenders routinely buy synthetically created pieces of single Loans. They do all this notwithstanding the bankruptcy problems they might otherwise avoid if they required Borrower to enter into separate loans with separate security documents, sufficient to create two classes of creditors.[14]

In some cases, loan originators have no choice but to have a single set of loan documents memorialize all loans. For example, if the loan originator decides to create an A/B structure only after closing of the

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11. *See, e.g., In re Midway Partners*, 995 F.2d 490, 495 (4th Cir. 1993). The use of separate liens (thus creating separate classes of creditors) also creates strategic opportunities in any Borrower bankruptcy, such as the alternatives and possibilities available to the various classes under 11 U.S.C. § 1111(b). The alternatives and possibilities will vary depending on the full range of possible Collateral values. This flexibility should in general only help and not hurt the Lenders as a group, subject perhaps to a few anomalous exceptions.

12. As of mid-2007, Borrowers have typically had enough leverage to force the Administrative Agent to close a single Loan and create the A and B Loans synthetically, regardless of the possible bankruptcy benefits of having two separate loans.

13. The importance of bankruptcy court for single asset real estate cases has probably much diminished since the last down cycle, thanks to the 2005 amendments to 11 U.S.C. §§ 101(51B) and 362(d)(3) (eliminating $4 million cap for "single asset real estate" debtors). If those amendments remove most single asset real estate cases from the bankruptcy system as anticipated, and if the state courts enforce real estate finance remedies and documents as written, then Lenders and Borrowers may find the entire process vastly simplified and many traps, minefields, and spurious issues removed. Of course, since 2005 none of this has been tested much. Borrowers and bankruptcy judges may yet figure out how to keep using bankruptcy to torment and delay real estate Lenders, particularly for Collateral that involves some business operations, such as a hotel, golf course, marina, or storage facility.

14. The Loan documents might require Borrower to cooperate to sever one Loan into two separate loans (*i.e.*, an A Loan and a B Loan) if Administrative Agent ever asked. If the Loan ever went into default, the only time that really matters, would Borrower likely perform that obligation? Would a bankruptcy court enforce it? Administrative Agent might try to address these concerns by figuring out a way to make the future bifurcation of the Loan self-executing so it requires no Borrower action or cooperation of any kind — perhaps just Administrative Agent's issuance of a "bifurcation certificate." Administrative Agent might also try to structure the bifurcation procedure so it constitutes part of a "subordination agreement," which the Bankruptcy Code says is enforceable in bankruptcy to the extent it is enforceable under state law. 11 U.S.C. § 510(a). The efficacy of any of these measures represents an issue beyond this article.

Loan, Borrower may have no obligation or inclination to execute new separate loan documents. In other cases, the loan originator may take a hybrid approach, using a single set of loan documents but within those documents setting up the A Loan and the B Loan as separate indebtednesses.[15] The originator might use two notes and (at least for any major Collateral) two mortgages to evidence and secure the two loans, even if a single Loan Agreement (and a single set of all other loan documents) governs both loans.

This deal structure may, however, create its own potential bankruptcy issues – demonstrating once again the range of techniques that bankruptcy offers to attack secured creditors.

If the B Lenders hold a separate loan and separate security (as suggested above), then they will constitute a separate creditor in a Borrower bankruptcy proceeding. A typical subordination agreement will say that in any such proceeding, the senior creditors (*i.e.*, the A Lenders) have authority to exercise voting and other rights of the junior creditors (*i.e.*, B Lenders). An A/B Intercreditor Agreement, in contrast, will not appoint any Lenders as agents for other Lenders; instead, all the Lenders will empower Administrative Agent to act on their behalf. The difference may not matter.

A recent bankruptcy case refused to enforce precisely an "agency appointment" provision in a subordination agreement, at least in the context of voting on a Chapter 11 plan of reorganization. In *In re 203 N. LaSalle St. P'ship*,[16] the court noted that the Bankruptcy Code provides that "[t]he holder of a claim" has the right to vote that claim for or against a Chapter 11 plan of reorganization.[17] Applying the plain language of the statute, the court concluded that the junior creditor, and only the junior creditor, met the statutory requirement to vote its claim. Thus, the senior creditor could not vote the junior creditor's claim.

Moreover, the *203 North LaSalle St.* court rejected the senior creditor's argument that it acted as "agent" for the junior creditor. The court reasoned that the senior creditor intended to vote the junior creditor's claim in the senior creditor's own best interests, rather than in the interests of its alleged "principal"; hence, it could not be considered an "agent."

The result in *203 North LaSalle St.* seems quite hypertechnical and unjustified, an inappropriate and unnecessary extension of bankruptcy principles and policies into areas where they should not apply. This Model Agreement includes language designed to prevent the result in *203 North LaSalle St.* Among other things, this Model Agreement seeks to make Administrative Agent the holder of all claims, not anyone's agent or

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15. The rating agencies may not like this arrangement even if it were subject to a restrictive intercreditor agreement.

16. 246 B.R. 325 (Bankr. N.D. Ill. 2000).

17. 11 U.S.C. § 1126(a).

designee. This Model Agreement also clarifies that as agent, Administrative Agent acts for the Lenders as a whole, not in Administrative Agent's own interest.

Any concern about the result in *203 North LaSalle St.* should be tempered by the fact that the junior creditor in that case was an affiliate of Borrower and not an unaffiliated, third-party holder of debt.[18]

The next cycle of workouts and bankruptcies will teach the real estate finance industry whether it should have worried more about these issues, and how A/B loans might best address them.

*Secured Swap Obligations.* This Model Agreement assumes Administrative Agent's "swap desk" or conceivably some other derivatives counterparty ("Swap Provider") has entered into with Borrower a swap agreement (a "Swap") to allow Borrower to convert a floating interest rate on the Loan into a fixed interest rate.[19] Premature termination of a Swap could require Borrower to make a substantial payment, for example if interest rates have dropped. Thus, Swap Provider will want security for Borrower's contingent obligations under the Swap. But Borrower has no security to offer, except the Collateral for the Loan. Therefore, Swap Provider will often share the mortgage that secures the Loan.

To cover that common circumstance, this Model Agreement treats Swap Provider as part of the group of "Secured Parties." Swap Provider receives a share of the Collateral as if Swap Provider held Loan principal in the same amount as Swap Provider's claim against Borrower – either an actual claim if the Swap has already terminated, or a hypothetical claim[20] equal to what Borrower would owe if Borrower defaulted on the Swap at that moment.

Although such a *pari passu* distribution of Loan proceeds has a ring of fairness to it, the resulting diversion of potential foreclosure sale proceeds to Swap Provider will dilute the Lenders' security. As an example, if the Lenders lent $80 against $100 worth of Collateral, they thought they

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18. As the larger lesson, perhaps, no matter how hard a senior creditor tries to "subordinate" a creditor that is a Borrower affiliate, "there's always something" that will get in the way. The senior creditor might try to solve the problem through nonrecourse carveouts, but if the principals have already incurred personal liability as the result of the bankruptcy filing itself, they probably won't care much about any incremental personal liability they might suffer by misbehaving under a subordination agreement.

19. Borrowers and Lenders often insist on such arrangements because interest rates fluctuate far more than net operating income of real estate. Swaps are not at all unique to A/B loans. They can arise in any substantial commercial mortgage loan, and raise all the same issues discussed here. For more on how swaps work and the risks they create for real estate borrowers and lenders, *see* Joshua Stein, *Stein on New York Commercial Mortgage Transactions* § 6.14 (2006).

20. This hypothetical claim will vary as interest rates shift. It seems an imperfect measure of Swap Provider's relative interest in the Collateral. That imperfection may create inconsistencies and anomalies over time. Other formulas might make more sense. Multi-lender security structures that involve Swap Providers typically don't consider these details at all. They just say Swap Provider has the benefit of the Collateral on a *pari passu* basis.

made an 80% loan-to-value loan. But if the Swap Termination Payment is $10, then the Lenders actually hold something much less attractive: an 8/9 share of a 90% loan-to-value loan.

The real estate finance market nevertheless typically treats the Swap Provider on a *pari passu* basis with the Lenders, for at least these reasons:

- The Lender group's dilution of security is hard to explain, hypothetical, pessimistic, and boring. Therefore, many may just ignore it.[21]
- The potential Swap termination payment will typically be a manageable amount and decrease as the Loan matures, hence becoming even more manageable over time.
- A Swap Provider likes to be secured. It may refuse to issue the Swap if its security is weaker than everyone else's (*e.g.*, subordinated).
- Swap Provider will usually be an affiliate of Administrative Agent. Administrative Agent will look out for Swap Provider. No Lender will walk from the deal as a result.
- An obligation of Borrower to pay a large Swap termination payment will probably correlate with a low interest rate environment, which will also increase the Collateral value and decrease the likelihood of default. Even in a booming real estate market, though, this particular Loan may go into default because of problems unique to its Collateral.

Notwithstanding the author's misgivings about industry standard practice in securing Swaps, this Model Agreement follows the industry standard approach without trying to improve on it.[22] Outside of real estate lending, Lender groups sometimes do consider these concerns, such as by limiting Swap Provider's maximum share of foreclosure proceeds or by limiting the maximum term of the Swap that can be secured. This may happen particularly when the Swap relates not to interest rates but instead to some commodity other than the use of money.

If Borrower obtains only a rate cap (or no interest rate hedging at all), then the drafter should delete everything in this Model Agreement about any Swap or Swap Provider.

*Syndicated Lending Provisions.* This Model Agreement includes some administrative provisions that would apply not only to A/B loans, but also to ordinary syndicated Loans with a single tranche of Lenders. These pro-

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21. They also often ignore the entire intercreditor relationship between Swap Provider and the Lenders, stating simply that the Collateral also backs Borrower's obligations to Swap Provider.

22. Improvements could include the following: treating the Swap as entirely junior to the Loan (including both A Loan and B Loan); sandwiching the Swap's priority between the A Loan and the B Loan; or making the Swap *pari passu* with just the A Loan or just the B Loan. Whatever the A Lenders and B Lenders gain in this trade, the Swap Provider loses. Conceivably, the Swap Provider could limit itself to a lien on Borrower's equity, a structure the author has never seen in the context of Swap security.

visions include, for example, transfer procedures, and delegations of authority. Such provisions change only slightly because of the existence of two tranches of a larger Loan.

This Model Agreement might well have omitted these administrative provisions, leaving them to be added by any particular drafter who considered them necessary.[23] In the interests of completeness and ease of use, however, this Model Agreement does include administrative provisions, written somewhat more clearly than the norm. Some of those provisions raise issues or otherwise merit commentary, which the author has also tried to include.

*Separate Enforcement.* This Model Agreement gives Administrative Agent sole authority to "Enforce" the Loan, to the exclusion of individual Lenders. Occasionally, a Lender within a Lender group seeks to Enforce some Loan document separately in a limited way. *See, e.g., Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318 (2007). In *Beal*, one Lender in a syndicated Lender group wanted itself to sue to enforce one of the ancillary loan documents, even though the Lender group as a whole wanted to forbear entirely. That particular document said, in an offhand way, that it was enforceable by any Lender. No loan document expressly prohibited any individual Lender from enforcing its rights separately. The court nonetheless considered the loan documents as a whole. In the court's view, the documents contemplated "an unequivocal collective design," where the Lenders make decisions together and rely on Administrative Agent to execute them. Separate enforcement would defeat that scheme.

The result in *Beal* conformed to industry expectations, as the author understands them. Given some of the language in the *Beal* loan documents, though, the court perhaps did the lending industry a favor to some degree.

Some market participants believe that even in a Lender group, and notwithstanding *Beal*, an individual Lender should retain the right to sue on the promissory note as an unsecured obligation. The author disagrees, at least in real estate finance. Therefore, this Model Agreement does not allow individual Lenders to proceed separately against Borrower. This approach reflects the author's beliefs that:

- Lenders in the syndicated market do not expect any one Lender to have direct enforcement rights.
- Borrowers do not want to have to deal with individual Lenders that break out of formation and have their own ideas about enforcement.
- The *Beal* court reached the right result, even if one might quibble with how the court got there.

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23. In many cases they won't be necessary at all, because the underlying Loan Agreement already includes them. They are rather common and generic.

- For typical nonrecourse real estate loans, with attendant "one form of action" issues, direct enforcement can be either meaningless or dangerous.
- Direct enforcement could create chaos, hasten bankruptcy, and increase the likelihood of liquidation.

At a minimum, the decision in *Beal* has sensitized the syndicated lending community (not just A/B Lenders) to the issue of separate enforcement rights of Lenders. One should expect to see new provisions on point in syndicated loan agreements and intercreditor agreements to address this issue. Usually, these new provisions will prohibit separate enforcement, except exercise of a right of offset. In rare cases or special circumstances, the parties may conceivably negotiate to allow individual Lenders to conduct certain limited enforcement activities.

*Borrower Role.* An A/B Intercreditor Agreement (such as this Model Agreement) is typically only signed by Administrative Agent and the Lenders. Borrower is not a party. Borrower cannot directly control what goes into the A/B Intercreditor Agreement.

Might the Lenders ever want Borrower to acknowledge and confirm and consent to the A/B Intercreditor Agreement? Do the Lenders need some Borrower concurrence before the Lenders can freely redistribute among themselves their various claims against Borrower? Can B Lenders obtain rights to receive interests under the A Loan merely by making cure payments to cover unpaid interest under the A Loan? Can B Lenders do this without involving Borrower in any way, and without Borrower's acquiescence?

The author would answer the first two questions in the negative and the last two in the affirmative. Lenders should have the right to make whatever partial assignments they want of their relative interests in the Loan, unless the Loan Agreement provides otherwise.[24]

Conservative Lenders and their counsel may, however, want more comfort. They may fear, for example, that Borrower will claim the benefit of any cure payments B Lenders made under the A/B Intercreditor Agreement. Such Lenders and their counsel may want Borrower to countersign the A/B Intercreditor Agreement to acknowledge and consent to its terms.

Borrower may care a great deal about some of the issues addressed here (such as who can buy into the Loan, decision-making procedures, and any bias toward prompt and expeditious exercise of remedies upon default).[25] If so, Borrower will need to proactively raise those issues in

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24. More typically, the Loan Agreement will expressly permit Administrative Agent and any Lenders to make all kinds of assignments and partial assignments.

25. Ultimately, however, Borrower cannot control what the Lenders do, even if the decision-making procedures for Loan enforcement are exquisitely complex and slow and the Loan Agreement allows only the sweetest and most patient Lenders to buy into the Loan. If the Loan goes into default, nice Lenders may stop being nice. Sooner or later, Borrower may lose the Collateral. In any event Borrower cannot control the situation.

loan document negotiations and try at that stage to control the terms of any possible A/B Intercreditor Agreement and Lender rights. Borrower can negotiate any rights or restrictions it wants in the loan documents. Nothing in any A/B Intercreditor Agreement can dilute those rights and restrictions as they affect Borrower. If Administrative Agent develops the A/B Intercreditor Agreement at the same time as the Borrower loan documents, Borrower may try to pay attention to the intercreditor negotiations and stay involved at least enough to try to prevent problems of the type this paragraph suggests.

*Structurally Subordinate A/B Loans.* The "typical" A/B Loan will arise from a single first mortgage loan broken into an A Loan and a B Loan. In some cases, however, the combined A/B Loan might be structurally subordinate to some other loan. For example, if the A/B loan is in itself a mezzanine loan, it will be structurally subordinate to a mortgage loan that encumbers the underlying real property. Or the Collateral for the A/B loan might consist of a majority of the shares (and proprietary leases) of a cooperative building, structurally subordinate to an "underlying" first mortgage loan on the same building. These "oddball" cases do sometimes occur. The endless ingenuity of the real estate industry — and the ever-increasing complexity and layering of real estate finance transactions — may produce other structures where the A/B loan somehow encumbers collateral that is itself subordinate to another loan.

If Borrower closes the senior loan simultaneously with the subordinated A/B Loan, the same originator will probably originate both loans at once. Such originator may also conceivably plan to hold the senior loan while acting as Administrative Agent for the subordinate A/B Loan. Those facts create a genuine conflict of interest[26] that should concern both "A" loan purchasers and "B" loan purchasers. This conflict should, above all else, concern the originator, which will face endless and boundless claims of breach of duties it didn't know it owed (and couldn't even have imagined) if the documents do not address the conflict and the transaction suffers any distress.

Because these facts arise rarely, this Model Agreement does not address them. But because these facts can and do sometimes arise, the author has prepared a set of optional provisions for possible use when an A/B Loan is "structurally subordinate" to some other loan. Most of those provisions apply whether or not the originator has a conflict of interest. A few focus on any such possible conflict. They are available from the author by request.

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26. The originator might instead plan to securitize the senior loan while continuing to administer the A/B loan. A quick securitization with a third-party servicer can eliminate the conflict of interest. Even so: (1) the risks of being "structurally subordinate" to the senior loan remain; and (2) the "conflict of interest" problem remains if for any reason the originator cannot quickly securitize the senior loan (for example, because the markets freeze up between origination and securitization).

*Plain English.* This Model Agreement seeks to use ordinary English prose, liberating the reader from the legalese that makes so many intercreditor and other agreements incomprehensible. To do that, the author has tried to follow the principles he has expressed in several articles on legal writing,[27] which can be boiled down as follows. Keep sentences short. Use the active voice and ordinary language. Eliminate section cross-references. Establish and consistently use an intuitive set of defined terms.

