

United States, or an Affiliate of any such bank with an office in the United States. If no such successor shall have been so appointed by the Required Lenders and shall have accepted such appointment within 30 days after the retiring Administrative Agent gives notice of its resignation, then the retiring Administrative Agent may on behalf of the Lenders and the Issuing Lender, appoint a successor Administrative Agent meeting the qualifications set forth above; provided that if the Administrative Agent shall notify Borrowers and the Lenders that no qualifying Person has accepted such appointment, then such resignation shall nonetheless become effective in accordance with such notice and (a) the retiring Administrative Agent shall be discharged from its duties and obligations hereunder and under the other Loan Documents (except that in the case of any collateral security held by the Administrative Agent on behalf of the Lenders or the Issuing Lender under any of the Loan Documents, the retiring Administrative Agent shall continue to hold such collateral security until such time as a successor Administrative Agent is appointed) and (b) all payments, communications and determinations provided to be made by, to or through the Administrative Agent shall instead be made by or to each Lender and the Issuing Lender directly, until such time as the Required Lenders appoint a successor Administrative Agent as provided for above in this Section. Upon the acceptance of a successor's appointment as Administrative Agent hereunder, such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring (or retired) Administrative Agent, and the retiring Administrative Agent shall be discharged from all of its duties and obligations hereunder or under the other Loan Documents (if not already discharged therefrom as provided above in this Section). The fees payable by Borrowers to a successor Administrative Agent shall be the same as those payable to its predecessor unless otherwise agreed between Borrowers and such successor. After the retiring Administrative Agent's resignation hereunder and under the other Loan Documents, the provisions of this Article and Section 10.5 shall continue in effect for the benefit of such retiring Administrative Agent, its sub-agents and their respective Related Parties in respect of any actions taken or omitted to be taken by any of them while the retiring Administrative Agent was acting as Administrative Agent.

Any resignation by Bank of America as Administrative Agent pursuant to this Section shall also constitute its resignation as Issuing Lender and Swing Line Lender. Upon the acceptance of a successor's appointment as Administrative Agent hereunder, (i) such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring Issuing Lender and Swing Line Lender, (ii) the retiring Issuing Lender and Swing Line Lender shall be discharged from all of their respective duties and obligations hereunder or under the other Loan Documents, and (iii) the successor Issuing Lender shall issue letters of credit in substitution for the Letters of Credit, if any, outstanding at the time of such succession or make other arrangements satisfactory to the retiring Issuing Lender to effectively assume the obligations of the retiring Issuing Lender with respect to such Letters of Credit.

9.7 Non-Reliance on Administrative Agent and Other Lenders. Each Lender and the Issuing Lender acknowledges that it has, independently and without reliance upon the Administrative Agent or any other Lender or any of their Related Parties and based on such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement. Each Lender and the Issuing Lender also acknowledges that it will, independently and without reliance upon the Administrative Agent or any other Lender or any of their Related Parties and based on such documents and information as it shall

from time to time deem appropriate, continue to make its own decisions in taking or not taking action under or based upon this Agreement, any other Loan Document or any related agreement or any document furnished hereunder or thereunder.

9.8 No Other Duties, Etc. Anything herein to the contrary notwithstanding, none of the Managers, Arrangers, Documentation Agents or Syndication Agents listed on the cover page hereof shall have any powers, duties or responsibilities under this Agreement or any of the other Loan Documents, except in its capacity, as applicable, as the Administrative Agent, a Lender or the Issuing Lender hereunder.

9.9 Administrative Agent May File Proofs of Claim. In case of the pendency of any proceeding under any Debtor Relief Law or any other judicial proceeding relative to any of the Companies, the Administrative Agent (irrespective of whether the principal of any Loan or L/C Obligation shall then be due and payable as herein expressed or by declaration or otherwise and irrespective of whether the Administrative Agent shall have made any demand on Borrowers) shall be entitled and empowered, by intervention in such proceeding or otherwise

(a) to file and prove a claim for the whole amount of the principal and interest owing and unpaid in respect of the Loans, L/C Obligations and all other Obligations that are owing and unpaid and to file such other documents as may be necessary or advisable in order to have the claims of the Lenders, the Issuing Lender and the Administrative Agent (including any claim for the reasonable compensation, expenses, disbursements and advances of the Lenders, the Issuing Lender and the Administrative Agent and their respective agents and counsel and all other amounts due the Lenders, the Issuing Lender and the Administrative Agent under Sections 2.8, 3.9, 3.10, and 10.5) allowed in such judicial proceeding; and

(b) to collect and receive any monies or other property payable or deliverable on any such claims and to distribute the same;

and any custodian, receiver, assignee, trustee, liquidator, sequestrator or other similar official in any such judicial proceeding is hereby authorized by each Lender and the Issuing Lender to make such payments to the Administrative Agent and, if the Administrative Agent shall consent to the making of such payments directly to the Lenders and the Issuing Lender, to pay to the Administrative Agent any amount due for the reasonable compensation, expenses, disbursements and advances of the Administrative Agent and its agents and counsel, and any other amounts due the Administrative Agent under Sections 2.8 and 10.4.

Nothing contained herein shall be deemed to authorize the Administrative Agent to authorize or consent to or accept or adopt on behalf of any Lender or the Issuing Lender any plan of reorganization, arrangement, adjustment or composition affecting the Obligations or the rights of any Lender or the Issuing Lender to authorize the Administrative Agent to vote in respect of the claim of any Lender or the Issuing Lender or in any such proceeding.

9.10 Collateral and Guarantee Matters. The Lenders and the Issuing Lender irrevocably authorize the Administrative Agent, at its option and in its discretion,

(a) to release any Lien on any property granted to or held by the Administrative Agent under any Loan Document (i) upon termination of the Commitments and payment in full of all Obligations (other than contingent indemnification obligations) and the expiration or termination of all Letters of Credit, (ii) that is sold or otherwise transferred as part

of or in connection with any sale or other disposition permitted hereunder or under any other Loan Document, or (iii) if approved, authorized or ratified in writing in accordance with Section 10.1;

(b) to release any Guarantor from its Guarantee Obligations if such Person ceases to be a Subsidiary as a result of a transaction permitted hereunder;

(c) to subordinate any Lien on any Property granted to or held by the Administrative Agent under any Loan Document to the holder of any Lien on such Property that is permitted by Section 7.3 and which is entitled to priority over the Liens securing the Obligations pursuant to the terms of this Agreement or any other Loan Document or to the extent such Property may be Disposed of in accordance with Section 7.5 to the Person acquiring such Property thereunder;

(d) to release or subordinate any Lien on any Property granted to or held by the Administrative Agent under any Loan Document which is disposed of in accordance with Section 7.5;

(e) to release the Parent Guaranty in accordance with its terms on following the Parent Guaranty Release Date, or to confirm the release of any Completion Guaranty in accordance with the terms of the Disbursement Agreement;

(f) to consent to (and execute, where appropriate) (i) adjustments to the configuration, location and size of the parcels which collectively constitute the Site (via subdivision, lot line adjustment or the like), (ii) the grant of easements or other similar rights to accommodate the Access Road, (iii) the creation of air rights parcels in connection with the creation of the Condo Units and to the grant of easements and covenants, conditions, restrictions and declarations in favor of the ultimate purchasers of the Condo Units; (iv) non-disturbance agreements in favor of tenants under leases or subleases in respect of portions of the Site, and (v) conveyance of strips or gores of land required to be conveyed to public agencies or quasi-public agencies for pedestrian walkways, sky bridges, roads, or other public purposes, in each case to the extent approved by the Administrative Agent in its discretion;

(g) to amend the Deed of Trust to accommodate any amendments to the parcels described therein based upon adjustments described in clause (f)(i) above or any inaccuracies or adjustments to such parcels which result from the failure of the Project (as constructed) to conform to the exact dimensions of the Retail Air Space Parcels as configured on the Closing Date (either because the floors constructed in the Project are of a higher or lower elevation, the outer walls are in a different location, or the parcels with respect thereto are in a different configuration than the parcels so described on the Closing Date), so long as the square footage or dimensions of the Retail Air Space Parcels are not increased by more than 5%; and

(h) to subordinate the Deed of Trust to any reciprocal easement agreements, covenants, and other similar rights reasonably acceptable to the Administrative Agent which are requested by the Companies to accommodate the creation of the Access Road or the declaration or any easements, covenants, conditions or restrictions associated with the Condo Units and related common areas.

Upon request by the Administrative Agent at any time, the Lenders will confirm in writing the Administrative Agent's authority to release or subordinate its interest in particular types or items of property, or to release any Guarantor from its Guarantee Obligations pursuant to this Section 9.10. In each case as specified in this Section 9.10, the Administrative Agent will, at Borrowers' expense, execute and deliver to the applicable Loan Party such documents as such Loan Party may reasonably request to evidence the release of such item of Collateral from the assignment and security interest granted under the Security Documents or to subordinate its interest in such item, or to release such Guarantor from its Guarantee Obligations, in each case in accordance with the terms of the Loan Documents and this Section 9.10.

9.11 Withholdings.

(a) To the extent required by any applicable law, the Administrative Agent may withhold from any interest payment to any Lender an amount equivalent to any applicable withholding tax. If the forms or other documentation required by Section 2.18(f) are not delivered to the Administrative Agent, then the Administrative Agent may withhold from any interest payment to any Lender not providing such forms or other documentation, an amount equivalent to the applicable withholding tax.

(b) If the Internal Revenue Service or any authority of the United States or other jurisdiction asserts a claim that the Administrative Agent did not properly withhold tax from amounts paid to or for the account of any Lender (because the appropriate form was not delivered, was not properly executed, or because such Lender failed to notify the Administrative Agent of a change in circumstances which rendered the exemption from, or reduction of, withholding tax ineffective, or for any other reason), such Lender shall indemnify the Administrative Agent fully for all amounts paid, directly or indirectly, by the Administrative Agent as tax or otherwise, including penalties and interest, together with all expenses incurred, including legal expenses, allocated staff costs and any out of pocket expenses.

(c) If any Lender sells, assigns, grants a participation in, or otherwise transfers its rights under this Agreement, the purchaser, assignee, participant or transferee, as applicable, shall comply and be bound by the terms of Section 2.18(f) and this Section 9.11.

SECTION 10. MISCELLANEOUS

10.1 Amendments and Waivers. Neither this Agreement nor any other Loan Document, nor any terms hereof or thereof may be amended, supplemented or modified except in accordance with the provisions of this Section 10.1 or as permitted by Section 9.1(c). The Required Lenders and each other Person party to the relevant Loan Document may, or (with the written consent of the Required Lenders) the Administrative Agent and each other Person party to the relevant Loan Document may, from time to time, (x) enter into written amendments, supplements or modifications hereto and to the other Loan Documents (including amendments and restatements hereof or thereof) for the purpose of adding any provisions to this Agreement or the other Loan Documents or changing in any manner the rights of the Lenders or of the other Persons hereunder or thereunder or (y) waive, on such terms and conditions as may be specified in the instrument of waiver, any of the requirements of this Agreement or the other Loan Documents or any Default or Event of Default and its consequences.

Notwithstanding the foregoing provisions of this Section 10.1, no such waiver and no such amendment, supplement or modification shall:

(i) forgive or reduce the principal amount or extend the final scheduled date of maturity of any Loan or Reimbursement Obligation, extend the scheduled date of any amortization payment in respect of any Term Loan, reduce the stated rate of any interest or fee payable hereunder or forgive the payment of any interest or fee payable hereunder (including any fee under Section 2.10(b)) or extend the scheduled date of any payment thereof, or increase the amount or extend the expiration date of any Commitment of any Lender, in each case without the consent of each Lender (other than a Defaulting Lender) directly affected thereby (such consent being in lieu of the consent of the Required Lenders required pursuant to the second sentence of this Section 10.1); provided that with the consent of the Required Lenders, the initial application of the Condo Sales Performance Adjustment may be deferred by up to three months;

(ii) amend, modify or waive any provision of this Section or reduce any percentage specified in the definition of Required Lenders, Required Facility Lenders, or Applicable Facility Lenders, consent to the assignment or transfer by any Person (other than a Lender) of any of its rights and obligations under this Agreement and the other Loan Documents, release all or substantially all of the Collateral or release a significant Guarantor from its guarantee obligations under the Loan Documents, in each case without the consent of all Lenders (other than Defaulting Lenders); provided that any Completion Guaranty may be released with the consent of the Required Lenders at any time following the Opening Date;

(iii) amend, modify or waive any provision of Section 9 without the consent of Administrative Agent (in addition to the consent of the Required Lenders required pursuant to the second sentence of this Section 10.1);

(iv) amend, modify or waive any provision of Section 2.5 or 2.6 without the written consent of the Swing Line Lender (in addition to the consent of the Required Lenders required pursuant to the second sentence of this Section 10.1);

(v) amend, modify or waive any provision of Section 2.11 or Section 2.23 without the consent of the Required Facility Lenders with respect to the Facility directly affected thereby (such consent being in lieu of the consent of the Required Lenders required pursuant to the second sentence of this Section 10.1);

(vi) amend, modify or waive any provision of Section 3 without the consent of the Issuing Lender (in addition to the consent of the Required Lenders required pursuant to the second sentence of this Section 10.1);

(vii) except to the extent permitted by the Disbursement Agreement on the Closing Date, amend, modify or waive the provisions of the Disbursement Agreement to the extent such provisions require the full expenditure of amounts on deposit in the Equity Funding Account and Second Mortgage Proceeds Account in advance of expenditures from the Bank Proceeds Account without the prior written consent of all

Lenders; or

(viii) amend the provisions of Section 2.24 without the consent of each Lender directly affected thereby (such consent being in lieu of the consent of the Required Lenders required pursuant to the second sentence of this Section 10.1).

Any such waiver and any such amendment, supplement or modification shall apply equally to each of the Lenders and shall be binding upon the Companies, the Lenders, the Administrative Agent, the Arrangers, the Managers and all future holders of the Loans and Letters of Credit. In the case of any waiver, the Companies, the Lenders, the Arrangers, the Managers and the Administrative Agent shall be restored to their former position and rights hereunder and under the other Loan Documents, and any Default or Event of Default waived shall be deemed to be cured and not continuing; but no such waiver shall extend to any subsequent or other Default or Event of Default, or impair any right consequent thereon. Any such waiver, amendment, supplement or modification shall be effected by a written instrument signed by the parties required to sign pursuant to the foregoing provisions of this Section; *provided*, that delivery of an executed signature page of any such instrument by facsimile transmission shall be effective as delivery of a manually executed counterpart thereof.

Subject to subsection (vii) above, to the extent the Administrative Agent is entitled or required to make any determinations (whether a consent, waiver or otherwise) under the Intercreditor Agreements or the Disbursement Agreement, the Administrative Agent shall be entitled make any determinations in the exercise of its discretion, *provided* that the Administrative Agent shall not waive the conditions to Advances pursuant to Section 3.3 of the Disbursement Agreement other than 3.3.1, 3.3.4 (in respect of attachments to or certifications made in the Advance Request), 3.3.5, 3.3.6, 3.3.14, 3.3.15, 3.3.16, 3.3.17, 3.3.19, and 3.3.22 without the consent of the Required Lenders.

#### 10.2 Notices; Effectiveness; Electronic Communications.

(a) Notices Generally. Except in the case of notices and other communications expressly permitted to be given by telephone (and except as provided in subsection (b) below), all notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail or sent by telecopier as follows, and all notices and other communications expressly permitted hereunder to be given by telephone shall be made to the applicable telephone number, as follows:

(i) if to Borrowers, the Administrative Agent, the Issuing Lender or the Swing Line Lender, to the address, telecopier number, electronic mail address or telephone number specified for such Person on Schedule 10.2; and

(ii) if to any other Lender, to the address, telecopier number, electronic mail address or telephone number specified in its Administrative Questionnaire.

Notices sent by hand or overnight courier service, or mailed by certified or registered mail, shall be deemed to have been given when received; notices sent by telecopier shall be deemed to have been given when sent (except that, if not given during normal business hours for the recipient, shall be deemed to have been given at the opening of business on the next Banking Day for the

recipient). Notices delivered through electronic communications to the extent provided in subsection (b) below shall be effective as provided in such subsection (b). Each Borrower (and by executing the each of the respective Loan Documents to which it is a party, each other Party) hereby irrevocably appoints either of the other Borrower as its agent for the purpose of receiving notices required hereunder, and agrees that Borrowers conclusively shall be deemed to have received any such notice when notice has been given to any Borrower.

(b) Electronic Communications. Notices and other communications to the Lenders and the Issuing Lender hereunder may be delivered or furnished by electronic communication (including e-mail and Internet or intranet websites) pursuant to procedures approved by the Administrative Agent, provided that the foregoing shall not apply to notices to any Lender or the Issuing Lender pursuant to Section 2 if such Lender or the Issuing Lender, as applicable, has notified the Administrative Agent that it is incapable of receiving notices under such Section by electronic communication. The Administrative Agent or Borrowers may, in its discretion, agree to accept notices and other communications to it hereunder by electronic communications pursuant to procedures approved by it, provided that approval of such procedures may be limited to particular notices or communications.

Unless the Administrative Agent otherwise prescribes, (i) notices and other communications sent to an e-mail address shall be deemed received upon the sender's receipt of an acknowledgement from the intended recipient (such as by the "return receipt requested" function, as available, return e-mail or other written acknowledgement), provided that if such notice or other communication is not sent during the normal business hours of the recipient, such notice or communication shall be deemed to have been sent at the opening of business on the next Banking Day for the recipient, and (ii) notices or communications posted to an Internet or intranet website shall be deemed received upon the deemed receipt by the intended recipient at its e-mail address as described in the foregoing clause (i) of notification that such notice or communication is available and identifying the website address therefor.

