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REN R HAYHURST, ESQ.
BRYAN CAVE LLP
2020 MAIN STREET, SUITE 600
IRVINE, CALIFORNIA 92614



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Skagit County Auditor

11/5/2003 Page 1 of 34 11:33AM

FIRST AMERICAN TITLE CO.

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

DOCUMENT TITLE:..... Second Lien Deed of Trust and Absolute Assignment of Rents
and Leases and Security Agreement (and Fixture Filing)

REFERENCE NO. OF DOCUMENTS

ASSIGNED/RELEASED: N/A

GRANTOR: TRAIL WEST, LLC, a Washington limited liability company

GRANTEE: BRIDGER COMMERCIAL FUNDING LLC, a Missouri limited
liability company

LEGAL DESCRIPTION: Portion Lot 6 "Sedro Acreage" aka Tract B of SW-02-453

ASSESSOR'S PARCEL NO.: 4170-000-006-0300

MAXIMUM PRINCIPAL AMOUNT TO BE ADVANCED: \$185,000.00

MATURITY DATE OF OBLIGATION SECURED: DECEMBER 1, 2013

DATED AS OF NOVEMBER 3, 2003

THIS DOCUMENT IS ALSO A FIXTURE FILING ACCORDING TO THE
APPROPRIATE SECTION OF THE COMMERCIAL CODE IN
THE STATE IN WHICH THE PROPERTY IS LOCATED.

Trustee: First American Title

**SECOND LIEN DEED OF TRUST AND ABSOLUTE ASSIGNMENT OF RENTS AND
LEASES AND SECURITY AGREEMENT (AND FIXTURE FILING)
(MEZZANINE LOAN)**

The parties to this SECOND LIEN DEED OF TRUST AND ABSOLUTE ASSIGNMENT OF RENTS AND LEASES AND SECURITY AGREEMENT (AND FIXTURE FILING) ("**Deed of Trust**"), dated as of November 3, 2003 are TRAIL WEST, LLC., a Washington limited liability company ("**Grantor**"), with a mailing address at 129 Olympic Avenue, Unit 101, Arlington, Washington 98223, FIRST AMERICAN TITLE COMPANY OF SKAGIT COUNTY ("**Trustee**"), with a mailing address at 1301-B Riverside Drive, P.O. Box 1667, Mount Vernon, Washington 98273, and BRIDGER COMMERCIAL FUNDING LLC, a Missouri limited liability company ("**Grantee**"), with a mailing address at 100 Shoreline Highway, Building B, Suite 100, Mill Valley, California 94941.

RECITALS

A. Grantor proposes to borrow from Grantee, and Grantee proposes to lend to Grantor the principal sum of One Hundred Eighty-Five Thousand Dollars (\$185,000.00) ("**Mezzanine Loan**") which Mezzanine Loan amount is subject to increase as provided in the "**Loan Documents**" (as defined below). The Mezzanine Loan is evidenced by a promissory note ("**Mezzanine Note**") executed by Grantor, dated the date of this Deed of Trust, payable to the order of Grantee in the principal amount of the Mezzanine Loan with a fixed maturity date of December 1, 2013.

B. The loan documents include this Deed of Trust, the Mezzanine Note and the other documents described in the Mezzanine Note as Loan Documents ("**Loan Documents**").

C. Grantor is sometimes referred to herein as "**Borrower**" and all references herein to Borrower or Grantor shall be deemed to be references to Grantor.

D. Grantor and Grantee have entered into a first lien mortgage of even date herewith in favor of Grantee ("**Senior Deed of Trust**") to secure Borrower's obligations under certain debt in the amount of Two Million Eight Hundred Eighty Thousand Dollars (\$2,880,000.00) ("**Senior Debt**") payable by Borrower to the holder of the Senior Debt ("**Senior Grantee**").

E. This Deed of Trust and Mezzanine Loan is in all respects subordinate to the Senior Deed of Trust and Senior Debt.

**ARTICLE 1
DEED OF TRUST**

1.1 Grant. For the purposes of and upon the terms and conditions of this Deed of Trust, Grantor irrevocably grants, conveys and assigns to Trustee, in trust for the benefit of Grantee, with power of sale and right of entry and possession, all estate, right, title and interest (subject only to the Senior Deed of Trust) which Grantor now has or may hereafter acquire in, to, under or derived from any or all of the following:

(a) That real property ("**Land**") located in Skagit County, Washington, and more particularly described on **Exhibit "A"** attached hereto;

(b) All appurtenances, easements, rights of way, water and water rights, pumps, pipes, flumes and ditches and ditch rights, water stock, ditch and/or reservoir stock or interests, royalties, development rights and credits, air rights, minerals, oil rights, and gas rights, now or later used or useful in connection with, appurtenant to or related to the Land;



(c) All buildings, structures, facilities, other improvements and fixtures now or hereafter located on the Land;

(d) All apparatus, equipment, machinery and appliances and all accessions thereto and renewals and replacements thereof and substitutions therefor used in the operation or occupancy of the Land, it being intended by the parties that all such items shall be conclusively considered to be a part of the Land, whether or not attached or affixed to the Land;

(e) All land lying in the right-of-way of any street, road, avenue, alley or right-of-way opened, proposed or vacated, and all sidewalks, strips and gores of land adjacent to or used in connection with the Land;

(f) All additions and accretions to the property described above;

(g) All licenses, authorizations, certificates, variances, consents, approvals and other permits now or hereafter pertaining to the Land and all estate, right, title and interest of Grantor in, to, under or derived from all trade names or business names relating to the Land or the present or future development, construction, operation or use of the Land; and

(h) All proceeds of any of the foregoing.

All of the property described above is hereinafter collectively defined as the "**Property**". The listing of specific rights or property shall not be interpreted as a limitation of general terms.

ARTICLE 2 OBLIGATIONS SECURED

2.1 Obligations Secured. Grantor makes the foregoing grant and assignment for the purpose of securing the following obligations ("**Secured Obligations**"):

(a) Full and punctual payment to Grantee of all sums at any time owing under the Mezzanine Note;

(b) Payment and performance of all covenants and obligations of Grantor under this Deed of Trust including, without limitation, indemnification obligations and advances made to protect the Property;

(c) Payment and performance of all additional covenants and obligations of Borrower and Grantor under the Loan Documents, including, without limitation, the payment and performance of covenants and obligations of Grantor and Grantee under the Environmental Indemnity Agreement of even date herewith;

(d) Payment and performance of all covenants and obligations, if any, which any rider attached as an exhibit to this Deed of Trust recites are secured hereby;

(e) Payment and performance of all future advances and other obligations that the then record owner of all or part of the Property may agree to pay and/or perform (whether as principal, surety or guarantor) for the benefit of Grantee, when the obligation is evidenced by a writing which recites that it is secured by this Deed of Trust;

(f) All interest and charges on all obligations secured hereby including, without limitation, prepayment charges, late charges and loan fees; and

(g) All modifications, extensions and renewals of any of the obligations secured hereby, however evidenced, including, without limitation: (i) modifications of the required principal payment dates or interest payment dates or both, as the case may be, deferring or accelerating payment



dates wholly or partly; and (ii) modifications, extensions or renewals at a different rate of interest whether or not any such modification, extension or renewal is evidenced by a new or additional promissory note or notes.

2.2 Obligations. The term "**obligations**" is used herein in its broadest and most comprehensive sense and shall be deemed to include, without limitation, all interest and charges, prepayment charges, late charges and loan fees at any time accruing or assessed on any of the Secured Obligations.

2.3 Incorporation. All terms and conditions of the documents which evidence any of the Secured Obligations are incorporated herein by this reference. All persons who may have or acquire an interest in the Property shall be deemed to have notice of the terms of the Secured Obligations and to have notice that the rate of interest on one or more Secured Obligation may vary from time to time.

2.4 Subordination. The Senior Deed of Trust in favor of Lender, and any renewals, modifications or extensions thereof (including those which increase the loan amount or interest rate, extend the maturity date, eliminate any interest reserve requirements, or change any of the terms and conditions of the Senior Deed of Trust), shall unconditionally be and remain at all times prior and superior to the Mezzanine Loan. Lender and Senior Grantee have entered into that certain Intercreditor Agreement of even date herewith ("**Intercreditor Agreement**") setting forth said parties' respective rights concerning this Deed of Trust and the Senior Deed of Trust.

ARTICLE 3 ABSOLUTE ASSIGNMENT OF RENTS AND LEASES

3.1 Assignment. Grantor irrevocably assigns to Grantee all of Grantor's right, title and interest in, to and under:

(a) all present and future leases of the Property or any portion thereof, all licenses and agreements relating to the management, leasing or operation of the Property or any portion thereof, and all other agreements of any kind relating to the use or occupancy of the Property or any portion thereof, whether such leases, licenses and agreements are now existing or entered into after the date hereof ("**Leases**"); and

(b) the rents, issues, deposits and profits of the Property, including, without limitation, all amounts payable and all rights and benefits accruing to Grantor under the Leases ("**Payments**"). The term "**Leases**" shall also include all Guarantees of and security for the tenants' performance thereunder, and all amendments, extensions, renewals or modifications thereto which are permitted hereunder.

This is a present and absolute assignment, not an assignment for security purposes only, and Grantee's right to the Leases and Payments is not contingent upon, and may be exercised without possession of, the Property.

3.2 Grant of License. Grantee confers upon Grantor a revocable license ("**License**") to collect and retain the Payments as they become due and payable, until the occurrence of a "**Default**" (as hereinafter defined). Upon a Default, the License shall be automatically revoked and Grantee may collect and apply the Payments pursuant to the terms hereof without notice and without taking possession of the Property. All Payments thereafter collected by Grantor shall be held by Grantor as trustee under a constructive trust for the benefit of Grantee. Grantor hereby irrevocably authorizes and directs the tenants under the Leases to rely upon and comply with any notice or demand by Grantee for the payment to Grantee of any rental or other sums which may at any time become due under the Leases, or for the performance of any of the tenants' undertakings under the Leases, and the tenants shall have no right or duty to inquire as to whether any Default has actually occurred or is then existing. Grantor hereby relieves the tenants from any liability to Grantor by reason of relying upon and complying with any such notice or demand by Grantee. Grantee may apply, in its sole discretion, any Payments so collected by



Grantee against any Secured Obligation or any other obligation of Borrower, Grantor or any other person or entity, under any document or instrument related to or executed in connection with the Loan Documents, whether existing on the date hereof or hereafter arising. Collection of any Payments by Grantee shall not cure or waive any Default or notice of Default or invalidate any acts done pursuant to such notice.

3.3 Effect of Assignment. The foregoing irrevocable assignment shall not cause Grantee to be:

- (a) a mortgagee in possession;
- (b) responsible or liable for the control, care, management or repair of the Property or for performing any of the terms, agreements, undertakings, obligations, representations, warranties, covenants and conditions of the Leases;
- (c) responsible or liable for any waste committed on the Property by the tenants under any of the Leases or by any other parties for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee, invitee or other person; or
- (d) responsible for or impose upon Grantee any duty to produce rents or profits. Grantee shall not directly or indirectly be liable to Grantor or any other person as a consequence of:
 - (i) the exercise or failure to exercise any of the rights, remedies or powers granted to Grantee hereunder; or
 - (ii) the failure or refusal of Grantee to perform or discharge any obligation, duty or liability of Grantor arising under the Leases.