*Review Process.* In preparing and editing this Model Agreement, the author requested comments from a number of commercial real estate and other finance lawyers. This document reflects many of their comments. The author wishes to thank these individuals (and a few reviewers who asked to remain anonymous) for their contributions: Christopher J. Carolan, Esq., of Brown Rudnick Berlack Israels LLP; Paul M. Fried, Esq., of AFC Realty Capital; Robert G. Harvey, Esq., of McKee Nelson LLP; Andrew L. Herz, Esq., of Patterson Belknap Webb & Tyler LLP; K.C. McDaniel of K.C. McDaniel PLLC; John C. Murray, Esq., of First American Title Insurance Company; and Michael Weinberger of Cleary Gottlieb Steen & Hamilton LLP. None of these individuals should be blamed for any mistakes or misjudgments in this document. None has "approved" this document.

*Further Comments.* Anyone who uses this document is encouraged to submit comments to the author through his website, http://www.real-estate-law.com. If enough improvements are suggested to justify a second edition, the author will produce one. Anyone who would like to receive a copy of any second edition should please notify the author through his website.

*Caveats.* Because we live in an era of caveats, disclosures, and risk management, no model document would be complete without a reminder of the following rather intuitively obvious propositions. This Model Agreement comes with no guarantee or warranty and is offered "as is." No representation is made that this document complies with law or is enforceable. It may or may not work for any particular transaction. It may omit important provisions or contain bad provisions or mistakes. Every transaction, however "routine," can and usually does raise its own unique issues, which may require extensive tailoring and thought, going beyond mere shoveling of words from one wordpile to another. Anyone using a model document must read and consider every word of it to decide what works and what doesn't. In the case of this particular Model Agreement, the drafter must also consider how this Model Agreement interacts with the Loan documents, and correct any anomalies or inconsistencies. This Model Agreement should be used only by a competent lawyer with substantial relevant experience admitted to practice in the state whose law

27. To see those articles, including publication details, *see* http://www.real-estate-law.com and click on "Better Documents."

applies. This Model Agreement should not be used in any transaction by a nonlawyer. Nothing in these introductory notes or in this Model Agreement reflects the positions or policies of, or has been approved by, any organization or anyone else. The author and his colleagues reserve the right, at any time, to take positions inconsistent with those in this article and accompanying Model Agreement. So do the individuals who reviewed this document in draft. Don't believe everything you read, even less of what you hear. Look both ways before you cross the street; if you don't, you might get run over by a bus. If it's cold, wear a jacket. If you think it might rain, also bring along an umbrella.

INTERCREDITOR AGREEMENT
(AMONG A LENDERS, B LENDERS, AND SWAP PROVIDER)

(the "Agreement")

For Obligations Secured by Real Property at:

_____

_____

(as "Sole Lead Arranger"
and "Administrative Agent")
Dated _____ (the "Effective Date")
Latham & Watkins LLP
885 Third Avenue, Suite 1000
New York, New York 10022-4802
Attention: Joshua Stein, Esq.

**INTERCREDITOR AGREEMENT**
**(AMONG A LENDERS, B LENDERS, AND SWAP PROVIDER)**

This **INTERCREDITOR AGREEMENT (AMONG A LENDERS, B LENDERS, AND SWAP PROVIDER)** (this "Agreement") is made as of _____ (the "Effective Date") by and among these parties:

Administrative Agent. _____, with an address at _____ (as Administrative Agent under this Agreement, with any successor or replacement in that capacity, "Administrative Agent");

Initial A Lenders. The party(ies) identified on the signature pages of this Agreement as acquiring interests in the A Loan ("A Lenders"), and if this Agreement does not identify any such A Lender(s), then "A Lender(s)" means Administrative Agent unless and until (and except to the extent that) Administrative Agent has assigned interests in the A Loan to other A Lender(s);

Initial B Lenders. The party(ies) identified on the signature pages of this Agreement as acquiring interests in the B Loan ("B Lenders"), and if this Agreement does not identify any such B Lender(s), then "B Lender(s)" means Administrative Agent unless and until (and except to the extent that) Administrative Agent has assigned interests in the B Loan to other B Lender(s); and

Swap Provider. _____, with an address at _____ _____, as Swap Provider (with its permitted successors and assigns, "Swap Provider").

This Agreement is entered into based on these facts, and may use capitalized terms before defining them. An Index of Defined Terms precedes the first page.

A. Administrative Agent and _____ ("Borrower") entered into a [Loan and Security] Agreement (the "Loan Agreement") dated as of _____ (the "Loan Date").

B. Under the Loan Agreement, Administrative Agent made on behalf of the A Lenders and the B Lenders (together, "Lenders") to Borrower two separate loans (together, the "Loan"), consisting of the A Loan and the B Loan, each a separate obligation and secured in part by separate liens and security interests encumbering the Collateral.[28]

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28. As an alternative, if Borrower entered into only a single Loan, this paragraph could read as follows:

> Under the Loan Agreement, Administrative Agent made to Borrower a single loan secured by all Collateral (the "Loan"), which Administrative Agent and the Lenders intend to break into the A Loan and the B Loan (each constituting part of the Loan) as this Agreement more fully describes.

C. Swap Provider and Borrower entered into the Swap for the Loan, and agreed to pay Swap Payments to one another.

D. In accordance with the Loan Documents,[29] the Security Documents (encumbering the Collateral) secure the Loan and Borrower's obligations under the Swap[30] (the "Secured Obligations"). Each reference to the "Secured Obligations" also includes a reference to the right to Enforce all Loan Documents, including the Credit Parties' obligations to reimburse any Borrower-Reimbursible Expenses.

E. On or about the Effective Date,[31] Administrative Agent and the Lenders are executing and delivering one or more Assignment and Acceptance Agreement(s) substantially in the form of **Exhibit A**[32] or otherwise in form and substance acceptable to Administrative Agent[33] (each, an "Assignment") by which Administrative Agent assigns the A Loan, in whole or in part, to A Lender(s), and the B Loan, in whole or in part, to B Lender(s), excluding such part(s) of the Loans (if any) as Administrative Agent retains as a Lender.

F. After the Effective Date, additional A Lender(s) and B Lender(s) may acquire interests in the Loan from Administrative Agent or from Lender(s), or may dispose of interest in the Loan.

G. The parties intend that Administrative Agent shall, subject to this Agreement, hold and exercise certain rights of the Lenders and Swap Provider (the "Secured Parties").[34]

**NOW, THEREFORE**, for good and valuable consideration, Secured Parties and Administrative Agent agree:

1. Definitions.

Any definitions in the Loan Agreement also apply here, except where this Agreement provides some other definition for a term.[35]

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29. The obligations under the Loan (and secured by the Security Documents) would typically include, as additional interest, Borrower's obligation to pay Swap Payments due Swap Provider from time to time. In New York, calling the Swap Payments "additional interest" is believed to mitigate mortgage recording tax. This belief is not necessarily correct.

30. A question arises, though. If at some point Swap Provider is no longer an Affiliate of any Lender, should Swap Provider lose the benefit of the Collateral?

31. Adjust description of timing as appropriate.

32. If the Loan Agreement contains an adequate Assignment form, use and refer to it instead, eliminating this exhibit.

33. Some Lenders might not want to give Administrative Agent this flexibility, but it seems reasonable.

34. If no Swap Provider exists, then all references to "Secured Parties" can simply refer to the Lenders instead.

35. This Model Agreement assumes the Loan Agreement already defines these terms: Accounts, Additional Advances, Advance, Affiliate, Approved Bank, Breakage Costs, Collateral, Consent, Control, Credit Party(ies), Default, Default Rate, Escrow Account, Event of Default, Exit Fee, Extension Condition, Insolvency Proceeding, Interest Payment Date, Law, Legal Costs, Loan Documents, Loss Proceeds, Major Lease, Maturity Date,

Within this Agreement, these terms shall have these meanings,[36] disregarding any Modification of any Borrower obligation(s) or any Loan Document(s) through any Insolvency Proceeding. Without limiting the previous sentence, the parties intend that interest of any kind (including Default Interest) shall continue to accrue before, during, and after any Insolvency Proceeding and shall therefore include post-petition interest.[37]

"A Expense" means any Expense of A Lenders.

"A Interest" means, for any period, interest on A Principal at the A Rate. To the extent B Lenders make Cure Payments for A Interest, such payments shall reduce A Interest (and increase the outstanding balance of Cure Payments) as among the Lenders and for purposes of this Agreement, with no effect on Borrower.

"A Loan" means the rights to receive A Principal, A Interest, Borrower-Reimbursible A Expenses, and Add-Ons based on the foregoing, and all related rights under the Loan Documents. To the extent Borrower defaulted in paying, but B Lenders made timely Cure Payments to A Lenders for, any such sums, the B Loan shall (and the A Loan shall not) include the right to receive such sums (as reimbursement of Cure Payments for purposes of this Agreement), with related Add-Ons.[38]

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Notice, Notify, Obligations, Person, Priority Expenses, Release Condition, Reserve Account, Restoration Fund, Security Documents, Sweep Event, and Title Policy. Any drafter should confirm each such assumption, and edit as appropriate. Even when the assumption checks out, the drafter should check that the definitions in the Loan Agreement work in this Model Agreement. As an example of how a Loan Agreement definition might not work here, the Loan Agreement might define "Loan Documents" to include documents for three separate loans, only one subject to this Model Agreement. In that case, the drafter should not invite mistakes and confusion. The term "Loan Documents" should not be used in this Model Agreement at all. Instead, this Model Agreement should use some other term, defined strictly within this Model Agreement.

36. Drafters should tailor definitions to reflect document structure for their particular transaction.

37. Ancient bankruptcy principles sometimes denied a senior creditor the right to recover post-petition interest as a priority claim, unless the subordination agreement expressly gave the senior creditor priority for post-petition interest. The courts reasoned (not necessarily the correct verb choice) that because ordinary bankruptcy principles cut off the accrual of interest at the time of filing, senior creditors needed to be extremely "explicit" if they wanted to overrule this result in subordination agreements. In other words, the subordination agreement needed to "clearly show that the general rule . . . is to be suspended, at least vis-à-vis these parties." *See, e.g., In re Time Sales Fin. Corp.*, 491 F.2d 841, 844 (3d Cir. 1974). Silence must have meant that the senior creditors accepted the general bankruptcy rule, as opposed to ordinary principles of contract law, which is of course an absurd proposition. Counterintuitive rules like these are informally known as "gotchas." They lead to ever-longer documents of all kinds, although they also further justify the use of competent and experienced counsel in any transaction. Section 510(a) of the Bankruptcy Code, which expressly provides for enforcement of subordination agreements, may supersede the so-called Rule of Explicitness.

38. If the parties synthetically create the A Loan under this Model Agreement, then add: "The A Loan constitutes part of the Loan, which part shall have the characteristics

"A Principal" means the principal amount of the A Loan.[39] On the Effective Date, A Principal equals $_____. A Principal shall decrease by any payments (including Cure Payments, without thereby affecting Borrower) applied to A Principal under this Agreement.[40]

"A Rate" means, for any period, an annual rate of interest equal to the Loan Interest Rate less ___ percent per annum.[41]

"Add-Ons" means Breakage Costs, Default Interest, late charges, and Prepayment Premiums, to the extent the Loan Documents require any of them.[42]

"Administrative Agent's knowledge," "actual knowledge," and "knowledge" (and terms of similar meaning) mean the actual knowledge (with no duty to investigate and no constructive or implied knowledge) of Administrative Agent's personnel who currently, actually, and directly service the Loan.[43]

"Appraisal" means an MAI appraisal obtained by Administrative Agent and prepared in accordance with Appraisal Institute standards by an independent appraiser (unaffiliated with any Lender) that is a member of the Appraisal Institute, with at least five years of experience appraising real property similar to the Collateral. Administrative Agent shall select the appraiser, subject to reasonable approval by a Majority of B Lenders. Administrative Agent may from time to time require a Majority of B Lenders to pre-approve up to four potential appraisers. Any such pre-approval shall remain effective unless and until a Majority of B Lenders reasonably revoke it by Notice to Administrative Agent, provided that they: (a) nominate a reasonable replacement for each appraiser disap-

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this Agreement describes. The A Loan is not separately documented except through this Agreement."

39. If the parties synthetically create the A Loan under this Model Agreement, then the drafter might add: "A Principal constitutes part of the principal of the Loan, which part shall have the characteristics this Agreement describes. A Principal is not separately documented except through this Agreement."

40. Adjust to reflect treatment of any additional advances. For example, a drafter may wish to say A Principal shall "increase on account of any Additional Advances that A Lender funded."

41. A drafter could also express the A Rate as an index plus a spread.

42. "Add-Ons" receive unfavorable treatment, at least from an A Lender's viewpoint. B Lenders can receive payment in a Default Period even if some Add-Ons remain unpaid to A Lenders. In contrast, if separate mortgages secured two loans, everything due A Lenders would need to be paid first to preserve B Loan's security. B Lenders will want to keep the list of "Add-Ons" short, such as by omitting late charges. If the Loan includes an exit fee, A Lenders will want to add it to the list.

43. Administrative Agent may want to identify those personnel by name. The Lenders should then seek assurance that the named individuals are the correct individuals to name.

proved; and (b) within the preceding 180 days, neither (i) gave a similar Notice; nor (ii) received a Substantial Impairment Notice.[44]

"B Decision Period" means a period determined as follows.[45]

1. Commencement. Any B Decision Period begins on the first day of a Default Period. If, however, a previous B Decision Period ended within __[46] days before the first day of a Default Period, then no new B Decision Period shall commence on account of that Default Period.

2. Maximum Number. If a total of _____[47] B Decision Periods have previously occurred, then no more B Decision Periods shall ever occur.

3. Termination. Any B Decision Period ends on the earliest of: (a) ___[48] days after it began; (b) B Lender(s)' material default under the B Option; and (c) a Borrower Cure Date.

4. Conditions. As conditions to continuation of any B Decision Period: (a) B Lenders shall reimburse A Lenders, Swap Provider, and Administrative Agent for all Expenses they paid (excluding any interest component of such Expenses, but any such unpaid interest shall remain payable under the Waterfall); (b) B Lenders shall make Cure Payments to cure all Defaults that affect the A Loan; and (c) the B Loan shall not be Substantially Impaired. B Lenders shall have _____ Business Days[49] after demand to satisfy these conditions. During that time, B Lenders need not satisfy such conditions in order to maintain a B Decision Period.

5. B Option. If, at any time, any B Lender(s) have validly exercised the B Option, then notwithstanding anything to the contrary in the preceding definition of "B Decision Period," the B Decision Period shall include the time from such exercise until the first to

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44. Much of this definition might be substantive enough to go in the text of the Agreement. Other definitions of that type: Majority Decision; Permitted Holder; Supermajority Decision; and Unanimous Decision.

45. This definition gives B Lenders the "first crack" at solving the problem. Some intercreditor relationships outside of real estate finance, in contrast, may give the senior creditor "first crack" for a certain period, while the junior creditor must "stand still." This does not seem to be the norm in real estate A/B Loans.

46. The parties would typically agree to some number of days between 30 and 90. This prevents the B Lenders from achieving chronic and long-term control based on a series of B Decision Periods. Instead, this Model Agreement effectively forces them to exercise the B Option, although they often face little time pressure to do so. B Lenders may object to this paragraph entirely, insisting on the possibility of multiple "back to back" B Decision Periods.

47. The drafter should fill in the blank as negotiated, probably between three and five. B Lenders will try to argue that the numerical cap on B Decision Periods justifies eliminating or reducing the number of days between B Decision Periods.

48. The usual range is 120 to 180 days.

49. This period might range from three to ten Business Days.

occur of the B Option Closing Date and any B Lender(s)' material default under the B Option.

"B Expense" means any Expense of B Lenders.

"B Interest" means, for any period, interest on B Principal at the B Rate.

"B Loan" means the rights to receive B Principal, B Interest, Borrower-Reimbursible B Expenses, and Add-Ons based on the foregoing, and all related rights under the Loan Documents. To the extent Borrower defaulted in paying, but B Lenders made timely Cure Payments to A Lenders for, any sums payable on account of the A Loan, the A Loan shall not (and the B Loan shall) include the right to receive such sums, to the extent not previously paid or reimbursed, and related Add-Ons.[50]

"B Option Closing Date" means the next Interest Payment Date that is more than five Business Days after exercise of the B Option, or as the parties agree. The B Option Closing Date need not fall within the B Option Period.

"B Option Period" means a period that begins when any Default Period begins and continues, whether or not a B Decision Period exists, until either: (a) a Borrower Cure Date has occurred; or (b) Enforcement has divested Borrower of all or substantially all Collateral.[51]

"B Option Price" means the sum of the following, without duplication, excluding Add-Ons:[52] (a) A Principal; (b) A Interest accrued and unpaid through the date of determination; (c) A Expenses; and (d) Swap Payments then due from Borrower to Swap Provider. Item "d" shall be payable to Swap Provider. All other items shall be payable to A Lender.

"B Principal" means the principal amount of the B Loan.[53] On the Effective Date, B Principal equals $_____. B Principal shall: (a) decrease by any payments applied to B Principal under this Agreement and (b) to the extent Law allows, rise by any Cure Payments made on

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50. If the parties synthetically create the B Loan under this Model Agreement, then the drafter might add: "The B Loan constitutes part of the Loan, which part shall have the characteristics this Agreement describes. The B Loan is not separately documented except through this Agreement."