(c) The Platform. THE PLATFORM IS PROVIDED "AS IS" AND "AS AVAILABLE." THE AGENT PARTIES (AS DEFINED BELOW) DO NOT WARRANT THE ACCURACY OR COMPLETENESS OF FONTAINEBLEAU MATERIALS OR THE ADEQUACY OF THE PLATFORM, AND EXPRESSLY DISCLAIM LIABILITY FOR ERRORS IN OR OMISSIONS FROM FONTAINEBLEAU MATERIALS. NO WARRANTY OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, INCLUDING ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OF THIRD PARTY RIGHTS OR FREEDOM FROM VIRUSES OR OTHER CODE DEFECTS, IS MADE BY ANY AGENT PARTY IN CONNECTION WITH FONTAINEBLEAU MATERIALS OR THE PLATFORM. In no event shall the Administrative Agent or any of its Related Parties (collectively, the "Agent Parties") have any liability to any Borrower, any Lender, the Issuing Lender or any other Person for losses, claims, damages, liabilities or expenses of any kind (whether in tort, contract or otherwise) arising out of Borrowers' or the Administrative Agent's transmission of Fontainebleau Materials through the Internet, except to the extent that such losses, claims, damages, liabilities or expenses are determined by a court of competent jurisdiction by a final and nonappealable judgment to have resulted from the gross negligence or willful misconduct of such Agent Party; provided, however, that in no event shall any Agent Party have any liability to any Borrower, any Lender,

the Issuing Lender or any other Person for indirect, special, incidental, consequential or punitive damages (as opposed to direct or actual damages).

(d) Change of Address, Etc. Borrowers, the Administrative Agent, the Issuing Lender and the Swing Line Lender may change its address, telecopier or telephone number for notices and other communications hereunder by notice to the other parties hereto. Each other Lender may change its address, telecopier or telephone number for notices and other communications hereunder by notice to Borrowers, the Administrative Agent, the Issuing Lender and the Swing Line Lender. In addition, each Lender agrees to notify the Administrative Agent from time to time to ensure that the Administrative Agent has on record (i) an effective address, contact name, telephone number, telecopier number and electronic mail address to which notices and other communications may be sent and (ii) accurate wire instructions for such Lender. Furthermore, each Public Lender agrees to cause at least one individual at or on behalf of such Public Lender to at all times have selected the "Private Side Information" or similar designation on the content declaration screen of the Platform in order to enable such Public Lender or its delegate, in accordance with such Public Lender's compliance procedures and applicable Law, including United States Federal and state securities Laws, to make reference to Fontainebleau Materials that are not made available through the "Public Side Information" portion of the Platform and that may contain material non-public information with respect to Borrowers or their securities for purposes of United States Federal or state securities laws.

(e) Reliance by Administrative Agent, Issuing Lender and Lenders. The Administrative Agent, the Issuing Lender and the Lenders shall be entitled to rely and act upon any notices (including telephonic Advance Requests) purportedly given by or on behalf of any Borrower even if (i) such notices were not made in a manner specified herein, were incomplete or were not preceded or followed by any other form of notice specified herein, or (ii) the terms thereof, as understood by the recipient, varied from any confirmation thereof. Each Borrower shall, absent gross negligence and willful misconduct, indemnify the Administrative Agent, the Issuing Lender, each Lender and the Related Parties of each of them from all losses, costs, expenses and liabilities resulting from the reliance by such Person on each notice purportedly given by or on behalf of any Borrower. All telephonic notices to and other telephonic communications with the Administrative Agent may be recorded by the Administrative Agent, and each of the parties hereto hereby consents to such recording.

10.3 No Waiver; Cumulative Remedies. No failure to exercise and no delay in exercising, on the part of the Administrative Agent, any Arranger, any Manager or any Lender, any right, remedy, power or privilege hereunder or under the other Loan Documents shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. The rights, remedies, powers and privileges herein provided are cumulative and not exclusive of any rights, remedies, powers and privileges provided by law.

10.4 Survival of Representations and Warranties. All representations and warranties made hereunder and in any other Loan Document or other document delivered pursuant hereto or thereto or in connection herewith or therewith shall survive the execution and delivery hereof and thereof. Such representations and warranties have been or will be relied upon by the Administrative Agent and each Lender, regardless of any investigation made by the



Administrative Agent or any Lender or on their behalf and notwithstanding that the Administrative Agent or any Lender may have had notice or knowledge of any Default at the time of any Loan or L/C Borrowing, and shall continue in full force and effect as long as any Loan or any other Obligation hereunder shall remain unpaid or unsatisfied or any Letter of Credit shall remain outstanding (other than Letters of Credit that have been Cash Collateralized).

10.5 Expenses; Indemnity; Damage Waiver.

(a) Borrowers shall pay (i) all reasonable out-of-pocket expenses incurred by the Administrative Agent, any Arranger, any Manager and any of their respective Affiliates (including the reasonable fees, charges and disbursements of counsel for each such party), in connection with the syndication of the credit facilities provided for herein, the preparation, negotiation, execution, delivery and administration of this Agreement and the other Loan Documents or any amendments, modifications or waivers of the provisions hereof or thereof (whether or not the transactions contemplated hereby or thereby shall be consummated), (ii) all reasonable out-of-pocket expenses incurred by the Issuing Lender in connection with the issuance, amendment, renewal or extension of any Letter of Credit or any demand for payment thereunder and (iii) all out-of-pocket expenses incurred by the Administrative Agent, any Arranger, any Manager, any Lender or the Issuing Lender (including the fees, charges and disbursements of any counsel for the Administrative Agent, any Arranger, any Manager, any Lender or the Issuing Lender), and shall pay all fees and time charges for attorneys who may be employees of the Administrative Agent, any Arranger, any Manager, any Lender or the Issuing Lender, in connection with the enforcement or protection of its rights (A) in connection with this Agreement and the other Loan Documents, including its rights under this Section, or (B) in connection with Loans made or Letters of Credit issued hereunder, including all such out-of-pocket expenses incurred during any workout, restructuring or negotiations in respect of such Loans or Letters of Credit.

(b) Indemnification by Borrowers. Each Borrower shall indemnify the Administrative Agent (and any sub-agent thereof), each Arranger, each Manager, each Lender and the Issuing Lender, and each Related Party of any of the foregoing Persons (each such Person being called an "Indemnatee") against, and hold each Indemnatee harmless from, any and all losses, claims, damages, liabilities and related expenses (including the fees, charges and disbursements of any counsel for any Indemnatee), and shall indemnify and hold harmless each Indemnatee from all fees and time charges and disbursements for attorneys who may be employees of any Indemnatee, incurred by any Indemnatee or asserted against any Indemnatee by any third party or by any Borrower or any other Loan Party arising out of, in connection with, or as a result of (i) the execution or delivery of this Agreement, any other Loan Document or any agreement or instrument contemplated hereby or thereby, the performance by the parties hereto of their respective obligations hereunder or thereunder or the consummation of the transactions contemplated hereby or thereby, or, in the case of the Administrative Agent (and any sub-agent thereof) and its Related Parties only, the administration of this Agreement and the other Loan Documents, (ii) any Loan or Letter of Credit or the use or proposed use of the proceeds therefrom (including any refusal by the Issuing Lender to honor a demand for payment under a Letter of Credit if the documents presented in connection with such demand do not strictly comply with the terms of such Letter of Credit), (iii) any actual or alleged presence or release of Hazardous Substances on or from any property owned or operated by the Project Entities, or (iv) any actual or prospective claim, litigation, investigation or proceeding relating to any of the

foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by any Borrower or any other Loan Party or any such Borrowers' or such Loan Party's directors, shareholders or creditors, and regardless of whether any Indemnitee is a party thereto, in all cases, whether or not caused by or arising, in whole or in part, out of the comparative, contributory or sole negligence of the Indemnitee; provided that such indemnity shall not, as to any Indemnitee, be available to the extent that such losses, claims, damages, liabilities or related expenses (x) are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted from the gross negligence or willful misconduct of such Indemnitee or (y) result from a claim brought by any Borrower or any other Loan Party against an Indemnitee for breach in bad faith of such Indemnitee's obligations hereunder or under any other Loan Document, if such Borrower or such Loan Party has obtained a final and nonappealable judgment in its favor on such claim as determined by a court of competent jurisdiction.

(c) Reimbursement by Lenders. To the extent that Borrowers for any reason fail to indefeasibly pay any amount required under subsection (a) or (b) of this Section to be paid by them to the Administrative Agent (or any sub-agent thereof), the Issuing Lender or any Related Party of any of the foregoing (and without limiting their obligation to do so), each Lender severally agrees to pay to the Administrative Agent (or any such sub-agent), the Issuing Lender or such Related Party, as the case may be (but without affecting the Borrowers' obligation to make such payments), such Lender's Aggregate Exposure Percentage (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought) of such unpaid amount, provided that (i) the unreimbursed expense or indemnified loss, claim, damage, liability or related expense, as the case may be, was incurred by or asserted against the Administrative Agent (or any such sub-agent) or the Issuing Lender in its capacity as such, or against any Related Party of any of the foregoing acting for the Administrative Agent (or any such sub-agent) or Issuing Lender in connection with such capacity, and (ii) to the extent indemnification of the Issuing Lender is required pursuant to this Section 10.05(c), such obligation will be limited to Revolving Lenders only. The obligations of the Lenders under this subsection (c) are subject to the provisions of Section 2.23(g).

(d) Waiver of Consequential Damages, Etc. To the fullest extent permitted by applicable law, Borrowers shall not assert, and hereby waives, any claim against any Indemnitee, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, this Agreement, any other Loan Document or any agreement or instrument contemplated hereby, the transactions contemplated hereby or thereby, any Loan or Letter of Credit or the use of the proceeds thereof. No Indemnitee referred to in subsection (b) above shall be liable for any damages arising from the use by unintended recipients of any information or other materials distributed to such unintended recipients by such Indemnitee through telecommunications, electronic or other information transmission systems in connection with this Agreement or the other Loan Documents or the transactions contemplated hereby or thereby other than for direct or actual damages resulting from the gross negligence or willful misconduct of such Indemnitee as determined by a final and nonappealable judgment of a court of competent jurisdiction.

(e) Payments. All amounts due under this Section shall be payable not later than ten Banking Days after demand therefor.

(f) Survival. The agreements in this Section shall survive the resignation of the Administrative Agent, the Issuing Lender and the Swing Line Lender, the replacement of any Lender, the termination of the Commitments and the repayment, satisfaction or discharge of all the other Obligations.

10.6 Successors and Assigns.

(a) Successors and Assigns Generally. The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that Borrowers and their Affiliates may not assign or otherwise transfer any of its rights or obligations under the Loan Documents without the prior written consent of the Administrative Agent and each Lender and no Lender may assign or otherwise transfer any of its rights or obligations hereunder except (i) to an assignee in accordance with the provisions of Section 10.6(b), (ii) by way of participation in accordance with the provisions of Section 10.6(d), or (iii) by way of pledge or assignment of a security interest subject to the restrictions of Section 10.6(f) (and any other attempted assignment or transfer by any party hereto shall be null and void). Nothing in this Agreement, expressed or implied, shall be construed to confer upon any Person (other than the parties hereto, their respective successors and assigns permitted hereby, Participants to the extent provided in subsection (d) of this Section and, to the extent expressly contemplated hereby, the Related Parties of each of the Administrative Agent, the Issuing Lender and the Lenders) any legal or equitable right, remedy or claim under or by reason of this Agreement.

(b) Assignments by Lenders. Any Lender may at any time assign to one or more assignees all or a portion of its rights and obligations under this Agreement (including all or a portion of its Commitment(s) and the Loans (including for purposes of this Section 10.6(b), participations in L/C Obligations and in Swing Line Loans) at the time owing to it); provided that any such assignment shall be subject to the following conditions:

(i) Minimum Amounts.

(A) in the case of an assignment of the entire remaining amount of the assigning Lender's Commitment under any Facility and the Loans at the time owing to it under such Facility or in the case of an assignment to a Lender, an Affiliate of a Lender or an Approved Fund, no minimum amount need be assigned; and

(B) in any case not described in subsection (b)(i)(A) of this Section, the aggregate amount of the Commitment (which for this purpose includes Loans outstanding thereunder) or, if the Commitment is not then in effect, the principal outstanding balance of the Loans of the assigning Lender subject to each such assignment, determined as of the date the Assignment and Assumption with respect to such assignment is delivered to the Administrative Agent or, if "Trade Date" is specified in the Assignment and Assumption, as of the Trade Date, shall not be less than \$1,000,000, in the case of any assignment in respect of any Facility; provided, however, that concurrent assignments to members of an Assignee Group and concurrent assignments from members of an Assignee Group to a single Eligible Assignee (or to an Eligible Assignee and members of its Assignee Group) will be treated as a single assignment for purposes of determining whether such minimum amount has been met;

(ii) Proportionate Amounts. Each partial assignment shall be made as an assignment of a proportionate part of all the assigning Lender's rights and obligations under this Agreement with respect to the Loans or the Commitment assigned, except that this clause (ii) shall not (A) apply to the Swing Line Lender's rights and obligations in respect of Swing Line Loans or (B) prohibit any Lender from assigning all or a portion of its rights and obligations among separate Facilities on a non-pro rata basis;

(iii) Required Consents. No consent shall be required for any assignment except to the extent required by subsection (b)(i)(B) of this Section and, in addition:

(A) the consent of Borrowers (such consent not to be unreasonably withheld or delayed) shall be required unless (1) an Event of Default has occurred and is continuing at the time of such assignment or (2) such assignment is to a Person that is a Lender with a Commitment in respect of the Revolving Facility or Delay Draw Term Loans, an Affiliate of such Lender or an Approved Fund with respect to such Lender (or, in the case of assignments of Term Loans, Conversion Term Loans or funded Delay Draw Term Loans, any Lender);

(B) the consent of the Administrative Agent (such consent not to be unreasonably withheld or delayed) shall be required if such assignment is to a Person that is not a Lender with a Commitment in respect of the Revolving Facility or Delay Draw Term Loans, an Affiliate of such Lender or an Approved Fund with respect to such Lender (or, in the case of assignments of Term Loans, Conversion Term Loans or funded Delay Draw Term Loans, any Lender); and

(C) the consent of the Issuing Lender (such consent not to be unreasonably withheld or delayed) shall be required for any assignment that increases the obligation of the assignee to participate in exposure under one or more Letters of Credit (whether or not then outstanding); and

(D) the consent of the Swing Line Lender (such consent not to be unreasonably withheld or delayed) shall be required for any assignment in respect of the Revolving Credit Facility.

(iv) Assignment and Assumption. The parties to each assignment shall execute and deliver to the Administrative Agent an Assignment and Assumption, together with a processing and recordation fee in the amount of \$3,500 (but such fee shall not be duplicative as to any concurrent assignments to two or more Approved Funds of the same Lender); provided, however, that the Administrative Agent may, in its sole discretion, elect to waive such processing and recordation fee in the case of any assignment. The assignee, if it shall not be a Lender, shall deliver to the Administrative Agent an Administrative Questionnaire.

(v) No Assignment to Borrowers. No such assignment shall be made to any Borrower or any of Borrowers' Affiliates or Subsidiaries.

(vi) No Assignment to Natural Persons. No such assignment shall be

made to a natural person.

Subject to acceptance and recording thereof by the Administrative Agent pursuant to subsection (c) of this Section, from and after the effective date specified in each Assignment and Assumption, the assignee thereunder shall be a party to this Agreement and, to the extent of the interest assigned by such Assignment and Assumption, have the rights and obligations of a Lender under this Agreement, and the assigning Lender thereunder shall, to the extent of the interest assigned by such Assignment and Assumption, be released from its obligations under this Agreement (and, in the case of an Assignment and Assumption covering all of the assigning Lender's rights and obligations under this Agreement, such Lender shall cease to be a party hereto but shall continue to be entitled to the benefits of Sections 2.17, 2.18, 2.19, and 10.5 with respect to facts and circumstances occurring prior to the effective date of such assignment). Upon request, Borrowers (at their expense) shall execute and deliver a Note to the assignee Lender. Any assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this subsection shall be treated for purposes of this Agreement as a sale by such Lender of a participation in such rights and obligations in accordance with Section 10.6(d).

(c) Register. The Administrative Agent, acting solely for this purpose as an agent of Borrowers, shall maintain at the Administrative Agent's Office a copy of each Assignment and Assumption delivered to it and a register for the recordation of the names and addresses of the Lenders, and the Commitments of, and principal amounts of the Loans and L/C Obligations owing to, each Lender pursuant to the terms hereof from time to time (the "Register"). The entries in the Register shall be conclusive absent manifest error, and Borrowers, the Administrative Agent and the Lenders may treat each Person whose name is recorded in the Register pursuant to the terms hereof as a Lender hereunder for all purposes of this Agreement, notwithstanding notice to the contrary. The Register shall be available for inspection by any Borrower and any Lender, at any reasonable time and from time to time upon reasonable prior notice.