3.4 Covenants. Grantor shall at Grantor's sole cost and expense:

- (a) perform the obligations of landlord contained in the Leases and use reasonable efforts to enforce performance by the tenants of the obligations of the tenants contained in the Leases;
- (b) use reasonable efforts to keep the Property leased at all times to tenants which Grantor in good faith believes are creditworthy at rents not less than the fair market rental value (including, but not limited to, free or discounted rents to the extent the market so requires);
- (c) promptly upon Grantee's request, deliver to Grantee a copy of each requested Lease and all amendments thereto and waivers thereof;
- (d) promptly upon Grantee's request, promptly execute and record any additional assignments to Grantee of landlord's interest in any Lease in form and substance satisfactory to Grantee; and
- (e) promptly upon Grantee's request to do so, but in any event by January 1 of each year, provide Grantee a current rent roll, certified by Grantor as being true and correct, containing the names of all tenants with respect to the Property, the terms of their respective Leases, the spaces occupied and the rentals or fees payable thereunder and the amount of each tenant's security deposit.

Unless consented to in writing by Grantee or otherwise permitted by any provision of the Loan Documents, Grantor shall not:

- (f) grant any tenant under any Lease any option, right of first refusal or other right to purchase all or any portion of the Property under any circumstances;

- (g) execute any other assignment of landlord's interest in any of the Leases;
- (h) grant any tenant under any Lease any right to prepay rent more than one (1) month in advance; or
- (i) execute any Lease which deviates materially from the standard form Lease approved by Grantee in writing.

Any such attempted action in violation of the provisions of this section shall be null and void.

3.5 Estoppel Certificates. Within thirty (30) days after request by Grantee, Grantor shall deliver to Grantee and to any party designated by Grantee, estoppel certificates relating to the Leases executed by Grantor and by each of the tenants, in form and substance acceptable to Grantee; provided, however, if any tenant shall fail or refuse to so execute and deliver any such estoppel certificate upon request, Grantor shall use reasonable efforts to cause such tenant to execute and deliver such estoppel certificate but such tenant's continued failure or refusal to do so, despite Grantor's reasonable efforts, shall not constitute a default by Grantor under this Section.

3.6 Right of Subordination. Grantee may at any time and from time to time by specific written instrument intended for the purpose unilaterally subordinate the lien of this Deed of Trust to any Lease, without joinder or consent of, or notice to, Grantor, any tenant or any other person. Notice is hereby given to each tenant under a Lease of such right to subordinate. No subordination referred to in this section shall constitute a subordination to any lien or other encumbrance, whenever arising, or improve the right of any junior lienholder. Nothing herein shall be construed as subordinating this Deed of Trust to any Lease.

ARTICLE 4 SECURITY AGREEMENT AND FIXTURE FILING

4.1 Security Interest. Grantor grants and assigns to Grantee a security interest to secure payment and performance of all of the Secured Obligations, in all of the following described personal property in which Grantor now or at any time hereafter has any interest ("Collateral"):

(a) All goods, building and other materials, supplies, work in process, equipment, machinery, fixtures, furniture, furnishings, signs and other personal property, wherever situated, which are or are to be incorporated into, used in connection with or appropriated for use on the Property;

(b) all rents, issues, deposits and profits of the Property (to the extent, if any, they are not subject to the Absolute Assignment of Rents and Leases);

(c) all inventory, accounts, cash receipts, deposit accounts, impounds, accounts receivable, contract rights, general intangibles, chattel paper, instruments, documents, notes, drafts, letters of credit, insurance policies, insurance and condemnation awards and proceeds, any other rights to the payment of money, trade names, trademarks and service marks arising from or related to the Property or any business now or hereafter conducted thereon by Grantor;

(d) all permits, consents, approvals, licenses, authorizations and other rights granted by, given by or obtained from, any governmental entity with respect to the Property;

(e) all deposits or other security now or hereafter made with or given to utility companies by Grantor with respect to the Property;

(f) all advance payments of insurance premiums made by Grantor with respect to the Property;

(g) all plans, drawings and specifications relating to the Property;



- (h) all loan funds held by Grantee, whether or not disbursed;
- (i) all funds deposited with Grantee pursuant to any Loan Document, including, without limitation, all "**Restoration Funds**" as defined herein;
- (j) all reserves, deferred payments, deposits, accounts, refunds, cost savings and payments of any kind related to the Property or any portion thereof, including, without limitation,
 - (i) all "**Impounds**" as defined herein together with all replacements and proceeds of, and additions and accessions to, any of the foregoing, and
 - (ii) all books, records and files relating to any of the foregoing.

As to all of the above-described personal property which is or which hereafter becomes a "fixture" under applicable law, this Deed of Trust constitutes a fixture filing under the Washington Uniform Commercial Code, as amended or recodified from time to time ("**UCC**").

4.2 Rights of Grantee. In addition to Grantee's rights as a "secured party" under the UCC, Grantee may, but shall not be obligated to, at any time without notice and at the expense of Grantor:

- (a) give notice to any person of Grantee's rights hereunder and enforce such rights at law or in equity;
- (b) insure, protect, defend and preserve the Collateral or any rights or interests of Grantee therein;
- (c) inspect the Collateral; and
- (d) endorse, collect and receive any right to payment of money owing to Grantor under or from the Collateral.

Notwithstanding the above, in no event shall Grantee be deemed to have accepted any property other than cash in satisfaction of any obligation of Grantor to Grantee unless Grantee shall make an express written election of said remedy under the UCC or other applicable law.

4.3 Additional Rights of Grantee Upon Default. Upon the occurrence of a Default hereunder, then in addition to all of Grantee's rights as a "secured party" under the UCC or otherwise at law:

- (a) **Sale of Collateral.** Grantee may:
 - (i) upon written notice, require Grantor to assemble any or all of the Collateral and make it available to Grantee at a place designated by Grantee;
 - (ii) without prior notice, enter upon the Property or other place where any of the Collateral may be located and take possession of, collect, sell and dispose of any or all of the Collateral, and store the same at locations acceptable to Grantee at Grantor's expense; or
 - (iii) sell, assign and deliver at any place or in any lawful manner all or any part of the Collateral and bid and become purchaser at any such sales; and
- (b) **Other Rights.** Grantee may, for the account of Grantor and at Grantor's expense:

(i) operate, use, consume, sell or dispose of the Collateral as Grantee deems appropriate for the purpose of performing any or all of the Secured Obligations;

(ii) enter into any agreement, compromise or settlement including insurance claims, which Grantee may deem desirable or proper with respect to any of the Collateral; and

(iii) endorse and deliver evidences of title for, and receive, enforce and collect by legal action or otherwise, all indebtedness and obligations now or hereafter owing to Grantor in connection with or on account of any or all of the Collateral.

Grantor acknowledges and agrees that a disposition of the Collateral in accordance with Grantee's rights and remedies as heretofore provided is a disposition thereof in a commercially reasonable manner and that five (5) days' prior notice of such disposition is commercially reasonable notice. Grantor further agrees that any sale or other disposition of all or any portion of the Collateral may be applied by Grantee first to the reasonable expenses in connection therewith, including reasonable attorneys' fees and disbursements, and then to the payment of the Secured Obligations.

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

ARTICLE 5 REPRESENTATIONS AND WARRANTIES

5.1 Representations and Warranties. Grantor represents and warrants to Grantee that, to Grantor's current actual knowledge after reasonable investigation and inquiry, the following statements are true and correct as of the "Closing Date" (as defined in the Mezzanine Note):

(a) **Legal Status.** Grantor and Borrower are duly organized and existing and in good standing under the laws of the state(s) in which Grantor and Borrower are organized. Grantor and Borrower are qualified or licensed to do business in all jurisdictions in which such qualification or licensing is required.

(b) **Permits.** Grantor and Borrower possess all permits, franchises and licenses and all rights to all trademarks, trade names, patents and fictitious names, if any, necessary to enable Grantor and Borrower to conduct the business(es) in which Grantor and Borrower are now engaged in compliance with applicable law.

(c) **Authorization and Validity.** The execution and delivery of the Loan Documents have been duly authorized and the Loan Documents constitute valid and binding obligations of Grantor, Borrower or the party which executed the same, enforceable in accordance with their respective terms, except as such enforcement may be limited by bankruptcy, insolvency, moratorium or other laws affecting the enforcement of creditors' rights, or by the application of rules of equity.

(d) **Violations.** The execution, delivery and performance by Grantor and Borrower of each of the Loan Documents do not violate any provision of any law or regulation, or result in any breach or default under any contract, obligation, indenture or other instrument to which Grantor or Borrower is a party or by which Grantor or Borrower is bound.

(e) **Litigation.** There are no pending or threatened actions, claims, investigations, suits or proceedings before any governmental authority, court or administrative agency which may



adversely affect the financial condition or operations of Grantor or Borrower other than those previously disclosed in writing by Grantor or Borrower to Grantee.

(f) **Financial Statements.** The financial statements of Grantor and Borrower, of each general partner (if Grantor or Borrower is a partnership), of each member (if Grantor or Borrower is a limited liability company) and of each guarantor, if any, previously delivered by Grantor or Borrower to Grantee:

- (i) are materially complete and correct;
- (ii) present fairly the financial condition of such party; and
- (iii) have been prepared in accordance with the same accounting standard used by Grantor or Borrower to prepare the financial statements delivered to and approved by Grantee in connection with the making of the Mezzanine Loan, or other accounting standards approved by Grantee.

Since the date of such financial statements, there has been no material adverse change in such financial condition, nor have any assets or properties reflected on such financial statements been sold, transferred, assigned, mortgaged, pledged or encumbered except as previously disclosed in writing by Grantor or Borrower to Grantee and approved in writing by Grantee.

(g) **Reports.** All reports, documents, instruments and information delivered to Grantee in connection with the Mezzanine Loan:

- (i) are correct and sufficiently complete to give Grantee accurate knowledge of their subject matter; and
- (ii) do not contain any misrepresentation of a material fact or omission of a material fact which omission makes the provided information misleading.

(h) **Income Taxes.** There are no pending assessments or adjustments of Grantor's or Borrower's income tax payable with respect to any year.

(i) **Subordination.** There is no agreement or instrument to which Borrower is a party or by which Borrower is bound (other than the Senior Mortgage) that would require the subordination in right of payment of any of Borrower's obligations under the Mezzanine Note to an obligation owed to another party.

(j) **Title.** Grantor lawfully holds and possesses fee simple title to the Property, without limitation on the right to encumber same. This Deed of Trust is a first lien on the Property prior and superior to all other liens and encumbrances on the Property except:

- (i) liens for real estate taxes and assessments not yet due and payable;
- (ii) senior exceptions previously approved by Grantee and shown in the title insurance policy insuring the lien of this Deed of Trust; and
- (iii) other matters, if any, previously disclosed to Grantee by Grantor in a writing specifically referring to this representation and warranty.

(k) **Mechanics' Liens.** There are no mechanics' or similar liens or claims which have been filed for work, labor or material (and no rights are outstanding that under law could give rise to any such liens) affecting the Property which are or may be prior to or equal to the lien of this Deed of Trust.