51. The B Option Period is very long. The drafter should consider whether to shorten it. As of 2007, real estate industry trends have dictated a long B Option Period, as suggested here. In corporate finance intercreditor agreements, however, the junior class often has only ten days to exercise a buyout option.

52. A Lenders would prefer to exclude Add-Ons, but usually drop the point. They recognize that exercise of the B Option can easily extricate them rather painlessly from a problem Loan. Under those circumstances, they don't need to hold out for the last penny.

53. If the parties synthetically create the B Loan under this Model Agreement, then the drafter might add: "B Principal constitutes part of the principal of the Loan, which part shall have the characteristics this Agreement describes. B Principal is not separately documented except through this Agreement."

account of A Principal. On the Effective Date, B Lender is fully funding $_____ on account of B Principal to close the Loans.

"B Rate" means, for any period, an annual rate of interest equal to the Loan Interest Rate plus ___ percent per annum.[54]

"Borrower Cure Date" means the date when, in Administrative Agent's reasonable determination, Credit Parties have cured all Event(s) of Default and Defaults under the Loan. Cure Payments shall not cause a Borrower Cure Date unless and until Credit Parties have cured all Event(s) of Default and Defaults under the Loan Documents that gave rise to such Cure Payments and fully performed their corresponding obligations under the Loan Documents then due or past due.

"Borrower-Reimbursible" means, for any Expense, that the Loan Documents require Borrower to pay or reimburse such Expense, whether or not Borrower has.

"Bucket" means each numbered paragraph in the Waterfall.

"Business Day" means any day except Saturday, Sunday, or any other day when commercial banks in New York City must or legally may close.

"CDO" means collateralized debt obligations.

"Cure Payment" means any amount (except Expense reimbursements) that B Lender(s) pay to Administrative Agent (to be disbursed to A Lenders through the Waterfall) or directly to A Lenders to cure (or to protect A Lenders from delay or lost payments as a result of) any Default, to the extent such Default impairs the A Loan or defers A Lenders' receipt of any sums A Lenders would have received if the Default had not occurred. B Lenders' making of any Cure Payment(s) shall affect only the Lenders' rights among themselves. It shall not cause a Borrower Cure Date or reduce any Borrower Obligations.[55]

"Decision Rules" means the Default Decision Rules and the Nondefault Decision Rules.

"Default Interest" means interest payable under the Loan Agreement at the Default Rate, to the extent it exceeds the Loan Interest Rate. The annual rate of Default Interest for A Lender and B Lender (as applied over and above the A Rate and the B Rate) shall be the same.[56]

"Default Period" means a period that begins when an Event of Default occurs under the Loan (even if governing law prevents Enforce-

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54. Adjust as appropriate, taking into account the mathematics and deal terms of the transaction. The spread added to the B Loan Interest Rate to derive B Rate will not necessarily equal the spread subtracted from the Loan Interest Rate to derive the A Rate. Those spreads will be the same only if A Principal equals B Principal and Administrative Agent does not receive a "skim" or "strip."

55. This definition says nothing about Swap Provider receiving anything.

56. If the Loan Agreement provides otherwise, the drafter should edit as appropriate.

ment) and ends on a Borrower Cure Date or a Final Recovery Determination.[57]

"Discretionary Action" means any Modification of, approval or consent under, or other discretionary action under or relating to any Loan Document, or material decision or action in any Borrower Insolvency Proceeding, unless required by the Loan Document(s) or Law.

"Dispute" means any action, suit, or other legal proceeding arising out of or relating to this Agreement, any Assignment, or the relationship between or among any of the parties regarding any Secured Obligations or Collateral.

"Emergency Expense" means any Expense that Administrative Agent reasonably determines is reasonably necessary to prevent imminent risk of death, injury, or significant property damage or loss to the Collateral.

"Enforce" means the exercise of any or all rights and remedies under the Secured Obligations (including the A Loan, the B Loan, and the Swap), the Loan Documents, and applicable law, including: give notice(s) of default; accelerate the Loan; collect or sue for payment; foreclose upon or take possession of Collateral; exercise any other rights against the Collateral; bid at any foreclosure or other auction of Collateral; initiate, join in, or object to motions or other actions in any Insolvency Proceeding; file proof(s) of claim in any Insolvency Proceeding; vote such claims; take any other actions in any Insolvency Proceeding (including purchase claims of other creditors[58]); receive Swap Payments (although Borrower may pay Regular Swap Payments directly to Swap Provider); enforce the Swap against Swap Provider; accept a Transfer of Collateral in lieu of foreclosure; sell, dispose of, hold, operate, or otherwise deal with Collateral; and (subject to the restrictions in this Agreement) incur Expenses related to any of the foregoing.

"Enforcement" means the act or process of Enforcing.

"Expense Approval Threshold" means: (a) for any individual Expense, $_____; and (b) over a calendar year, Expenses aggregating $_____ (disregarding Expenses the Lenders approved under this Agreement).[59]

"Expenses" means, subject to the Decision Rules, any out-of-pocket expenses or advances (including Legal Costs[60]) Administrative Agent has

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57. Under this definition, a Swap Termination would not trigger a Default Period. If the parties desire that outcome, they can define Event of Default accordingly in the Loan Agreement.

58. The restrictions on Expenses in this Model Agreement would make such purchases rather difficult.

59. The author would suggest $25,000 and $100,000. These numbers are rather low, but they track industry expectations. The drafter can consider raising them.

60. Loan Documents always obligate Borrower to reimburse Lenders' Legal Costs, because otherwise "costs of collection" (or similar terms) do not typically include Legal

actually and reasonably incurred (or proposes to actually and reasonably incur) in administering, Enforcing, holding, preserving, and protecting the Secured Obligations, the Collateral, or any REO,[61] excluding any such expenses that:

1. Not Otherwise Incurred. Administrative Agent would not reasonably have incurred if it held the entire Loan for its own account, except any expenses incurred to comply with this Agreement;

2. Material Breach, Etc. Result from Administrative Agent's willful misconduct, gross negligence, or material breach of any Loan Document or this Agreement; or

3. Overhead. Constitute Administrative Agent's normal overhead, including staffing and other ordinary operating expenses.

Subject to the preceding exclusions and the Decision Rules, Expenses shall include Borrower-Reimbursible Expenses, Non-Borrower-Reimbursible Expenses, and any sums paid to cure any Borrower's default, to Enforce the Secured Obligations, or to protect any Collateral or REO (including environmental remediation).[62]

To the extent that any Person reimburses any other Person for any Expense: (a) the reimbursing Person shall be treated as if it had paid an Expense equal to such reimbursement; and (b) the Person reimbursed shall no longer be deemed to have incurred that Expense.

Except where this Agreement states otherwise, unpaid Expenses shall bear interest (excluding Default Interest[63]) at the A Rate (for A Ex-

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Costs – even though it might be "intuitively obvious" that Legal Costs should be entitled to the same treatment as any other costs of collection. As a result of this principle, any obligation to reimburse another party's expenses always expressly mentions Legal Costs. Is that truly necessary? Or does the exclusion of Legal Costs really apply only to an obligation to reimburse costs of collection? The answers to these questions lie outside the scope of this article, which takes the traditional approach of expressly mentioning Legal Costs.

61. B Lenders' Cure Payments would not constitute Expenses. This Model Agreement handles them separately, with separate rights, obligations, and priorities in the Waterfall.

62. Some A/B Intercreditor Agreements create special decision procedures to deal with environmental problems. In fact, such problems are functionally no different from any other issue or problem with the Collateral. They require no special treatment. Similarly, many Loan Document drafts contain extensive covenants on environmental matters. A well-represented Borrower will, however, often negotiate its environmental covenants to consist of nothing more than an obligation to comply with environmental law and to Indemnify against any failure to comply. In that case, the generic obligation to comply with Law (and to Indemnify against any failure to comply) should suffice. Any additional provisions specific to environmental law therefore serve no additional purpose. But "fear of environmental liability" drove a tremendous expansion of loan documents in the 1980's. Even with two decades of experience the industry does not yet have enough comfort to cut back the environmental verbiage. Again, loan documents only grow and never shrink.

63. If the A Loan and B Loan were senior and junior mortgages, the junior mortgagee (*i.e.*, holder of the B Loan) would need to pay whatever the senior loan required the borrower to pay, at whatever rate applied to the borrower. In an A/B loan, the B Lender

penses) or B Rate (for B Expenses or Administrative Agent's unreimbursed Expenses).

"Final Recovery Determination" means Administrative Agent's reasonable determination, in accordance with the Servicing Standard, that Administrative Agent and the Secured Parties have recovered all Loan Proceeds they will likely ever recover.[64]

"Indemnify" means that the Person (the "Indemnitor") that agrees to Indemnify another Person (the "Indemnitee") regarding a matter (the "Indemnified Risk") shall indemnify, defend, and hold harmless the Indemnitee from and against every action, claim, cost, damage, demand, disbursement, expense, judgment, liability, loss, obligation, penalty, and suit (including reasonable attorneys' fees and charges) of any kind or nature whatsoever (excluding consequential damages) that may be imposed on, incurred by, or asserted against Indemnitee in any way relating to or arising from the Indemnified Risk.

"Lender" means each A Lender and each B Lender.

"Loan Interest Rate" means, for any period, the aggregate average interest rate under the Loan Agreement, disregarding Default Interest, as reasonably calculated by Administrative Agent.

"Loan Proceeds" means all sums Administrative Agent receives from any source on account of the Secured Obligations, the Collateral, or any REO. Loan Proceeds include principal, interest, Add-Ons, Cure Payments, Swap Payments whether payable by Borrower (except Swap Regular Payments due Swap Provider) or by Swap Provider, funds from any lockbox or cash management arrangements for the Collateral, application of reserves or other cash collateral, Loss Proceeds, and Enforcement proceeds, whether from or on account of any Credit Party, from REO operations, or from any Transfer of REO. Loan Proceeds also include any funds Administrative Agent obtains by drawing upon or applying Substantial Impairment Prevention Collateral.

"Majority" means Lenders whose aggregate Pro Rata Share exceeds 50%, except as follows.

1. Majority in Group. For any group (less than all) of the Lenders, a "Majority" means Lenders that collectively hold more than 50% of the aggregate Pro Rata Share of all Lenders in the group. For example, if the B Lenders' aggregate Pro Rata Share were 40%,

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typically negotiates a "better" deal than that, such as having no obligation to pay default interest to preserve its position or cure payment defaults on the A Loan. In that respect, A/B loans follow the "securitization" model (where the various tranches share seats on a leaky boat, and all share an interest in plugging the leaks) rather than the "junior/senior mortgage" model (where Borrower creates the junior mortgagee's position strictly out of Borrower's equity, subject entirely to the senior mortgage).

64. The parties may want to give the Lenders some right to approve a Final Recovery Determination, but it seems unnecessary.

then a Majority of B Lenders would mean B Lenders collectively holding more than a 20% Pro Rata Share.

2. Nonvoting Lenders. Any "Majority" calculation shall disregard the Pro Rata Share of each Nonvoting Lender, for both numerator and denominator.

"Majority Decision" means any Discretionary Action that would:[65]

1. Additional Debt. Allow Borrower to incur additional debt (or allow any beneficial owner of Borrower to enter into any mezzanine financing arrangement);

2. Default Interest. Waive any Default Interest;

3. Expenses. Incur any Expense, except an Emergency Expense, if Administrative Agent reasonably estimates it will exceed the Expense Approval Threshold;

4. Lease Approvals. Approve any Major Lease or Modification of an existing Major Lease;[66]

5. Property Management. Consent to (i) replacement or termination of any property manager or (ii) execution or material Modification of any property management agreement;[67]

6. Reserve Accounts. Modify any requirement of the Loan Agreement about any required deposit in, or material condition(s) to release(s) of any amount from, the _____ Reserve Account, any _____ Escrow Account, or any Restoration Fund;[68]

7. Swap. Consent to any material modification of Borrower's interest in the Swap; or

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65. Administrative Agent may want to shorten this list, starting with any items except "Additional Debt" and "Expenses." Everything else could go either way. And the parties may want to lengthen the list to reflect Loan-specific decisions such as approval of a replacement general contractor in a construction loan.

66. This Majority Decision will vary among transactions and may affect only certain Major Leases. Borrower will want to minimize Lender involvement and discretion, but will probably need to cover the issue in the Loan Agreement, not in an A/B Intercreditor Agreement. Because this particular approval right can severely interfere with Borrower's execution of its most fundamental task as an owner of real estate, Borrower and Administrative Agent may want to have the right to seek approvals based on term sheets or letters of intent rather than final signed Leases. Lease approvals will also very commonly be deemed granted if not withheld, even if similar "deemed consent" language does not otherwise apply to Lender decisions. And Borrowers may sometimes suggest eliminating approval requirements for any Lease that complies with agreed-upon leasing guidelines.

67. Administrative Agent or Borrower may want to pre-approve certain potential management changes.

68. Limit to refer only to particularly important Accounts, taking into account the terms of the Loan.

8. Other. Diminish or waive Borrower's material obligations under the Loan Documents in any material respect,[69] but any waivers affecting these matters are not Majority Decisions and are within Administrative Agent's sole authority: (a) late charges; (b) deliveries of documents to satisfy any Extension Condition or Release Condition, provided that Administrative Agent reasonably determines that Borrower has satisfied all substantive Extension Conditions or Release Conditions, as the case may be; (c) any insurance-related waiver, provided that after such waiver Borrower's insurance program, considered as a whole, is in Administrative Agent's reasonable judgment commercially reasonable; and (d) the grant of other immaterial waivers (including any waiver or consent that the Loan Agreement expressly states Administrative Agent can grant) and extensions, provided that Administrative Agent determines in accordance with the Servicing Standard that any such waiver or extension would not materially impair Loan collectibility.

"Modify" means from time to time abandon, amend, cancel, consolidate, discharge, extend, increase, modify, refinance, reject, renew, replace, restate, split, spread, subordinate (except in accordance with this Agreement), substitute, supplement, surrender, terminate, or waive a specified agreement or document, or any of its terms or provisions, or accept, agree to, cause, make, or permit any of the foregoing. "Modification" has a corresponding meaning.

"Non-Borrower-Reimbursible" means, for any Expense, that it is not Borrower-Reimbursible. Non-Borrower-Reimbursible Expenses would include these Expenses except to the extent, if any, they constitute Borrower-Reimbursible Expenses: Expenses incurred in the ordinary course of servicing commercial real estate loans that are not in default, such as costs of reasonable additional appraisals, tax searches, and collateral audits; maintaining mortgage impairment insurance; receiving, reviewing, and distributing copies of documents and information; reasonable consultants, advisors, and counsel to benefit the Secured Parties as a group; and Expenses of any litigation for which this Agreement requires the Secured Parties (but the Loan Agreement does not require Borrower) to Indemnify Administrative Agent.

"Nonvoting Lender" means any Lender that is: (1) in default under this Agreement; (2) an Affiliate of any Borrower; or (3) a B Lender when the B Loan is Substantially Impaired. Administrative Agent shall be a Nonvoting Lender for any vote on whether to: (a) Notify Administrative Agent that it is in default; or (b) remove or replace Administrative Agent.

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69. This item is less standard than others in the list of Majority Decisions, because it is rather broad and murky. Administrative Agent may prefer to delete it.

"Payment Cap" means $_____[70] per calendar year (or in each B Decision Period, in the case of B Expenses in a B Decision Period). A separate Payment Cap applies to each of: (a) Cure Payments by B Lenders per calendar year; (b) Administrative Agent's Non-Borrower-Reimbursible Expenses per calendar year; and (c) aggregate B Expenses in each B Decision Period.

"Permitted Holder" means Administrative Agent, any Person that acquires an interest in the Loan directly from Administrative Agent, or any Person that is (a) a "qualified institutional buyer" or institutional "accredited investor" within the meaning of Securities Act Regulation D; (b) not Borrower or its Affiliate; and (c) one or more of these, provided in each case that it meets the financial test at the end of this definition:[71]

1. Financial Institutions. A bank, commercial credit corporation, governmental entity, insurance company, investment bank, mutual fund, pension fund, pension fund advisory firm, pension plan, real estate advisory firm, real estate investment trust, savings and loan association, or trust company, or an Affiliate[72] of any of the foregoing Persons;[73]

2. Institutional Investors. An investment company, money management firm, or "qualified institutional buyer" (as defined in Rule 144A under the Securities Act) that in each of the foregoing cases is a Real Estate Lender;

3. Securitization Vehicles. Any Securitization Vehicle; or

4. Similar Entities. Any Real Estate Lender that is substantially similar to any of the foregoing.

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70. This number might fall between $25,000 and $100,000, even for large loans. Although that number may seem rather low, it tracks market expectations. One might express the number as a multiple of the then-current monthly payment on the Loan, but this raises all kinds of interesting calculational questions.

71. Some of these paragraphs could include hedge funds, a category that some fear or dislike, because some market professionals view them as short-term opportunists (part of the "loan to own" gang) rather than long-term real estate investors. The Loan Agreement may already define who may hold the Loan. In such cases, drafters should try to cross-reference the Loan Agreement restrictions rather than repeat them, though the parties could add more restrictions in this Model Agreement. Any such restrictions may raise other questions. Would any such additional restrictions require Borrower concurrence? Does Borrower have any right to prevent the Lenders from agreeing among themselves on anything they want among themselves?