(d) Participations. Any Lender may at any time, without the consent of, or notice to, Borrowers or the Administrative Agent, sell participations to any Person (other than a natural person or any Borrower or any of Borrowers' Affiliates or Subsidiaries) (each, a "Participant") in all or a portion of such Lender's rights and/or obligations under this Agreement (including all or a portion of its Commitment and/or the Loans (including such Lender's participations in L/C Obligations and/or Swing Line Loans) owing to it); provided that (i) such Lender's obligations under this Agreement shall remain unchanged, (ii) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations and (iii) Borrowers, the Administrative Agent, the Lenders and the Issuing Lender shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement. Any agreement or instrument pursuant to which a Lender sells such a participation shall provide that such Lender shall retain the sole right to enforce this Agreement and to approve any amendment, modification or waiver of any provision of this Agreement; provided that such agreement or instrument may provide that such Lender will not, without the consent of the Participant, agree to any amendment, waiver or other modification described in Sections 10.1(i) and (ii) that affects such Participant. Subject to subsection (e) of this Section, each Borrower agrees that each Participant shall be entitled to the benefits of Sections 2.17, 2.18

(so long as such Participant has complied with the requirements thereof), and 2.19 to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to Section 10.6(b). To the extent permitted by law, each Participant also shall be entitled to the benefits of Section 10.7(b) as though it were a Lender, provided such Participant agrees to be subject to Section 2.24 as though it were a Lender.

(e) Limitations upon Participant Rights. A Participant shall not be entitled to receive any greater payment under Section 2.18 or 2.19 than the applicable Lender would have been entitled to receive with respect to the participation sold to such Participant, unless the sale of the participation to such Participant is made with Borrowers' prior written consent. A Participant that would be a Non-U.S. Lender if it were a Lender shall not be entitled to the benefits of Section 2.18 unless Borrowers are notified of the participation sold to such Participant and such Participant agrees, for the benefit of Borrowers, to comply with Sections 2.18(f) and (g) as though it were a Lender.

(f) Certain Pledges. Any Lender may, without the consent of the Borrowers or the Administrative Agent, at any time pledge or assign a security interest in all or any portion of its rights under this Agreement (including under its Note, if any) to secure obligations of such Lender, including any pledge or assignment to secure obligations to a Federal Reserve Bank; provided that no such pledge or assignment shall release such Lender from any of its obligations hereunder or substitute any such pledgee or assignee for such Lender as a party hereto.

(g) Electronic Execution of Assignments. The words "execution," "signed," "signature," and words of like import in any Assignment and Assumption shall be deemed to include electronic signatures or the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature or the use of a paper-based recordkeeping system, as the case may be, to the extent and as provided for in any applicable law, including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act, or any other similar state laws based on the Uniform Electronic Transactions Act.

(h) Resignation as Issuing Lender or Swing Line Lender after Assignment. Notwithstanding anything to the contrary contained herein, if at any time Bank of America assigns all of its Revolving Commitments and Revolving Loans pursuant to Section 10.6(b), Bank of America may, (i) upon 30 days' notice to Borrowers and the Lenders, resign as Issuing Lender and/or (ii) upon 30 days' notice to Borrowers, resign as Swing Line Lender. In the event of any such resignation as Issuing Lender or Swing Line Lender, Borrowers shall be entitled to appoint from among the Lenders a successor Issuing Lender or Swing Line Lender hereunder; provided, however, that no failure by Borrowers to appoint any such successor shall affect the resignation of Bank of America as Issuing Lender or Swing Line Lender, as the case may be. If Bank of America resigns as Issuing Lender, it shall retain all the rights, powers, privileges and duties of the Issuing Lender hereunder with respect to all Letters of Credit outstanding as of the effective date of its resignation as Issuing Lender and all L/C Obligations with respect thereto (including the right to require the Lenders to make Base Rate Loans or fund risk participations in Unreimbursed Amounts pursuant to Section 3.3. If Bank of America resigns as Swing Line Lender, it shall retain all the rights of the Swing Line Lender provided for hereunder with respect to Swing Line Loans made by it and outstanding as of the effective date of such resignation,

including the right to require the Lenders to make Base Rate Loans or fund risk participations in outstanding Swing Line Loans pursuant to Section 2.6. Upon the appointment of a successor Issuing Lender and/or Swing Line Lender, (a) such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring Issuing Lender or Swing Line Lender, as the case may be, and (b) the successor Issuing Lender shall issue letters of credit in substitution for the Letters of Credit, if any, outstanding at the time of such succession or make other arrangements satisfactory to Bank of America to effectively assume the obligations of Bank of America with respect to such Letters of Credit.

10.7 Adjustments; Set-off.

(a) [Reserved]<sup>1</sup>

(b) In addition to any rights and remedies of the Lenders provided by law, each Lender shall have the right, without prior notice to Borrowers, any such notice being expressly waived by Borrowers to the extent permitted by applicable law, upon any amount becoming due and payable by Borrowers hereunder (whether at the stated maturity, by acceleration or otherwise), to (when any Event of Default has occurred and remains continuing) set off and appropriate and apply against such amount any and all deposits (general or special, time or demand, provisional or final), in any currency, and any other credits, indebtedness or claims, in any currency, in each case whether direct or indirect, absolute or contingent, matured or unmatured, at any time held or owing by such Lender or any branch or agency thereof to or for the credit or the account of Borrowers. Each Lender agrees to notify promptly Borrowers and the Administrative Agent after any such setoff and application made by such Lender, provided that the failure to give such notice shall not affect the validity of such setoff and application.

10.8 Counterparts. This Agreement may be executed by one or more of the parties to this Agreement on any number of separate counterparts, and all of said counterparts taken together shall be deemed to constitute one and the same instrument. Delivery of an executed signature page of this Agreement by facsimile transmission shall be effective as delivery of a manually executed counterpart hereof. A set of the copies of this Agreement signed by all the parties shall be lodged with Borrowers and the Administrative Agent.

10.9 Severability. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

10.10 Integration. Other than the promises, undertakings, representations or warranties set forth in the Administrative Agent Fee Letter and the Facility Fee Letter, this Agreement and the other Loan Documents represent the agreement of Borrowers, the Administrative Agent, the Arrangers, the Managers and the Lenders with respect to the subject matter hereof, and there are no promises, undertakings, representations or warranties by the Administrative Agent, any Arranger, any Manager, or any Lender relative to the subject matter

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<sup>1</sup> Note to readers – this Section deleted as duplicative of Section 2.24.

hereof not expressly set forth or referred to herein or in the other Loan Documents.

**10.11 GOVERNING LAW. THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK WITHOUT REGARD TO THE CONFLICT OF LAW RULES THEREOF OTHER THAN SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW.**

10.12 Submission To Jurisdiction; Waivers. Each Borrower hereby irrevocably and unconditionally:

(a) submits for itself and its Property in any legal action or proceeding relating to this Agreement and the other Loan Documents to which it is a party, or for recognition and enforcement of any judgment in respect thereof, to the non-exclusive general jurisdiction of the courts of the State of New York, the courts of the United States of America for the Southern District of New York, and appellate courts from any thereof;

(b) consents that any such action or proceeding may be brought in such courts and waives any objection that it may now or hereafter have to the venue of any such action or proceeding in any such court or that such action or proceeding was brought in an inconvenient court and agrees not to plead or claim the same;

(c) agrees that service of process in any such action or proceeding may be effected by mailing a copy thereof by registered or certified mail (or any substantially similar form of mail), postage prepaid, to that Borrower at its address set forth in Section 10.2 or at such other address of which the Administrative Agent shall have been notified pursuant thereto;

(d) agrees that nothing herein shall affect the right to effect service of process in any other manner permitted by law or shall limit the right to sue in any other jurisdiction; and

(e) waives, to the maximum extent not prohibited by law, any right it may have to claim or recover in any legal action or proceeding referred to in this Section any special, exemplary, punitive or consequential damages.

10.13 Certain Matters Affecting Lenders.

(a) If (i) the Nevada Gaming Authorities determine that any Lender does not meet suitability standards prescribed under the Nevada Gaming Laws or (ii) any other gaming authority with jurisdiction over the gaming business of Borrowers determines that any Lender does not meet its suitability standards (in any such case, a "Former Lender"), the Administrative Agent shall have the right (but not the duty) to a substitute Person (in each case, a "Substitute Lender") which may be any Lender or Lenders or Approved Fund of a Lender that agrees to become a Lender and to assume the rights and obligations of the Former Lender, subject to receipt by the Administrative Agent of evidence that such Substitute Lender (if not a Lender or Lenders or Approved Fund of a Lender) is an Eligible Assignee. The Substitute Lender shall assume the rights and obligations of the Former Lender under this Agreement. Borrowers shall bear the reasonable costs and expenses of any Lender required by the Nevada Gaming Authorities, or any other gaming authority with jurisdiction over the gaming business of



Borrowers, to file an application for a finding of suitability in connection with the investigation of an application by Borrowers for a license to operate a gaming establishment.

(b) Notwithstanding the provisions of subsection (a) of this Section 10.13, if any Lender becomes a Former Lender, and if the Administrative Agent fails to find a Substitute Lender pursuant to subsection (a) of this Section 10.13 within any time period specified by the appropriate gaming authority for the withdrawal of a Former Lender (the "Withdrawal Period"), Borrowers shall immediately prepay in full the outstanding amount of all Revolving Extensions of Credit, Conversion Term Loans and Term Loans of such Former Lender, together with accrued interest thereon to the earlier of (x) the date of payment or (y) the last day of the applicable Withdrawal Period.

10.14 Acknowledgments. In connection with all aspects of each transaction contemplated hereby (including in connection with any amendment, waiver or other modification hereof or of any other Loan Document), each Borrower acknowledges and agrees, and acknowledges its Affiliates' understanding, that:

(a) (i) the arranging and other services regarding this Agreement provided by the Administrative Agent and the Arrangers, are arm's-length commercial transactions between Borrowers and their Affiliates, on the one hand, and the Administrative Agent, the Lenders, the Arrangers and the Managers, on the other hand, (ii) Borrowers have consulted legal, accounting, regulatory and tax advisors to the extent it has deemed appropriate, and (iii) Borrowers are capable of evaluating, and understands and accepts, the terms, risks and conditions of the transactions contemplated hereby and by the other Loan Documents;

(b) (i) the Administrative Agent, the Arrangers, and the Managers each is and has been acting solely as a principal and, except as expressly agreed in writing by the relevant parties, has not been, is not, and will not be acting as an advisor, agent or fiduciary for the Loan Parties or any other Person and (ii) neither the Administrative Agent, the Lenders, the Arrangers, nor the Managers has any obligation to the Loan Parties or any other Person with respect to the transactions contemplated hereby except those obligations expressly set forth herein and in the other Loan Documents;

(c) the Administrative Agent, the Lenders, the Arrangers, the Managers and their respective Affiliates may be engaged in a broad range of transactions that involve interests that differ from those of the Companies and the other Loan Parties, and neither the Administrative Agent, any of the Lenders, any of the Arrangers, nor any of the Managers has any obligation to disclose any of such interests to any Person; and

(d) no joint venture is created hereby or by the other Loan Documents or otherwise exists by virtue of the transactions contemplated hereby among the Arrangers, the Administrative Agent, the Managers and the Lenders or among the Loan Parties and the Lenders.

To the fullest extent permitted by law, each of Borrowers, hereby waives and releases any claims that it may have against the Administrative Agent, the Lenders, the Arrangers, the Managers and their respective Affiliates with respect to any breach or alleged breach of agency or fiduciary duty in connection with any aspect of any transaction contemplated hereby.

10.15 Treatment of Certain Information; Confidentiality. Each of the Administrative Agent, the Lenders and the Issuing Lender agrees to maintain the confidentiality of the Information (as defined below), except that Information may be disclosed (a) to its Affiliates and to its and its Affiliates' respective partners, directors, officers, employees, agents and advisors (it being understood that the Persons to whom such disclosure is made will be informed of the confidential nature of such Information and instructed to keep such Information confidential), (b) to the extent requested by any regulatory authority purporting to have jurisdiction over it (including any self-regulatory authority, such as the National Association of Insurance Commissioners), (c) to the extent required by applicable laws or regulations or by any subpoena or similar legal process, (d) to any other party hereto, (e) in connection with the exercise of any remedies hereunder or under any other Loan Document or any action or proceeding relating to this Agreement or any other Loan Document or the enforcement of rights hereunder or thereunder, (f) subject to an agreement containing provisions substantially the same as those of this Section, to (i) any assignee of or Participant in, or any prospective assignee of or Participant in, any of its rights or obligations under this Agreement or (ii) any actual or prospective counterparty (or its advisors) to any swap or derivative transaction relating to Borrowers and their obligations, (g) with the consent of Borrowers or (h) to the extent such Information (i) becomes publicly available other than as a result of a breach of this Section or (ii) becomes available to the Administrative Agent, any Lender, the Issuing Lender or any of their respective Affiliates on a nonconfidential basis from a source other than the Loan Parties.

For purposes of this Section, "Information" means all information received from any Loan Party or any Subsidiary thereof relating to any Loan Party or any Subsidiary thereof or their respective businesses, other than any such information that is available to the Administrative Agent, any Lender or the Issuing Lender on a nonconfidential basis prior to disclosure by any Loan Party or any Subsidiary thereof, provided that, in the case of information received from a Loan Party or any such Subsidiary after the date hereof, such information is clearly identified at the time of delivery as confidential. Any Person required to maintain the confidentiality of Information as provided in this Section shall be considered to have complied with its obligation to do so if such Person has exercised the same degree of care to maintain the confidentiality of such Information as such Person would accord to its own confidential information.

Each of the Administrative Agent, the Lenders and the Issuing Lender acknowledges that (a) the Information may include material non-public information concerning a Borrower or a Subsidiary, as the case may be, (b) it has developed compliance procedures regarding the use of material non-public information and (c) it will handle such material non-public information in accordance with applicable Requirement of Law, including United States Federal and state securities laws.

10.16 Release of Collateral and Guarantee Obligations.

(a) Notwithstanding anything to the contrary contained herein or in any other Loan Document, upon request of Borrowers in connection with any Disposition of Property permitted by the Loan Documents, the Administrative Agent shall (without the consent of any Lender, or any affiliate of any Lender that is a party to any Specified Hedge Agreement) take such actions as shall be required to release its security interest in any Collateral being Disposed of in such Disposition, and to release any guarantee obligations of any Person being Disposed of

in such Disposition, to the extent necessary to permit consummation of such Disposition in accordance with the Loan Documents, provided that Borrowers have delivered to the Administrative Agent, at least five Banking Days prior to the date of the proposed release (or such shorter period as is agreed to by the Administrative Agent in its sole discretion), a written request for release identifying the relevant Collateral being Disposed of in such Disposition and the terms of such Disposition in reasonable detail, including the date thereof, the price thereof and any expenses in connection therewith, together with a certification by Borrowers stating that such transaction is in compliance with this Agreement and the other Loan Documents and that the proceeds of such Disposition will be applied in accordance with this Agreement and the other Loan Documents.

(b) Notwithstanding anything to the contrary contained herein or any other Loan Document, when all Obligations (other than Obligations consisting of contingent reimbursement or indemnification obligations and Obligations in respect of any Specified Hedge Agreement or Specified Cash Management Agreement) have been paid in full, all Commitments have terminated or expired and no Letter of Credit or Reimbursement Obligation shall be outstanding (other than Letters of Credit which have been Cash Collateralized), upon request of Borrowers, the Administrative Agent shall (without notice to or vote or consent of any Lender, or any affiliate of any Lender that is a party to any Specified Hedge Agreement or Specified Cash Management Agreement) take such actions as shall be required to release the security interest of the Loan Documents in all Collateral, and to release all guarantee obligations provided for in any Loan Document, whether or not on the date of such release there may be outstanding Obligations in respect of Specified Hedge Agreements or Specified Cash Management Agreements.

10.17 Accounting Changes. In the event that any "Accounting Change" (as defined below) shall occur and such change results in a change in the method of calculation of financial covenants, standards or terms in this Agreement, then Borrowers and the Administrative Agent agree to enter into negotiations in order to amend such provisions of this Agreement so as to equitably reflect such Accounting Changes with the desired result that the criteria for evaluating Companies' financial condition (including the requirements and restrictions associated with the provisions of this Agreement applicable thereto) shall be the same after such Accounting Changes as if such Accounting Changes had not been made. Until such time as such an amendment shall have been executed and delivered by Borrowers, the Administrative Agent and the Required Lenders, all financial covenants, standards and terms in this Agreement shall continue to be calculated or construed as if such Accounting Changes had not occurred. "Accounting Changes" refers to changes in accounting principles required or permitted by the promulgation of any rule, regulation, pronouncement or opinion by the Financial Accounting Standards Board of the American Institute of Certified Public Accountants or, if applicable, the SEC.

10.18 Delivery of Lender Addenda. Each initial Lender shall become a party to this Agreement by delivering to the Administrative Agent a Lender Addendum duly executed by such Lender, Borrowers and the Administrative Agent.

10.19 Construction. Each covenant contained herein shall be construed (absent express provision to the contrary) as being independent of each other covenant contained herein, so that compliance with any one covenant shall not (absent such an express contrary provision)

be deemed to excuse compliance with any other covenant. Where any provision herein refers to action to be taken by any Person, or which such Person is prohibited from taking, such provision shall be applicable whether such action is taken directly or indirectly by such Person.