(l) **Encroachments.** Except as shown in the survey, if any, previously delivered to Grantee, none of the buildings or other improvements which were included for the purpose of determining the appraised value of the Property lies outside of the boundaries or building restriction lines of the Property and no buildings or other improvements located on adjoining properties encroach upon the Property.

(m) **Leases.** All existing Leases are in full force and effect and are enforceable in accordance with their respective terms. No material breach or default by any party, or event which would constitute a material breach or default by any party after notice or the passage of time, or both, exists under any existing Lease. None of the landlord's interests under any of the Leases, including, but not limited to, rents, additional rents, charges, issues or profits, has been transferred or assigned. No rent or other payment under any existing Lease has been paid by any tenant for more than one (1) month in advance.

(n) **Collateral.** Grantor has good title to the existing Collateral. Grantor has not previously assigned or encumbered Grantor's interest in any of the Collateral. No financing statement covering any of the Collateral has been delivered to any other person or entity. Grantor's principal place of business is located at the address shown in this Deed of Trust.

(o) **Condition of Property.** Except as shown in the property condition survey or other engineering reports, if any, previously delivered to or obtained by Grantee, the Property is in good condition and repair and is free from any damage, waste or defect that would materially and adversely affect the value of the Property as security for the Mezzanine Loan or the intended use of the Property.

(p) **Wetlands.** No part of the Property consists of or is classified as wetlands, tidelands or swamp and overflow lands.

(q) **Compliance With Laws: ERISA.**

(i) All federal, state and local laws, rules and regulations applicable to the Property, including, without limitation, all zoning and building requirements and all requirements of the Americans With Disabilities Act of 1990, as amended from time to time (42 U.S.C. Section 12101 et seq.) have been satisfied or complied with. Grantor is in possession of all certificates of occupancy and all other licenses, permits and other authorizations required by applicable law for the existing use of the Property. All such certificates of occupancy and other licenses, permits and authorizations are valid and in full force and effect;

(ii) Grantor and Borrower shall not engage in any transaction which would cause any obligation, or action taken or to be taken, hereunder (or the exercise by Grantee of any of its rights under the Mezzanine Note, this Deed of Trust and the other Loan Documents) to be a non-exempt (under a statutory or administrative class exemption) prohibited transaction under the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**"); and

(iii) Grantor and Borrower shall deliver to Grantee such certifications or other evidence from time to time throughout the term of this Deed of Trust, as requested by Grantee in its sole discretion, that neither Grantor nor Borrower

(A) is an "employee benefit plan" as defined in Section 3(32) of ERISA, which is subject to Title I of ERISA, or a "governmental plan" within the meaning of Section 3(32) of ERISA, and

(B) is subject to state statutes regulating investments and fiduciary obligations with respect to governmental plans.



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(r) **Property Taxes and Other Liabilities.** All taxes, governmental assessments, insurance premiums, water, sewer and municipal charges, and ground rents, if any, which previously became due and owing in respect of the Property have been paid.

(s) **Condemnation.** There is no proceeding pending or threatened for the total or partial condemnation of the Property.

(t) **Homestead.** There is no homestead or other exemption available to Grantor which would materially interfere with the right to sell the Property at a trustee's sale or the right to foreclose this Deed of Trust.

(u) **Single-Purpose Entity.** Grantor satisfies all of the single-purpose entity requirements set forth in **Exhibit "B"** attached hereto and incorporated herein by this reference.

ARTICLE 6 RIGHTS AND DUTIES OF THE PARTIES

6.1 **Maintenance and Preservation of the Property.** Grantor shall:

- (a) keep the Property in good condition and repair;
- (b) complete or restore promptly and in workmanlike manner the Property or any part thereof which may be damaged or destroyed (unless, if and to the extent permitted under Section 6.10, Grantee elects to require that insurance proceeds be used to reduce the Secured Obligations and after such repayment the ratio of Secured Obligations to the value of the Property, as reasonably determined by Grantee is the same as or lower than it was immediately before the loss or taking occurred);
- (c) comply and cause the Property to comply with (i) all laws, ordinances, regulations and standards, (ii) all covenants, conditions, restrictions and equitable servitudes, whether public or private, of every kind and character and (iii) all requirements of insurance companies and any bureau or agency which establishes standards of insurability, which laws, covenants or requirements affect the Property and pertain to acts committed or conditions existing thereon, including, without limitation, any work of alteration, improvement or demolition as such laws, covenants or requirements mandate;
- (d) operate and manage the Property at all times in a professional manner and do all other acts which from the character or use of the Property may be reasonably necessary to maintain and preserve its value;
- (e) promptly after execution, deliver to Grantee a copy of any management agreement concerning the Property and all amendments thereto and waivers thereof; and
- (f) execute and acknowledge all further documents, instruments and other papers as Grantee or Trustee deems necessary or appropriate to preserve, continue, perfect and enjoy the benefits of this Deed of Trust and perform Grantor's obligations, including, without limitation, statements of the amount secured hereby then owing and statements of no offset.

Grantor shall not:

- (g) remove or demolish all or any material part of the Property;
- (h) alter either (i) the exterior of the Property in a manner which materially and adversely affects the value of the Property or (ii) the roof or other structural elements of the Property in a manner which requires a building permit;



(i) initiate or acquiesce in any change in any zoning or other land classification which affects the Property;

(j) materially alter the type of occupancy or use of all or any part of the Property; or

(k) commit or permit waste of the Property.

Grantor shall at Borrower's expense deliver any reappraisal or updated appraisal for the Property; provided, however, that notwithstanding the foregoing, Grantee shall not order appraisals of the Property more than one (1) time per year unless (i) Grantee believes that a material adverse change has occurred with respect to the Property or any portion thereof, or (ii) Grantor requests in writing that Grantee order an appraisal of the Property, or (iii) Grantee is required to reappraise the Property in connection with any rating agency or similar requirements.

6.2 Compliance With Laws: ERISA.

(a) Grantor shall comply with all federal, state and local laws, rules and regulations applicable to the Property, including, without limitation, all zoning and building requirements and all requirements of the Americans With Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.), as amended from time to time;

(b) Grantor shall possess and maintain or cause Borrower to possess and maintain in full force and effect at all times:

(i) all certificates of occupancy and other licenses, permits and authorizations required by applicable law for the existing use of the Property; and

(ii) all permits, franchises and licenses and all rights to all trademarks, trade names, patents and fictitious names, if any, required by applicable law for Grantor and Borrower to conduct the business(es) in which Grantor and Borrower are now engaged;

(c) neither Grantor nor Borrower is or will be an "employee benefit plan" as defined in Section 3(32) of ERISA, which is subject to Title I of ERISA, and the assets of both Grantor and Borrower do not and will not constitute "plan assets" of one or more such plans for purposes of Title I of ERISA; and

(d) neither Grantor nor Borrower is or will be a "governmental plan" within the meaning of Section 3(32) of ERISA, and transactions by or with Grantor and Borrower are not and will not be subject to state statutes applicable to Grantor and Borrower regulating investments of and fiduciary obligations with respect to governmental plans.

6.3 Litigation. Grantor shall promptly notify Grantee in writing of any litigation pending or threatened against Grantor or Borrower claiming damages in excess of \$50,000 and of all pending or threatened litigation against Grantor or Borrower if the aggregate damage claims against Grantor or Borrower exceed \$100,000.

6.4 Merger, Consolidation, Transfer of Assets. Grantor shall not:

(a) merge or consolidate with any other entity or permit Borrower to merge or consolidate with any other entity;

(b) make any substantial change in the nature of Grantor's business or structure or permit Borrower to make any substantial change in the nature of Borrower's business or structure;

(c) acquire all or substantially all of the assets of any other entity or permit Borrower to acquire all or substantially all of the assets of any other entity; or



(d) sell, lease, assign, transfer or otherwise dispose of a material part of Grantor's assets except in the ordinary course of Grantor's business or permit Borrower to sell, lease, assign, transfer or otherwise dispose of a material part of Borrower's assets except in the ordinary course of Borrower's business.

6.5 Accounting Records. Grantor shall maintain and cause Borrower to maintain adequate books and records in accordance with the same accounting standard used by Grantor or Borrower to prepare the financial statements delivered to and approved by Grantee in connection with the making of the Mezzanine Loan or other accounting standards approved by Grantee. Grantor shall permit and shall cause Borrower to permit any representative of Grantee, at any reasonable time and from time to time, to inspect, audit and examine such books and records and make copies of same.

6.6 Costs, Expenses and Attorneys' Fees. Grantor shall pay to Grantee the full amount of all costs and expenses, including, without limitation, reasonable attorneys' fees and expenses of Grantee's in-house or outside counsel, incurred by Grantee in connection with:

(a) appraisals and inspections of the Property or Collateral required by Grantee as a result of (i) a "Transfer "or proposed "Transfer" (as defined below), or (ii) a Default,

(b) any acts performed by Grantee at Grantor's request or wholly or partially for the benefit of Grantor (including, without limitation, the preparation or review of amendments, assumptions, waivers, releases, reconveyances, estoppel certificates or statements of amounts owing under any Secured Obligation). Grantor shall pay all costs and expenses arising under this section immediately upon demand by Grantee together with interest thereon following notice of such indebtedness at the rate of interest then applicable to the principal balance of the Mezzanine Note as specified therein.

6.7 No Other Debt; Liens, Encumbrances and Charges.

(a) Without obtaining Grantee's prior written consent (which consent shall be granted or withheld in Grantee's sole and absolute discretion and at Grantor's sole cost and expense), Grantor shall not incur any debt, secured or unsecured, direct or indirect, absolute or contingent (including guaranteeing any obligation), other than the Mezzanine Loan, the Senior Debt and trade debt incurred in the ordinary course of Grantor's business (with any such trade debt to be paid within sixty (60) days of the date such debt was incurred and, in any event, prior to delinquency); and

(b) Grantor shall immediately discharge by bonding or otherwise any lien (other than the SeniorMortgage), charge or other encumbrance which attaches to the Property in violation of Section 6.14.

Subject to Grantor's right to contest such matters under this Deed of Trust or as expressly permitted in the Loan Documents, Grantor shall pay when due all obligations secured by or reducible to liens and encumbrances which shall now or hereafter encumber or appear to encumber all or any part of the Property or any interest therein, whether senior or subordinate hereto, including, without limitation, all claims for work or labor performed, or materials or supplies furnished, in connection with any work of demolition, alteration, repair, improvement or construction of or upon the Property, except such as Grantor may in good faith contest or as to which a bona fide dispute may arise (provided provision is made to the satisfaction of Grantee for eventual payment thereof in the event that Grantor is obligated to make such payment and that any recorded claim of lien, charge or other encumbrance against the Property is immediately discharged by bonding or otherwise).

6.8 Taxes and Other Liabilities. Grantor shall pay and discharge when due any and all indebtedness, obligations, assessments and taxes, both real and personal and including federal and state income taxes and state and local property taxes and assessments. Grantor shall promptly provide to Grantee copies of all tax and assessment notices pertaining to the Property. Grantor hereby authorizes Grantee to obtain, at Grantor's expense, a tax service contract which shall provide tax information on the



Property to Grantee for the term of the Mezzanine Loan and any extensions or renewals of the Mezzanine Loan.