72. Only certain Permitted Holders – financial institutions – can act through Affiliates. Others don't have that option. Any definition of "Permitted Holder" will often automatically include Affiliates of any Person that otherwise appears anywhere on the list. The broader the list, the less sense "Affiliates" will make. The list offered here is relatively broad.

73. Although this language is fairly typical, not all of these "Financial Institutions" are really financial institutions. Borrower and Administrative Agent may prefer to exclude some of them from the list.

Regardless of its categorization above,[74] a Person cannot constitute a Permitted Holder unless it: (a) has at least $250,000,000 in capital/statutory surplus or shareholders' equity (unless a pension advisory firm or similar fiduciary)[75] and (b) at least $650,000,000 in total assets (in its name or under management).

"Prepayment Premium" means all sums payable by Borrower on account of any prepayment premium, extra charge, spread maintenance premium, yield maintenance premium, or similar fee under any Loan Document, except a Swap Termination Payment.

"Principal" means: (a) for A Lenders, A Principal; and (b) for B Lenders, B Principal.

"Pro Rata Share" means, for each Lender, its then Principal divided by the Lenders' then total Principal,[76] subject to the further provisions of this paragraph. For voting, Swap Provider's Pro Rata Share shall always equal 0%. For any other purpose (including Expenses, Loan Proceeds, Waterfall, and other financial rights and obligations), Administrative Agent shall calculate Swap Provider's Pro Rata Share as if any Swap Termination Payment Borrower owes (or would hypothetically owe if a Swap Termination had just occurred) were additional Principal. Except for voting, the other Lenders' Pro Rata Shares shall drop to reflect Swap Provider's Pro Rata Share under the previous sentence.

"Rating Agency" means Fitch, Inc.; Fitch Ratings Ltd.; Moody's Investors Service, Inc.; their Affiliates and successors; and S&P.

"Real Estate Lender" means any Person regularly engaged in the business of making or owning (or advising makers or owners of) mezzanine loans, B loans, loan participations, and noninvestment grade tranches in securitizations, in each case secured or backed by interests in commercial real property in the United States.

"REO" means Collateral (except cash and equivalents) acquired through Enforcement.

"Representative" of Administrative Agent means any agent, Affiliate, attorney-in-fact, or servicer of Administrative Agent.

"S&P" means Standard & Poor's Rating Group and its Affiliates and successors.

"Securities Act" means the Securities Act of 1933, as amended.

"Securitization Vehicle" means a trustee (or in the case of a CDO, a single-purpose bankruptcy-remote entity that at the same time pledges its

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74. The drafter may prefer to apply the financial test only for certain types of Permitted Holder, not all of them.

75. The drafter may consider deleting the previous parenthetical.

76. If unfunded commitments exist, the drafter should adjust as necessary, at least for voting.

interest in the Loan to a trustee) in connection with (a) a securitization of, (b) creation of a CDO secured by, or (c) financing through an "owner trust" of, any interest in the Loan, provided that either:

1. Securities. Such Securitization Vehicle has issued at least one class of securities that at least one Rating Agency has initially rated at least investment grade;

2. Special Servicer. If the Securitization Vehicle is not a CDO, then its special servicer must: (a) be identified as an "approved servicer" by one or more Rating Agencies and (b) comply with a specified servicing standard, notwithstanding any contrary direction or instruction from any other Person; or

3. CDO. If the Securitization Vehicle is a CDO, then its asset manager is a Permitted Holder not itself a Securitization Vehicle.

"Separate Swap Collateral" means security (or collateral or credit support) for the Swap that does not also constitute Collateral for the Loan.[77]

"Servicing Standard"[78] means to administer, Enforce, and service the Secured Obligations on behalf of, and for the benefit of the Secured Parties as a collective whole (as Administrative Agent determines in its good faith and commercially reasonable judgment), consistent with Law, this Agreement, and the Loan Documents. Consistent with the previous sentence, the Servicing Standard also requires Administrative Agent to administer, Enforce, and service the Secured Obligations:

1. Standards. With such care, skill, and diligence as is customary in its mortgage servicing and REO management for third parties or

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77. Given Borrower's penury (except its ownership of the Collateral for the Loan), the notion of Separate Swap Collateral seems rather unlikely, though a Borrower Affiliate might conceivably provide it. In that case, Administrative Agent must consider possible complexity resulting from the Affiliate's demands for reimbursement and subrogation rights.

78. This concept comes from securitized loans. In syndications of portfolio loans, the documents often impose no particular performance standard beyond perhaps subparagraph "1." The notion of a Servicing Standard seems appropriate. The parties may, of course, want to negotiate the standard. Expectations may change as industry standards and requirements develop over time, prodded perhaps by governmental authorities. The author anticipates that these changes will take place first in securitizationland, then gradually spill over to portfolioland. Any Servicing Standard will create difficult factual issues in any dispute. How can anyone ever prove or disprove Administrative Agent's compliance or noncompliance with most of the qualitative standards embodied in any Servicing Standard? The parties may want to establish an expedited dispute resolution system to resolve any disagreements about the Servicing Standard, but that does not seem common practice. Few issues seem to have arisen about Administrative Agents' standard of performance, except occasional "conflict" issues. Ultimately, Administrative Agent may just say "trust me." Many Lenders may go along. This seems more likely in ordinary single-tranche syndicated loans than in A/B loans, where Administrative Agent may hold differing interests in the two tranches.

for itself, whichever is higher, for secured loans similar to the Loan and REO similar to the Collateral;

2. Collection. With a view, in any Default Period, to: (x) timely collecting all scheduled principal and interest payments; and (y) if, in Administrative Agent's judgment, no satisfactory arrangements can be made to collect all delinquent payments, then maximizing recovery of the Secured Obligations (as a collective whole) on a net present value basis (discounted at such rate as Administrative Agent determines, but at a rate no lower than the Loan Interest Rate); and

3. Conflicts. Disregarding: (a) Administrative Agent's (or its Affiliate's) ownership of any interest in the A Loan, the B Loan, any other loan, or the Swap; (b) the sufficiency of Administrative Agent's compensation (if any) for acting as such;[79] and (c) any Person's right or obligation to purchase the Secured Obligations or any interest in the Secured Obligations.[80]

"Substantial Impairment Prevention Collateral" means, collectively, the following, all in form and substance reasonably satisfactory to Administrative Agent: (a) cash, United States Treasury obligations with a remaining term of up to 90 days, a letter of credit from a bank or other financial institution whose long-term unsecured debt obligations are rated at least "AA" by S&P or whose short-term obligations are rated at least "A-1" by S&P, or other investment-grade collateral or assurance of payment; and (b) such security interests, security agreements, pledges, filings, and agreements as Administrative Agent reasonably requires to give Administrative Agent a first priority security interest (where applicable) and right to draw upon and apply (in accordance with this Agreement) the item(s) referred to above in clause (a).

"Substantially Impaired" or "Substantial Impairment"[81] means a hypothetical status of the B Loan that Administrative Agent shall determine as follows. Administrative Agent shall hypothetically sell all Collateral (including all Substantial Impairment Prevention Collateral timely delivered to Administrative Agent) at its fair market value.[82] For that purpose, Ad-

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79. This Model Agreement provides for no compensation. The Loan Agreement may require Borrower to pay Administrative Agent an administrative fee, typically between $24,000 and $50,000 a year.

80. To address their overall fear about Administrative Agent's servicing, Lenders might also want to say that Administrative Agent must also disregard: "any other actual or potential transactions or relationships between Administrative Agent (or its Affiliates) and Borrower (or its Affiliates or principals)."

81. Most intercreditor agreements that provide for a concept like this use the defined term "Control Appraisal Event." The defined term used in this Model Agreement, in contrast, seems more helpful to the reader, as it reminds the reader of its meaning.

82. This assumption seems rather optimistic. Some A/B Intercreditor Agreements assume a sale at ninety percent of value. Though this assumption seems reasonable, the definition of Substantially Impaired already contemplates a huge degree of collateral failure. Also, Lenders often forget that mortgages are illiquid assets. Sometimes markets

ministrative Agent shall value: (a) Substantial Impairment Prevention Collateral in any commercially reasonable manner; and (b) all other Collateral based on an Appraisal. Administrative Agent shall hypothetically disburse all resulting Loan Proceeds through the Waterfall. Administrative Agent shall then measure the total Loan Proceeds that B Lenders would receive through such hypothetical disbursement. Only if that total is 25% or less of B Principal, then the B Loan is Substantially Impaired. Notwithstanding anything to the contrary in this definition, the B Loan is not Substantially Impaired so long as any B Lender(s) have exercised, and no B Lender is in material default under, the B Option.

"Supermajority" means Lenders whose aggregate Pro Rata Share exceeds 66 2/3%, except as follows:

1. Supermajority in Group. For any group (less than all) of the Lenders, a "Supermajority" means Lenders that collectively hold more than 66 2/3% of the aggregate Pro Rata Share of all Lenders in the group. For example, if A Lenders' aggregate Pro Rata Share were 40%, then a Supermajority of A Lenders would mean A Lenders collectively holding more than a 26 2/3% Pro Rata Share.

2. Nonvoting Lenders. Any "Supermajority" calculation shall disregard the Pro Rata Share of each Nonvoting Lender, for both numerator and denominator.

"Supermajority Decision" means any Discretionary Action to consent to (or waive acceleration on) any Transfer or Change of Control.

"Swap" means any swap that Swap Provider enters into from time to time with Borrower, provided that: (a) it complies with the Loan Agreement; and (b) Borrower has, in compliance with the Loan Agreement, pledged Borrower's rights under such swap to Administrative Agent for the Lenders. At the Effective Date, the Swap consists of Master Agreement (Reference No. _____), between Swap Provider and Borrower, dated as of _____, supplemented only by Confirmation(s) issued under Swap Provider's Reference No. _____, dated as of _____.[83]

"Swap Payment" means any Swap Regular Payment or Swap Termination Payment.

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seize up or even "fail," and no one wants to buy particular types of mortgages because of a temporary panic or change in marketplace tastes (*e.g.*, "subprime" mortgages in late summer 2007). How should Administrative Agent deal with such circumstances? Does the concept of "Substantial Impairment" work if the entire relevant marketplace has been "Substantially Impaired"?

83. Swap desks often believe "less is more" and may skip the Master Agreement. Drafters should revise this Model Agreement accordingly.

"Swap Regular Payment" means any payment that the Swap requires any Swap party to pay the other (including periodic payments), unless accrued and unpaid at Swap Termination.

"Swap Termination" means any termination, including early termination, of a Swap.

"Swap Termination Payment" means any payment that any Swap requires any Person to pay upon Swap Termination, including: (a) Swap breakage (not Breakage Costs under the Loan Agreement); (b) any sums due and payable under the Swap, but not paid, at Swap Termination; and (c) any Borrower-Reimbursible Expenses owed to Swap Provider.[84]

"Transfer" any property means assign, convey, encumber, hypothecate, mortgage, participate, pledge, sell, sub-participate, transfer, or in any other way dispose of such property or any interest in it. "Transferee" and "Transferor" have corresponding meanings.

"Unanimous Approval" means approval of all Lenders (or those in any group whose Unanimous Approval is required), except Nonvoting Lenders.

"Unanimous Decision" means any Discretionary Action that would:

1. Fundamental Financial Terms. Defer, reduce, increase, or decrease any payment of principal or interest; or

2. Release. Release any material Collateral or any Credit Party's obligations.

"Waterfall" means application of Loan Proceeds in this order of priority of payment until exhausted:[85]

1. Swap Regular Payments. So long as no Swap Termination[86] has occurred, to Swap Provider all Swap Regular Payments not paid directly;

2. Swap Termination Payments. If a Swap Termination has occurred (except a Wrongful Swap Termination), then to Swap Pro-

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84. Swap Provider may prefer to treat these previously accrued sums (in clauses (b) and (c)) as Swap Regular Payments. That could give Swap Provider priority for those payments, probably unwarranted in a meltdown.

85. Many intercreditor agreements define separate Waterfalls pre- and post-Default. This approach takes more space and requires conforming changes if the parties negotiate the Waterfall in any way, thus increasing the risk of inconsistencies and mistakes. It seems quite unnecessary given the minimal changes in the Waterfall that any Default Period actually engenders. This Model Agreement therefore uses a single Waterfall with only a few pinpointed changes during a Default Period. Those who prefer duplication, extra work, extra risk of mistakes, more cross-references that can go wrong, longer documents, and extra excitement can create two Waterfalls.

86. Typically a Loan Event of Default will automatically trigger a Swap Termination. If it does not, then the Lenders may want to provide for that result. Otherwise, Swap Provider may continue to receive Swap Regular Payments as a first-priority claim, even during a Default Period.

vider its Pro Rata Share of such Loan Proceeds, to be applied against any Swap Termination Payment due Swap Provider until fully paid;[87]

3. A Interest. To A Lenders, accrued unpaid A Interest;

4. A Expenses. To A Lenders, A Expenses,[88] with interest at the A Rate;

5. A Principal. To A Lenders, their Pro Rata Shares (as among the Lenders) of principal repayments;[89]

6. Additional A Principal. In any Default Period (even if B Lenders have made and are making Cure Payments),[90] to A Lenders, A Principal until fully repaid;[91]

7. Cure Payments. To B Lenders, to reimburse Cure Payments B Lenders actually paid, with interest at the B Rate;

8. B Interest. To B Lenders, accrued unpaid B Interest;

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87. This Bucket in the Waterfall diverts some percentage of the water away from the main Waterfall even before the Lender group starts to receive the first drop. If Borrower pays a dollar of principal after default, the Lenders won't see all of it, because Swap Provider will receive some part of it. That will, among other things, produce a disconnect between the "principal" that Borrower thinks it owes and the aggregate "principal" that the Lenders think they are owed. Once the Swap Provider becomes "*pari passu*," however, that disconnect cannot be avoided. Eliminating it would eliminate the Swap Provider's "*pari passu*" participation in the security. The author would favor that result, preferring instead to treat the Swap Provider as a subordinate participant (behind both the A Loan and the B Loan). As noted in the introductory comments, however, no one else seems to agree.

88. This would include both Borrower-Reimbursible Expenses and Non-Borrower-Reimbursible Expenses. B Lenders may feel otherwise. If B Lenders prevail, the drafter should edit the Waterfall to cover Non-Borrower-Reimbursible Expenses later.

89. Conceivably, principal prepayments might go first to one Lender until that Lender has been fully repaid. In that case, if Borrower has signed two separate sets of loan documents (or a single set of loan documents that builds in the A Loan and the B Loan, with varying interest rates), the balance of one Loan will drop faster than the balance of the other Loan, and Borrower's all-in interest rate will increase or decrease – so-called "rate creep." To prevent "rate creep," prepayments should be applied to A Loan and B Loan pro rata. If Borrower doesn't "see" the A/B structure at all, then Borrower also doesn't "see" the "rate creep" issue. Whether or not Borrower "sees" the rate creep issue, accelerated repayment of the A Loan could turn the entire arrangement into a "taxable mortgage pool" – essentially a failed and hence taxable REMIC. *See* 26 U.S.C. § 7701(i)(2)(A)(ii) (defining a taxable mortgage pool in part as any arrangement that involves mortgage-backed "debt obligations with 2 or more maturities" that fails to qualify as a REMIC). This could unintentionally create a significant tax headache. Would the same problem of "2 or more maturities" arise merely as the result of the A Lenders' priority under the Waterfall during any Default Period? And just how bad a tax headache would a "taxable mortgage pool" actually create? The answers to those questions lie outside the scope of this article.

90. B Lenders may argue that as long as they have cured the Event of Default, the payments should not stop here.

91. This is one of only two ways the Waterfall changes during a Default Period. The other change relates to "Additional B Principal."

9. B Expenses. To B Lenders, B Expenses, with interest at the B Rate; B Principal. To B Lenders, their Pro Rata Shares (as among the Lenders) of principal repayments;

10. B Principal. To B Lenders, their Pro Rata Shares (as among the lenders) of principal repayments;

11. Additional B Principal. In any Default Period, to B Lenders, B Principal until fully repaid;

12. Excess Interest. To Administrative Agent, as additional consideration for originating the Loan and entering into this Agreement, any interest (except Default Interest) Borrower has paid on account of the Loan, in excess of interest (except Default Interest) due and payable to the Lenders for the period such payment covered;[92]

13. Lenders' Additional Amounts. To each Lender, its Pro Rata Share of all other payments under the Loan Documents (including Add-Ons),[93] until the Loan has been fully repaid;

14. Subordinated Swap Payments. If a Wrongful Swap Termination occurred, then to Swap Provider until all Swap Termination Payments then due and owing to Swap Provider have been fully paid; and

15. Residual Sums. To each Lender, its relative Pro Rata Share (as measured based on the maximum aggregate Principal of each Lender's interest in the Loan, including that of its predecessor(s) in interest, that was outstanding at any time after the Effective Date, even though no Principal remains outstanding at the date of determination) of any sums remaining.

"Wire Address" of each Lender means such Lender's account identified on the signature page for such Lender, as such Lender may change it by Notice.

"Workout" means, during (and as a means of concluding) any Default Period, any of these for the Loan: (a) Modification, (b) discounted

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92. This Bucket gives Administrative Agent a "skim" or a "strip" arising because Borrower is willing to pay more interest than the Lenders collectively demand (the same arbitrage that drives securitization). It is, however, rather deeply subordinated in a Default Period, which seems appropriate. In the syndicated lending market, any such "skim" or "strip" is quite unusual. Even though loan purchaser demand might enable Administrative Agent to extract a couple of extra dollars this way, Administrative Agent knows that on the "next deal," it may be a buyer instead of a seller; may end up on the losing end of a "skim" or a "strip"; and doesn't relish the prospect.