10.20 Payments Set Aside. To the extent that any payment by or on behalf of Borrower is made to the Administrative Agent, the Issuing Lender or any Lender, or the Administrative Agent, the Issuing Lender or any Lender exercises its right of setoff, and such payment or the proceeds of such setoff or any part thereof is subsequently invalidated, declared to be fraudulent or preferential, set aside or required (including pursuant to any settlement entered into by the Administrative Agent, the Issuing Lender or such Lender in its discretion) to be repaid to a trustee, receiver or any other party, in connection with any proceeding under any Debtor Relief Law or otherwise, then (a) to the extent of such recovery, the obligation or part thereof originally intended to be satisfied shall be revived and continued in full force and effect as if such payment had not been made or such setoff had not occurred, and (b) each Lender and the Issuing Lender severally agrees to pay to the Administrative Agent upon demand its applicable share (without duplication) of any amount so recovered from or repaid by the Administrative Agent, plus interest thereon from the date of such demand to the date such payment is made at a rate per annum equal to the Federal Funds Rate from time to time in effect. The obligations of the Lenders and the Issuing Lender under clause (b) of the preceding sentence shall survive the payment in full of the Obligations and the termination of this Agreement.

10.21 Replacement of Lenders. Borrowers may, at their sole expense and effort, upon notice to any affected Lender and the Administrative Agent, require a Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in, and consents required by, Section 10.6), all of its interests, rights and obligations under this Agreement and the related Loan Documents at par (including all of its outstanding Loans and Commitments, if any) to an assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment) if any of the following occur:

(a) such Lender requests compensation under Section 2.17, or if Borrowers are required to pay any additional amount to such Lender or any Governmental Authority for the account of such Lender pursuant to Section 2.18 or Section 2.20;

(b) such Lender is a Defaulting Lender; or

(c) such Lender does not consent to any proposed amendment, modification, termination, waiver or consent as contemplated by clauses (i), (ii) or (vii) of the second paragraph of Section 10.1 where the consent of the Required Lenders has been obtained;

in each case *provided* that:

(i) the Borrowers shall concurrently exercise their rights under this Section 10.21 in respect of all Lenders in respect of which they are entitled to exercise such rights (and, in the case of clause (c), to assignee Lenders which will approve the requested amendment, modification waiver or consent);

(ii) Borrowers shall have paid to the Administrative Agent the assignment fee specified in Section 10.6(b)(iv) and, in the case of any Lender holding Term Loans that is being required to assign its interest, rights and obligations under this

Agreement pursuant to clause (c) above as a result of a proposed amendment, modification, termination, waiver or consent that would result in the reduction of the interest rate than applicable to the Term Loans, and to the extent prior to the first anniversary of the Opening Date, the prepayment premium required by Section 2.10(b);

(iii) such Lender shall have received payment of an amount equal to the outstanding principal of its Loans and L/C Advances, accrued interest thereon, accrued fees and all other amounts payable to it hereunder and under the other Loan Documents (including any amounts under Section 2.19) from the assignee (to the extent of such outstanding principal and accrued interest and fees) or Borrowers (in the case of all other amounts);

(iv) in the case of any such assignment resulting from a claim for compensation under Section 2.17 or payments required to be made pursuant to Section 2.18, such assignment will result in a reduction in such compensation or payments thereafter;

(v) such assignment does not conflict with applicable Requirements of Law; and

(vi) no Default or Event of Default shall have occurred and remain continuing.

A Lender shall not be required to make any such assignment or delegation if, prior thereto, as a result of a waiver by such Lender or otherwise, the circumstances entitling Borrowers to require such assignment and delegation cease to apply.

**10.22 WAIVERS OF JURY TRIAL. EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PERSON HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PERSON WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.**

10.23 Gaming Authorities. The Arrangers, the Administrative Agent and each Lender agree to cooperate with the Nevada Gaming Authorities in connection with the administration of their regulatory jurisdiction over the other Loan Parties, including, without limitation, to the extent not inconsistent with the internal policies of such Lender, Arranger, Agent or Manager and any applicable legal or regulatory restrictions, the provision of such documents or other information as may be requested by any such Nevada Gaming Authorities

relating to the Administrative Agent, the Arrangers, any of the Lenders, or any Loan Party, or the Loan Documents. The obligations of the Administrative Agent, the Arrangers and the Lenders under this Section are subject to the receipt by them of any requested authorization from the Loan Parties to cooperate with the Nevada Gaming Authorities as described above.

10.24 USA PATRIOT Act Notice. Each Lender that is subject to the Act (as hereinafter defined) and the Administrative Agent (for itself and not on behalf of any Lender) hereby notifies Borrowers that pursuant to the requirements of the USA PATRIOT Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the "Act"), it is required to obtain, verify and record information that identifies each Loan Party, which information includes the name and address of each Loan Party and other information that will allow such Lender or the Administrative Agent, as applicable, to identify each Loan Party in accordance with the Act.

10.25 Joint and Several.

(a) Borrowers shall be obligated for all of the Obligations outstanding under the Commitments, Loans and the related Notes, Letters of Credit and Swing Line Loans from time to time on a joint and several basis, notwithstanding which of Borrowers may have directly received the proceeds of any particular Loan.

(b) Each Borrower acknowledges and agrees that, for purposes of the Loan Documents, Borrowers constitute a single integrated financial enterprise and that each receives a benefit from the availability of credit under this Agreement to all of Borrowers. Each Borrowers waives all defenses arising under the laws of suretyship, to the extent such laws are applicable, in connection with its joint and several obligations under this Agreement. Without limiting the foregoing, each of the Borrowers agrees to the Joint Borrower Provisions set forth in Exhibit J, incorporated by this reference.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]**

IN WITNESS WHEREOF, the parties hereto have caused this Credit Agreement to be duly executed and delivered by their proper and duly authorized officers as of the day and year first above written.

FONTAINEBLEAU LAS VEGAS, LLC,  
a Nevada limited liability company

and

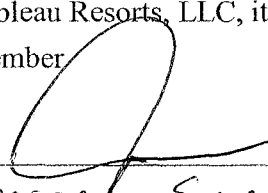
FONTAINEBLEAU LAS VEGAS II, LLC,  
a Florida limited liability company

By: Fontainebleau Las Vegas Holdings, LLC,  
Managing Member of each of the foregoing

By: Fontainebleau Resort Properties I, LLC, its  
Managing Member

By: Fontainebleau Resort Holdings, LLC, its  
Managing Member

By: Fontainebleau Resorts, LLC, its  
Managing Member

By:   
Name: Jeffrey Sopper  
Title: Executive Chairman

BANK OF AMERICA, N.A.,  
as Administrative Agent

By: Donna F. Kimbrough  
Name: Donna F. Kimbrough  
Title: Assistant Vice President




BANK OF AMERICA, N.A., as a Lender, as Issuing Lender,  
and as Swing Line Lender

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

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

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



Jeff Susman

Senior Vice President

# **Exhibit B**

EXECUTION

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**MASTER DISBURSEMENT AGREEMENT**

among

**FONTAINEBLEAU LAS VEGAS HOLDINGS, LLC,  
FONTAINEBLEAU LAS VEGAS CAPITAL CORP.,  
FONTAINEBLEAU LAS VEGAS RETAIL, LLC,  
FONTAINEBLEAU LAS VEGAS, LLC,**

and

**FONTAINEBLEAU LAS VEGAS II, LLC,**

**BANK OF AMERICA, N.A.,** as the Bank Agent,

**WELLS FARGO BANK, N.A.,** as the Trustee,

**LEHMAN BROTHERS HOLDINGS INC.,** as the Retail Agent,

and

**BANK OF AMERICA, N.A.,**  
as the Disbursement Agent

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**THIS MASTER DISBURSEMENT AGREEMENT** (the "Agreement"), dated as of June 6, 2007, is among:

**FONTAINEBLEAU LAS VEGAS HOLDINGS, LLC**, a Delaware limited liability company ("Las Vegas Holdings"), **FONTAINEBLEAU LAS VEGAS CAPITAL CORP.**, a Delaware corporation, a ("Las Vegas Capital" and collectively with Las Vegas Holdings, the "Issuers");

**FONTAINEBLEAU LAS VEGAS RETAIL, LLC**, a Delaware limited liability company ("Retail Affiliate");

**FONTAINEBLEAU LAS VEGAS, LLC**, a Nevada limited liability company ("Las Vegas"), **FONTAINEBLEAU LAS VEGAS II, LLC**, a Florida limited liability company ("Las Vegas II" and collectively with Las Vegas, the "Borrowers");

**BANK OF AMERICA, N.A.**, as the initial Bank Agent, **WELLS FARGO BANK, N.A.**, as the initial Trustee, **LEHMAN BROTHERS HOLDINGS INC.**, as the initial Retail Agent, and **BANK OF AMERICA, N.A.**, as the initial Disbursement Agent.

Capitalized terms used herein have the meanings set forth on Exhibit A hereto.

#### ***RECITALS***

A. The Project Entities propose to develop, construct and operate the Project on the Site. The Borrowers shall own and operate the Project other than certain retail elements thereof to be located in the Retail Air Space Parcels, which shall be owned and operated by the Retail Affiliate.

B. To finance the expenditures associated with the Project, concurrently herewith, the parties thereto have entered into the following financing arrangements:

(1) the Bank Credit Agreement pursuant to which revolving and term credit facilities in an aggregate principal amount not to exceed \$1,850,000,000 will be provided to the Borrowers (including \$700,000,000 in Initial Term Loans, the proceeds of which shall be deposited into the Bank Proceeds Account);

(2) the Second Mortgage Indenture, pursuant to which the Issuers will issue \$675,000,000 of Second Mortgage Notes due 2015 (the net proceeds of which shall be deposited into the Second Mortgage Proceeds Account); and

(3) the Retail Facility Agreement pursuant to which the Retail Lenders shall provide credit facilities in the principal amount of \$315,000,000 to the Retail Affiliate. For the avoidance of doubt, all Debt Service and other amounts payable to the Retail Lender shall not be funded through this Agreement, but rather shall be financed by the making of advances outside of this Agreement by the Retail

Lenders.

C. While the bulk of the costs of the Project are to be financed using the Companies' equity, the proceeds of the Second Mortgage Notes and the Bank Credit Agreement, a portion of such costs (i.e., the "Shared Costs") described herein, will be financed using the proceeds of Advances made pursuant to the Retail Facility. The Resort Budget includes the costs of all elements of the Project (other than tenant allowances to be made by the Retail Affiliate to its tenants, leasing commissions and related expenses of the Retail Affiliate reflected in the Retail Budget), including all of the Shared Costs (including the \$83,000,000 portion of the Shared Costs to be paid for by the Retail Affiliate and financed by means of drawings under the Retail Facility). The Retail Budget excludes the Shared Costs.

D. Substantially concurrently with the closing of the Financing Agreements, it is anticipated that Fontainebleau Resorts, LLC, a Delaware corporation which is the indirect owner of the Project Entities, will enter into certain other financing and equity issuance transactions which are described in the Flow of Funds Memo.

E. The parties are entering into this Agreement in order to set forth (a) the mechanics for and allocation of the Project Entities' requests for Advances under the Facilities and the making of payments from the Payment Accounts, (b) the conditions precedent to the Closing Date, to the initial Advances and to subsequent Advances, (c) certain common representations, warranties and covenants of the Project Entities in favor of the Funding Agents and the Lenders and (d) certain common Events of Default.

## AGREEMENT

NOW, THEREFORE, in consideration of the foregoing, the parties agree as follows:

### ARTICLE 1

#### DEFINITIONS; RULES OF INTERPRETATION

1.1 **Definitions.** Except as otherwise expressly provided herein, capitalized terms used in this Agreement and its exhibits shall have the meanings given in Exhibit A hereto. To the extent such terms are defined by reference to the Financing Agreements, such terms shall continue to have their original definitions notwithstanding any termination, expiration or amendment of such agreements unless (i) each of the parties hereto is a signatory to any such amendment or (ii) the signatories to such amendment have the right to amend this Agreement without the consent of the other parties hereto, in which case all references herein shall be to such terms or provisions as so amended.

1.2 **Rules of Interpretation.** Except as otherwise expressly provided herein, the rules of interpretation set forth in Exhibit A hereto shall apply to this Agreement.

1.3 **Conflict with Facility Agreements and Intercreditor Agreements.** This Agreement and each of the Facility Agreements is being drafted concurrently and are each intended to cover the respective matters specifically set forth therein. In the case of any express

conflict between the terms of this Agreement and the terms of any Facility Agreement, the terms of this Agreement shall control. In the case of any conflict involving this Agreement and any Intercreditor Agreement, the terms of the related Intercreditor Agreement shall control as between the parties to that Intercreditor Agreement.

## ARTICLE 2

### FUNDING - THE ACCOUNTS

#### 2.1 General Mechanics.

2.1.1 Closing Date Advances. On the Closing Date, subject to the applicable conditions set forth herein and in each of the Financing Agreements, each of the Funding Agents shall cause the Advances contemplated by the Flow of Funds Memo to be made by it, and the proceeds of such Advances shall be deposited to the various Accounts as described in the Flow of Funds Memo and, in the case of amounts deposited into the Resort Payment Account, for further payment to the applicable Contractors in respect of Project Costs due and payable in accordance with the Flow of Funds Memo.

2.1.2 Subsequent Advances. Following the Closing Date each of the Funding Agents shall cause Advances to be made to the Disbursement Agent for disbursement pursuant to the terms of this Agreement upon the satisfaction of only the applicable conditions set forth in Article 3. For the avoidance of doubt, it is agreed that following the Closing Date, the applicable conditions precedent set forth in this Agreement (rather than any conditions precedent set forth in the Facility Agreements) shall govern and control the making of Advances until the termination of this Agreement in accordance with Section 11.18.

2.1.3 Timing and Availability. Unless the Controlling Person otherwise agrees, and except for Advances made pursuant to Section 2.23, Advances shall be made no more frequently than once in any calendar month, *provided* that notwithstanding any such agreement by the Controlling Person, (a) the Retail Agent and the Retail Lenders shall not be obligated to make Advances more frequently than monthly unless the Retail Agent otherwise agrees and (b) the Trustee shall not be obligated to make Advances from the Second Mortgage Proceeds Account more frequently than monthly (*provided* that the Trustee shall also debit the Second Mortgage Proceeds Account when and as required for the payment of Debt Service as contemplated by Section 2.6.5(b)).

#### 2.2 The Accounts.

2.2.1 Generally. The Project Entities have, and, in the case of the Completion Guaranty Proceeds Account, Turnberry Residential has, heretofore established the following Accounts, with the depositories listed below, the account numbers for which are set forth in the chart directly below:

<u>Proceeds Accounts</u>	<u>Funding Accounts</u>	<u>Payment Accounts</u>	<u>Depository</u>	<u>Pledges</u>
	Equity Funding Account; Account No. 0238-5090110385		Disbursement Agent	Bank Agent and Trustee
Second Mortgage Proceeds Account; Account No. 1038377			Trustee	Trustee
	Second Mortgage Funding Account; Account No. 1233055954		Disbursement Agent	Bank Agent and Trustee
Bank Proceeds Account; Account No. 0238- 5090110384			Bank Agent	Bank Agent
	Bank Funding Account; Account No. 1233056005		Disbursement Agent	Bank Agent and Trustee
Resort Loss Proceeds Account; Account No. 1233055959			Disbursement Agent	Bank Agent and Trustee
Retail Loss Proceeds Account; Account No. 1233057330			Disbursement Agent	Retail Agent
Bonded Condo Proceeds Account; Account No. 1233055997			Disbursement Agent	Bank Agent and Trustee
Completion Guaranty Proceeds Account Account No. 1233056968			Disbursement Agent	Bank Agent and Trustee
	Liquidity Account; Account No. 0155- 5090110382		Disbursement Agent	Bank Agent and Trustee
		Resort Payment Account; Account No. 501001203813	Disbursement Agent	Bank Agent and Trustee
		Interest Account; Account No. 1233055973	Disbursement Agent	Bank Agent and Trustee
		Cash Management Account; Account No. 4968332450	Disbursement Agent	Bank Agent and Trustee
	Retail Funding Account; Account No. 1233057335		Disbursement Agent	Retail Agent
		Retail Payment Account; Account No. 501001205390	Disbursement Agent	Retail Agent

Each of the Accounts listed in the matrix above has been established in the name of Las Vegas, other than (a) the Completion Guaranty Proceeds Account, which has been established in the name of Turnberry Residential, and (b) the Retail Accounts, each of which have been established in the name of the Retail Affiliate.

2.2.2 Liens and Control Agreements. Each of the Accounts is subject to the exclusive liens, granted in accordance with Section 2.3 (and as the same may be more generally granted in the Bank Security Documents, the Second Mortgage Security Documents, or the Retail Security Documents) or, in the case of the Completion Guaranty Proceeds Account, granted in accordance with the terms of each Completion Guaranty, in favor of the Pledgees listed above opposite the name of the related account (in the case of any such account where both the Bank Agent and the Trustee are listed as Pledgees, in favor of both the Bank Agent and the Trustee with the priority set forth in the Project Lenders Intercreditor Agreement). The Project Entities shall not be permitted to make withdrawals from, or otherwise access, any of the Accounts other than the Cash Management Account, the Resort Payment Account and the Retail Payment Account (and then only for the payment of Project Costs). The Project Entities may request that any Account be converted to a securities account in order to facilitate the investment of amounts contained therein and the Bank Agent, the Retail Agent and the Disbursement Agent agree to amend any Control Agreement in any respect reasonably required to conform the same to the converted Account, and the Trustee shall sign such Control Agreement pursuant to Section 4.4.2 of the Project Lender Intercreditor Agreement.