6.9 Insurance Coverage. Grantor shall insure the Property against loss or damage by fire and such other hazards as Grantee shall from time to time require, however, not to exceed full replacement cost; provided, however,

(a) Grantee, at Grantee's election, may only require flood insurance if all or any portion of the improvements located on the Property is or becomes located in a special flood hazard area, and

(b) Grantee, at Grantee's election, may only require earthquake insurance if all or any portion of the Property is or becomes located in an earthquake fault zone.

Grantor shall also carry public liability insurance and such other insurance as Grantee may require, including, without limitation, business interruption insurance or loss of rents insurance. In addition, but not by way of limitation, Grantor shall also, at its expense, obtain and keep in effect (or cause any contractor and, if required under applicable law, any subcontractor engaged in work on, or with respect to, the Property, to procure and keep in effect), worker's compensation insurance (including employer's liability in an amount satisfactory to Lender and if applicable, insurance covering claims of workers against employers arising under federal law) covering all employees of Grantor (and/or any employees of any contractor and, if required under applicable law, any subcontractor engaged in work on, or with respect to, the Property) in such amount as is reasonably satisfactory to Grantee. Such policies shall contain a standard mortgage clause naming Grantee and its successors and assigns as a loss payee or additional insured, as appropriate, and requiring at least thirty (30) days' prior notice to the holder at termination or cancellation. Grantor shall maintain all required insurance at Grantor's expense, in companies, and in substance and form satisfactory to Grantee, including, without limitation, an agreed amount endorsement.

(c) Neither Grantee nor Trustee, by reason of accepting, rejecting, approving or obtaining insurance shall incur any liability for:

- (i) the existence, nonexistence, form or legal sufficiency of any insurances;
- (ii) the solvency of any insurer; or
- (iii) the payment of claims.

If Grantor fails to maintain and deliver to Grantee the original policies or certificates of insurance required by this Deed of Trust, upon ten (10) days' prior notice to Grantor, Grantee may procure such insurance at Grantor's sole cost and expense. Grantor agrees to deliver to Grantee promptly upon receipt, but in any event no later than thirty (30) days prior to the termination of any of such insurance policies, a renewal policy (or certificate of insurance evidencing the same) satisfying the requirements of this Deed of Trust.

6.10 Insurance and Condemnation Proceeds.

(a) **Assignment of Claims.** Grantor absolutely and irrevocably assigns to Grantee all of the following rights, claims and amounts (collectively, "Claims"), all of which shall be paid to Grantee:

(i) all awards of damages and all other compensation payable directly or indirectly by reason of a condemnation or proposed condemnation for public or private use affecting all or any part of, or any interest in, the Property;

(ii) all other claims and awards for damages to or decrease in value of all or any part of, or any interest in, the Property;



(iii) all proceeds of any insurance policies payable by reason of loss sustained to all or any part of the Property; and

(iv) all interest which may accrue on any of the foregoing.

Grantor shall give Grantee prompt written notice of the occurrence of any casualty affecting, or the institution of any proceedings for eminent domain or for the condemnation of, the Property or any portion thereof. So long as no Default has occurred and is continuing at the time, Grantor shall have the right to adjust, compromise and settle any Claim of \$100,000 or less without the consent of Grantee, provided, however, all awards, proceeds and other sums described herein shall continue to be payable to Grantee. Grantee may commence, appear in, defend or prosecute any Claim exceeding \$100,000, and may adjust, compromise and settle all Claims (except for Claims which Grantor may settle as provided herein), but shall not be responsible for any failure to commence, appear in, defend, prosecute or collect any such Claim regardless of the cause of the failure. All awards, proceeds and other sums described herein shall be payable to Grantee.

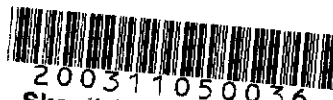
(b) **Application of Proceeds; No Default.** So long as no Default has occurred and is continuing at the time of Grantee's receipt of the proceeds of the Claims ("**Proceeds**") and no Default occurs thereafter, Grantee shall apply the Proceeds in the following order of priority: **First**, to Grantee's expenses in settling, prosecuting or defending the Claims; **Second**, to the repair or restoration of the Property; and **Third**, to Grantor if the repair or restoration of the Property has been completed, but to the Secured Obligations in any order without suspending, extending or reducing any obligation of Grantor to make installment payments if the repair or restoration of the Property has not been completed; provided, however, that nothing herein shall prevent Grantee from applying any such proceeds or awards if, as required by Washington law, Grantee is able to demonstrate that its security for the Mezzanine Loan has been substantially impaired. Notwithstanding the foregoing, Grantee shall have no obligation to make any Proceeds available for the repair or restoration of the Property unless and until all the following conditions have been satisfied in Grantee's sole and absolute discretion:

(i) delivery to Grantee of the Proceeds plus any additional amount which is needed to pay all costs of the repair or restoration (including, without limitation, taxes, financing charges, insurance and rent during the repair period);

(ii) establishment of an arrangement for lien releases and disbursement of funds acceptable to Grantee;

(iii) delivery to Grantee in form and content acceptable to Grantee of all of the following:

- (A) plans and specifications for the work;
- (B) a contract for the work, signed by a contractor acceptable to Grantee;
- (C) a cost breakdown for the work;
- (D) if required by Grantee, a payment and performance bond for the work;
- (E) evidence of the continuation of all Leases unless consented to in writing by Grantee;
- (F) evidence that, upon completion of the work, the size, capacity, value, and income coverage ratios for the Property will be at least as great as those which existed immediately before the damage or condemnation occurred; and



(G) evidence of the satisfaction of any additional conditions that Grantee may reasonably establish to protect Grantee's security.

Grantor acknowledges that the specific conditions described above are reasonable.

(c) **Application of Proceeds; Default.** If a Default has occurred and is continuing at the time of Grantee's receipt of the Proceeds or if a Default occurs at any time thereafter, Grantee may, at Grantee's absolute discretion and regardless of any impairment of security or lack of impairment of security, but subject to applicable law governing use of the Proceeds, if any, apply all or any of the Proceeds to Grantee's expenses in settling, prosecuting or defending the Claims and then apply the balance to the Secured Obligations in any order without suspending, extending or reducing any obligation of Grantor to make installment payments, and may release all or any part of the Proceeds to Grantor upon any conditions Grantee chooses.

6.11 **Impounds**

(a) **Post-Default Impounds.** Subject to the provisions of the Intercreditor Agreement if required by Grantee at any time after a Default occurs (and regardless of whether such Default is thereafter cured), Grantor shall deposit with Grantee such amounts ("**Post-Default Impounds**") on such dates (determined by Grantee as provided below) as will be sufficient to pay any or all "**Costs**" (as defined below) specified by Grantee. Grantee in its sole discretion shall estimate the amount of such Costs that will be payable or required during any period selected by Grantee not exceeding one year and shall determine the fractional portion thereof that Grantor shall deposit with Grantee on each date specified by Grantee during such period. If the Post-Default Impounds paid by Grantor are not sufficient to pay the related Costs, Grantor shall deposit with Grantee upon demand an amount equal to the deficiency. All Post-Default Impounds shall be payable by Grantor in addition to (but without duplication of) any other "**Impounds**" (as defined below).

(b) **All Impounds.** Post-Default Impounds and any other impounds that may be payable by Borrower under the Mezzanine Note are collectively called "**Impounds**". All Impounds shall be deposited into an account maintained by Grantee or its servicing agent, which may be a commingled account, and Grantee shall not be entitled to interest thereon. Grantee shall not be a trustee, special depository or other fiduciary for Grantor with respect to such account, and the existence of such account shall not limit Grantee's rights under this Deed of Trust, any other agreement or any provision of law. If no Default exists, Grantee shall apply all Impounds to the payment of the related Costs, or in Grantee's sole discretion may release any or all Impounds to Grantor for application to and payment of such Costs. If a Default exists, Grantee may apply any or all Impounds to any Secured Obligation and/or to cure such Default, whereupon Grantor shall restore all Impounds so applied and cure all Defaults not cured by such application. The obligations of Grantor hereunder shall not be diminished by deposits of Impounds made by Grantor, except to the extent that such obligations have actually been met by application of such Impounds. Upon any assignment of this Deed of Trust, Grantee may assign all Impounds in its possession to Grantee's assignee, whereupon Grantee and Trustee shall be released from all liability with respect to such Impounds. Within sixty (60) days following full repayment of the Secured Obligations (other than as a consequence of foreclosure or conveyance in lieu of foreclosure) or at such earlier time as Grantee may elect, Grantee shall pay to Grantor all Impounds in its possession, and no other party shall have any right or claim thereto. "**Costs**" means (i) all taxes and other liabilities payable by Grantor under Section 6.8, (ii) all insurance premiums payable by Grantor under Section 6.9, (iii) all other costs and expenses for which Impounds are required under the Mezzanine Note, and/or (iv) all other amounts that will be required to preserve the value of the Property. Grantor shall deliver to Grantee, promptly upon receipt, all bills for Costs for which Grantee has required Post-Default Impounds.

6.12 **Defense and Notice of Losses, Claims and Actions.** Grantor shall protect, preserve and defend the Property and title to and right of possession of the Property, the security of this Deed of Trust and the rights and powers of Grantee and Trustee hereunder at Grantor's sole expense against all adverse claims, whether the claim: (a) is against a possessory or non-possessory interest; (b) arose prior



or subsequent to the Closing Date; or (c) is senior or junior to Grantor's or Grantee's rights. Grantor shall give Grantee and Trustee prompt notice in writing of the assertion of any claim, of the filing of any action or proceeding, of the occurrence of any damage to the Property and of any condemnation offer or action.

6.13 Right of Inspection. Grantee and its independent contractors, agents and employees may enter the Property from time to time at any reasonable time for the purpose of inspecting the Property and ascertaining Grantor's compliance with the terms of this Deed of Trust. Grantee shall use reasonable efforts to assure that Grantee's entry upon and inspection of the Property shall not materially and unreasonably interfere with the business or operations of Grantor or Grantor's tenants on the Property.

6.14 Prohibition of Transfer of Property or Interests in Grantor. Grantor acknowledges that Grantee has relied upon the principals of Grantor and Borrower and their experience in owning and operating properties similar to the Property in connection with the closing of the Mezzanine Loan. Accordingly, except with the prior written consent of Grantee or as otherwise expressly permitted in the Mezzanine Note, Grantor shall not cause or permit any sale, exchange, mortgage, pledge, hypothecation, assignment, encumbrance or other transfer, conveyance or disposition, whether voluntarily, involuntarily or by operation of law (other than in connection with the Senior Debt or the Senior Mortgage) ("Transfer") of all or any part of, or all or any direct or indirect interest in, the Property or the Collateral (except for equipment and inventory in the ordinary course of its business), or cause or permit a Transfer of any direct or indirect interest (whether general or limited partnership interest, stock, limited liability company interest, trust, or otherwise) in Grantor or Borrower. In the event of any Transfer that is not expressly permitted in the Mezzanine Note and is without the prior written consent of Grantee, Grantee shall have the absolute right at its option, without prior demand or notice, to declare all of the Secured Obligations immediately due and payable, except to the extent prohibited by law, and pursue its rights and remedies under Section 7.3 herein. Grantor agrees to pay any prepayment fee as set forth in the Mezzanine Note in the event the Secured Obligations are accelerated pursuant to the terms of this Section. Consent to one such Transfer shall not be deemed to be a waiver of the right to require the consent to future or successive Transfers.