93. A Lenders might expect higher priority for their Add-Ons, because if A Lenders and B Lenders each had their own mortgage, A Lenders would receive everything due them before B Lenders received a penny. A/B Lenders seem to have a different view of the world, perhaps by analogy to a securitization.

payoff, (c) conveyance of Collateral, or (d) other negotiated or consensual resolution.

"Wrongful Swap Termination" means a Swap Termination that results from Swap Provider's breach or default.

2. Administrative Agent.

2.1 Appointment. Each Lender appoints and designates Administrative Agent as such Lender's sole and exclusive agent to hold and Enforce such Lender's entire interest in the Loan. Swap Provider appoints and designates Administrative Agent as Swap Provider's sole and exclusive agent to hold and Enforce Swap Provider's interest in the Collateral. In furtherance of those appointments and designations, each Secured Party designates and appoints Administrative Agent as its agent for all the foregoing matters; to take such action on its behalf as Lender or any payee, mortgagee, assignee, or beneficiary may take under any Loan Document; and to Enforce the Secured Obligations. Administrative Agent shall also have all powers reasonably incidental to the foregoing, on the terms of this Agreement and the Loan Documents.

2.2 Duties. Administrative Agent shall have no duty or responsibility except as this Agreement and the Loan Documents expressly state. No implied covenant, duty, function, liability, obligation, or responsibility of Administrative Agent shall be construed to exist. Administrative Agent shall administer and Enforce the Secured Obligations and the Loan Documents (and exercise its rights and authority and perform its obligations under this Agreement) in accordance with the Servicing Standard. Administrative Agent shall have no duty to inspect the Collateral or to ascertain or inquire into or verify performance or observance of any covenant or agreement or satisfaction of any condition. Administrative Agent shall not be liable for any undertaking of Borrower, Swap Provider (as Swap Provider), or any other Person or for any error of judgment or any action taken or omitted to be taken by Administrative Agent except Administrative Agent's willful misconduct, gross negligence, or intentional and material breach of this Agreement. Administrative Agent shall have no fiduciary or trustee relationship with any Secured Party. This Agreement defines Administrative Agent's obligations to and relationship with Secured Parties. No such obligations or relationship shall be inferred beyond the words of this Agreement.

2.3 Reliance. Administrative Agent may rely (and shall be protected in relying) on: (a) any written communication (including email) that Administrative Agent reasonably believes to be genuine and correct and to have been given by the proper Person; and (b) advice of counsel (including counsel for Borrower), accountants, engineers, architects, and other experts Administrative Agent selects.

2.4 Delegation. Administrative Agent may execute any duties under this Agreement, as Administrative Agent, or as an assignee, beneficiary,

mortgagee, party, or payee under any Loan Document, by or through a Representative. Any such arrangement shall be at Administrative Agent's sole cost and expense and shall not change Administrative Agent's obligations. Administrative Agent shall be responsible for its Representative's acts or omissions.[94]

2.5 Administrative Agent's Interests. For purposes of Administrative Agent's interest in the Secured Obligations as a Secured Party, Administrative Agent may exercise its rights and authority under this Agreement, including its voting rights, as if it were not Administrative Agent.

2.6 Indemnification. Secured Parties shall Indemnify Administrative Agent (to the extent Administrative Agent is not otherwise reimbursed under this Agreement or under the Loan Documents), severally in proportion to their Pro Rata Shares, regarding this Agreement, the Loan Documents, Enforcement, any litigation with Borrower, and Administrative Agent's actions or omissions under this Agreement and the Loan Documents, except as follows. Whenever the Default Decision Rules entitle any group of Lender(s) to direct Administrative Agent regarding Enforcement, only such directing Lender(s) (and no other Secured Party(ies)) shall Indemnify Administrative Agent regarding any actions Administrative Agent takes in furtherance of such directing Lenders' directions. (For example, if a Majority of B Lenders direct Administrative Agent to take some action, then only the B Lenders constituting such Majority shall Indemnify Administrative Agent.) Administrative Agent's certificate of the amount of any indemnity payable under this paragraph shall be *prima facie* evidence of such amount absent manifest error. Such indemnity obligations shall survive the termination of this Agreement and the Loan Documents. Unless Indemnified to Administrative Agent's reasonable satisfaction regarding such matters, Administrative Agent may not be compelled to perform any act under this Agreement or the Loan Documents or take any action toward the execution or enforcement of the powers thereby created or to prosecute or defend any suit with respect to the Loan Documents. In no event, however, shall Administrative Agent be required to take any action that Administrative Agent determines could expose Administrative Agent to criminal or material civil liability. Notwithstanding the foregoing, no Person shall be required to Indemnify: (a) Administrative Agent for its willful misconduct, gross negligence, or intentional and material breach of any Loan Document or this Agreement; or (b) Swap Provider for its obligations as Swap Provider.

2.7 Replacement. If (i) Administrative Agent is negligent or otherwise defaults in performing its duties or obligations under this Agreement or the Loan Documents and fails to cure such negligence or default

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94. The concept of blaming Administrative Agent for Representative's actions seems reasonable. Administrative Agent may, however, prefer to negate any such liability unless Administrative Agent chose Representative negligently.

within ten Business Days (or, if it cannot reasonably be cured within such time, then a reasonable time under the circumstances) after Notice from a Supermajority of the Lenders,[95] or (ii) Administrative Agent fails to Enforce the Secured Obligations in compliance with the Default Decision Rules during the B Decision Period (and does not cure such failure within ten Business Days after Notice from a Supermajority of B Lenders, or if such failure cannot reasonably be cured within such time, then Administrative Agent fails to cure it within a reasonable time[96] under the circumstances after such Notice), then a Supermajority of the Lenders (or of the B Lenders, in the case of clause (ii)) may, in its sole and absolute discretion, replace Administrative Agent. The replacement Administrative Agent shall have all rights and obligations of Administrative Agent under this Agreement. Any replaced Administrative Agent shall cooperate to Transfer all Security Documents to its replacement.

2.8 No Separate Authority. Administrative Agent shall have sole and exclusive authority to deal and communicate with every Credit Party and any other Person about the Secured Obligations, the Loan Documents, the Collateral, and any REO on behalf of the Secured Parties. No Secured Party shall communicate directly with any of the foregoing parties about such matters on behalf of any Secured Party(ies), Enforce any Loan Document or Swap Provider's rights in the Collateral, or have any power or authority to directly Enforce any Loan Document or Swap Provider's rights in the Collateral. Although each Lender (as a direct Lender under the Loan Agreement, and not a participant) is in direct privity with Borrower (and Swap Provider has direct rights against the Collateral and is in direct privity with Borrower regarding the Collateral), all such privity (and rights) shall be exercised exclusively through Administrative Agent. Except during a Default Period, nothing in this paragraph prevents any Secured Party from communicating directly with any of the foregoing parties to request information and for marketing and client relations. Nothing in this paragraph prevents any Secured Party from exercising a right of offset against any Credit Party, subject to the Loan Agreement and governing law, provided that: (a) in the case of Swap Provider, Swap Provider would otherwise remit Swap Payments directly to Borrower and not to Administrative Agent; and (b) such Secured Party remits to Admin-

95. If only one Lender exists beyond Administrative Agent and its Affiliates, this concept might not work. Even more generally, Administrative Agent may think it's too easy for the Lenders. On the other hand, the Lenders may argue that any Lender should have the right to give Notice of default, because removal still requires an actual Lender vote, and that requirement adequately protects Administrative Agent.

96. The Lenders may prefer to cut off this open-ended cure period, for example at sixty days.

istrative Agent (as Loan Proceeds) the entire amount it realizes through such offset.[97]

2.9 Documents. Administrative Agent shall hold the original Loan Documents (except any promissory note(s) evidencing any other Lenders' interest in the Loan) for the benefit of the Secured Parties. Administrative Agent shall exercise reasonable care regarding the Loan Documents. If Administrative Agent misplaces or destroys any Loan Documents, then Administrative Agent may in place of delivering such original Loan Documents issue a customary lost document affidavit and indemnity.

2.10 Ownership and Administration of REO. Administrative Agent may require that any REO be held by: (a) Administrative Agent, subject to this Agreement; (b) a newly formed single purpose entity owned by the Secured Parties in a manner consistent with their relative rights under this Agreement; or (c) a wholly owned subsidiary of Administrative Agent. In each case, this Agreement shall govern all decisions and actions regarding the REO, and the distribution of any Loan Proceeds that arise from the REO. All documentation to implement the provisions of this paragraph must be reasonably satisfactory to Administrative Agent.

3. Secured Parties.

3.1 Obligations. Each Lender joins in, assumes, and shall perform, in proportion to its Pro Rata Share, all obligations of a Lender under the Loan Agreement. The Loan Agreement shall bind each Lender.

3.2 Funding. Each Lender shall fund its Principal to Administrative Agent substantially when Administrative Agent assigns to such Lender its Pro Rata Share of the Loan.[98]

3.3 Initial Advance. On the Effective Date, each Lender shall fund its Principal (less any applicable origination fee), in accordance with written (including emailed) instructions of Administrative Agent's counsel. Administrative Agent or its counsel shall close the Loan when Administrative Agent has determined that all material closing conditions have been satisfied or waived, with no need to obtain any Lender's approval.[99]

3.4 Additional Advances. A Lender shall fund all Additional Advances. A Principal shall increase to the extent of each Additional Advance when made. Administrative Agent shall administer the Additional Advance process, including reviewing and approving documents and, in

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97. The Swap would typically address offsets. It should expressly allow Swap Provider to offset for sums due Swap Provider as a Lender, at least if Swap Provider would otherwise make Swap Payments to Borrower (not Administrative Agent).

98. Optional. The drafter may edit this and the next two paragraphs as appropriate.

99. The drafter may delete if Lenders will buy in after closing.

Administrative Agent's discretion, Modifying any Additional Advance conditions.[100]

3.5 Swap Provider. To the extent that a Lender or its Affiliate is Swap Provider, it may exercise all rights and remedies (including its rights and remedies as an unsecured creditor of Borrower unless doing so may impair any Collateral or any Lender's rights) as Swap Provider (except regarding Collateral or Insolvency Proceedings) as if it were not a party to this Agreement or any Loan Document. This does not limit: (a) Swap Provider's rights and obligations under this Agreement; or (b) Administrative Agent's authority under this Agreement to act for Swap Provider as to the Collateral. If Swap Provider obtains a judgment against Borrower, Swap Provider shall: (a) comply with Administrative Agent's instructions on enforcement (or nonenforcement) of such judgment against the Collateral; and (b) promptly remit to Administrative Agent any proceeds of any such enforcement. If the Swap requires Borrower or its Affiliate to give Swap Provider any Separate Swap Collateral,[101] then: (a) Swap Provider may act against the Separate Swap Collateral as if this Agreement did not exist, unless such action limits or impairs any Enforcement of any Secured Obligation (for example, because of one form of action or anti-deficiency rules) or any Loan Document or relates to initiation of an Insolvency Proceeding; and (b) no Lender shall have any interest in any Separate Swap Collateral or its proceeds. If Administrative Agent so directs, Swap Provider shall act against (and apply proceeds of) its Separate Swap Collateral for Swap Provider's benefit before Administrative Agent acts against the Collateral under this Agreement.

3.6 Insolvency Proceedings. No Secured Party shall commence, file, institute, petition (either by itself or in conjunction with any other Person), or join any Person in the foregoing, or otherwise initiate or cause any other Person to initiate, or facilitate or acquiesce in commencement of, or file any motion or objection or other papers in, any Insolvency Proceeding affecting Borrower, unless Administrative Agent requests such Secured Party to do so consistently with this Agreement. Each Secured Party shall, on Administrative Agent's request, execute, verify, deliver, and file in a prompt and timely manner any proofs of claim, consents, assignments, or other acts or documents necessary or appropriate for Enforcement. By signing this Agreement, each Secured Party irrevocably assigns to Administrative Agent all claims and rights of such Se-

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100. The drafter may edit based on treatment of Additional Advances. Conform all references to Additional Advances. Check definitions in Loan Agreement.

101. Administrative Agent and Lenders may want to assure that any Separate Swap Collateral comes from Borrower's Affiliates rather than Borrower, to satisfy "single purpose entity" principles as they relate to Borrower. Administrative Agent would also want to limit the Affiliate's rights of indemnity, reimbursement, or subrogation. Borrower's delivery of Separate Swap Collateral may complicate Borrower's affairs and increase the likelihood and complexity of an Insolvency Proceeding. The typical transaction will not involve Separate Swap Collateral, so the drafter can delete all provisions that address it.

cured Party in any Borrower Insolvency Proceeding, and authorizes Secured Party to exercise such claims and rights (to the exclusion of the assignor) in accordance with this Agreement. All Secured Parties acknowledge that such assignment, and the terms of this Agreement, benefit all Secured Parties, including each assignor. If any Secured Party seeks to exercise individually any claim or right in any Borrower Insolvency Proceeding (except in accordance with Administrative Agent's directions), or otherwise violates this paragraph, then such Secured Party shall Indemnify all other Secured Parties regarding any loss they suffer as a result of such Secured Party's actions.[102] The fact that any court authorizes an individual Secured Party's actions shall not excuse such Secured Party from the foregoing Indemnity obligations.

3.7 Subagents. Administrative Agent may at any time require A Lenders as a group or B Lenders as a group to appoint, by a Majority of either such group, a "sub-agent" to act for all A Lenders or all B Lenders, as applicable.[103] The relationship between each group of Lenders and its subagent shall be governed by this Agreement, to the extent reasonably applicable to such relationship (replacing references to Administrative Agent as it relates to such group with references to the subagent for such group), as Modified by agreement of Lenders within such group. Administrative Agent need thereafter deal only with such subagent(s) and need not deal with individual Lender(s) within each group.

4. Communications.

4.1 Changes in Interest Rate. Administrative Agent shall promptly notify Lenders in writing of each election notice Administrative Agent receives from Borrower on interest rate calculations.

4.2 Requests for Instructions. Subject to the Decision Rules, Administrative Agent may at any time (even if this Agreement does not require it) request instructions from Majority Lenders on any Discretionary Action. Administrative Agent may refrain from taking (and may withhold) any Discretionary Action (and shall incur no liability to any Person for doing so) until Administrative Agent has received such instructions.

4.3 Reporting. Administrative Agent shall periodically give the Secured Parties copies of all material financial information and notices Administrative Agent has given or received under the Loan Agreement. Administrative Agent shall: (a) promptly give the Secured Parties copies of any written communications between Borrower and Administrative Agent about any actual or alleged (Event of) Default; and (b) otherwise keep

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102. These Indemnity claims will not be easy to measure. Therefore, it may make more sense to give the other Secured Parties a right to "put" their interest in the Loan, at par, to whatever Secured Party violates this paragraph.

103. The drafter may consider adding this statement: "Unless a Majority of either such group determines otherwise, the sub-agent of each group shall be whichever Lender holds the largest Pro Rata Share within such group."

the Secured Parties reasonably informed of the status of any such actual or alleged (Event of) Default. Administrative Agent shall upon reasonable request from a Lender give such Lender copies of any other material information in Administrative Agent's possession about the Collateral or Loan.

4.4 Publicity. In accordance with its customary procedures, Administrative Agent shall use reasonable precautions to avoid disclosing the identity or involvement of any Secured Party in connection with the Secured Obligations in any of its advertising or other publicity materials, without such Secured Party's prior written consent.[104]

5. Decisions and Approvals.

5.1 Administrative Agent's Authority. Subject only to the Decision Rules[105] and the Servicing Standard, Administrative Agent may, in its sole discretion, in each instance without prior notice to any Secured Party (and even if any such action adversely affects a Secured Party), and to the exclusion of the Secured Parties: (i) exercise or refrain from exercising any power or right of Administrative Agent or any Lender under any Loan Document or against any Collateral; (ii) Enforce or not Enforce the Secured Obligations; (iii) grant or withhold any consent, approval, or waiver, and make any determination, under any Loan Document; (iv) Modify any Loan Document; (v) accept additional security or release any Collateral; (vi) collect the Obligations; and (vii) exercise or determine not to exercise any or all powers incidental to any of the foregoing. No Lender shall have any authority to take any action within Administrative Agent's authority under the previous sentence or otherwise, except to the limited extent that this Agreement allows Swap Provider to enforce the Swap against Borrower. No Lender shall have any right to Enforce the Loan (and Swap Provider shall have no rights to proceed against any Collateral) directly,[106] and presently and irrevocably assigns, conveys, and delegates to Administrative Agent all rights to Enforce the Secured Obligations (and proceed against any Collateral). Nothing in any Decision Rule gives Swap Provider any rights.[107]

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104. Tailor as appropriate to reflect understandings on publicity.

105. The Decision Rules generally give B Lenders substantial controls over many important decisions. In contrast, in a corporate loan, the more senior class of Lenders and Administrative Agent would probably take a very different approach and instead want the more junior class to "go along" with almost anything the senior Lenders wanted to do. For example, if the senior Lenders wanted to release certain Collateral, the intercreditor agreement would require the junior Lenders to do the same thing. The junior Lenders might also agree to acquiesce in any increase in the senior debt principal or interest, or any future waivers granted to Borrower.