2.2.3 Investment of the Accounts. The Companies shall be entitled to direct the investment of the amounts contained in the Accounts (other than the Retail Accounts and the Completion Guaranty Proceeds Account) from time to time in Cash Equivalents. The Retail Affiliate shall be entitled to direct the investment of the amounts contained in the Retail Accounts from time to time in Cash Equivalents. Each Completion Guarantor shall be entitled to direct the investment of amounts contained in its Completion Guaranty Proceeds Account from time to time in Cash Equivalents.

### 2.3 **Grant of Liens and Control in respect of the Accounts.**

(a) To secure the payment and performance of each Borrower's obligations arising under the Bank Credit Agreement and each Issuer's obligations arising under the Second Mortgage Indenture, each Borrower hereby grants to the Bank Agent for the ratable benefit of the Lenders represented by the Bank Agent and the Trustee for the ratable benefit of the Lenders represented by the Trustee a security interest in all if its right, title and interest to and under the (i) Equity Funding Account, maintained at the Disbursement Agent, (ii) Bank Funding Account, maintained at the Disbursement Agent, (iii) Resort Loss Proceeds Account, maintained at the Disbursement Agent, (iv) Bonded Condo Proceeds Account, maintained at the Disbursement Agent, (v) Liquidity Account, maintained

at the Disbursement Agent, (vi) Resort Payment Account, maintained at the Disbursement Agent, (vii) Interest Account, maintained at the Disbursement Agent, and (viii) Cash Management Account, maintained at the Disbursement Agent, together with all present and future deposit accounts, securities entitlements, securities accounts, and investment property related to any of the foregoing accounts (whether arising under a sweep or similar arrangement or arising in any other manner whatsoever) and all present and future proceeds of any of the foregoing;

(b) To secure the payment and performance of each Issuer's obligations arising under the Second Mortgage Indenture, each Issuer and each Borrower hereby grants to the Trustee for the ratable benefit of the Lenders represented by the Trustee a security interest in all of its right, title and interest to and under the Second Mortgage Proceeds Account, maintained at the Trustee, together with all present and future deposit accounts, securities entitlements, securities accounts, and investment property related to the foregoing account (whether arising under a sweep or similar arrangement or arising in any other manner whatsoever) and all present and future proceeds of any of the foregoing;

(c) To secure the payment and performance of each Borrower's obligations arising under the Bank Credit Agreement and each Issuer's obligations arising under the Second Mortgage Indenture, each Issuer hereby grants to the Bank Agent for the ratable benefit of the Lenders represented by the Bank Agent and the Trustee for the ratable benefit of the Lenders represented by the Trustee a security interest in all of its right, title and interest to and under the Second Mortgage Funding Account, maintained at the Disbursement Agent, together with all present and future deposit accounts, securities entitlements, securities accounts, and investment property related to the foregoing account (whether arising under a sweep or similar arrangement or arising in any other manner whatsoever) and all present and future proceeds of any of the foregoing;

(d) To secure the payment and performance of each Borrower's obligations arising under the Bank Credit Agreement, each Borrower hereby grants to the Bank Agent for the ratable benefit of the Lenders represented by the Bank Agent a security interest in the Bank Proceeds Account, maintained at the Bank Agent, together with all present and future deposit accounts, securities entitlements, securities accounts, and investment property related to any of the foregoing accounts (whether arising under a sweep or similar arrangement or arising in any other manner whatsoever) and all present and future proceeds of any of the foregoing; and

(e) To secure the payment and performance of the Retail Affiliate's obligations arising under the Retail Facility Agreement, the Retail Affiliate hereby grants to the Retail Agent for the ratable benefit of the

Lenders represented by the Retail Agent a security interest in all of its right, title and interest to and under the Retail Accounts, together with all present and future deposit accounts, securities entitlements, securities accounts, and investment property related to any of the foregoing accounts (whether arising under a sweep or similar arrangement or arising in any other manner whatsoever) and all present and future proceeds of any of the foregoing.

Concurrently herewith, (i) the Project Entities shall execute the Control Agreements with respect to each Account (other than the Completion Guaranty Proceeds Account and the Second Mortgage Proceeds Account) in favor of the Disbursement Agent and the Pledgees listed opposite the name of that Account in Section 2.2, and (ii) Turnberry Residential shall execute a Control Agreement with respect to the Completion Guaranty Proceeds Account. The Project Entities shall not be permitted to withdraw funds from any of the Accounts except to the extent expressly set forth in this Agreement. Once funds are deposited therein, no Completion Guarantor may withdraw funds from a Completion Guaranty Proceeds Account, but may direct the Disbursement Agent to make any withdrawals and transfers contemplated by this Agreement or its Completion Guaranty. Upon the occurrence and during the continuance of an Event of Default under its respective Facility Agreement, and subject to the Intercreditor Agreements but as to each Funding Agent, only to the extent that it is a party to such Intercreditor Agreement, each Funding Agent may deliver to the Disbursement Agent a notice of exclusive control pursuant to the Control Agreements in respect of the Accounts (other than the Completion Guaranty Proceeds Account) with respect to which it is a Pledgee, and the Disbursement Agent shall thereafter accept instructions with respect to the relevant Account solely from that Funding Agent.

#### 2.4 **Advance Requests.**

2.4.1 Each Advance under this Agreement shall be requested jointly by the Borrowers, the Issuers and the Retail Affiliate pursuant to an Advance Request substantially in the form of Exhibit C-1 (except as provided in clause (i) of the definition thereof), *provided* that any Advances which are made solely to finance Other Retail Costs may be requested solely by the Retail Affiliate pursuant to an Advance Request described in clause (ii) of the definition thereof and (ii) any Advances under the Resort Budget that do not involve Advances under the Retail Facility for Shared Costs may be requested solely by the Companies. Each Advance Request shall be delivered to the Disbursement Agent, each Funding Agent and the Construction Consultant not later than the 11th day of each calendar month, but in any event not later than ten Banking Days prior to the Scheduled Advance Date.

2.4.2 Without limitation upon the other elements of the Resort Request and Retail Request set forth in any such Advance Request, the Project Entities shall include in each Advance Request delivered by them a request that Advances be

made in amounts sufficient to pay:

- (a) Debt Service that will become due and payable under each of the Bank Credit Agreement and the Second Mortgage Notes on or after the requested Advance Date and prior to the immediately succeeding Advance Date (other than Debt Service on the Second Mortgage Notes to be paid directly out of the Second Mortgage Notes Proceeds Account and Debt Service on the Bank Credit Facility to be paid directly out of the Bank Proceeds Account, in each case as provided in Section 2.6.4 and Section 3.3, and only to the extent that such interest accrues prior to the Opening Date);
- (b) without duplication as to (a), and except to the extent that a portion of the requested Advance will be funded by drawing on the Bank Revolving Facility, the amount of any drawings made under the Bank Revolving Facility after the immediately preceding Advance Date to reimburse the issuing bank for any draws made under Letters of Credit issued under the Bank Credit Agreement; and
- (c) such amounts as the Companies desire to replenish the Cash Management Account (but an amount which will not cause the balance thereof to exceed \$6,000,000).

2.4.3 Each Advance Request shall attach each of the applicable Appendices (except that in the period prior to the date of the initial Advances from the Second Mortgage Proceeds Account Advance Requests will not be required to be accompanied by any General Contractor's Advance Certificate or Architect's Advance Certificate or any other certificates or attachments set forth on Exhibit C-1; it being understood that Advance Requests issued prior to such date will not take the form of Exhibit C-1 or otherwise contain certifications or any other information other than as set forth in Section 3.2).

2.4.4 Promptly after delivery of the Advance Request:

- (a) General Review. The Disbursement Agent and the Construction Consultant shall review the Advance Request and attachments thereto to determine whether all required documentation has been provided, and shall use commercially reasonable efforts to notify the Project Entities of any deficiency within three Banking Days after delivery thereof by the Project Entities, it being acknowledged that any failure to notify the Project Entities of any deficiency in the Advance Request so delivered within the aforesaid time period shall not be deemed an approval thereof.
- (b) Construction Consultant Work Review and Certificate. In respect of the Advance Request for the initial Advance from the Second Mortgage Proceeds Account and each subsequent Advance, the Construction Consultant shall review the work referenced in the Requested Cost Report,



including work estimated to be completed through the applicable Advance Date as such work is being performed. Not later than four Banking Days prior to the requested Advance Date for any such Advance, the Construction Consultant shall deliver to the Disbursement Agent (with a copy to the Project Entities) a Construction Consultant Advance Certificate either approving or disapproving the Advance Request; provided that if the Construction Consultant disapproves one or more particular payments or disbursements to any Contractor or Subcontractor requested by the Advance Request, but the Advance Request otherwise complies with the requirements hereof, then the Advance Request shall be deemed approved with respect to all payments and disbursements requested therein other than the particular payments or disbursements so disapproved. If the Construction Consultant disapproves the Advance Request or any one or more particular payments requested therein, the Construction Consultant shall provide the Project Entities, in reasonable detail, its reasons for such disapproval, however the failure of the Construction Consultant to do so shall not be deemed approval of any such payment.

(c) Debt Service Notifications. The Bank Agent and the Trustee may deliver notices correcting the amount of the Debt Service due to each of them on the relevant Advance Date to the Disbursement Agent.

The Disbursement Agent shall use reasonable diligence to assure that the Construction Consultant performs its review of the materials required by this Section 2.4 and delivers its Construction Consultant Advance Certificate, and that the Disbursement Agent's own review of the materials required by this Section 2.4 is finalized, in each case not less than three Banking Days prior to the Scheduled Advance Date. In the event that the Construction Consultant approves only a portion of the payments or disbursements requested by the Advance Request or the Disbursement Agent finds any minor or purely mathematical errors or inaccuracies in the Advance Request or supporting materials, the Disbursement Agent may require the Project Entities to revise and resubmit the same.

2.4.5 Supplementation of Advance Requests. In the event that the Project Entities obtain additional information or documentation or discover any errors in or updates required to be made to any Advance Request prior to the Scheduled Advance Date, the Project Entities may, with the approval of the Disbursement Agent and the Construction Consultant, revise and resubmit such Advance Request to the Disbursement Agent and the Construction Consultant, provided that the Disbursement Agent shall not be required to accept any such updates or revisions, but shall consider their submission in good faith. The Disbursement Agent shall use reasonable diligence to review and approve such supplemental Advance Request and to cause the Construction Consultant to review and approve the same not less than three Banking Days prior to the Scheduled Advance Date.

2.4.6 Advance Confirmation Notice. When the applicable conditions precedent set forth in Article 3 have been satisfied, the Disbursement Agent shall notify the Project Entities and the Project Entities and the Disbursement Agent shall execute an Advance Confirmation Notice setting forth the amount of the Advances to be made pursuant to each Financing Agreement on the Advance Date and, if requested by any Funding Agent, attaching to the Advance Confirmation Notice to be submitted to such Funding Agent a finalized Advance Request, including all Exhibits, which will reflect any amendments made to the Advance Request since its initial submission. When executed by the Project Entities and the Disbursement Agent (and, to the extent of any Advances for which the conditions precedent set forth in Section 3.5 apply, by the Retail Agent), the Disbursement Agent shall deliver the Advance Confirmation Notice to the Project Entities and each of the Funding Agents. On the Scheduled Advance Date, (a) each of the Funding Agents shall make the Advances contemplated by that Advance Confirmation Notice to the relevant Accounts and (b) the Disbursement Agent shall make the resulting transfers amongst the Accounts described in the Advance Confirmation Notice.

## 2.5 **Stop Funding Notices.**

2.5.1 Stop Funding Notices. In the event that (i) the conditions precedent to an Advance have not been satisfied, or (ii) the Controlling Person notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing, then the Disbursement Agent shall notify the Project Entities and each Funding Agent thereof as soon as reasonably possible (a "Stop Funding Notice"). Each Stop Funding Notice shall specify, in reasonable detail, the conditions precedent which the Disbursement Agent has determined have not been satisfied and/or shall attach a copy of any notice of default received by the Disbursement Agent. The Disbursement Agent shall have no liability to the Project Entities arising from any Stop Funding Notice except to the extent arising out of the gross negligence or willful misconduct of the Disbursement Agent.

2.5.2 Effect of Issuance. Upon the issuance of a Stop Funding Notice, unless and until:

(a) the Controlling Person waives the related conditions under Section 3.3 pursuant to Section 3.7:

(i) the Bank Agent and the Trustee shall have no obligation to make Advances;

(ii) subject to the penultimate sentence of this Section 2.5.2, the Disbursement Agent shall not withdraw, transfer or release any funds on deposit in the Accounts (other than the Retail Accounts); and

- (iii) any Advance Confirmation Notice issued to the Bank Agent or the Trustee prior to the issuance of a Stop Funding Notice (if the Advance to which such Advance Confirmation Notice relates has not been made) shall become null and void and of no force or effect as it relates to the Bank Agent or the Trustee; and
- (b) the Retail Agent waives the related conditions under Section 3.5 pursuant to Section 3.7:
  - (i) the Retail Lenders shall have no obligation to make Advances to which the conditions set forth in Section 3.5 apply;
  - (ii) subject to the penultimate sentence of this Section 2.5.2, the Disbursement Agent shall not withdraw, transfer or release any funds on deposit in the Retail Loss Proceeds Account, the Retail Funding Account or the Retail Payment Account; and
  - (iii) any Advance Confirmation Notice issued to the Retail Agent prior to the issuance of a Stop Funding Notice (if the Advance to which such Advance Confirmation Notice relates has not been made) shall become null and void and of no force or effect as it relates to the Retail Agent.

Notwithstanding the foregoing provisions of this Section 2.5.2, unless the Stop Funding Notice resulted from notice by the Controlling Person that an Event of Default has occurred:

- (i) Advances for Debt Service shall continue to be made to the limited extent set forth in the last paragraph of Section 3.3; and
- (ii) the Project Entities may continue to make withdrawals from the Cash Management Account, the Resort Payment Account and the Retail Payment Account, and all scheduled transfers from the Interest Payment Account and, to the extent provided in Section 2.6.4 or Section 3.3, the Second Mortgage Proceeds Account and the Bank Proceeds Account for the payment of Debt Service shall continue to be made.

Any nullification of any such Advance Confirmation Notice shall not affect the obligations of the Project Entities for break funding costs under the Bank Credit Facility and the Retail Facility.

2.5.3 Retractions. If the Disbursement Agent (w) later determines that the conditions precedent giving rise to a Stop Funding Notice have been satisfied, (x) receives a notice from the Funding Agent who issued the notice of default that the related Default or Event of Default no longer exists, (y) receives notice from the Controlling Person retracting a Stop Funding Notice, or (z) receives

notice from the Controlling Person or the Retail Agent, as applicable, of its waiver of conditions pursuant to Section 3.7, then the Disbursement Agent shall deliver an Advance Confirmation Notice to the Project Entities and each of the applicable Funding Agents (modified, if required, to apply only to amounts to be advanced under such Funding Agent's Facility unless all Funding Agents entitled to waive conditions with respect to such Advance Request have waived the conditions, in which case the Disbursement Agent shall deliver an Advance Confirmation Notice with respect to all Advances requested by the Project Entities).

## 2.6 Provision of Advances by the Funding Agents and Account Transfers.

2.6.1 Advances and Timing. With respect to each Advance Confirmation Notice issued pursuant to Section 2.4 or Section 2.5, on before 12:00 p.m., New York, New York time on the Advance Date referred to therein:

- (a) the Trustee shall remit the required Advance from the Second Mortgage Proceeds Account to the Second Mortgage Funding Account;
- (b) the Bank Agent shall (i) cause the Bank Lenders to remit any required Loans under the Bank Credit Agreement to the Bank Proceeds Account, and (ii) the Bank Agent shall thereafter remit any required Advances under the Bank Credit Agreement from the Bank Proceeds Account to the Bank Funding Account; and
- (c) the Retail Agent shall cause the Retail Lenders to make loans and shall remit any required Advances under the Retail Facility into the Retail Funding Account;

in each case in immediately available funds and as detailed in the Advance Request Transfer Report and Funding Order Report.

2.6.2 Account Transfers. Promptly following its confirmation that the remittances required by Section 2.6.1 have been made, the Disbursement Agent shall make each of the transfers detailed in the final Funding Order Report and Advance Request Transfer Report.

2.6.3 Concurrent Advances. Neither the Disbursement Agent nor any of the Funding Agents shall be responsible for the failure of any other Funding Agent to make any required Advance. The Disbursement Agent shall not release any Advances to the Project Entities until the Trustee has remitted any required Advances from the Second Mortgage Proceeds Account, the Bank Agent has remitted any required Advances from the Bank Proceeds Account, and the Retail Lenders have made any requested Loans under the Retail Facility, provided that (a) the Retail Agent may waive this Section 2.6.3 in respect of Advances to be provided by the Retail Lenders, and (b) the Controlling Person may waive this Section 2.6.3 in respect of Advances to be provided from the Second Mortgage

Proceeds Account or under the Bank Credit Agreement.

2.6.4 The Interest Account & Proceeds Accounts - Payments of Debt Service.

(a) Unless a Pledgee has previously delivered a Stop Funding Notice asserting that an Event of Default has occurred, the Disbursement Agent shall apply amounts on deposit in the Interest Account to the payment of Debt Service under the relevant Facility on the date that the Disbursement Agent is advised such amounts will become due and payable.

(b) Unless the Trustee has previously delivered a Stop Funding Notice asserting that an Event of Default has occurred, from and after the Exhaustion of proceeds in the Equity Funding Account, the Trustee shall apply amounts on deposit in the Second Mortgage Proceeds Account, if any, to the payment of Debt Service on the Second Mortgage Notes on the date and at such time that such amounts become due and payable pursuant to the Second Mortgage Indenture.