6.15 Acceptance of Trust; Powers and Duties of Trustee. Trustee accepts this trust when this Deed of Trust is recorded. From time to time upon written request of Grantee and presentation of this Deed of Trust, or a certified copy thereof, for endorsement, and without affecting the personal liability of any person for payment of any indebtedness or performance of any Secured Obligation, Trustee may, without liability therefor and without notice:

- (a) reconvey all or any part of the Property;
- (b) consent to the making of any map or plat of the Property;
- (c) join in granting any easement on the Property;
- (d) join in any declaration of covenants and restrictions; or
- (e) join in any extension agreement or any agreement subordinating the lien or charge of this Deed of Trust.

Nothing contained in the immediately preceding sentence shall be construed to limit, impair or otherwise affect the rights of Grantor in any respect. Except as may otherwise be required by applicable law, Trustee or Grantee may from time to time apply to any court of competent jurisdiction for aid and direction in the execution of the trusts hereunder and the enforcement of the rights and remedies available hereunder, and Trustee or Grantee may obtain orders or decrees directing or confirming or approving acts in the execution of said trusts and the enforcement of said remedies. Trustee has no obligation to notify any party of any pending sale or any action or proceeding (including, without limitation, actions in which Grantor, Grantee or Trustee shall be a party) unless held or commenced and maintained by Trustee under this Deed of Trust. Trustee shall not be obligated to perform any act required of it



hereunder unless the performance of the act is requested in writing and Trustee is reasonably indemnified and held harmless against loss, cost, liability and expense.

6.16 Compensation of Trustee. Grantor shall pay to Trustee reasonable compensation and reimbursement for services and expenses in the administration of this trust, including, without limitation, reasonable attorneys' fees and costs. Grantor shall pay all indebtedness arising under this section immediately upon demand by Trustee or Grantee together with interest thereon from the date the indebtedness arises at the rate of interest then applicable to the principal balance of the Mezzanine Note as specified therein.

6.17 Exculpation. Grantee shall not directly or indirectly, be liable to Grantor or any other person as a consequence of:

(a) the exercise of the rights, remedies or powers granted to Grantee in this Deed of Trust;

(b) the failure or refusal of Grantee to perform or discharge any obligation or liability of Grantor under any agreement related to the Property or under this Deed of Trust; or

(c) any loss sustained by Grantor or any third party resulting from Grantee's failure to lease the Property after a "Default" (hereafter defined) or from any other act or omission of Grantee in managing the Property after a Default unless the loss is caused by the willful misconduct and bad faith of Grantee and no such liability shall be asserted or enforced against Grantee, all such liability being expressly waived and released by Grantor.

6.18 Indemnity. Without in any way limiting any other indemnity contained in this Deed of Trust, Grantor agrees to defend, indemnify and hold harmless Trustee and the "Grantee Group" (as defined below) from and against any claim, loss, damage, cost, expense or liability directly or indirectly arising out of:

(a) the making of the Mezzanine Loan, except for violations of banking laws or regulations by the Grantee Group;

(b) this Deed of Trust;

(c) the execution of this Deed of Trust or the performance of any act required or permitted hereunder or by law;

(d) any failure of Grantor to perform Grantor's obligations under this Deed of Trust or the other Loan Documents;

(e) any alleged obligation or undertaking on the Grantee Group's part to perform or discharge any of the representations, warranties, conditions, covenants or other obligations contained in any other document related to the Property;

(f) any act or omission by Grantor or any contractor, agent, employee or representative of Grantor with respect to the Property; or

(g) any prohibited transaction or in the sale of a prohibited loan, and in obtaining any individual prohibited transaction exemption under ERISA that may be required, in Lender's sole discretion that Lender may incur, directly or indirectly, as a result of a Default under Sections 5.1(q) or 6.2.

The foregoing to the contrary notwithstanding, this indemnity shall not include any claim, loss, damage, cost, expense or liability directly or indirectly arising out of the gross negligence or willful misconduct of any member of the Grantee Group or Trustee, or any claim, loss, damage, cost, expense or liability incurred by the Grantee Group or Trustee arising from any act or incident on the Property occurring after



the full reconveyance and release of the lien of this Deed of Trust on the Property. This indemnity shall include, without limitation:

(h) all consequential damages (including, without limitation, any third-party tort claims or governmental claims, fines or penalties against Trustee or the Grantee Group); and

(i) all court costs and reasonable attorneys' fees (including, without limitation, expert witness fees) paid or incurred by Trustee or the Grantee Group "**Grantee Group**", as used herein, shall mean

(i) Grantee (including, without limitation, any participant in the Mezzanine Loan),

(ii) any entity controlling, controlled by or under common control with Grantee,

(iii) the directors, officers, employees and agents of Grantee and such other entities, and

(iv) the successors, heirs and assigns of the entities and persons described in foregoing clauses (i) through (iii).

Grantor shall pay immediately upon Trustee's or Grantee's demand any amounts owing under this indemnity together with interest from the date the indebtedness arises until paid at the rate of interest applicable to the principal balance of the Mezzanine Note as specified therein. Grantor agrees to use legal counsel reasonably acceptable to Trustee and the Grantee Group in any action or proceeding arising under this indemnity. THE PROVISIONS OF THIS SECTION SHALL SURVIVE THE TERMINATION AND RECONVEYANCE OF THIS DEED OF TRUST, BUT GRANTOR'S LIABILITY UNDER THIS INDEMNITY SHALL BE SUBJECT TO THE PROVISIONS OF THE SECTION, IF ANY, IN THE NOTE ENTITLED "**BORROWER'S LIABILITY**."

6.19 Substitution of Trustee. From time to time, by a writing signed and acknowledged by Grantee and recorded in the Office of the Recorder of the County in which the Property is situated, Grantee may appoint another trustee to act in the place and stead of Trustee or any successor. Such writing shall set forth any information required by law. The recordation of such instrument of substitution shall discharge Trustee herein named and shall appoint the new trustee as the trustee hereunder with the same effect as if originally named trustee herein. A writing recorded pursuant to the provisions of this section shall be conclusive proof of the proper substitution of such new trustee.

6.20 Releases, Extensions, Modifications and Additional Security. Without notice to or the consent, approval or agreement of any persons or entities having any interest at any time in the Property or in any manner obligated under the Secured Obligations ("**Interested Parties**"), Grantee may, from time to time:

(a) fully or partially release any person or entity from liability for the payment or performance of any Secured Obligation;

(b) extend the maturity of any Secured Obligation;

(c) make any agreement with Borrower increasing the amount or otherwise altering the terms of any Secured Obligation;

(d) accept additional security for any Secured Obligation; or

(e) release all or any portion of the Property, Collateral and other security for any Secured Obligation.



None of the foregoing actions shall release or reduce the personal liability of any of said Interested Parties, or release or impair the priority of the lien of this Deed of Trust upon the Property.

6.21 Sale or Participation of Mezzanine Loan. Grantor agrees that Grantee may at any time sell, assign, participate or securitize all or any portion of Grantee's rights and obligations under the Loan Documents, and that any such sale, assignment, participation or securitization may be to one or more financial institutions or other entities, to private investors, and/or into the public securities market, in Grantee's sole discretion. Grantor further agrees that Grantee may disseminate to any such actual or potential purchasers, assignees or participants all documents and financial and other information heretofore or hereafter provided to or known to Grantee with respect to: (a) the Property and its operation; and/or (b) any party connected with the Mezzanine Loan (including, without limitation, Grantor, any partner or member of Grantor, any constituent partner or member of Grantor, any guarantor and any nonborrower Grantor).

In the event of any such sale, assignment, participation or securitization, Grantee and the other parties to the same shall share in the rights and obligations of Grantee set forth in the Loan Documents as and to the extent they shall agree among themselves. In connection with any such sale, assignment, participation or securitization, Grantor further agrees that the Loan Documents shall be sufficient evidence of the obligations of Grantor to each purchaser, assignee or participant, and Grantor shall, within fifteen (15) days after request by Grantee, deliver an estoppel certificate verifying for the benefit of Grantee and any other party designated by Grantee the status and the terms and provisions of the Mezzanine Loan in form and substance acceptable to Grantee, and enter into such amendments or modifications to the Loan Documents as may be reasonably required in order to facilitate any such sale, assignment, participation or securitization without impairing Grantor's rights or increasing Grantor's obligations. The indemnity obligations of Grantor under the Loan Documents shall also apply with respect to any purchaser, assignee or participant.

6.22 Reconveyance. Upon Grantee's written request, and upon surrender of this Deed of Trust or certified copy thereof and any note, instrument or instruments setting forth all obligations secured hereby to Trustee for cancellation, Trustee shall reconvey, without warranty, the Property or that portion thereof then held hereunder. The recitals of any matters or facts in any reconveyance executed hereunder shall be conclusive proof of the truthfulness thereof. To the extent permitted by law, the reconveyance may describe the grantee as "the person or persons legally entitled thereto". Neither Grantee nor Trustee shall have any duty to determine the rights of persons claiming to be rightful grantees of any reconveyance. When the Property has been fully reconveyed, the last such reconveyance shall operate as a reassignment of all future rents, issues and profits of the Property to the person or persons legally entitled thereto.

6.23 Subrogation. Grantee shall be subrogated to the lien of all encumbrances, whether released of record or not, paid in whole or in part by Grantee pursuant to this Deed of Trust or by the proceeds of any loan secured by this Deed of Trust.

6.24 Single-Purpose Entity. Grantor shall maintain itself at all times as a single-purpose entity in compliance with the requirements set forth in **Exhibit "B"** attached hereto.

ARTICLE 7 DEFAULT

7.1 Default. For all purposes hereof, "Default" shall mean either an "Optional Default" (as defined below) or an "Automatic Default" (as defined below).

(a) **Optional Default.** An "Optional Default" shall occur, at Grantee's option, upon the occurrence of any of the following events:

(i) **Monetary.** Borrower or Grantor shall fail to



(A) pay when due any sums which by their express terms require immediate payment without any grace period or sums which are payable on the Maturity Date, or

(B) pay within five (5) days when due any other sums payable under the Mezzanine Note, this Deed of Trust or any of the other Loan Documents, including, without limitation, any monthly payment due under the Mezzanine Note.

(ii) **Failure To Perform.** Borrower or Grantor shall fail to observe, perform or discharge any of Borrower's or Grantor's obligations, covenants, conditions or agreements, other than Borrower's or Grantor's payment obligations, under the Mezzanine Note, this Deed of Trust or any of the other Loan Documents, and

(A) such failure shall remain uncured for thirty (30) days after written notice thereof shall have been given to Borrower or Grantor, as the case may be, by Grantee or

(B) if such failure is of such a nature that it cannot be cured within such 30-day period, Borrower or Grantor shall fail to commence to cure such failure within such 30-day period or shall fail to diligently prosecute such curative action thereafter or shall fail to cure such default within ninety (90) days after written notice thereof was first given to Borrower.

(iii) **Representations and Warranties.** Any representation, warranty, certificate or other statement (financial or otherwise) made or furnished by or on behalf of Borrower, Grantor, or a guarantor, if any, to Grantee or in connection with any of the Loan Documents, or as an inducement to Grantee to make the Mezzanine Loan, shall be false, incorrect, incomplete or misleading in any material respect when made or furnished.