106. This language responds to the *Beal Sav. Bank v. Sommer* case as discussed in the introductory notes.

107. Swap Provider might seek the right to approve at least Supermajority Decisions or Unanimous Decisions. This Model Agreement gives Swap Provider no decision rights, on the theory that Swap Provider is a bit of an interloper, merely piggybacking on the

5.2 Nondefault Decision Rules. Notwithstanding anything to the contrary in this Agreement but subject to the Default Decision Rules, Administrative Agent must obtain the following approval (or deemed approval) of these Lenders for only these decisions (such approval requirements, collectively, the "Nondefault Decision Rules"):[108]

| If a Decision Constitutes: | Then It Needs Approval (or Deemed Approval) by These Lenders, Except Nonvoting Lenders: |
|---|---|
| Unanimous Decision | Unanimous Approval |
| Supermajority Decision | Majority of A Lenders;<br>Majority of B Lenders; and<br>Supermajority of all Lenders |
| Majority Decision | Majority of A Lenders; and<br>Majority of B Lenders |

5.3 Default Decision Rules. In any Default Period, Administrative Agent's Enforcement shall be subject to the Nondefault Decision Rules and these limits (the "Default Decision Rules"), subject always to Administrative Agent's indemnity rights under this Agreement. The Default Decision Rules shall supersede the Nondefault Decision Rules where inconsistent.[109]

5.3.1 B Decision Period. In any B Decision Period,[110] Administrative Agent shall follow (i) a Majority of B Lenders' directions on when and how to Enforce the Secured Obligations and (ii) the direc-

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Lenders' security, and should not have a seat at the decision table. Swap Provider would argue that "taxation without representation" violates fundamental principles of fairness.

108. These approval requirements and related agency/bank group issues mostly conform to the approval requirements and related agency/bank group issues in a typical syndicated credit, with nuances because of two tranches. The checklist of decisions requiring approval has become extremely standard, but the parties may still want to expand or shrink the decision lists, or recategorize decisions, in particular cases. All the Decision Rules disenfranchise Swap Provider entirely. To the extent that Borrower participates in negotiating this Model Agreement, Borrower will focus first on these approval requirements as well as the related approval procedures, such as deemed consents.

109. A "Default Period" would include the duration of any Borrower Insolvency Proceeding. Do the fairly typical Default Decision Rules in this Model Agreement provide a reasonable structure, and enough flexibility, to deal with a Borrower Insolvency Proceeding? Some might suggest that the A Lenders should control everything during a Borrower Insolvency Proceeding, with B Lenders relegated to their B Option. The market does not seem to agree, but the market could be wrong.

110. The B Decision Period arises at the beginning of a Default Period. During the B Decision Period, the A Lenders must stand still. In contrast, if the loan structure were not an A/B structure, and instead a "junior" tranche of lenders held separate collateral, that junior tranche would probably have to stand still for some period while the more senior lenders decided whether to enforce their collateral.

tion of the Majority of B Lenders to agree to a Workout of the Loan,[111] provided that (in the case of (i) or (ii)):

5.3.1.1 Servicing Standard. Administrative Agent reasonably determines such Enforcement or Workout meets the Servicing Standard;

5.3.1.2 Conditions. B Lenders continue to meet all conditions to the existence and continuation of a B Decision Period;

5.3.1.3 Projection. Except with their Unanimous Approval, all A Lenders receive and reasonably project that they shall continue at all times to receive (including after Enforcement or Workout), when and as (or before) otherwise required (whether from Credit Party(ies), any other Person, or Cure Payments), all Loan Proceeds (including Expense reimbursements and Add-Ons) that A Lenders (and Swap Provider receives all Swap Payments that Swap Provider) would have received if: (i) no Default Period existed; (ii) a Borrower Cure Date had occurred; (iii) the Loan had not been accelerated; and (iv) no Workout, Enforcement, or Swap Termination had occurred. In making that projection, A Lenders shall recognize that B Lenders have no obligation to make Cure Payments except as they expressly agree in writing; and

5.3.1.4 Effect of Loss. Any loss resulting from the Enforcement or Workout, as the case may be, does not otherwise materially adversely affect A Lenders.

5.3.2 Disputes on Enforcement or Workout. If Administrative Agent reasonably determines that A Lenders or B Lenders have instructed Administrative Agent to act (or fail to act) in a manner that does not satisfy this Agreement, Administrative Agent shall promptly Notify all Lenders of such determination and, in reasonable detail, its basis, and specific changes that, in Administrative Agent's view, would cause the applicable Lenders' instructions to satisfy this Agreement. The parties shall diligently and in good faith seek to resolve any such impasse. Its existence shall not limit B Lenders' right to exercise the B Option at any time during the B Option Period.

Outside B Decision Period. During any Default Period (except when either: (a) B Lenders can still timely satisfy the conditions to a B Decision Period; or (b) a B Decision Period exists), Administrative Agent shall follow the directions of a Majority of A Lenders on when and how to Enforce the Loan; obtain approval from a Majority of A Lenders for any Workout;[112] and give B Lenders at least five Business Days notice before agreeing to any Workout. In acting under the

111. B Lenders may want to require a greater vote.
112. A Lenders may want to require a greater vote.

previous sentence, A Lenders need not consider B Lenders' interests in any way; shall have no obligations except as stated in clause (c) (and shall therefore have no obligations of "good faith" or obligations to comply with the Servicing Standard[113]) to B Lenders; and a Majority of A Lenders may Modify the B Loan with no limits of any kind. B Lenders acknowledge that this Agreement gives them sufficient contractual rights to protect their interests. If B Lenders do not exercise such rights, then A Lenders shall have no obligation to protect B Lenders in any way.[114]

5.3.3 Failure to Act. Notwithstanding anything to the contrary in the preceding Default Decision Rules, if at any time (a) the Lenders (as applicable) have not directed Administrative Agent to Enforce the Secured Obligations in any way and (b) have not remedied such failure within ten Business Days after Notice (given in accordance with the "Deemed Consents" paragraph below), then Administrative Agent may (but shall have no obligation to) take only such actions to Enforce the Secured Obligations as Administrative Agent reasonably determines necessary to protect and preserve the Collateral and prevent any material impairment of the Secured Parties' interests, such as filing a proof of claim and paying unpaid Priority Expenses. In addition, if any Default Period has continued for 60 days and the Lenders have not directed Administrative Agent on whether and how to Enforce the Loan, then Administrative Agent may (but shall have no obligation to), seek to Enforce the Secured Obligations consistent with the Servicing Standard and with achieving a reasonably prompt Transfer of the Collateral from Borrower.

5.4 Deemed Consents. If Administrative Agent or any Lender requests any Lender's consent to any matter requiring such Lender's consent (in its capacity as a Lender) under this Agreement, such request may contain a statement substantially to this effect, in boldface and/or capital letters: "IF YOU DO NOT RESPOND TO THIS REQUEST FOR CONSENT WITHIN TEN BUSINESS DAYS OF RECEIPT, THEN YOUR CONSENT SHALL BE DEEMED GRANTED." If a request for consent complies with this grammatical paragraph and the sender does not re-

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113. B Lenders may want to negotiate that the Servicing Standard continues to apply in these circumstances. A Lenders would probably insist that in a meltdown, B Lenders must rely on exercising the B Option rather than theorizing about what the Servicing Standard really requires.

114. This paragraph seems rather harsh, but it reflects reality. B Lenders should not purchase interests in B Loans unless they can and will (if appropriate) buy out the A Loan to preserve their position if the Loan encounters stress. That's the added risk of a B Loan, justifying its added return. The financing market has until recently tended to ignore such risks. This has produced shock and outrage when market players have learned that risk actually exists and deals can go bad. In other words, subordinate lenders may actually at some point need to write big checks (beyond mere Cure Payments for missed interest) or else abandon their investment. They don't necessarily have the option to go to court seeking relief based on theories of "preventing forfeitures" or "doing equity."

ceive the recipient's written response within ten Business Days after the recipient receives such request, the recipient shall be deemed for all purposes of this Agreement (including any Lender approval requirements) to have consented to such request.

5.5 Dissenters. If any Lender opposes any recommendation from Administrative Agent on any Discretionary Action and does not irrevocably withdraw its opposition within five Business Days after Administrative Agent's written request (a "Dissenter"), then Administrative Agent may, at its option, acquire such Dissenter's entire interest in the Loan either for its own account or for the account of others, disclosed or undisclosed. The purchase price shall equal the amount Dissenter would receive if Borrower paid all Obligations (except Add-Ons)[115] and Administrative Agent distributed the resulting Loan Proceeds through the Waterfall. In all other respects, the provisions of this Agreement on the B Option shall govern the purchase and sale of Dissenter's interest in the Loan.[116]

6. Expenses.

6.1 Decision Process. If Administrative Agent desires to incur any Expense, then Administrative Agent shall proceed as follows. In any B Decision Period, the Default Decision Rules and the definition of B Decision Period shall govern any decision to incur an Expense. The B Lenders shall have the same rights and obligations for approval and payment of any such Expense that they do for Cure Payments. At any other time, if Administrative Agent reasonably determines that any Expense (or a series of related Expenses) is reasonably likely to exceed the Expense Approval Threshold, Administrative Agent shall obtain approval from the Lenders under the Nondefault Decision Rules. Administrative Agent may, however, incur any Emergency Expense at any time (even during a Default Period or a B Decision Period) without seeking or obtaining approval of any Lenders. Administrative Agent shall reasonably endeavor to minimize, and shall with reasonable promptness Notify the Lenders of, any Emergency Expense. To the extent that Administrative Agent satisfies the conditions under this paragraph for incurring Expenses, Administrative Agent may incur such Expense itself and request reimbursement as more fully described below or may request that Secured Parties con-

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115. Dissenter will want to receive its share of Add-Ons as well.

116. A "yank a bank" clause like this one sounds great, but as a practical matter it probably gives Administrative Agent nothing more than it already has – the ability to buy out a Lender that doesn't want to stay in the Loan. To have teeth, a "yank a bank" clause should value Dissenter's interest in the Loan taking into account the liquidation value of the Collateral, much like the formula for testing Substantial Impairment of the B Loan. Otherwise, the pricing seems overly generous in the only circumstance where it might ever matter – the Loan has gotten into trouble and Dissenter misbehaves to try to get bought out. But "yank a bank" clauses rarely establish a value-based formula, and are very far from universal to begin with, probably for the reasons this footnote suggests. They may be somewhat more common as a Borrower's technique to remove particularly expensive or uncooperative Lenders.

tribute to such Expense, when incurred, in accordance with the further provisions of this paragraph. For any Expense arising outside a B Decision Period:

6.1.1 Administrative Agent Request. Administrative Agent may request (but not require, except as this Agreement otherwise expressly provides) that Secured Parties incur such Expense.

6.1.2 B Lenders' Rights. B Lenders' right to incur any such Expense shall supersede A Lenders' and Swap Provider's right to do so.

6.1.3 Sharing. If multiple Secured Parties desire to incur any such Expense, then they shall do so in proportion to their Pro Rata Shares or as they otherwise agree.

6.1.4 Borrower-Reimbursible Expense(s). Any Borrower-Reimbursible Expense(s) shall be added to the Secured Obligations (or part of the Secured Obligations) held by whichever Secured Party(ies) incurred such Borrower-Reimbursible Expense(s); shall not become part of any Lender's Principal; shall therefore not affect Pro Rata Shares; and shall be repaid in accordance with the Waterfall (or as the definition of "B Decision Period" provides).

6.1.5 Non-Borrower-Reimbursible Expense(s). To the extent that Non-Borrower-Reimbursible Expenses were approved in accordance with the Nondefault Decision Rules and do not (except in the case of Emergency Expenses) exceed the Payment Cap, each Secured Party shall promptly upon demand pay its Pro Rata Share of such Non-Borrower-Reimbursible Expenses.

6.1.6 No Lender Obligation. Except as the previous subparagraph provides, no Secured Party shall ever be obligated to make a payment to contribute to any Expense.

6.2 Reporting. Administrative Agent shall give the Secured Parties a monthly statement of Expenses. If any Lender so requests within 60 days after receiving the first monthly report of a particular Expense, Administrative Agent shall give the Secured Parties reasonable additional documentation for that Expense.

7. Cure Rights and Purchase Option.

7.1 Defaults. In any Default Period, a Majority of B Lenders may determine that B Lenders shall make Cure Payments.[117] To the extent that total Cure Payments in any calendar year do not exceed the Payment

117. A Lenders might want the right to "reject" Cure Payments if they represent only a "temporary fix" to a problem or otherwise merely delay the inevitable. This Model Agreement does not give A Lenders that right, at least during a B Decision Period. The author believes that giving A Lenders a rejection right would introduce low-value factual and judgmental issues into the discussion, with little benefit to anyone. In exchange, B Lenders have strict limits on their cure rights. In a particular transaction, A Lenders could certainly take a more aggressive view.

Cap, all B Lenders shall make such Cure Payments (as determined by a Majority of B Lenders) in proportion to their Pro Rata Shares within three Business Days after the Majority of B Lenders vote to make such Cure Payments. After total Cure Payments in any given calendar year have equalled the Payment Cap, thereafter in such calendar year any B Lender that has voted against making Cure Payments need not contribute to such Cure Payments. The other B Lenders shall, in proportion to their relative Pro Rata Shares, cover the resulting Cure Payment shortfall (simultaneously with the funding of such Cure Payments by the Majority of B Lenders).[118] If B Lenders make Cure Payments at any time outside a B Decision Period, A Lenders may (by a Majority vote) reject them. Nothing in this paragraph limits the number or amount of any Cure Payments. No Cure Payment limits Borrower's obligations to any Lender. To the extent those obligations run to the A Lender(s), but B Lender(s) paid Cure Payment(s) to A Lender(s) on account of such obligations, A Lender(s), by signing this Agreement, assign to B Lender(s) all rights to receive such payments from Borrower, subject to the Waterfall.

7.2 B Option. In any B Option Period, B Lenders shall have the right (the "B Option"), but not the obligation, to elect to purchase the A Loan from A Lenders, and the Swap (including Swap Provider's entire interest in the Collateral and any Separate Swap Collateral) from Swap Provider, on the B Option Closing Date, for the B Option Price. If at the B Option Closing Date no Swap Termination has already occurred, then a Swap Termination shall be deemed to occur immediately before the B Option Closing Date. B Lenders may exercise the B Option by giving A Lenders and Swap Provider Notice of exercise. The transfer of the A Loan, the Swap, and Swap Provider's entire interest in the Collateral and any Separate Swap Collateral shall occur on the B Option Closing Date. Such transfer shall be effectuated under an agreement in industry standard form, with such modifications as Secured Parties reasonably agree are necessary to reflect the terms and attendant circumstances of such transfer. Any such agreement shall not require A Lenders or Swap Provider to make any representations or warranties, or be subject to any recourse, except that each shall represent and warrant that it has not otherwise Transferred its interest in the A Loan or the Swap.[119] On the B Option Closing Date, the B Lenders shall assume (and shall cause Swap

118. The B Lenders that choose to write checks may want the right to "dilute" the other B Lenders through a squeezedown mechanism similar to that which applies when partners fail to meet capital calls. Such dilution would erode the optionality of most Cure Payments; hence this Model Agreement does not provide for it. In some circumstances, though, it may make sense.

119. This paragraph offers only a minimalistic description of the contract and closing mechanics for the B Option. Under some circumstances, the parties may want to add provisions of the types found in a loan purchase agreement, such as a deposit, a financing contingency (very unusual), a specific executory interval, rights and remedies for default, and other provisions. The author would submit, however, that the B Option represents a very simple purchase and sale transaction, and no further detail is necessary.

Provider to be released from) all of Swap Provider's obligations under the Swap.

7.3 Decision Process. Any B Lender (or group of B Lenders) may request B Lenders as a whole, by Notice to B Lenders, to exercise the B Option when B Lenders have the right to do so. Within five Business Days, any B Lender that receives such Notice may elect (by Notice to all B Lenders) not to participate in the exercise of such B Option. If any B Lender(s) give Notice that they do not wish to participate in such exercise, then the B Lender(s) that proposed such exercise may withdraw such proposal.

7.4 Effect of Exercise. The B Lender(s) that exercise the B Option shall acquire the A Loan in proportion to their relative Pro Rata Shares. They shall succeed to all rights and obligations of A Lenders, including those under this Agreement. If Administrative Agent is not a B Lender, then on the B Option Closing Date, a Majority of B Lenders shall designate a replacement Administrative Agent.

8. Distributions.

8.1 Loan Proceeds. Administrative Agent shall distribute all Loan Proceeds to Secured Parties under the Waterfall, in proportion to the claims of multiple claimants within each Bucket. Administrative Agent may apply any amounts payable to any Secured Party first to reimburse Administrative Agent for such Secured Party's Pro Rata Share of any Expenses and Indemnity obligations for which any such Secured Party did not already contribute or pay its Pro Rata Share, even if this Agreement did not require such Secured Party to pay such Pro Rata Share of such Expenses and Indemnity obligations in the first instance.[120] In calculating interest due the Lenders, Administrative Agent shall allocate each Advance between A Loan and B Loan based on Pro Rata Shares.