(c) At all times from and after the Exhaustion of proceeds in the Equity Funding Account and prior to the Initial Bank Advance Date, unless the Bank Agent has previously delivered a Stop Funding Notice asserting that an Event of Default has occurred, the Bank Agent shall apply amounts on deposit in the Bank Proceeds Account, if any, to the payment of Debt Service on the Bank Credit Facility on the date that such amounts become due and payable pursuant to the Bank Credit Agreement.

2.6.5 Loss Proceeds Accounts. All funds remitted from time to time to the Resort Loss Proceeds Account shall be remitted to the Resort Payment Account on each Scheduled Advance Date upon which the applicable conditions precedent set forth in Section 3 are satisfied. Upon notice from the Retail Agent that the applicable conditions set forth in the Retail Facility Agreement to the release of Loss Proceeds have been satisfied, the Disbursement Agent shall transfer the relevant amounts contained in the Retail Loss Proceeds Account to the Retail Payment Account.

2.6.6 Completion Guaranty Proceeds Account. All funds remitted from time to time to the Completion Guaranty Proceeds Account pursuant to any Completion Guaranty shall be held in such Account as security for the performance of the applicable Completion Guarantor's obligations under such Completion Guaranty. In the event that such Completion Guaranty is required to fund a portion of an Advance Request hereunder in accordance with its terms and such Completion Guarantor does not otherwise cause any required amounts to be deposited into the Resort Payment Account pursuant to such Completion Guaranty, such amounts shall be transferred by the Disbursement Agent from the Completion Guaranty Proceeds Account to the Resort Payment Account in satisfaction of such Completion Guarantor's obligations under such Completion Guaranty; provided that, notwithstanding anything to the contrary herein, the

proceeds of any drawing under any Completion Guaranty shall be used solely to pay Applicable Project Costs (as such term is defined in the Completion Guaranties).

2.6.7 Account Access. Unless a Pledgee has previously exercised its rights as a secured party with respect to the relevant Account following an Event of Default, the Project Entities shall be entitled to write checks upon, or otherwise transfer monies contained in the Retail Payment Account, the Resort Payment Account and the Cash Management Account from time to time for the payment of Project Costs, *provided* that, notwithstanding anything to the contrary set forth herein, (a) only the Companies may write checks upon or otherwise transfer monies contained in the Resort Payment Account and the Cash Management Account, and (b) only the Retail Affiliate may write checks upon or otherwise transfer monies contained in the Retail Payment Account (or authorize any payments or transfers from any of the Retail Accounts). The Project Entities shall not be entitled to write checks upon, access, or otherwise transfer funds from, the other Accounts.

2.6.8 Special Procedures for Direct Payments to Contractors and Vendors. Notwithstanding Section 2.6.1 and Section 2.6.3, at the direction of any Funding Agent (but only in respect of an Account containing monies advanced by that Funding Agent), the Disbursement Agent shall transfer monies in such Account directly to Contractors or other vendors for invoices for Project Costs. The right of the Disbursement Agent to make direct transfers in this manner may be exercised without further authorization from the Project Entities, however the Disbursement Agent shall use reasonable efforts to minimize any resulting disruption. Each of the Project Entities hereby constitutes and appoints the Disbursement Agent its true and lawful attorney-in-fact to make such direct payments. This power of attorney shall be deemed to be a power coupled with an interest and shall be irrevocable. The Disbursement Agent shall not exercise the rights provided under this Section 2.6.8 in respect of any invoices which Project Entities have notified the Disbursement Agent and the Construction Consultant are in dispute, and the Construction Consultant concurs are reasonably disputed by the Project Entities.

2.7 **Requested Cost Reports.** Each Advance Request shall be accompanied by a Requested Cost Report detailing the Resort Request and the Retail Request (as applicable) as of the relevant Advance Date. There are four versions of the Requested Cost Report attached as Appendix 1 to Exhibit C-1, and the Project Entities shall attach the appropriate version to each Advance Request. Each Requested Cost Report shall summarize costs reflected in the Budgets for which Advances are requested to be made on the relevant Advance Date *provided* Requested Cost Reports delivered prior to the Initial Bank Advance Date shall not include requests for Debt Service (which shall be directly debited by the Trustee and the Bank Agent from the Second Mortgage Proceeds Account and Bank Proceeds Account, respectively).

2.8 **Shared Cost Allocation Reports.** The Advance Request submitted by the Project Entities in respect of the Initial Bank Advance Date and each subsequent Advance Date shall

also be accompanied by a Shared Cost Allocation Report. Each Shared Cost Allocation Report shall describe the portion of the Retail Lenders Shared Cost Commitment which will be funded on the relevant Advance Date. There are three versions of the Shared Cost Allocation Report attached as Appendix 2 to Exhibit C-1, and the Project Entities shall attach the appropriate version to each such Advance Request. Each Shared Cost Allocation Report shall set forth:

2.8.1 in row A, the Retail Lenders Shared Cost Commitment which is to be funded by the Retail Lenders during the term of this Agreement;

2.8.2 in row B, the Retail Shared Cost Percentage on the relevant Advance Date;

2.8.3 in row C, the cumulative amount of the Retail Lenders Shared Cost Commitment which is allocable to the Resort Facility through the relevant Advance Date (i.e., row A times row B);

2.8.4 in row D, the amount of the Retail Lenders Shared Cost Commitment funded to date; and

2.8.5 in row E, the amount of the Retail Lenders Shared Cost Commitment which is to be funded on that date (i.e., row C minus row D).

In no instance will the Retail Shared Cost Percentage be reduced from the prior Shared Cost Allocation Report.

**2.9 Current Available Sources Reports.** Each Advance Request shall be accompanied by a Current Available Sources Report which shall detail the funds which are available to satisfy the Resort Request and the Retail Request. There are four versions of the Current Available Sources Report attached as Appendix 3 to Exhibit C-1, and the Project Entities shall attach the appropriate version to each Advance Request. For each Current Available Sources Report, the "Current Available Retail Sources" and the "Current Available Resort Sources" are the amounts reflected in such report in the appropriate rows in the column headed "Balance."

In each Current Available Sources Report, the Retail Payment Account balance and the Resort Payment Account balance will each be adjusted to reflect payments to be made from those Accounts pursuant to any previously submitted Advance Request.

In addition thereto:

(a) in each Current Available Sources Report submitted prior to the Initial Bank Advance Date, the balance of the Second Mortgage Proceeds Account and the Bank Proceeds Account shall be adjusted to reflect Debt Service to be paid directly from those Accounts; and

(b) in each Current Available Sources Report submitted on or after the Initial Bank Advance Date, the balance of the Interest Account shall be

adjusted to reflect payments of Debt Service to be made from the Interest Account pursuant to any previously submitted Advance Request.

**2.10 Funding Order Reports.** Each Advance Request shall be accompanied by a Funding Order Report which shall detail the order in which the funds described in the relevant Current Available Sources Report will be applied to satisfy the Resort Request and the Retail Request. There are four versions of the Funding Order Report attached as Appendix 4 to Exhibit C-1, and the Project Entities shall attach the appropriate version to each Advance Request.

2.10.1 In each Funding Order Report submitted prior to the Completion Reserve Calculation Date, the Project Entities shall detail the manner in which

(a) the Current Available Retail Sources as of the Advance Date shall be applied to the payment of the Retail Request in the following order of priority and in each case until the relevant Retail Source is Exhausted:

(i) First, from funds then on deposit in the Retail Loss Proceeds Account;

(ii) then from funds then on deposit in the Retail Payment Account (as adjusted in the relevant Current Available Sources Report to reflect any payments therefrom); and

(iii) then from amounts available to be drawn under the Retail Facility.

(b) the Current Available Resort Sources as of the Advance Date shall be applied to the Resort Request by applying the following order of priority and in each case until the relevant Resort Source is Exhausted (except to the extent otherwise limited below):

(i) First (and only on and after the Initial Bank Advance Date), from funding required under the Retail Lenders Shared Cost Commitment (as calculated in the relevant Shared Cost Allocation Report);

(ii) then from funds then on deposit in the Resort Loss Proceeds Account;

(iii) then from funds then on deposit in the Resort Payment Account (as adjusted in the relevant Current Available Sources Report to reflect any payments therefrom);

(iv) then (but only on or after the Initial Bank Advance Date) from funds then on deposit in the Interest Account (as adjusted in the relevant Current Available Sources Report to reflect any payments therefrom);



(v) then from funds then on deposit in the Liquidity Account, but only to the extent that the balance thereof exceeds \$50,000,000;

(vi) then from funds then on deposit in the Bonded Condo Proceeds Account;

(vii) then from funds then on deposit in the Equity Funding Account;

(viii) then from funds then on deposit in the Second Mortgage Proceeds Account;

(ix) then, from funds then on deposit in the Bank Proceeds Account prior to giving effect to the requested Advance;

(x) then, from funds available to be drawn under the Bank Credit Facility, until the aggregate amount of the Bank Revolving Availability has been reduced to \$55,000,000;

(xi) then, only on and after the Initial Bank Advance Date, from the making of draws under the Completion Guaranties (subject to the proviso in Section 2.6.6);

(xii) then, only on and after the Initial Bank Advance Date, from the Liquidity Account; *provided* that to the extent that any Project Costs that are not Applicable Project Costs (as defined in the Completion Guaranties) are due and payable, the amount of such Project Costs will be paid from the Liquidity Account regardless of whether the Completion Guaranties have been fully drawn; and

(xiii) then, only on and after the Initial Bank Advance Date, from the remainder of the Bank Credit Facility; *provided* that to the extent that any Project Costs that are not Applicable Project Costs (as defined in the Completion Guaranties) are due and payable and have not been satisfied pursuant to clause (j), the amount of such Project Costs will be paid from the Bank Credit Facility regardless of whether the Completion Guaranties have been fully drawn.

2.10.2 In each Funding Order Report submitted for the Completion Reserve Calculation Date and for each subsequent Advance Date, the Project Entities shall detail the manner in which:

(a) the Current Available Retail Sources as of the Advance Date shall be applied to the payment of the Retail Request in the following order of priority and in each case until the relevant Retail Source is exhausted:

- (i) First from funds then on deposit in the Retail Loss Proceeds Account;
  - (ii) then from funds then on deposit in the Retail Payment Account (as adjusted in the relevant Current Available Sources Report to reflect any payments therefrom); and
  - (iii) then from amounts available to be drawn under the Retail Facility.
- (b) the Current Available Resort Sources as of the Advance Date shall be applied to the Resort Request by applying the following order of priority and in each case until the relevant Resort Source is exhausted (except to the extent otherwise limited below):
- (i) First, from funding required under the Retail Lenders Shared Cost Commitment (as calculated in the relevant Shared Cost Allocation Report);
  - (ii) then to the extent that such Project Costs constitute Debt Service, from the amounts transferred to the Interest Account pursuant to Section 2.16.2(h)(B)(i);
  - (iii) then from funds then on deposit in the Resort Loss Proceeds Account;
  - (iv) then from funds then on deposit in the Resort Payment Account (as adjusted in the relevant Current Available Sources Report to reflect any payments therefrom);
  - (v) then from funds then on deposit in the Interest Account (as adjusted in the relevant Current Available Sources Report to reflect any payments therefrom);
  - (vi) then from funds then on deposit in the Liquidity Account, but only to the extent that the balance thereof exceeds \$50,000,000 less any amounts theretofore applied to the payment of Debt Service pursuant to Section 7.24 of the Credit Agreement;
  - (vii) then from funds then on deposit in the Bonded Condo Proceeds Account;
  - (viii) then from funds then on deposit in the Equity Funding Account;
  - (ix) then from funds then on deposit in the Second Mortgage Proceeds Account;

(x) then from funds then on deposit in the Bank Proceeds Account;

(xi) then from the Bank Revolving Facility Completion Reserve Amount;

(xii) then from Completion Guaranty Availability (but not for Debt Service);

(xiii) then from the Liquidity Account Remainder; *provided* that to the extent that any Project Costs that are not Applicable Project Costs (as defined in the Completion Guaranties) are due and payable, the amount of such Project Costs will be paid from the Liquidity Account Remainder regardless of whether the Completion Guaranties have been fully drawn; and

(xiv) then from the Residual Bank Revolving Facility Completion Reserve Amount; *provided* that to the extent that any Project Costs that are not Applicable Project Costs (as defined in the Completion Guaranties) are due and payable, the amount of such Project Costs will be paid from the Residual Bank Revolving Facility Completion Reserve Amount regardless of whether the Completion Guaranties have been exhausted.

**2.11 Advance Request Transfer Reports.** Each Advance Request shall be accompanied by an Advance Request Transfer Report which details how and the order in which the amounts determined by the Funding Order Report are to be deposited into the various Accounts established pursuant to this Agreement (or, in the appropriate case, to reimburse the Bank Agent for drawings made under Project Letters of Credit). There are four versions of the Advance Request Transfer Report attached as Appendix 5 to Exhibit C-1, and the Project Entities shall attach the appropriate version to each Advance Request.

**2.12 Final Completion Reserve Package.** In addition to the reports described in Section 2.7 through 2.11, in respect of the Completion Reserve Calculation Date, the Project Entities shall also submit:

2.12.1 a Requested Cost to Final Completion Report in the form of Appendix 1 to Exhibit Q-1 calculating the Retail Request to Final Completion and the Resort Request to Final Completion in the manner set forth in Section 2.13;

2.12.2 a Shared Cost to Final Completion Allocation Report in the form of Appendix 2 to Exhibit Q-1 calculating the remaining amount of the Advances Required under the Retail Lenders Shared Cost Commitment in order to achieve Final Completion in the manner set forth in Section 2.14;

2.12.3 an Available Sources to Final Completion Report in the form of Appendix 3 to Exhibit Q-1 detailing the funds which are available to satisfy the

Resort Request to Final Completion and the Retail Request to Final Completion in the manner set forth in Section 2.15; and

2.12.4 a Funding Order to Final Completion Report in the form of Appendix 4 to Exhibit Q-1 detailing the order in which the funds described in the Available Sources to Final Completion Report will be applied to satisfy the Resort Request to Final Completion and the Retail Request to Final Completion in the manner set forth in Section 2.16.

**2.13 Requested Cost to Final Completion Report.** The Requested Cost to Final Completion Report will detail the amount of the Retail Request to Final Completion and the Resort Request to Final Completion (as defined below in this Section). The Project Entities' calculation of the Requested Cost to Final Completion is subject to final approval by the Construction Consultant. This report shall set forth:

2.13.1 in the Retail Budget section, without duplication, (i) the amount of Other Retail Costs paid to date through the Cash Management Account and not reflected in any prior Advance Request, (ii) the amount of the Other Retail Costs to be paid through Final Completion that have not been requested in a previous Advance Request, and (iii) the amount of any disputed claims with contractors or vendors in respect of costs under the Retail Budget (the sum of these amounts being the "Retail Request to Final Completion");

2.13.2 in the Resort Budget section, without duplication, (i) 100% of the amount of all Project Costs under the Resort Budget paid to date through the Cash Management Account and not reflected in any prior Advance Request, (ii) 100% of all Debt Service in respect of Indebtedness of the Companies which will accrue through the Opening Date, (iii) 120% of all other Project Costs of the types which will accrue pursuant to the Resort Budget through the Opening Date, (iv) 120% of all other Project Costs not otherwise reflected in this Section 2.13.2 which will accrue and be payable pursuant to the Resort Budget through the Final Completion Date that have not been requested in a previous Advance Request and (v) 120% of the amount of any disputed claims with contractors or vendors in respect of costs under the Resort Budget (the sum of these amounts being the "Resort Request to Final Completion").

**2.14 Shared Cost to Final Completion Allocation Report.** The Shared Cost to Final Completion Allocation Report shall calculate the amount of the Retail Lenders Shared Cost Commitment which has not been funded prior to the Completion Reserve Calculation Date.

**2.15 Available Sources to Final Completion Report.** The Available Sources to Final Completion Report shall detail the funds which are available to satisfy the Retail Request to Final Completion and the Resort Request to Final Completion.

In the Available Sources to Final Completion Report:

- (a) the balance of the Cash Management Account shall be adjusted to

reflect any checks or other outstanding items with respect thereto; and

(b) the balances of the Retail Payment Account, the Resort Payment Account and the Interest Account shall be adjusted to reflect any payments to be made from these Accounts pursuant to any previously submitted Advance Request.

The "Available Retail Sources to Final Completion" and the "Available Resort Sources to Final Completion" are the amounts reflected in the Available Sources to Final Completion Report in the appropriate rows in the column headed the "Balance."

**2.16 Funding Order to Final Completion Report.** The Funding Order to Final Completion Report shall detail the order in which the funds described in the relevant Current Available Sources Report will be applied to satisfy the Resort Request to Final Completion and the Retail Request to Final Completion. It is agreed that:

2.16.1 the Available Retail Sources to Final Completion shall be applied to the payment of the Retail Request to Final Completion in the following order of priority and in each case until the relevant Retail Source is Exhausted:

- (a) First from funds then on deposit in the Retail Loss Proceeds Account;
- (b) then from funds then on deposit in the Retail Payment Account; and
- (c) then from amounts available to be drawn under the Retail Facility.