(iv) **Condemnation, Attachment.** The condemnation, seizure or appropriation of any material portion (as reasonably determined by Grantee) of the Property, or the sequestration or attachment of, or levy or execution upon any of the Property, the Collateral or any other collateral provided by Borrower or Grantor under any of the Loan Documents, or any material portion of the other assets of Borrower or Grantor, which sequestration, attachment, levy or execution is not released or dismissed within forty-five (45) days after its occurrence; or the sale of any assets affected by any of the foregoing.

(v) **Uninsured Casualty.** The occurrence of an uninsured casualty with respect to any material portion (as reasonably determined by Grantee) of the Property unless:

(A) no other Default has occurred and is continuing at the time of such casualty or occurs thereafter;

(B) Grantor promptly notifies Grantee of the occurrence of such casualty; and

(C) not more than forty-five (45) days after the occurrence of such casualty, Grantor delivers to Grantee immediately available funds ("**Restoration Funds**") in an amount sufficient, in Grantee's reasonable opinion, to pay all costs of the repair or restoration (including, without limitation, taxes, financing charges, insurance and rent during the repair period).

So long as no Default has occurred and is continuing at the time of Grantee's receipt of the Restoration Funds and no Default occurs thereafter, Grantee shall make the Restoration Funds available for the repair or restoration of the Property. Notwithstanding the foregoing, Grantee shall have no obligation to make any Restoration Funds available for repair or restoration of the Property unless and until all the conditions set forth in clauses (ii) and (iii) of the second sentence



of Section 6.10(b) of this Deed of Trust have been satisfied. Grantor acknowledges that the specific conditions described above are reasonable.

(vi) **Adverse Financial Change.** Any adverse change in the financial condition of Borrower or any general partner of Borrower, any guarantor, or any other person or entity from the condition shown on the financial statements submitted to Grantee and relied upon by Grantee in making the Mezzanine Loan, and which change Grantee reasonably determines will have a material adverse effect on

(A) the business, operations or condition of the Property; or

(B) the ability of Borrower or Grantor to pay or perform Borrower's or Grantor's obligations in accordance with the terms of the Mezzanine Note, this Deed of Trust, and the other Loan Documents.

(vii) **Key Person or Entity.** The retirement, death, incapacity or withdrawal of SCOTT WAMMACK as TRAIL WEST, LLC's managing member and Grantor's failure to provide a substitute or replacement acceptable to Grantee within thirty (30) days after the occurrence of any such event.

(viii) **Single-Purpose Entity.** Grantor's failure to satisfy, maintain or comply with all of the single-purpose entity requirements set forth in **Exhibit "B"** attached hereto and incorporated herein by this reference.

(b) **Automatic Default.** An "Automatic Default" shall occur automatically upon the occurrence of any of the following events:

(i) **Voluntary Bankruptcy, Insolvency, Dissolution.**

(A) Borrower's filing a petition for relief under the Bankruptcy Reform Act of 1978, as amended or recodified ("**Bankruptcy Code**"), or under any other present or future state or federal law regarding bankruptcy, reorganization or other relief to debtors (collectively, "**Debtor Relief Law**"); or

(B) Borrower's filing any pleading in any involuntary proceeding under the Bankruptcy Code or other Debtor Relief Law which admits the jurisdiction of a court to regulate Borrower or the Property or the petition's material allegations regarding Borrower's insolvency; or

(C) Borrower's making a general assignment for the benefit of creditors; or

(D) Borrower's applying for, or the appointment of, a receiver, trustee, custodian or liquidator of Borrower or any of its property; or

(E) the filing by or against Borrower of a petition seeking the liquidation or dissolution of Borrower or the commencement of any other procedure to liquidate or dissolve Borrower.

(ii) **Involuntary Bankruptcy.** Borrower's failure to effect a full dismissal of any involuntary petition under the Bankruptcy Code or other Debtor Relief Law that is filed against Borrower or in any way restrains or limits Borrower or Grantee regarding the Mezzanine Loan or the Property, prior to the earlier of the entry of any order granting relief sought in the involuntary petition or forty-five (45) days after the date of filing of the petition.



(iii) **Partners, Guarantors.** The occurrence of an event specified in Sections (i) or (ii) as to Grantor, any general partner of Borrower or Grantor, or any guarantor or other person or entity in any manner obligated to Grantee under the Loan Documents.

(iv) **Default Under Senior Mortgage.** The occurrence of a Default under the Senior Mortgage.

7.2 Acceleration. Upon the occurrence of an Optional Default, Grantee may, at its option and subject to the provisions of the Intercreditor Agreement, declare all sums owing to Grantee under the Mezzanine Note and the other Loan Documents immediately due and payable. Upon the occurrence of an Automatic Default, all sums owing to Grantee under the Mezzanine Note and the other Loan Documents shall automatically become immediately due and payable.

7.3 Rights and Remedies. In addition to the rights and remedies in Section 7.2 above, at any time after a Default, subject to the provisions of the Intercreditor Agreement, Grantee and Trustee shall each have all of the following rights and remedies:

(a) **Entry on Property.** With or without notice, and without releasing Grantor from any Secured Obligation, and without becoming a mortgagee in possession, to enter upon the Property from time to time and to do such acts and things as Grantee or Trustee deem necessary or desirable in order to inspect, investigate, assess and protect the security hereof or to cure any Default, including, without limitation:

(i) to take and possess all documents, books, records, papers and accounts of Grantor, Borrower or the then owner of the Property which relate to the Property;

(ii) to make, terminate, enforce or modify leases of the Property upon such terms and conditions as Grantee deems proper;

(iii) to make repairs, alterations and improvements to the Property necessary, in Trustee's or Grantee's sole judgment, to protect or enhance the security hereof;

(iv) to appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Grantee or Trustee hereunder;

(v) to pay, purchase, contest or compromise any encumbrance, charge, lien or claim of lien which, in the sole judgment of either Grantee or Trustee, is or may be senior in priority hereto, the judgment of Grantee or Trustee being conclusive, as between the parties hereto;

(vi) to obtain insurance;

(vii) to pay any premiums or charges with respect to insurance required to be carried hereunder; and/or

(viii) to employ legal counsel, accountants, engineers, consultants, contractors and other appropriate persons to assist them;

(b) **Appointment of Receiver.** To apply to a court of competent jurisdiction for and obtain appointment of a receiver of the Property as a matter of strict right and without regard to:

(i) the adequacy of the security for the repayment of the Secured Obligations;

(ii) the existence of a declaration that the Secured Obligations are immediately due and payable;



(iii) the filing of a notice of default; and Grantor consents to such appointment;

(c) **Judicial Foreclosure, Injunction.** To commence and maintain an action or actions in any court of competent jurisdiction to foreclose this instrument as a mortgage or to obtain specific enforcement of the covenants of Grantor hereunder, and Grantor agrees that such covenants shall be specifically enforceable by injunction or any other appropriate equitable remedy and that for the purposes of any suit brought under this subparagraph, Grantor waives the defense of laches and any applicable statute of limitations;

(d) **Nonjudicial Foreclosure.** To execute a written notice of such Default and of the election to cause the Property to be sold to satisfy the Secured Obligations. Trustee shall give and record such notice as the law then requires as a condition precedent to a trustee's sale. When the minimum period of time required by law after such notice has elapsed, Trustee, without notice to or demand upon Grantor except as required by law, shall sell the Property at the time and place of sale fixed by it in the notice of sale, at one or several sales, either as a whole or in separate parcels and in such manner and order, all as Grantee in its sole discretion may determine, at public auction to the highest bidder for cash, in lawful money of the United States, payable at time of sale. Neither Grantor nor any other person or entity other than Grantee shall have the right to direct the order in which the Property is sold. Subject to requirements and limits imposed by law, Trustee may, from time to time postpone sale of all or any portion of the Property by public announcement at such time and place of sale, and from time to time may postpone the sale by public announcement at the time and place fixed by the preceding postponement. A sale of less than the whole of the Property or any defective or irregular sale made hereunder shall not exhaust the power of sale provided for herein. Trustee shall deliver to the purchaser at such sale a deed conveying the Property or portion thereof so sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Trustee, Grantor or Grantee may purchase at the sale;

Upon sale of the Property at any judicial or nonjudicial foreclosure, Grantee may credit bid (as determined by Grantee in its sole and absolute discretion) all or any portion of the Secured Obligations. In determining such credit bid, Grantee may, but is not obligated to, take into account all or any of the following:

(i) appraisals of the Property as such appraisals may be discounted or adjusted by Grantee in its sole and absolute underwriting discretion;

(ii) expenses and costs incurred by Grantee with respect to the Property prior to foreclosure;

(iii) expenses and costs which Grantee anticipates will be incurred with respect to the Property after foreclosure, but prior to resale, including, without limitation, costs of structural reports and other due diligence, costs to carry the Property prior to resale, costs of resale (e.g., commissions, attorneys' fees, and taxes), costs of deferred maintenance, repair, refurbishment and retrofit, costs of defending or settling litigation affecting the Property, and lost opportunity costs (if any), including the time value of money during any anticipated holding period by Grantee;

(iv) declining trends in real property values generally and with respect to properties similar to the Property;

(v) anticipated discounts upon resale of the Property as a distressed or foreclosed property;

(vi) the fact of additional collateral (if any), for the Secured Obligations; and



(vii) such other factors or matters that Grantee (in its sole and absolute discretion) deems appropriate.

In regard to the above, Grantor acknowledges and agrees that:

(viii) Grantee is not required to use any or all of the foregoing factors to determine the amount of its credit bid;

(ix) this paragraph does not impose upon Grantee any additional obligations that are not imposed by law at the time the credit bid is made;

(x) the amount of Grantee's credit bid need not have any relation to any loan-to-value ratios specified in the Loan Documents or previously discussed between Grantor and Grantee; and

(xi) Grantee's credit bid may be (at Grantee's sole and absolute discretion) higher or lower than any appraised value of the Property;

(e) **Multiple Foreclosures.** To resort to and realize upon the security hereunder and any other security now or later held by Grantee concurrently or successively and in one or several consolidated or independent judicial actions or lawfully taken nonjudicial proceedings, or both, and to apply the proceeds received upon the Secured Obligations all in such order and manner as Trustee and Grantee or either of them determine in their sole discretion and in accordance with the statute then in effect; and

(f) **Rights to Collateral.** To exercise all rights Trustee or Grantee may have with respect to the Collateral under this Deed of Trust, the UCC or otherwise at law; and

(g) **Other Rights.** To exercise such other rights as Trustee or Grantee may have at law or in equity or pursuant to the terms and conditions of this Deed of Trust or any of the other Loan Documents.

In connection with any sale or sales hereunder, Grantee may elect to treat any of the Property which consists of a right in action or which is property that can be severed from the Property (including, without limitation, any improvements forming a part thereof) without causing structural damage thereto as if the same were personal property or a fixture, as the case may be, and dispose of the same in accordance with applicable law, separate and apart from the sale of the Property. Any sale of Collateral hereunder shall be conducted in any manner permitted by the UCC.