8.2 Timing. If Administrative Agent receives Loan Proceeds by 11 a.m. New York City time on a Business Day, Administrative Agent shall disburse them on that Business Day. If Administrative Agent receives Loan Proceeds at any other time, Administrative Agent shall disburse them on the next Business Day. Administrative Agent shall disburse Loan

120. The previous sentence reflects two important decisions, either of which could go either way. First, all Secured Parties must bear their Pro Rata Shares of all Expenses. One could argue that the B Lenders and not the A Lenders should bear all Expenses (such as by reimbursing Expenses as the first Bucket of the Waterfall or after payments to A Lenders only). Second, Administrative Agent can almost never require a Secured Party to write a check for an Expense. Instead, Administrative Agent must wait for repayment through diversion of funds otherwise payable to Lenders. One could argue that the Lenders should "pay up" sooner. If any Lender refused to "pay up," Administrative Agent could then reimburse itself for Expenses out of any amounts otherwise payable to that Lender. If a reimbursement exceeded a certain level, Administrative Agent might agree to payment over time. An Administrative Agent could certainly take a more aggressive position.

Proceeds by wire transfer of immediately available funds to the recipient's Wire Address.

8.3 Sharing. If a Lender obtains any payment (voluntary, involuntary, or otherwise) on account of such Lender's interest in the Secured Obligations, including through any rights of setoff (including any setoff a Lender asserts against its obligation as Swap Provider, if applicable), such Lender shall immediately pay over such payment to Administrative Agent, to be applied as Loan Proceeds under this Agreement. This Section does not apply in any way to: (a) so long as no Swap Termination has occurred, any Swap Regular Payments from Borrower to Swap Provider; or (b) any payments Swap Provider receives from any Separate Swap Collateral. If, however, Swap Provider receives from Borrower any Swap Payment (or any recovery on account of a Swap Payment) simultaneously with or after a Swap Termination, Swap Provider shall remit it to Administrative Agent, to be applied as Loan Proceeds, except to the extent it arises from Separate Swap Collateral.

8.4 Disgorgement. If any Insolvency Proceeding or court order requires Administrative Agent to disgorge or return any Loan Proceeds, or if Administrative Agent remits to any Secured Party any Loan Proceeds in error, then each Secured Party shall, on request, promptly pay Administrative Agent: (a) any such Loan Proceeds that such Secured Party received (as reasonably calculated by Administrative Agent); (b) such Secured Party's proportionate share of any interest or other amount Administrative Agent pays or is required to pay on account of such Loan Proceeds; and (c) interest at the federal funds rate on any amount in (a) or (b) above, unless such Secured Party pays such amount within one Business Day after the request for payment.

8.5 Liability. If, in Administrative Agent's reasonable opinion, distribution of any Loan Proceeds might produce any liability to Administrative Agent, it may refrain from making distribution until its right to do so has been determined by a court of competent jurisdiction or has been resolved by agreement of all Secured Parties. In addition, Administrative Agent may require Secured Parties to Indemnify Administrative Agent against any such liability, before making any such distribution.

8.6 Taxes. Administrative Agent shall remit Loan Proceeds to any Secured Party without deduction for taxes, charges, levies, or withholdings, except to the extent, if any, that Law, the Loan Documents, or this Agreement requires Administrative Agent to withhold such amounts. Each Secured Party promptly shall deliver such withholding exemption forms as Administrative Agent reasonably requests.

9. Transfers.

No Secured Party shall Transfer its interest (or any part of its interest) in the Secured Obligations, without Administrative Agent's prior consent, which Administrative Agent may withhold in its sole and abso-

lute discretion except as stated below.[121] Secured Parties further agree as follows, superseding the preceding sentence, regarding Transfers:

9.1 Borrower. No Secured Party shall Transfer any interest in any Secured Obligation to Borrower or its Affiliate.

9.2 Cross-Holdings. Any Lender may hold interest(s) in both the A Loan and the B Loan. As among the Secured Parties, no A Lender shall have any obligation to act in any particular manner because of its interest(s) in the B Loan, and vice versa. Each Lender may vote any part of its interest in the Loan on any matter (including exercise or nonexercise of the B Option, in the case of a B Lender) in accordance with its own determination of its best interests, including its interests as holder of other interest(s) in the Loan. Nothing in this paragraph shall cause the A Loan and the B Loan to constitute a single indebtedness of Borrower. To the contrary, the A Loan and the B Loan remain entirely separate obligations subject to the possibility of overlapping ownership.

9.3 Loan Agreement. No Lender shall cause or permit any Transfer that would violate the Loan Agreement, even if Administrative Agent consents to it.

9.4 Minimum Hold. If, after any Transfer, any Lender would hold less than $_____ in principal of the Loan, then simultaneously with such Transfer such Lender shall Transfer its entire interest in the Loan to the same Transferee.[122]

9.5 Permitted Transfers. Administrative Agent's consent shall not be required for: (a) a Secured Party's Transfer of its interest in the Secured Obligations or under this Agreement to its Affiliate or a Federal Reserve Bank; (b) any Transfer to a Permitted Holder; or (c) a Lender's grant of a participation interest to any Permitted Holder, provided that such Lender's agreement with its participant (a copy of which such Lender shall have delivered to Administrative Agent) gives the participant no consent or approval rights on any Discretionary Action, except Unanimous Decisions. Administrative Agent and Borrower shall have no obligations of any kind to any participant.

9.6 Pledge. Any Lender (a "Pledgor") may pledge its interest in the Loan (a "Pledge") to any entity that has extended a credit facility (or may "sell" its interest in the Loan to, and "repurchase" it from, the provider of

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121. As in syndicated loans, Transfers may also require Borrower approval (so long as no Event of Default exists under the Loan). This assumes Borrower will participate in structuring and negotiating the A/B Loan. If that process occurs after closing or independently of Borrower, Borrower will need to address the issue in the Loan Agreement, and Administrative Agent will need to remember to comply with the Loan Agreement in administering Transfers.

122. Borrower or Lenders may also negotiate a minimum hold requirement for Administrative Agent. If Administrative Agent wants to go below that minimum, then Administrative Agent would need to offer to resign as Administrative Agent.

a so-called "repurchase" facility) to such Lender (a "Pledgee"), on the terms and conditions of this paragraph, provided that such Pledgee is: (x) a Permitted Holder; (y) a financial institution whose long-term unsecured debt is rated at least "A" (or its equivalent) or better by each Rating Agency; or (z) Deutsche Bank AG, New York Branch; RBS Greenwich Capital Markets, Inc.; Goldman Sachs Mortgage Company; Bank of America N.A.; Lehman Brothers Holdings Inc.; or their successor institutions.[123] The parties further agree as follows regarding any Pledge:

9.6.1 Effect of Notice. If a Lender Notifies Administrative Agent that such Lender has made a Pledge (which Notice shall give Pledgee's name and address within the United States), then Administrative Agent shall promptly acknowledge receipt. Thereafter, Administrative Agent shall: (a) give Notice to Pledgee of any default under this Agreement by Pledgor of which default Administrative Agent has actual knowledge; and (b) allow such Pledgee ten Business Days to cure such default. Pledgee need not cure any such default. In addition, from and after Administrative Agent's receipt of Notice of a Pledgee: (a) no Modification of this Agreement that would require Pledgor's consent shall be effective against such Pledgee without its written consent, not to be unreasonably withheld, conditioned, or delayed and deemed granted[124] if Pledgee fails to respond to any request for consent within ten Business Days after written request; and (b) if Pledgee gives Notice (a "Redirection Notice") to Administrative Agent that Pledgor is in default, beyond applicable cure periods, under Pledgor's obligations to Pledgee (which Notice need not be joined in or confirmed by Pledgor), and until Pledgee withdraws or rescinds its Redirection Notice, Administrative Agent shall remit to Pledgee any payments that this Agreement would otherwise require Administrative Agent to remit to Pledgor from time to time. Any Pledgor unconditionally and absolutely releases Administrative Agent from any liability to Pledgor for complying with any Redirection Notice.

9.6.2 Pledgee's Rights and Remedies. Pledgee may fully exercise its rights and remedies against Pledgor, and cause a Transfer of any and all collateral granted by Pledgor to such Pledgee, in accordance with applicable law and this Agreement. In such event, Administrative Agent shall recognize such Pledgee (and any transferee of such collateral that is also a Permitted Holder), and its successors and assigns, as the successor to Pledgor's rights, remedies, and obligations

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123. These institutions are the "usual suspects" as warehouse (repo) lenders. Therefore, Pledge clauses often identify them by name. But the world can change. The parties may therefore prefer to rely on objective criteria (which these "usual suspects" will usually satisfy anyway, at least at the time of writing) rather than to "hard-wire" anyone into the document.

124. Pledgee's "deemed approval" procedures are less protective than those for Lenders.

under this Agreement. Any such transferee shall assume in writing Pledgor's obligations accruing from and after such Transfer (i.e., such Pledgee's realization upon its collateral) and shall agree to be bound by this Agreement.

9.6.3 Termination of Pledgee's Rights. Any Pledgee's rights under this paragraph shall continue unless and until such Pledgee has Notified Administrative Agent that the Pledge has terminated.

9.7 Prohibited Transfers. If any Secured Party Transfers its interest in the Secured Obligations in violation of this Agreement, then the Transfer shall be void ab initio. Without limiting the previous sentence, Administrative Agent shall not make any payments to such Transferees.

9.8 Required Deliveries. A Lender that makes any Transfer (except: (a) to a Federal Reserve Bank or (b) a Pledge to a Pledgee as this Agreement expressly allows) shall deliver to Administrative Agent: (i) a certificate of a senior officer of the Transferor or Transferee certifying that Transferee is a Permitted Holder; (ii) an original fully executed Assignment from Transferor to Transferee; (iii) copies of all other documents for such Transfer; and (iv) a Transfer fee of $3,500.[125]

10. Substantial Impairment.[126]

10.1 Substantial Impairment Notice. If at any time Administrative Agent believes the B Loan is Substantially Impaired,[127] then Administrative Agent may at its option so Notify B Lenders (a "Substantial Impairment Notice"). With or before any Substantial Impairment Notice, Administrative Agent shall give B Lenders a copy of an Appraisal and Administrative Agent's calculations demonstrating such Substantial Impairment. If a Majority of A Lenders request Administrative Agent to obtain an Appraisal (and agree to pay for such Appraisal as an Expense with no effect on future application of any Expense Approval Threshold) to determine whether the B Loan is Substantially Impaired, then Administrative Agent shall promptly comply with such request, provided that the Majority of A Lenders made no similar request within the preceding 180

125. This fee is almost universally $3,500. It varies less than almost anything else in this Model Agreement. Some agent banks have eliminated this fee, but that does not seem to be the trend.

126. This Model Agreement uses the term "Substantial Impairment" to refer to the circumstance where B Lenders are "out of the money" by at least seventy-five percent of their outstanding principal balance. Other A/B Intercreditor Agreements call this circumstance a "Control Appraisal Event," a term that does not seem particularly intuitive. Whatever the parties call it, the mechanism achieved more popularity a few years ago than today, but sometimes still appears. Any user of this Model Agreement should regard the concept as optional.

127. The entire concept of Substantial Impairment assumes Administrative Agent can order up a reliable Appraisal of the Collateral at any time. That may not make sense at all for certain types of Loans, such as construction loans, and may not be practical during market meltdowns (perhaps the only time it will matter). The process may also take time and invite flyspecking of the Appraisal.

days. If the resulting Appraisal demonstrates the B Loan is Substantially Impaired, then Administrative Agent shall not unreasonably refuse to give B Lenders a Substantial Impairment Notice.[128]

10.2 Delivery of Substantial Impairment Prevention Collateral. Within ten Business Days after any Substantial Impairment Notice, any B Lender(s) may in their sole and absolute discretion notify Administrative Agent that they unconditionally and irrevocably agree and commit to deliver to Administrative Agent Substantial Impairment Prevention Collateral sufficient to prevent Substantial Impairment of the B Loan. If any B Lender(s) give(s) such Notice to Administrative Agent, then such B Lender(s) shall, within ten days after committing to do so, deliver to Administrative Agent Substantial Impairment Prevention Collateral in such amount. So long as B Lender(s) timely perform under this paragraph, the B Loan shall not be deemed Substantially Impaired.[129]

10.3 Use of Substantial Impairment Prevention Collateral. If any B Lender(s) deliver to Administrative Agent any Substantial Impairment Prevention Collateral, then only if Administrative Agent has made a Final Recovery Determination and applied all other Loan Proceeds through the Waterfall, Administrative Agent may draw upon and apply through the Waterfall (as Loan Proceeds) all such Substantial Impairment Prevention Collateral. Until then, the B Lender(s) that delivered Substantial Impairment Prevention Collateral shall preserve and maintain it. Unless and until the A Loan has been unconditionally, irrevocably, and finally paid in full from Loan Proceeds, B Lenders unconditionally and irrevocably waive any rights of contribution, indemnity, reimbursement, or subrogation from Credit Parties or their Affiliates on account of Administrative Agent's application, drawing, or use of Substantial Impairment Prevention Collateral. Delivery of Substantial Impairment Prevention Collateral does not in itself (unless and until applied as Loan Proceeds) affect the amount of the B Loan.

10.4 Release of Substantial Impairment Prevention Collateral. Administrative Agent shall promptly release all undrawn and unapplied Substantial Impairment Prevention Collateral to the B Lender(s) that delivered it if and when any of the following has occurred:

> 10.4.1 Appraisal. Administrative Agent has, in accordance with the Servicing Standard and at B Lenders' request (which request they may make no more than once every 180 days) and expense, obtained an updated Appraisal showing that even without the Substantial Impairment Prevention Collateral, the B Loan is no longer Substantially Impaired;

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128. The notion of allowing the A Lenders to initiate this process is nonstandard but reasonable.

129. If B Lenders are creditworthy, it might suffice for them to deliver an undertaking (as if they issued a letter of credit themselves) in place of actual Collateral.

10.4.2 B Option. B Lenders have exercised the B Option;[130]

10.4.3 Discretionary Approval. A Lenders, by Unanimous Approval (in their sole and absolute discretion), have directed Administrative Agent to release the Substantial Impairment Prevention Collateral; or

10.4.4 Repayment. A Lenders and Swap Provider have received unconditional (re)payment of an amount equal to the B Option Price;

11. Representations, Warranties, and Acknowledgments.

11.1 All Parties. Administrative Agent and each Lender each represents and warrants to all other parties to this Agreement that: (a) it is a Permitted Holder and legally authorized to enter into this Agreement, any Assignment to which it is a party, and, in the case of Administrative Agent only, any Loan Documents to which it is party (the "Documents"); (b) it has duly executed and delivered the Documents; (c) the Documents do not violate any agreement or Law that binds it, and are its legal, valid, binding, and enforceable obligation; (d) it has dealt with no agent, broker, consultant, investment banker, or other Person that may be entitled to any commission or compensation as a result of any transaction this Agreement describes; and (e) it is sophisticated about (and experienced in making) decisions to acquire assets such as its interest(s) in the Secured Obligations. Swap Provider, in its capacity as Swap Provider, makes to all other parties to this Agreement the representations and warranties in clauses (a) through (d) above.

11.2 Secured Parties. Each Secured Party agrees, acknowledges, represents, and warrants to all other parties that:

11.2.1 Decisions. It will, independently and without reliance on any other Person, based on such documents and information as it deems appropriate at the time, make and continue to make its own credit decisions about Credit Parties and the Secured Obligations. It has previously, in the same way, made its own credit decision to acquire its interest(s) in the Secured Obligations.

11.2.2 No Responsibility. No party to this Agreement: (a) shall be responsible to any other party for the collectibility, enforceability, execution, genuineness, legality, sufficiency, or validity of any Loan Document or other instrument or document furnished under the Loan Documents or relating to the Obligations; or (b) has made or shall be deemed to have made any warranty or representation to another or be responsible to another for any statement, warranty, or

130. Administrative Agent may prefer to wait until the closing under the B Option. This paragraph assumes Administrative Agent will rely on B Lenders' credit once they elect to purchase. That concept is somewhat inconsistent with requiring Substantial Impairment Prevention Collateral (instead of a mere undertaking) from B Lenders in the first instance.

representation (written or otherwise) made in or in connection with the Secured Obligations or the Loan Documents or for the financial condition of any Person or for any Collateral (but this does not limit any Person's express representations and warranties under this Agreement).

11.2.3 Review and Approval. It has: (a) reviewed and accepted the Loan Documents as they exist on the Effective Date and the closing deliveries (or waivers of closing requirements) under the Loan Agreement as of the Effective Date; (b) received all relevant financial information as it has deemed appropriate to make its own credit analysis and decision to acquire its interest in the Secured Obligations; and (c) used the information it has received about the Secured Obligations solely to evaluate the Secured Obligations and will keep such information confidential (except as Law or judicial process requires) and not use it for any other purpose.

11.2.4 Securities Compliance. It acquires its interest in the Secured Obligations for its own account and not with a view to or for sale in connection with any distribution of any evidence of indebtedness.

11.3 Administrative Agent. Administrative Agent represents and warrants to each Secured Party as follows, as of the Effective Date, subject to any matters that any Loan Document or **Exhibit B** discloses:[131]

11.3.1 Actions and Proceedings. Administrative Agent has received no notice of any pending action, suit, proceeding, arbitration, or governmental investigation against any Credit Party or the Collateral, an adverse outcome of which, to Administrative Agent's knowledge, would materially and adversely affect any Credit Party's ability to perform under the Loan Documents or the value or use of the Collateral. To Administrative Agent's knowledge: (a) no proceeding exists to condemn any Collateral; and (b) no Credit Party is a debtor in any Insolvency Proceeding.