2.16.2 the Available Resort Sources to Final Completion shall be applied to the Resort Request to Final Completion by applying the following order of priority and in each case until the relevant Resort Source is Exhausted (except to the extent otherwise limited below):

- (a) First from funding required under the Retail Lenders Shared Cost Commitment (as calculated in the Shared Cost to Final Completion Allocation Report);
- (b) then from funds then on deposit in the Resort Loss Proceeds Account;
- (c) then from the Resort Payment Account (including interest income);
- (d) then from funds then on deposit in the Interest Account;
- (e) then from funds then on deposit in the Liquidity Account, but only to the extent that the balance thereof exceeds \$50,000,000;
- (f) then from funds then on deposit in the Bonded Condo Proceeds

Account;

(g) then from funds then on deposit in the Equity Funding Account;

(h) then from funds then on deposit in the Second Mortgage Proceeds Account;

(i) then from funds on deposit in the Bank Proceeds Account;

(j) then from funds available to be drawn under the Bank Credit Facility, until the aggregate amount of the Bank Revolving Availability has been reduced to \$55,000,000 (the aggregate amount required pursuant to this clause (h), is the "Bank Revolving Facility Completion Reserve Amount" on the Completion Reserve Calculation Date);

(k) then from the balance of the Cash Management Account net of any checks or other outstanding items with respect thereto; and

(l) then from the making of draws under the Completion Guaranties, from the Liquidity Account and from the remainder of the Bank Credit Facility (as described below):

(A) To the extent that the Resort Request to Final Completion is fully satisfied by application of amounts available pursuant to clauses (a) through (g), then the Liquidity Account shall thereafter be made available to fund Debt Service which accrues following the Opening Date or applied to the payment of Revolving Loans to the extent permitted by Section 7.24 of the Bank Credit Agreement.

(B) To the extent that the Resort Request to Final Completion is **not** fully satisfied by application of amounts available pursuant to clauses (a) through (i), then:

(i) the amount of any Debt Service which is included in the remaining amount of the Resort Request to Final Completion shall be immediately transferred from the Liquidity Account to the Interest Account and reserved for the payment of such Debt Service;

(ii) following the transfer described in clause (B)(i), any remaining portion of the Resort Request to Final Completion shall thereafter be satisfied from the making of draws under the Completion Guaranties;

(iii) following the exhaustion of the amount available under the Completion Guaranties, any remaining portion of the Resort Request to Final Completion shall thereafter be satisfied

from the remaining balance of the Liquidity Account (the amounts described in clause (i) above and this clause (iii) being the "Liquidity Account Remainder"); and

(iv) finally, to the extent that any portion of the Resort Request to Final Completion remains after steps (i), (ii) and (iii), such remainder shall be satisfied from the remainder of the funds available to be drawn under the Bank Credit Facility (any amount determined pursuant to this clause (iv), rounded upwards to the nearest increment of \$1,000,000, is the "Residual Bank Revolving Facility Completion Reserve Amount" on the Completion Reserve Calculation Date).

Except to the extent of any Liquidity Account Remainder, the Companies shall thereafter be entitled to apply any remaining balances in the Liquidity Account to the payment of Debt Service accruing following the Opening Date (or, to the extent permitted by Section 7.24 of the Bank Credit Agreement, to prepay Revolving Loans under the Bank Credit Agreement).

[Sections 2.17 through 2.20 intentionally reserved]

## 2.21 **Opening Date Procedures.**

2.21.1 The Opening Date Certificates. Immediately prior to the Opening Date, the Project Entities shall deliver to the Construction Consultant, the Disbursement Agent, and each Funding Agent the Project Entities Opening Date Certificate indicating the date upon which the Project Entities believe the conditions to the Opening Date will be satisfied and appropriately completed and duly executed by a Responsible Officer of the Project Entities with all attachments thereto (including the reports required by Section 2.12, a Remaining Cost Report and the Opening Certificates of the Architect and the General Contractor).

2.21.2 The Bank Revolving Facility Completion Reserve Amount and the Residual Bank Revolving Facility Completion Reserve Amount. In the event that the Disbursement Agent or the Construction Consultant discovers any errors in the Project Entities Opening Certificate or its attachments, the Disbursement Agent or Construction Consultant, as appropriate, shall request that the Project Entities revise and resubmit the certificate. Promptly after receipt of a final and correct Project Entities Opening Certificate, the Construction Consultant shall deliver to the Disbursement Agent, each Funding Agent and the Project Entities, the Construction Consultant Opening Certificate. On the basis of the Opening Date Certificates, and in consultation with the Construction Consultant, the Bank Revolving Facility Completion Reserve Amount and the Residual Bank Revolving Facility Completion Reserve Amount shall be determined in accordance with Section 2.16.2, and shall notify the Disbursement Agent and the

Project Entities thereof.

2.21.3 Application of Completion Reserve Amount, Bank Revolving Facility Completion Reserve Amount and Residual Bank Revolving Facility Completion Reserve Amount - Direct Advances under the Credit Agreement. Following the Opening Date:

(a) The Borrowers shall be entitled to request Loans, Letters of Credit and other credit accommodations under the Bank Credit Agreement for working capital needs (other than Project Costs) directly from the Bank Agent, and the Lenders under the Bank Credit Agreement shall make such advances directly to the Borrowers, subject to the terms and conditions set forth in the Bank Credit Agreement (without the requirement that the proceeds thereof be funded to the Disbursement Agent and without satisfaction of the conditions set forth herein), *provided* that the Bank Revolving Facility Completion Reserve Amount and Residual Bank Revolving Facility Completion Reserve Amount shall be reserved from the amounts otherwise available for drawing under the Bank Credit Agreement, and shall be used to fund Project Costs through the disbursement program established by this Agreement.

(b) Each Resort Request shall be satisfied by the application of the amounts contained in the various Accounts and from the Bank Revolving Facility Reserve Amount, the Completion Guaranties, the Liquidity Account Remainder and the Residual Bank Revolving Facility Reserve Amount in the order described in the Funding Order Report described in Section 2.10.2 and in each case shall diminish the same.

## 2.22 Completion Date Procedures.

2.22.1 Immediately prior to the Completion Date, the Project Entities shall deliver to the Construction Consultant, the Disbursement Agent, and each Funding Agent the Project Entities Completion Certificate appropriately completed and duly executed by a Responsible Officer of the Project Entities with all attachments thereto. The Project Entities Completion Certificate shall indicate the date the Project Entities believe the conditions to Completion will be satisfied, shall include the Completion Certificates of the Architect and the General Contractor, and shall set forth all other information required thereby.

2.22.2 In the event that the Disbursement Agent or the Construction Consultant discovers any errors in the Project Entities Completion Certificate, the Disbursement Agent or Construction Consultant, as appropriate, shall request that the Project Entities revise and resubmit the certificate. Promptly after receipt of a final and correct Project Entities Completion Certificate, the Construction Consultant shall deliver to the Disbursement Agent, each Funding Agent and the Project Entities, the Construction Consultant Completion Certificate.



2.22.3 Promptly after receipt by the Disbursement Agent of the Construction Consultant Completion Certificate, the Disbursement Agent shall, subject to its determination that each of the applicable conditions to the Completion Date has been satisfied, countersign the Project Entities Completion Certificate and forward it to each of the Funding Agents. The Disbursement Agent may rely on the certifications set forth in the Completion Certificates in determining whether the Completion Date has occurred. The Completion Date shall be deemed to occur on the date the Disbursement Agent countersigns the Project Entities Completion Certificate.

**2.23 Final Completion Date Procedures.**

2.23.1 Immediately prior to the Final Completion Date, the Project Entities shall deliver to the Construction Consultant, the Disbursement Agent, and each Funding Agent the Project Entities Final Completion Certificate appropriately completed and duly executed by a Responsible Officer of the Project Entities with all attachments thereto. The Project Entities Final Completion Certificate shall indicate the date the Project Entities believe the conditions to Final Completion will be satisfied, shall include the Final Completion Certificates of the Architect and the General Contractor, and shall set forth all other information required thereby.

2.23.2 In the event that the Disbursement Agent or the Construction Consultant discovers any errors in the Project Entities Final Completion Certificate, the Disbursement Agent or Construction Consultant, as appropriate, shall request that the Project Entities revise and resubmit the certificate. Promptly after receipt of a final and correct Project Entities Final Completion Certificate, the Construction Consultant shall deliver to the Disbursement Agent, each Funding Agent and the Project Entities, the Construction Consultant Final Completion Certificate.

2.23.3 Promptly after receipt by the Disbursement Agent of the Construction Consultant Final Completion Certificate, the Disbursement Agent shall, in the following order:

- (a) subject to its determination that each of the applicable conditions to the Final Completion Date has been satisfied, countersign the Project Entities Final Completion Certificate and forward it to each of the Funding Agents.
- (b) release to the Retail Affiliate any amounts then contained in the Retail Funding Account and the Retail Payment Account;
- (c) release to the Borrowers all other amounts on deposit in the Resort Accounts (other than the Completion Guaranty Proceeds Account and the Liquidity Account), and terminate the Control Agreements with respect to such Accounts. Thereafter, the Liquidity Account shall remain subject to

the Control Agreements in favor of the Bank Agent and the Trustee contemplated by this Agreement, however funds in the Liquidity Account shall be released therefrom in the manner contemplated by Section 7.24 of the Bank Credit Agreement; and

(d) deliver to each Completion Guarantor a written release of its Completion Guaranty and release any Cash Support to the relevant Completion Guarantor (in each case, subject to the proviso in clause (h) of the definition of "Final Completion Date").

The Final Completion Date shall be deemed to occur on the date the Disbursement Agent countersigns the Project Entities Completion Certificate. The Disbursement Agent may rely on the certifications set forth in the Final Completion Certificates in determining whether the Final Completion Date has occurred.

**2.24 No Approval of Work.** The making of any Advance shall not be deemed an approval or acceptance by the Disbursement Agent, any Funding Agent, any Lender or the Construction Consultant (except to the extent set forth in the Construction Consultant Engagement Agreement, and then only for the benefit of the Lenders) of any work, labor, supplies, materials or equipment furnished or supplied with respect to the Project.

**2.25 Security.** The Obligations shall be secured by the Project Security in accordance with the Security Documents. Further, all funds advanced by the Bank Lenders or the Retail Lenders to complete the Project or to protect the rights and interests of the Secured Parties under the Financing Agreements are deemed to be obligatory advances and are to be added to the total indebtedness secured by the Bank Deed of Trust or the deed of trust or other security documents executed in connection with the Retail Facility (the "Retail Security Documents"), as applicable. All sums so advanced by the Bank Lenders shall be secured by the Bank Deed of Trust and all sums so advanced by the Retail Lenders shall be secured by the Retail Security Documents, in each case with the same priority of lien as the security for any other obligations secured thereunder.

### ARTICLE 3

#### CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES

**3.1 Conditions Precedent to the Closing Date.** The occurrence of the Closing Date is subject to the prior satisfaction of each of the conditions precedent hereinafter set forth in this Section 3.1 in form and substance satisfactory to each of the Funding Agents (or, in the case of the Trustee, Banc of America Securities LLC, as Representative), each in its sole discretion. It is acknowledged that the Representative has been appointed as the representative of the initial purchasers of the Second Mortgage Notes for the purpose of determining the satisfaction of the conditions set forth in this Section 3.1, and that the Trustee shall have no responsibility for determining the satisfaction of the conditions set forth in this Section. Subject to the preceding sentence, by executing this Agreement and by executing its respective Facility Agreement or

making its initial Advances thereunder (or, in the case of the Representative, by the purchase of the Second Mortgage Notes by the Representative), each of the Funding Agents (or, in the case of the Trustee, Banc of America Securities LLC, as Representative) shall be deemed to have confirmed that it has become satisfied that each of the following conditions precedent applicable to its Facility in this Section 3.1 has been satisfied.

3.1.1 Financing Agreements and Material Contracts. Delivery to each of the Funding Agents and the Disbursement Agent of (a) executed originals of each Financing Agreement which is required to be delivered on the Closing Date (collectively, the "Closing Financing Agreements"), (b) true and correct copies of each Material Contract then in effect and any supplements or amendments thereto then in effect, all of which shall be in form and substance satisfactory to each of the Funding Agents, shall have been duly authorized, executed and delivered by the parties thereto, certified by a Responsible Officer of the Project Entities as of the Closing Date as being true, complete and correct and in full force and effect, and (c) evidence satisfactory to each of the Funding Agents that each such Material Contract and each such Closing Financing Agreement is in full force and effect and that no party to any such Material Contract or Closing Financing Agreement is or, but for the passage of time or giving of notice or both will be, in breach of any obligation thereunder.

3.1.2 Authority of the Loan Parties. Delivery to each of the Funding Agents and the Disbursement Agent of (a) a certified copy of the Articles of Incorporation, Certificates of Formation or other similar formation documents of the each of the Loan Parties, (b) good standing certificates for each of the Loan Parties issued by the state of incorporation or organization, (c) a certified copy of the bylaws or a copy of the Operating Agreement of each of the Loan Parties, certified by the Secretary or a Responsible Officer of each such Loan Party, and (d) resolutions or other authorizations of the Loan Parties certified by the Secretary or a Responsible Officer of each such Loan Party acceptable to the Funding Agents.

3.1.3 Incumbency of the Loan Parties. Delivery to the Funding Agents of an incumbency certificate from each of the Loan Parties.

3.1.4 Other Parties. Delivery to each of the Funding Agents and the Disbursement Agent of (i) a certified copy of the articles of incorporation and bylaws of the General Contractor; (ii) a certificate of the Nevada Secretary of State to the effect that the General Contractor is in good standing in Nevada; (iii) a fully executed certificate as to the incumbency of the Persons authorized to execute and deliver on behalf of the General Contractor the Operative Documents and any other instruments or agreements contemplated hereby to which the General Contractor is a party; (iv) certified resolution authorizing the execution and delivery by the General Contractor of the Operative Documents to which such entity is a party; (v) an incumbency certificate setting forth specimen signatures of each individual authorized to execute certifications hereunder on behalf of the General Contractor; and (vi) an incumbency certificate setting forth

specimen signatures of each individual authorized to execute certifications hereunder on behalf of the Architect.

3.1.5 Closing Certificates. Delivery to each of the Funding Agents and the Disbursement Agent of the Project Entity Closing Certificate, the Construction Consultant Closing Certificate and the Insurance Advisor Closing Certificate, substantially in the forms of Exhibits B-1, B-2 and B-3 (certifying that insurance complying with the requirements of Exhibit D shall be in place and in full force and effect).

3.1.6 Insurance Brokers' Insurance Certificates. Delivery to each of the Funding Agents and the Disbursement Agent of certified copies of all policies evidencing insurance (or a binder, commitment or certificates signed by the insurer or a broker authorized to bind the insurer along with a commitment to deliver certified copies of the policies within 45 days after the Closing Date) meeting the requirements of Exhibit D.

3.1.7 Project Security. All actions necessary or desirable, including all filings, in the opinion of the Funding Agents party thereto to perfect the security interests granted in the Security Documents having the priority contemplated therefor by this Agreement, the Intercreditor Agreements and the Security Documents shall have been taken or made.

3.1.8 Opinions. Each of the Funding Agents and the Disbursement Agent shall have received legal opinions addressed to them of Buchanan, Ingersoll & Rooney, PC and Snell and Wilmer L.L.P.

3.1.9 Construction Consultant Report. The Funding Agents and the Representative shall have received the Construction Consultant Report in a form which is acceptable to them.

3.1.10 Fees. All amounts required to be paid to or deposited with the Funding Agents, the Disbursement Agent and the Construction Consultant and all taxes, fees and other costs payable in connection with the execution, delivery, recordation and filing of the documents and instruments referred to in this Section 3.1, shall have been paid or deposited, as the case may be, in full. The Project Entities shall have paid or arranged for payment out of the requested Advance of all fees, expenses and other charges then due and payable by it under this Agreement or other Financing Agreements or under any agreements between the Project Entities and the Construction Consultant.

3.1.11 Budgets. The Budgets shall be acceptable to each of the Funding Agents.

3.1.12 Control Agreements. The Project Entities shall have executed the Control Agreements in respect of the Accounts in favor of the Pledges referred to in Section 2.2.

3.1.13 Project Schedule. The Project Schedule attached hereto as Exhibit F shall be acceptable to each of the Funding Agents.

3.1.14 Financial Statements. Delivery to the Disbursement Agent and the Funding Agents of:

- (a) the audited consolidated and consolidating financial statements of Parent as of December 31, 2005 and as of December 31, 2006 and for the fiscal years then ended;
- (b) the audited consolidated financial statements of Las Vegas Holdings and its Subsidiaries as of December 31, 2005 and as of December 31, 2006 and for the fiscal years then ended;
- (c) a pro forma consolidated balance sheet of Las Vegas Holdings and its Subsidiaries as of the Closing Date (and giving effect to the transactions contemplated to occur on the Closing Date);
- (d) the audited consolidated financial statements of Turnberry Residential as of December 31, 2006 and for the fiscal year then ended; and
- (e) certificates of a Responsible Officer of Parent, Las Vegas Holdings and Turnberry Residential certifying such financial statements and, in the case of Parent and Las Vegas Holdings, stating that no Material Adverse Effect has occurred since December 31, 2006.

Each audit shall be unqualified and otherwise acceptable to the Disbursement Agent and the Funding Agents.