7.4 Application of Foreclosure Sale Proceeds. If any foreclosure sale is effected, Trustee shall apply the proceeds of such sale in the following order of priority: First, to the costs, fees and expenses of the foreclosure sale, including, without limitation, the payment of attorneys' fees; Second, to the payment of the Secured Obligations which are secured by the Senior Deed of Trust, in such order as Grantee shall determine in its sole discretion; Third, to the payment of the Secured Obligations which are secured by this Deed of Trust, in such order as Grantee shall determine in its sole discretion, Fourth, to satisfy the outstanding balance of obligations secured by any junior liens or encumbrances in the order of their priority; and Fifth, to the Grantor or the Grantor's successor in interest, or in the event the Property has been sold or transferred to another, to the vested owner of record at the time of the foreclosure sale.

7.5 Waiver of Marshaling Rights. Grantor, for itself and for all parties claiming through or under Grantor, and for all parties who may acquire a lien on or interest in the Property, hereby waives all rights to have the Property and/or any other property, including, without limitation, the Collateral, which is now or later may be security for any Secured Obligation, marshaled upon any foreclosure of this Deed of Trust or on a foreclosure of any other security for any of the Secured Obligations.



7.6 No Cure or Waiver. Neither Grantee's nor Trustee's nor any receiver's entry upon and taking possession of all or any part of the Property, nor any collection of rents, issues, profits, insurance proceeds, condemnation proceeds or damages, other security or proceeds of other security, or other sums, nor the application of any collected sum to any Secured Obligation, nor the exercise of any other right or remedy by Grantee or Trustee or any receiver shall cure or waive any Default or notice of default under this Deed of Trust, or nullify the effect of any notice of default or sale (unless all Secured Obligations then due have been paid or performed and Grantor has cured all other Defaults hereunder), or impair the status of the security, or prejudice Grantee or Trustee in the exercise of any right or remedy, or be construed as an affirmation by Grantee of any tenancy, lease or option or a subordination of the lien of this Deed of Trust.

7.7 Payment of Costs, Expenses and Attorneys' Fees. Grantor agrees to pay to Grantee immediately and upon demand all costs and expenses incurred by Trustee and Grantee in the enforcement of the terms and conditions of this Deed of Trust (including, without limitation, statutory trustee's fees, court costs and attorneys' fees, whether incurred in litigation or not) with interest from the date of expenditure until said sums have been paid at the rate of interest applicable to the principal balance of the Mezzanine Note as specified therein.

7.8 Power to File Notices and Cure Defaults. Grantor hereby irrevocably appoints Grantee and its successors and assigns, as its attorney-in-fact, which power of attorney is coupled with an interest, to perform any obligation of Grantor hereunder upon the occurrence of an event, act or omission which, with notice or passage of time or both, would constitute a Default, provided, however, that: (i) Grantee as such attorney-in-fact shall only be accountable for such funds as are actually received by Grantee; and (ii) Grantee shall not be liable to Grantor or any other person or entity for any failure to act under this Section.

7.9 Remedies Cumulative. All rights and remedies of Grantee and Trustee provided hereunder are cumulative and are in addition to all rights and remedies provided by applicable law (including specifically that of foreclosure of this instrument as though it were a mortgage) or in any other agreements between Grantor and Grantee. Grantee may enforce any one or more remedies or rights hereunder successively or concurrently.

7.10 Expenses During Redemption Period. If this Deed of Trust is foreclosed as a mortgage and the Property is sold at a foreclosure sale, the purchaser may, during any redemption period allowed, make such repairs or alterations of the Property as may be reasonably necessary for the proper operation, care, preservation, protection and insuring thereof. Any sums so paid, together with interest thereon from the time of such expenditure at the lesser of the default rate under the Mezzanine Note, or the maximum rate permitted by law, shall be added to and become part of the amount required to be paid for redemption from such sale.

ARTICLE 8 MISCELLANEOUS PROVISIONS

8.1 Additional Provisions. The Loan Documents contain or incorporate by reference the entire agreement of the parties with respect to matters contemplated herein and supersede all prior negotiations. The Loan Documents grant further rights to Grantee and contain further agreements and affirmative and negative covenants by Grantor which apply to this Deed of Trust and to the Property and such further rights and agreements are incorporated herein by this reference. THE OBLIGATIONS AND LIABILITIES OF GRANTOR UNDER THIS DEED OF TRUST AND THE OTHER LOAN DOCUMENTS ARE SUBJECT TO THE PROVISIONS OF THE SECTION, IF ANY, IN THE NOTE ENTITLED "BORROWER'S LIABILITY."

8.2 Non-Waiver. By accepting payment of any amount secured hereby after its due date or late performance of any other Secured Obligation, Grantee shall not waive its right against any person obligated directly or indirectly hereunder or on any Secured Obligation, either to require prompt payment or performance when due of all other sums and obligations so secured or to declare default for failure to



make such prompt payment or performance. No exercise of any right or remedy by Grantee or Trustee hereunder shall constitute a waiver of any other right or remedy herein contained or provided by law. No failure by Grantee or Trustee to exercise any right or remedy hereunder arising upon any Default shall be construed to prejudice Grantee's or Trustee's rights or remedies upon the occurrence of any other or subsequent Default. No delay by Grantee or Trustee in exercising any such right or remedy shall be construed to preclude Grantee or Trustee from the exercise thereof at any time while that Default is continuing. No notice to nor demand on Grantor shall of itself entitle Grantor to any other or further notice or demand in similar or other circumstances.

8.3 Consents and Approvals. Wherever Grantee's consent, approval, acceptance or satisfaction is required under any provision of this Deed of Trust or any of the other Loan Documents, such consent, approval, acceptance or satisfaction shall not be unreasonably withheld, conditioned or delayed by Grantee unless such provision expressly so provides.

8.4 Permitted Contests. After prior written notice to Grantee, Grantor may contest, by appropriate legal or other proceedings conducted in good faith and with due diligence, the amount, validity or application, in whole or in part, of any lien, levy, tax or assessment, or any lien of any laborer, mechanic, materialman, supplier or vendor, or the application to Grantor or the Property of any law or the validity thereof, the assertion or imposition of which, or the failure to pay when due, would constitute a Default; provided that

(a) Grantor pursues the contest diligently, in a manner which Grantee determines is not prejudicial to Grantee, and does not impair the lien of this Deed of Trust;

(b) the Property, or any part hereof or estate or interest therein, shall not be in any danger of being sold, forfeited or lost by reason of such proceedings;

(c) in the case of the contest of any law or other legal requirement, Grantee shall not be in any danger of any civil or criminal liability; and

(d) if required by Grantee, Grantor deposits with Grantee any funds or other forms of assurance (including a bond or letter of credit) satisfactory to Grantee to protect Grantee from the consequences of the contest being unsuccessful.

Grantor's right to contest pursuant to the terms of this provision shall in no way relieve Grantor or Borrower of its obligations under the Mezzanine Loan or to make payments to Grantee as and when due.

8.5 Further Assurances. Grantor shall, upon demand by Grantee or Trustee, execute, acknowledge (if appropriate) and deliver any and all documents and instruments and do or cause to be done all further acts reasonably necessary or appropriate to effectuate the provisions hereof.

8.6 Attorneys' Fees. In the event it is necessary for Lender to retain the services of an attorney or any other party to enforce or to commence any legal action to enforce the terms of this Mezzanine Note, Deed of Trust, or any of the other Loan Documents, or any portion hereof or thereof, Borrower agrees to pay to Lender, in addition to damages or other relief, any and all costs and expenses, including, without limitation, expert witness fees and reasonable attorneys' fees and costs incurred by Lender as a result thereof.

8.7 Grantor and Grantee Defined. The term "Grantor" includes both the original Grantor and any subsequent owner or owners of any of the Property, and the term "Grantee" includes the original Grantee and any future owner or holder, including assignees, pledges and participants, of the Mezzanine Note or any interest therein.



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8.8 Disclaimers.

(a) **Relationship.** The relationship of Grantor and Grantee under this Deed of Trust and the other Loan Documents is, and shall at all times remain, solely that of borrower and lender; and Grantee neither undertakes nor assumes any responsibility or duty to Grantor or to any third party with respect to the Property. Notwithstanding any other provisions of this Deed of Trust and the other Loan Documents:

(i) Grantee is not, and shall not be construed to be, a partner, joint venturer, member, alter ego, manager, controlling person or other business associate or participant of any kind of Grantor, and Grantee does not intend to ever assume such status; and

(ii) Grantee does not intend to ever assume any responsibility to any person for the quality, suitability, safety or condition of the Property; and

(iii) Grantee shall not be deemed responsible for or a participant in any acts, omissions or decisions of Grantor.

(b) **No Liability.** Grantee shall not be directly or indirectly liable or responsible for any loss, claim, cause of action, liability, indebtedness, damage or injury of any kind or character to any person or property arising from any construction on, or occupancy or use of, the Property, whether caused by or arising from:

(i) any defect in any building, structure, grading, fill, landscaping or other improvements thereon or in any on-site or off-site improvement or other facility therein or thereon;

(ii) any act or omission of Grantor or any of Grantor's agents, employees, independent contractors, licensees or invitees;

(iii) any accident in or on the Property or any fire, flood or other casualty or hazard thereon;

(iv) the failure of Grantor or any of Grantor's licensees, employees, invitees, agents, independent contractors or other representatives to maintain the Property in a safe condition; or

(v) any nuisance made or suffered on any part of the Property.

8.9 Severability. If any term of this Deed of Trust, or the application thereof to any person or circumstances, shall, to any extent, be invalid or unenforceable, the remainder of this Deed of Trust, or the application of such term to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term of this Deed of Trust shall be valid and enforceable to the fullest extent permitted by law.

8.10 Relationship of Articles. The rights, remedies and interests of Grantee under the deed of trust established by Article 1 and the security agreement established by Article 4 are independent and cumulative, and there shall be no merger of any lien created by the deed of trust with any security interest created by the security agreement. Grantee may elect to exercise or enforce any of its rights, remedies or interests under either or both the deed of trust or the security agreement as Grantee may from time to time deem appropriate. The absolute assignment of rents and leases established by Article 3 is similarly independent of and separate from the deed of trust and the security agreement.

8.11 Merger. No merger shall occur as a result of Grantee's acquiring any other estate in, or any other lien on, the Property unless Grantee consents to a merger in writing.

8.12 Obligations of Grantor, Joint and Several. If more than one person has executed this Deed of Trust as "Grantor", the obligations of all such persons hereunder shall be joint and several.



8.13 Separate and Community Property. Any married person who executes this Deed of Trust as a Grantor agrees that any money judgment which Grantee or Trustee obtains pursuant to the terms of this Deed of Trust or any other obligation of that married person secured by this Deed of Trust may be collected by execution upon any separate property or community property of that person.

8.14 Integration; Interpretation. The Loan Documents contain or expressly incorporate by reference the entire agreement of the parties with respect to the matters contemplated therein and supersede all prior negotiations or agreements, written or oral. The Loan Documents shall not be modified except by written instrument executed by all parties. Any reference in any of the Loan Documents to the Property or Collateral shall include all or any part of the Property or Collateral. Any reference to the Loan Documents includes any amendments, renewals or extensions now or hereafter approved by Grantee in writing. When the identity of the parties or other circumstances make it appropriate, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

8.15 Capitalized Terms. Capitalized terms not otherwise defined herein shall have the meanings set forth in the Mezzanine Note.