11.3.2 Engineering and Environmental. Administrative Agent has delivered to each Lender true and complete copies of (i) the engineering report or update prepared by _____ dated _____; (ii) the letter from _____ to Administrative Agent, dated as of _____ about _____; and (iii) the Phase I environmental report prepared by _____ and dated _____. Administrative Agent has received no other written re-

131. An Administrative Agent would typically not make all these representations and warranties. Each, however, relates to disclosure of matters actually known to Administrative Agent rather than to objective guaranties of Loan quality. Thus, Administrative Agent should find them tolerable. Any Administrative Agent may still prefer to trim them back in any number of rather obvious ways.

ports about any physical or environmental issues that materially adversely affect any Collateral.

11.3.3 Full Disbursement. The Loan has been fully disbursed except _____.

11.3.4 Insurance. To Administrative Agent's knowledge, all insurance the Loan Documents require is in full force and effect in all material respects subject only to waivers that satisfy the Servicing Standard.

11.3.5 Loan Defaults. Administrative Agent has delivered no Notice of any uncured (Event of) Default to Borrower. Administrative Agent has no knowledge of any basis for such a Notice. The Loan is not, and has never been, delinquent for 30 or more days, in any sum(s) due Administrative Agent or any Lender.[132]

11.3.6 Loan Documents. Administrative Agent has delivered to the Lenders true and complete copies of each Loan Document listed in **Exhibit B**. Those Loan Documents constitute all material agreements about, and all material documents evidencing or securing, the Loan.

11.3.7 Loan Status. Administrative Agent has not: (a) Modified in writing any material provision of the Loan; (b) released any material Collateral; or (c) to Administrative Agent's knowledge, released any Credit Party from any material Obligation.

11.3.8 No Equity Participation. Except as the Loan Agreement discloses, Administrative Agent does not (and has no right to) own any equity participation or preferred equity interest in any Credit Party or its Affiliate.[133]

11.3.9 No Sweep Event. Administrative Agent has not Notified Borrower of a Sweep Event.[134]

11.3.10 Opinions. Administrative Agent has delivered to each Lender true and correct copies of the legal opinions Administrative Agent received for the Loan. Administrative Agent has received no Notice (and has no reason to believe) that any such opinion is materially incorrect.

11.3.11 Other Loans. To Administrative Agent's knowledge, (a) no subordinate mortgage or lien encumbers any Collateral, and (b) there is no mezzanine debt related to the Collateral or Borrower.

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132. This sentence would not cover monetary defaults relating to third party payments, such as real estate taxes.

133. This assurance may be tricky if the Loan originator provided, or may later provide, some form of mezzanine financing. The drafter should edit as appropriate or delete.

134. The drafter should tailor this provision to refer to particular "bad" events that could have occurred under the Loan Agreement.

11.3.12 Permits. Administrative Agent has no reason to believe any representations and warranties in the Loan Agreement about Permits are materially false.

11.3.13 Reserves and Escrows. Administrative Agent or its Representative holds or controls all escrows and reserves the Loan Documents require.

11.3.14 Servicing. Administrative Agent has complied with the Servicing Standard in all material respects since the Loan Date.

11.3.15 Status. Administrative Agent: (a) is a branch, licensed in New York, of a banking corporation duly organized under the laws of _____; (b) has entered into no intercreditor, participation, co-lender, or similar agreement for any Secured Obligations except this Agreement or as the Loan Agreement discloses; and (c) except as disclosed to the Lenders in writing, possesses all original material Loan Documents (except individual Lenders' separate promissory notes, if any, and any Loan Documents delivered to appropriate third parties for recording or filing).

11.3.16 Swap. The Swap is in full force and effect. Swap Provider (and, to Administrative Agent's knowledge, Borrower) is not in default under the Swap.[135]

11.3.17 Title Policy. Administrative Agent has received no Notice (and has no knowledge or reason to believe) the Title Policy is not in full force and effect. Administrative Agent has not made (and knows of nothing that might support) any claim under the Title Policy. Administrative Agent has no actual knowledge of anything that would impair or diminish the Title Policy.

11.4 Conflict. All Secured Parties acknowledge: (a) Administrative Agent has fully disclosed that Administrative Agent, Swap Provider, Administrative Agent as an A Lender (if applicable), and Administrative Agent as a B Lender (if applicable) (all the foregoing, the "Conflicted Parties") are the same Person or different departments of the same Person; (b) Conflicted Parties have been represented by the same counsel in negotiating and closing all legal relationships referred to in this Agreement to which any of them are party, and this Agreement; (c) this Agreement satisfactorily addresses any conflict of interest that may result from the matters in clauses (a) and (b); (d) each Lender has had ample opportunity to have its own counsel review and approve this Agreement and all other documents as to which the Conflicted Parties have any actual or potential conflict of interest; (e) this Agreement fully defines the duties of Administrative Agent, including such duties as they relate to Administrative Agent's conflict of interest (if any) in dealing with any other Conflicted Party; and (f) Administrative Agent shall not be deemed to have

135. This paragraph assumes Administrative Agent also acts as Swap Provider.

any fiduciary duties or implied obligations as a result of any such conflict or otherwise. This does not limit Administrative Agent's express obligations under this Agreement.

12. Miscellaneous.

12.1 Certain Claims. Each party waives any right to recover consequential or speculative damages of any kind in the event of any Dispute.

12.2 Characterization. This Agreement, the Assignments, and the Loan Documents create no partnership or joint venture. No interest of any Lender in any Loan, and no rights of any Person under this Agreement, are a security under the Securities Act or any other securities law.

12.3 Counterparts. This Agreement may be executed in any number of counterparts, as if all parties had signed the same document. All counterparts shall be construed together. They constitute one agreement.

12.4 Further Assurances. Each party shall, from time to time, execute such documents as Administrative Agent reasonably requires to evidence Administrative Agent's authority, and to further effectuate the parties' intentions, under this Agreement. If any Lender determines that it desires to securitize its interest in the Loan, then the other parties shall not unreasonably refuse to agree to any amendments of this Agreement necessary or appropriate to achieve such securitization, provided that any such amendment does not: (a) defer or reduce any payment; (b) impair the rights of the signing party in any material respect; or (c) in any other way materially adversely affect any Lender.[136]

12.5 Governing Law, Disputes. This Agreement and any Dispute shall be governed by, and construed under, New York law. The parties irrevocably: (a) agree that any Dispute may be brought in any state or federal court in New York County having subject matter jurisdiction[137]; (b) consent to jurisdiction of each such court in any Dispute; (c) waive any objection to venue of any Dispute in any such court and any claim that any Dispute has been brought in an inconvenient forum; and (d) consent to service of process in any Dispute by service of copies at its notice address, with simultaneous service of copies on all its copy recipients, under this Agreement.[138] Nothing in this paragraph limits any Person's right to serve legal process in any manner Law allows or Administra-

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136. Lenders often say they will never securitize. But then, in the next reorganization of their institution, they decide they must securitize. This language accommodates that possibility. Other Lenders (and, particularly, Borrower) may argue that securitizing any interest in the Loan is fundamentally incompatible with the transaction as originally contemplated.

137. This language allows New York jurisdiction but does not limit jurisdiction to New York. Should the parties provide for exclusive jurisdiction in New York? The author sees no reason to tie Administrative Agent's hands.

138. For foreign Lenders, Administrative Agent may want to consider requiring designation of an agent for service of process.

tive Agent's right to initiate any Dispute with Borrower anywhere. THE PARTIES WAIVE JURY TRIAL IN ANY DISPUTE.

12.6 Interpretation. "Include" and its variants shall be interpreted as if followed by: "without limitation." If any provision(s) of this Agreement are held illegal, invalid, or unenforceable in any respect, that shall not limit the enforceability, legality, or validity of the remainder.

12.7 Merger. This Agreement and the Assignment(s) embody the entire agreement among the parties about the Secured Obligations and the Collateral, superseding all prior agreements and understandings about such matters.

12.8 Modifications. Nothing in this Agreement may be Modified except by a written instrument signed by the party to be charged.

12.9 Notices and Payment Instructions. Any Notice under this Agreement shall comply (and become effective in accordance) with the Notice procedures in the Loan Agreement, but shall be dispatched to the address or fax numbers (and to the copy recipients) specified below each party's signature to this Agreement. Each party may change its address or copy recipient(s) by such Notice. Notice of any matter except a default (or exercise of remedies) under this Agreement may be given by email.

12.10 Obligations Absolute. Each party's obligations under this Agreement are absolute and unconditional. They shall not be affected by any circumstance whatsoever, including any Person's breach of obligations, lack of validity or enforceability of any Loan Document, Default Period, or failure to satisfy any term or condition of any Loan Document. Any payment this Agreement requires shall be made with no abatement, offset, reduction, or withholding whatsoever, except required withholdings.

12.11 Other Transactions. Each party to this Agreement and its Affiliates: (a) may accept deposits from, lend money to, act as trustee under indentures of, and generally engage in any business with, Borrower, its Affiliates, and any Person that may do business with any of the foregoing, with no duty to account to one another; but (b) shall acquire no direct or indirect ownership interest in Borrower or its Affiliates.

12.12 Streit Act. If any Secured Obligation, this Agreement, or the interest of any Secured Party under this Agreement constitutes or is deemed to constitute a "mortgage investment" under New York Real Property Law § 125, then Administrative Agent shall have all powers, shall perform all obligations, and shall be bound by all restrictions and requirements, that apply to a trustee under New York Real Property Law § 126.[139]

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139. New York's ancient and largely unknown and ignored "Streit Act" imposes certain investor protection requirements for a "mortgage investment," defined more or less as a mortgage in which multiple persons hold an interest. The Streit Act applies

12.13 Successors and Assigns. Subject to the Transfer restrictions in this Agreement, the parties' obligations and rights in this Agreement shall bind and benefit their successors and assigns. This Agreement does not benefit Borrower or any third party. Nothing in this Agreement, or any rights, obligations or payments among the parties to this Agreement, diminishes Borrower's obligations under the Loan Documents. By entering into and performing under this Agreement, Secured Parties merely assign among themselves various partial interests in the Loan and the Collateral, in exchange for various payments, without benefiting Borrower in any way.

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whenever the underlying real property is located within New York. Also, in a moment of jurisdictional exuberance, the Legislature decided the Streit Act protections should also apply for any real property anywhere, whenever the "trustee" under such an investment has an office in New York or is authorized to do business in New York. Therefore, this paragraph will typically apply even for real property located outside New York. The Streit Act lies in wait as cannon fodder for litigators in the next downturn.

**IN WITNESS WHEREOF**, Administrative Agent and the Secured Parties have duly executed this Agreement as of the Effective Date.

**ADMINISTRATIVE AGENT AND SWAP PROVIDER:**[140]

_____

By: _____
Name:
Title:

By: _____[141]
Name:
Title:

| Notice Address and Wire Transfer Address: | Copy Recipient for Notice(s): |
|---|---|
| _____ | Latham & Watkins LLP |
| _____ | 885 Third Avenue, Suite 1000 |
| Attention: _____ | New York, New York 10022 |
| Fax No.: _____ | Attention: Joshua Stein, Esq. |
| Wire Transfer Address: _____ | |
| _____ | |

140. If Administrative Agent does not also act as Swap Provider, then add a separate signature for Swap Provider.

141. Many banks (and all German banks) active in syndicated lending follow a "four eyes" rule, requiring two signatures for any document. For any bank that requires only one signature, delete the second signer. The same comment applies to all other signatures in this Model Agreement and any Assignment.

[INITIAL LENDERS' SIGNATURE PAGE TO INTERCREDITOR AGREEMENT (AMONG A LENDERS, B LENDERS, AND SWAP PROVIDER) DATED AS OF _____, 200__.]

**PARTY**

**NAME OF PARTY**, a _____

| | |
|---|---|
| By: _____ | By: _____ |
| Name: _____ | Name: _____ |
| Title: _____ | Title: _____ |

| Notice Address: | Copy Recipient for Notice(s): |
|---|---|
| _____<br>_____<br>Attention: _____<br>Fax No.: _____<br>Wire Transfer Address: _____<br>_____<br>_____ | _____<br>_____<br>_____ |

The above Lender is acquiring the following interest in the following Loan(s):

| Loan | Principal Amount | Pro Rata Share (Disregarding Swap Provider's Interest) |
|---|---|---|
| A Loan | $ | _____% |
| B Loan | $ | _____% |

[Copy as Appropriate.]

EXHIBIT A

ASSIGNMENT AND ACCEPTANCE AGREEMENT, FORM OF

This **ASSIGNMENT AND ACCEPTANCE AGREEMENT** (this "Assignment") is made as of _____ (the "Assignment Date"), by and between _____ ("Assignor") and _____ _____ ("Assignee"), based on these facts:

A. Assignor, Assignee, and _____, as Administrative Agent ("Administrative Agent"), entered into an Intercreditor Agreement dated as of _____ (the "Agreement"). The Agreement contemplates Assignor and Assignee may enter into this Assignment. All definitions in the Agreement apply here.

B. Assignor wishes to assign to Assignee (part of) Assignor's rights and obligations regarding the Loans, including (part of) Assignor's interest as Lender (A Lender or B Lender or both) in and to the Loans.

C. As a condition to the release of Assignor from its rights and obligations as a Lender arising after the Assignment Date under the assigned interest in the Loan, the Loan Agreement requires the parties to execute and deliver this Assignment.

**NOW, THEREFORE**, Assignor and Assignee agree:

1. *Purchase Price and Assignment*. On the Assignment Date, Assignee shall pay to Assignor's account specified beneath Assignor's signature below, the dollar amount specified below Assignee's signature. That sum constitutes the purchase price (the "Purchase Price") for Assignor's assignment to Assignee of the Pro Rata Share of the A Loan, the B Loan, or both (disregarding any interest of Swap Provider) stated below Assignee's signature. Assignee is acquiring only the interest (if any) in the A Loan, and the interest (if any) in the B Loan, stated below Assignee's signature. Effective on Assignor's receipt of the Purchase Price, Assignor shall be deemed to have assigned, granted, and transferred to Assignee, and Assignee shall have assumed and received, such Pro Rata Share of such Loan(s) (consisting of (portions of) the A Loan, the B Loan, or both) in accordance with the Agreement, this Assignment, and the Loan Agreement. The Purchase Price includes accrued interest payable by Borrower through the Assignment Date.[142]

2. *Administrative Agent Authority*. Assignee acknowledges and agrees that (i) Administrative Agent, in its capacity as "Administrative Agent" shall act, to the exclusion of Assignee, for and on behalf of Assignee as the Agreement provides; and (ii) such Administrative Agent shall remain the sole Administrative Agent as provided in and subject to the Agreement.

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142. As an alternative: "The Purchase Price includes interest only through the last Interest Payment Date before the Assignment Date. Assignee shall promptly remit Assignor's share of the next interest payment (based on a *per diem* allocation) when and as received."

3. *Lender Obligations*. Assignee assumes all obligations (and makes all representations and warranties) of an A Lender, B Lender, or both (depending on the interest(s) Assignee is acquiring in which Loan(s), as indicated under Assignee's signature) under the Agreement. By signing this Assignment, Assignee joins in the Agreement as such Lender(s). This Assignment is subject to the Agreement and the Loan Documents.

4. *Disputes*. Any Dispute under this Assignment shall be subject to the same choice of law and other Dispute-related provisions (including the jury trial waiver) as any Dispute under the Agreement.

5. *Notices*. Any Notice under this Assignment shall be given in accordance with the Agreement.

6. *Miscellaneous*. Nothing in this Assignment may be Modified except by an instrument in writing executed by the party to be charged. This Assignment is for the sole benefit of Assignor and Assignee and no third party, except Administrative Agent, shall be a third party beneficiary of all provisions in this Assignment that benefit Administrative Agent. If anything in this Assignment should be held invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions in this Assignment shall not in any way be affected or impaired thereby. This Assignment may be executed in any number of counterparts, with the same effect as if all of the parties had signed the same document. All counterparts shall be construed together. All constitute one agreement. This Assignment and the Agreement embody the entire agreement between the parties about assignment of interests in the A Loan, the B Loan, or both, superseding all prior agreements and understandings.

**IN WITNESS WHEREOF**, Assignor and Assignee have executed this Assignment as of the Assignment Date.

**ASSIGNOR**

**NAME OF ASSIGNOR**, a
_____

By: _____ By: _____
Name: _____ Name: _____
Title: _____ Title: _____

| Notice Address: | Copy Recipient for Notice(s): |
|---|---|
| _____<br>_____<br>Attention: _____<br>Fax No.: _____<br>Wire Transfer Address: _____<br>_____<br>_____ | _____<br>_____<br>_____ |

**ASSIGNEE**

**NAME OF ASSIGNEE**, a
_____

By: _____ By: _____
Name: _____ Name: _____
Title: _____ Title: _____

| Notice Address: | Copy Recipient for Notice(s): |
|---|---|
| _____<br>_____<br>Attention: _____<br>Fax No.: _____<br>Wire Transfer Address: _____<br>_____<br>_____ | _____<br>_____<br>_____ |

The above Assignee is acquiring the following interest in the following Loan(s):

| Loan | Principal Amount | Pro Rata Share (Disregarding Swap Provider's Interest) |
|---|---|---|
| A Loan | $ | _____% |
| B Loan | $ | _____% |

EXHIBIT B

DISCLOSURE SCHEDULE