8.16 Successors in Interest. The terms, covenants, and conditions herein contained shall be binding upon and inure to the benefit of the heirs, successors and assigns of the parties hereto. The foregoing sentence shall not be construed to permit Grantor to assign the Mezzanine Loan except as otherwise permitted under the Mezzanine Note or the other Loan Documents.

8.17 Governing Law. This Deed of Trust has been executed and delivered in and shall be governed by laws of the State of Washington. Accordingly, in all respects, matters of construction, validity, enforceability and performance of this Deed of Trust, the Mezzanine Note and the other Loan Documents and the obligations arising hereunder and thereunder shall be governed by, and construed in accordance with, the laws of the State of Washington. The Grantor consents to the jurisdiction of the courts of the State of Washington and agrees that service may be made in any manner acceptable for use in the courts of the State of Washington. In addition, the Grantor irrevocably and unconditionally waives any claim which the Grantor may now or hereafter have that the law of any jurisdiction other than Washington governs this Deed of Trust, the Mezzanine Note and the other Loan Documents.

8.18 Consent to Jurisdiction. Grantor irrevocably submits to the Jurisdiction of any state or federal court sitting in the county of the state where the Property is located over any suit, action, or proceeding, brought by Grantee to exercise its rights and remedies provided for in under this Deed of Trust, the Mezzanine Note and the other Loan Documents or any action brought by Grantee to enforce its rights with respect to the Collateral. Grantor irrevocably and unconditionally waives, to the fullest extent permitted by law, any claim or objection that Grantor may now or hereafter have to the laying of venue of any such suit, action, or proceeding brought in any such court and any claim that any such suit, action, or proceeding brought in any such court has been brought in an inconvenient forum.

8.19 Exhibits. Exhibit "A" and Exhibit "B" are incorporated into this Deed of Trust by this reference.

8.20 Addresses; Request for Notice. All notices and other communications that are required or permitted to be given to a party under this Deed of Trust shall be in writing, refer to the Mezzanine Loan number, and shall be sent to such party, either by personal delivery, by overnight delivery service, by certified first-class mail, return receipt requested, or by facsimile transmission to the addressee or facsimile number below. All such notices and communications shall be effective upon receipt of such delivery or facsimile transmission. The addresses of the parties are set forth on page 1 of this Deed of Trust and the facsimile numbers for the parties are as follows:



Grantor: TRAIL WEST, LLC
Attn: Scott Wammack
Fax No.: 360-435-2265

Trustee: FIRST AMERICAN TITLE COMPANY OF SKAGIT COUNTY
Attn: Shelly K. Langness
Fax No.: 360-395-3064

Grantee: BRIDGER COMMERCIAL FUNDING LLC
Attn: Christina Hawn
Fax No.: 415-331-3390
Mezzanine Loan No.: 327037124

Grantor's principal place of business is at the address set forth on page 1 of this Deed of Trust.

Any Grantor whose address is set forth on page 1 of this Deed of Trust hereby requests that a copy of notice of default and notice of sale be delivered to it at that address. Failure to insert an address shall constitute a designation of Grantor's last known address as the address for such notice. Any party shall have the right to change its address for notice hereunder to any other location within the continental United States by giving thirty (30) days' notice to the other parties in the manner set forth above.

8.21 Counterparts. This Deed of Trust may be executed in any number of counterparts, each of which, when executed and delivered, will be deemed an original and all of which taken together, will be deemed to be one and the same instrument.

8.22 Waiver of Jury Trial. GRANTEE AND GRANTOR HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THEY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS DEED OF TRUST OR ANY OTHER LOAN DOCUMENT, OR ANY COURSE OR CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF GRANTEE OR GRANTOR. THIS PROVISION IS A MATERIAL INDUCEMENT FOR GRANTEE TO ENTER INTO THIS DEED OF TRUST.

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

IN WITNESS WHEREOF, Grantor has executed this Deed of Trust as of the day and year set forth above.

"Grantor"

TRAIL WEST, LLC, a Washington limited liability company

By: _____

Scott Wammack, its managing member



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STATE OF WASHINGTON)
COUNTY OF Snohomish) ss.

THIS IS TO CERTIFY that on 11-4-03, before me, a Notary public in and for the State of Washington, duly commissioned and sworn, came SCOTT WAINMACK, personally known or having presented satisfactory evidence to be the MANAGING MEMBER, of _____, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he/she is authorized to execute the said instrument on behalf of said corporation.

WITNESS MY HAND and official seal the day and year in this certificate first above written.

Cynthia G. Stevens
Print Name: CYNTHIA G. STEVENS
Notary Public in and for the State of Washington, residing at:
Everett
My Commission Expires: 6/20/07



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EXHIBIT "A"
DESCRIPTION OF LAND

Exhibit "A" to DEED OF TRUST AND ABSOLUTE ASSIGNMENT OF RENTS AND LEASES AND SECURITY AGREEMENT (AND FIXTURE FILING) ("**Deed of Trust**") among TRAIL WEST, LLC, a Washington limited liability company as "**Grantor**", FIRST AMERICAN TITLE INSURANCE COMPANY as "**Trustee**", and BRIDGER COMMERCIAL FUNDING LLC, a Missouri limited liability company as "**Grantee**".

1. **Description of Land.** The Land referred to in this Deed of Trust is situated in Skagit County, Washington and is described as follows:

The land referred to is situated in the State of Washington, County of Skagit, and is described as follows:

The West 425.25 feet of the North $\frac{1}{2}$ of Lot 6, "SEDRO ACREAGE", as per plat recorded in Volume 3 of Plats, page 35, records of Skagit County, Washington;

EXCEPT the Westerly 25 feet thereof for future road purposes;

TOGETHER WITH Lot 2 of Short Plat No. SW-02-0452 as recorded under Auditor's File No. 200208210072, being a portion of the South $\frac{1}{2}$ of said Lot 6, "SEDRO ACREAGE".

(Said property also shown as Tract "B" of Survey BLA No. SW-02-453 recorded under Auditor's File No. 200209050045).



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EXHIBIT "B"

This **Exhibit "B"** is attached to and forms a part of the Deed of Trust and Absolute Assignment of Rents and Leases and Security Agreement (and Fixture Filing) ("**Deed of Trust**") executed by TRAIL WEST, LLC, a Washington limited liability company ("**Grantor**") in favor of BRIDGER COMMERCIAL FUNDING LLC, a Missouri limited liability company ("**Grantee**").

Grantor hereby covenants that for so long as the loan secured by the Deed of Trust (such loan, as modified, amended, or extended, the "**Mezzanine Loan**") shall remain in existence and unpaid:

1. Grantor shall not own and will not own any asset or property other than (i) the Property and (ii) incidental personal property necessary for the ownership or operation of the Property.
2. Grantor shall not incur any debt, secured or unsecured, direct or indirect, absolute or contingent (including guaranteeing any obligation), other than the Mezzanine Loan, the Senior Debt and trade debt incurred in the ordinary course of Grantor's business and the managing member or general partner of Grantor shall not incur any debt, secured or unsecured, direct or indirect, absolute or contingent (including guaranteeing any obligation).
3. Grantor shall not engage directly or indirectly in any business other than those necessary for the ownership, management or operation of the Property and any business transactions with any member, partner, owner of 50% or more of the outstanding shares of common stock of Grantor ("**Beneficial Owner**") or affiliate of Grantor or any affiliate of any member, partner or Beneficial Owner of Grantor shall be entered into upon the terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arm's-length basis with third parties other than an affiliate of Grantor or any member, partner, Beneficial Owner or an affiliate of any member, partner or Beneficial Owner of Grantor.
4. Grantor shall not make any loans or advances to any third party (including any affiliate of Grantor or any member, partner or Beneficial Owner or principal or an affiliate of any member, partner, Beneficial Owner or principal of Grantor) and shall not acquire obligations or securities of its affiliates.
5. Grantor shall be solvent and pay its liabilities from its assets including salaries of any employees as the same shall become due, and each managing member or general partner of Grantor shall be solvent and pay its liabilities from its assets as the same shall become due.
6. Grantor shall do all things necessary to observe organizational formalities and preserve its existence, and it will not amend, modify or otherwise change the articles of incorporation or the articles of organization, as the case may be, and Grantor will not change its name, identity, the state under which Grantor is registered and/or organized or Grantor's principal place of business (if different than the state of organization) without the prior written consent of Grantee. If Grantor is a corporation, Grantor's Board of Directors will hold regular meetings, not less frequently than once every calendar quarter, to review the actions of the officers of Grantor and to authorize and approve (i) all transactions outside the ordinary course of Grantor's business that are incidental, necessary, suitable or convenient for the accomplishment of the purposes of Grantor set forth in the articles of incorporation thereof, and (ii) such other transactions, agreements and actions of Grantor as the Board of Directors deems appropriate in connection with its review and supervision of Grantor's actions.
7. Grantor shall conduct and operate its business as presently conducted and operated.
8. Grantor shall maintain books and records, financial statements and bank accounts separate from those of its affiliates, including its members, general partners or Beneficial Owners.
9. Grantor shall be, and at all times shall hold itself out to the public as, a legal entity separate and distinct from any other entity (including any affiliate thereof, including any member, general partner or Beneficial Owner or any affiliate of any member, general partner or Beneficial Owner of Grantor) **AND/OR** shall correct any known misunderstanding regarding its status as a separate entity, shall conduct and



operate its business in its own name, shall not identify itself or any of its affiliates as a division or part of the other and shall maintain and utilize a separate telephone number and separate stationery, invoices and checks.

10. Grantor shall establish and maintain an office through which its business shall be conducted separate and apart from those of any of its affiliates or, if it shares office space with its parent or any affiliate, it shall allocate fairly and reasonably any overhead and expense for shared office space.

11. Grantor shall file its own tax returns.

12. Grantor shall maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations.

13. Grantor shall not seek or consent to the dissolution or winding up in whole or in part, of Grantor nor shall Grantor permit the managing member or general partner of Grantor to consent to the dissolution or liquidation in whole or in part of Grantor. In the event of a dissolution of Grantor effected by the withdrawal or addition of a member or general partner, Grantor shall continue its existence, unless the members or partners *unanimously* vote to dissolve Grantor. In the event of any dissolution of Grantor, Grantor shall not liquidate its interest in the Property without the prior written consent of Grantee.

14. Grantor shall not commingle the funds and other assets of Grantor with those of any member, general partner or Beneficial Owner of Grantor, any affiliate of a member, general partner or Beneficial Owner of Grantor or any other person.

15. Grantor shall maintain its assets in such a manner that it will not be costly or difficult to segregate, ascertain or identify its individual asset or assets, as the case may be, from those of any affiliate or constituent party, or any affiliate, member, partner or Beneficial Owner, or any other person.

16. Grantor shall not pledge its assets and does not and will not hold itself out to be responsible for the debts or obligations of any other person.

17. Grantor hereby authorizes Grantee to file a financing statement, with or without Grantor's signature, to perfect Grantee's lien and security interest in the Collateral and Fixtures as described in the Loan Documents (including any required continuation statements, amendment statements or other such documents necessary to perfect and continue the lien) and Grantor hereby expressly ratifies any financing statements Grantee may have filed prior to the date of this Deed of Trust.



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Skagit County Auditor

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