3.1.15 Material Adverse Effect. Since December 31, 2006, there shall not have occurred any Material Adverse Effect.

3.1.16 Permits.

- (a) All Permits described in Exhibit G as required to have been obtained by the Project Entities or any other Person by the Closing Date shall have been issued and be in full force and effect and not subject to current legal proceedings or to any unsatisfied conditions (that are required to be satisfied by the Closing Date) that could reasonably be expected to materially adversely modify any Permit, to revoke any Permit, to restrain or prevent the construction or operation of the Project or otherwise impose adverse conditions on the Project or the financing contemplated under the Financing Agreements and all applicable appeal periods with respect thereto shall have expired; and
- (b) With respect to any of the Permits described in Exhibit G as not

yet required to be obtained (other than gaming and liquor license and findings of suitability to own an interest in a licensee), (i) each such Permit is of a type that is routinely granted on application and compliance with the conditions for issuance and (ii) no facts or circumstances exist which indicate that any such Permit will not be timely obtainable without undue expense or delay by the Project Entities or the applicable Person, respectively, prior to the time that it becomes required.

3.1.17 Third Party Consents. Delivery to the Disbursement Agent and each of the Funding Agents of Consents from (a) General Contractor, and (b) Architect; each in form of Exhibit H or otherwise in form and substance satisfactory to the Funding Agents.

3.1.18 Representations and Warranties. Each representation and warranty of:

- (a) each Project Entity set forth in Article 4 or in any of the other Operative Documents shall be true and correct in all material respects; and
- (b) to the Project Entities' knowledge, each Major Project Participant (other than any Project Entity) set forth in any of the Operative Documents shall be true and correct in all material respects (except that any representation and warranty that relates expressly to an earlier date shall be deemed made only as of such earlier date) unless the failure of any such representation and warranty referred to in this clause (b) to be true and correct could not reasonably be expected to have a Material Adverse Effect, in each case, as certified by the Project Entities in the Project Entities Closing Certificate.

3.1.19 Utility Availability. The Construction Consultant shall have become satisfied that arrangements for the provision of all utilities necessary for the construction, operation and maintenance of the Project as contemplated by the Operative Documents and the Final Plans and Specifications shall have been or will be made under the Material Contracts or otherwise on commercially reasonable terms.

3.1.20 Flow of Funds. Each of the transactions contemplated by the Flow of Funds Memo shall be concurrently consummated.

3.1.21 Completion Guaranty Letter of Credit. Turnberry Residential shall have caused the delivery to the Disbursement Agent of a letter of credit in the amount of \$50,000,000 supporting payments under its Completion Guaranty in a form, and by an issuing financial institution, which is acceptable to the Disbursement Agent, the Bank Agent and the Representative.

3.1.22 ALTA Survey. The Disbursement Agent and each of the Funding Agents shall have received an ALTA survey of the Site and the Site Easements with (i) an overlay showing the locations of the Retail Air Space Parcels, and

(ii) an overlay showing the proposed perimeters within which all of the foundations for the Project are to be located pursuant to the Plans and Specifications, in each case satisfactory in form and substance to the Title Insurer and each of the Funding Agents.

3.1.23 Title Policies. The Project Entities shall have delivered to (a) the Bank Agent, a lender's ALTA policy of title insurance, or a commitment to issue such policy, in the amount of \$1,850,000,000, (b) the Trustee, a lender's ALTA policy of title insurance, or a commitment to issue such policy, in the amount of \$675,000,000, and (c) the Retail Agent a lender's ALTA policy of title insurance, or a commitment to issue such policy, in the amount of \$315,000,000, in each case (i) with exceptions to coverage as are acceptable to the Bank Agent and the Representative, (ii) with such endorsements as are required by the beneficiary of such policy, (iii) with such reinsurance as is satisfactory to such beneficiary, and (iv) issued by Title Insurer in form and substance satisfactory to such beneficiary.

3.1.24 Fee Letters. Letters regarding the fees of the Funding Agents, the Disbursement Agent and the Construction Consultant, shall have been executed and delivered and the Project Entities shall have complied with all of their obligations thereunder then required to be complied with.

3.1.25 Plans and Specifications. The Project Entities shall have delivered to the Construction Consultant Plans and Specifications in form and substance satisfactory to the Construction Consultant, as certified to in the Construction Consultant Closing Certificate.

3.1.26 Corporation and Capital Structure; Management. The corporate organization structure, capital structure and ownership of the Project Entities and Turnberry Residential shall be satisfactory to each of the Funding Agents.

3.1.27 Real Estate Appraisals. Each of the Funding Agents (other than the Retail Agent) and the Disbursement Agent shall have received a FIRREA appraisal of the Site from an independent real estate appraiser reasonably satisfactory to them, in form, scope and substance satisfactory to them, satisfying the requirements of any applicable laws and regulations, and showing projected gross sales revenues (less costs of sales) of not less \$727,000,000 for the Condo Units.

3.1.28 Environmental Reports. Each of the Funding Agents and the Disbursement Agent shall have received the Phase I Report.

3.1.29 In Balance Requirement. The In Balance Test shall be satisfied.

3.1.30 No Restrictions. No order, judgment or decree of any court, arbitrator or governmental authority shall purport to enjoin or restrain any of the Lenders from making the Advances to be made by them on the Closing Date.

3.1.31 Due Diligence. The Lenders shall have completed their due diligence review of each Loan Party and Turnberry Residential and their respective affiliates and operations, and shall be satisfied with the results thereof.

3.1.32 Acceptable Rating. On or before the Closing Date, the Companies shall have obtained a rating of the Companies' long term, senior debt securities by a "nationally recognized statistical rating organization" (as such term is defined by the Securities and Exchange Commission for purposes of Rule 436(g)(2) under the Securities Act of 1933, as amended) that is satisfactory to the Bank Lenders and the Representative.

3.1.33 Construction Arrangements. The Project Entities shall have entered into contracts and other arrangements for the development, equipage and construction of the Project that have been approved in all respects by the Construction Consultant and the Funding Agents. Without limitation on the foregoing, the Prime Construction Agreement shall have been collaterally assigned to the Bank Agent and the Trustee, and Contractors acceptable to the Bank Agent shall have provided fixed price or guaranteed maximum price contracts in respect of not less than 60% of the Total Hard Costs. In addition, the Project Entities shall have delivered to the Construction Consultant, the Bank Agent and the Disbursement Agent, in respect of each of the Contractors identified on Exhibit W, either (a) a Payment and Performance Bond or, where acceptable to the Disbursement Agent, a guaranty of the corporate parent of such Contractor of its performance under its contract, or (b) letters in form and substance acceptable to the Construction Consultant and the Funding Agents issued by (i) bonding companies acceptable to the Disbursement Agent in consultation with the Construction Consultant to the effect that each such Contractor has applied for a Payment and Performance Bond with such bonding company and indicating the amount of the Payment and Performance Bond applied for and (ii) from such Contractor agreeing to promptly provide a Payment and Performance Bond.

3.1.34 Retail Arrangements. The Borrowers and the Retail Affiliate shall have entered into the Reciprocal Easement Agreement and the Retail Air Space Lease.

3.1.35 Tax Analysis. The Companies shall have delivered to the Bank Agent and the Representative an analysis memo prepared by their tax counsel, based upon financial and tax information provided by the Companies, validating the Companies' conclusion that no federal income taxes will become due by reason of the sale of the Condo Units, in a form acceptable to the Bank Agent and the Representative.

3.2 **Equity Advances**. Notwithstanding any other provision hereof to the contrary, prior to the date of the initial disbursement of funds from the Second Mortgage Proceeds Account, the Disbursement Agent shall make Advances from the Equity Funding Account at the written direction of the Companies without conditions.



**3.3 Conditions Precedent to Advances by the Trustee and the Bank Agent.** The obligation (a) of the Trustee to make Advances from the Second Mortgage Proceeds Account to the Second Mortgage Funding Account, and (b) of the Bank Agent to make Advances from the Bank Proceeds Account are each subject to the prior satisfaction of each of the conditions precedent set forth in this Section 3.3:

**3.3.1 Certain Operative Documents.**

(a) Each Material Contract shall be in full force and effect except (i) for amendments to Material Contracts not prohibited by Section 6.1 or by the Financing Agreements, (ii) to the extent the Project Entities have entered into a replacement Material Contract to the extent required or permitted by Section 7.1.6, and (iii) to the extent terminated in accordance with their respective terms; and

(b) Each Financing Agreement shall be in full force and effect, without amendment since the date of its execution and delivery, and in a form which was provided to the Bank Agent and the Trustee prior to the Closing Date, except for amendments to the Financing Agreements to the extent permitted under the Facility Agreements or to the extent terminated in accordance with their respective terms.

**3.3.2 Representations and Warranties.** Each representation and warranty of:

(a) Each Project Entity set forth in Article 4 or in any Material Contract shall be true and correct in all material respects as if made on such date (except that any representation and warranty that relates expressly to an earlier date shall be deemed made only as of such earlier date), unless, with respect to any Advance prior to the Initial Bank Advance Date, the failure of any such representation and warranty referred to in this clause (a) to be true and correct could not reasonably be expected to result in a Material Adverse Effect; and

(b) To the Project Entities' knowledge, each Major Project Participant (other than any Project Entity) set forth in any of the Material Contracts shall be true and correct in all material respects as if made on such date (except that any representation and warranty that relates expressly to an earlier date shall be deemed made only as of such earlier date) unless the failure of any such representation and warranty referred to in this clause (b) to be true and correct could not reasonably be expected to result in a Material Adverse Effect, in each case, as certified by the Project Entities in the relevant Advance Request.

**3.3.3 Default.** No Default or Event of Default shall have occurred and be continuing.

**3.3.4 Advance Request and Advance Confirmation Notice.**

(a) Delivery to the Disbursement Agent, each Funding Agent and the Construction Consultant of an Advance Request, together with all then required attachments, exhibits and certificates. Such Advance Request shall request an Advance in an amount sufficient to pay all amounts due and payable for work performed on the Project through the last day of the period covered by such Advance Request and sufficient to pay the amounts required by Section 2.4.2.

(b) Delivery to the Funding Agents of an executed Advance Confirmation Notice, *provided* that the Trustee shall not receive copies of the Advance Confirmation Notices following the Exhaustion of the Second Mortgage Proceeds Account.

3.3.5 Consultant Certificates and Reports. Delivery to each of the applicable Funding Agents and the Disbursement Agent, of (a) the Construction Consultant Advance Certificate approving the corresponding Advance Request, and (b) the Architect's Advance Certificate with respect to the Advance, and (c) the General Contractor Advance Certificate with respect to the Advance.

3.3.6 As-Built Survey. At the time of the first Advance Request occurring more than 45 days after completion of the foundation work for each phase of the Project, the Project Entities shall cause an updated as-built survey to be delivered to the Construction Consultant and the Disbursement Agent satisfactory in form and substance to the Title Insurer and the Bank Agent.

3.3.7 Project Security. All of the Security Documents shall continue to be in full force and effect and all actions necessary or desirable (including all filings) to perfect the security interests granted therein as a valid security interest over the Project Security thereunder having the priority contemplated therefor by this Agreement and the Security Documents shall have been taken or made. All property, rights and assets required for the Project shall be free and clear of all encumbrances except for Permitted Liens.

3.3.8 In Balance Requirement. The Project Entities shall have submitted an In Balance Report demonstrating that the In Balance Test is satisfied.

3.3.9 No Restriction. No order, judgment or decree of any court, arbitrator or governmental authority shall purport to enjoin or restrain the Bank Lenders or the Trustee from making the Advances to be made by them on the requested Advance Date.

3.3.10 Violation of Law. The making of the requested Advance shall not violate any law.

3.3.11 Material Adverse Effect. Since the Closing Date, there shall not have occurred any change in the economics or feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the

Project Entities, any of which could reasonably be expected to have a Material Adverse Effect.

3.3.12 No Suspension of Performance. Construction of the Project is proceeding materially in accordance with the Project Schedule and the plans and specifications for the Project (including any Final Plans and Specifications then delivered) and no Major Project Participant or first tier Subcontractor under the Prime Construction Agreement or party to a Subcontract with a total contract amount or value in excess of \$25,000,000 has suspended performance or otherwise repudiated its obligation to perform any duty or obligation under its respective Material Contract or Subcontract (unless such suspended or repudiated Material Contract or Subcontract is permitted to be, and actually has been, replaced, or a replacement is determined not to be necessary, pursuant to Section 7.1.5 or Section 7.1.6).

3.3.13 Funding of Equity. Solely with respect to the initial Advance of funds from the Second Mortgage Proceeds Account, the entire amount of the Equity Proceeds Account has been, or shall concurrently be, applied to the payment of Project Costs.

3.3.14 Updated Consultant Certificates and Reports. Solely with respect to the initial Advance of funds from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, each of the Funding Agents and the Disbursement Agent shall have received an updated Construction Consultant Report which is consistent with the Construction Consultant Engagement Agreement and in form and substance satisfactory to the Bank Agent which will address (i) construction progress for the period from the Closing Date through the Initial Bank Advance Date and (ii) the Final Plans and Specifications that have been completed through such period to the extent not theretofore delivered.

3.3.15 Subcontracts.

(a) Solely with respect to the initial Advance of funds from the Second Mortgage Proceeds Account (other than any Advance made solely to pay interest on the Second Mortgage Notes), there shall be in place fixed price or guaranteed maximum price Contracts with Subcontractors in respect of 75% of the Total Hard Costs.

(b) Solely with respect to the first Advance which occurs following October 1, 2007, there shall be in place fixed price or guaranteed maximum price Contracts with Subcontractors in respect of 85% of the Total Hard Costs.

(c) Solely with respect to the Initial Bank Advance Date, there shall be in place (i) fixed price or guaranteed maximum price Contracts with Subcontractors in respect of 95% of the Total Hard Costs, and (ii) fixed

price contracts in respect of not less than 50% of the Costed FF&E.

(d) In each case specified in clauses (a) through (c) above, the Project Entities shall have certified in the Project Entities' Advance Certificate that such Subcontracts and Contracts are consistent with the Resort Budget, the Project Schedule and the plans and specifications for the Project then in effect.

(e) In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Project Entities shall have delivered a copy of (i) each Contract or series of related Contracts with the same Person entered into between the Project Entities and any Contractor with a contract price (or expected aggregate amount to be paid in the case of "cost plus" contracts) in excess of \$25,000,000, (ii) each first tier Subcontract with a contract price (or expected aggregate amount to be paid in the case of "cost plus" contracts) in excess of \$25,000,000 (or any or series of related Contracts with the same person), and (iii) a copy of any Payment and Performance Bond required pursuant to Section 5.8 to the Disbursement Agent, the Construction Consultant and Bank Agent promptly after mutual execution and delivery thereof.

3.3.16 Liens. In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Project Entities shall have delivered to the Disbursement Agent an updated lien release summary chart substantially in the form of Appendix 11 to the Advance Request and duly executed acknowledgments of payments and releases of mechanics' and materialmen's liens substantially in the form of Exhibit I (with modifications required by Nevada law) from the required Contractors described below for all work, services and materials, including equipment and fixtures of all kinds, done, performed or furnished for the construction of the Project from the last day covered by the immediately preceding Advance Request through the last day covered by the current Advance Request except for such work, services and materials the payment for which does not exceed, in the aggregate \$50,000,000 and is being disputed in good faith pursuant to NRS Chapter 624, so long as (1) such proceedings shall not involve any substantial danger of the sale, forfeiture or loss of the Project or the Site, as the case may be, title thereto or any interest therein and shall not interfere in any material respect with the Project or the Site, and (2) adequate cash reserves have been provided therefor through an allocation in the relevant Remaining Cost Report. The Contractors required to provide such lien releases are those party to a Contract with a Project Entity and each of such direct Contractor's first tier trade subcontractors and materialmen, in each case performing work with a contract price (or expected aggregate amount to be paid in the case of "cost-plus" Contracts) in excess of \$500,000.

Notwithstanding the foregoing, if the Project Entities or any Contractor do not

obtain any of the waivers and releases of liens required under the foregoing provisions of this Section 3.3.16 (collectively, "Outstanding Releases"), then instead of delivering such Outstanding Releases and as a condition to any progress or other payment from the proceeds of the requested Advance, the Project Entities may obtain and provide to the Disbursement Agent from the Title Insurer bonds or endorsements to the title insurance policies insuring the lien free status of the work; provided, however, that at no time shall the aggregate of all Outstanding Releases represent work with an aggregate value in excess of \$50,000,000.

3.3.17 Title Policy Endorsements. The Disbursement Agent shall have received a commitment from the Title Insurer, attached to the Advance Request, evidencing the Title Insurer's unconditional commitment to issue an endorsement to the Bank Agent's and/or Trustee's Title Policy in the form of a 122 CLTA Endorsement insuring the continuing priority of the Lien of its Deed of Trust as security for the requested Advance and confirming and/or insuring that there are no intervening liens or encumbrances which may then or thereafter take priority over the Lien of such Deed of Trust other than (i) Permitted Encumbrances, (ii) such intervening liens or encumbrances securing amounts the payment of which is being disputed in good faith by the Borrowers pursuant to NRS Chapter 624, so long as (A) in the case of disbursements from the Second Mortgage Notes Proceeds Account, the Company has certified that the Title Insurer has delivered to the Trustee an endorsement to its title policy to assure against loss due to the priority of such lien or encumbrance or (B) in the case of Advances under the Bank Credit Facility, the Disbursement Agent has received confirmation from the Bank Agent that the Title Insurer has delivered to the Bank Agent any endorsement to its Title Policy required or desirable to assure against loss due to the priority of such lien or encumbrance, and (iii) Permitted Mechanics Liens.

3.3.18 [Intentionally Omitted].

3.3.19 Plans and Specifications. In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Construction Consultant shall to the extent set forth in the Construction Consultant Advance Certificate have approved all Plans and Specifications which, as of the date of the relevant Advance Request, constitute Final Plans and Specifications to the extent not theretofore approved.

3.3.20 Litigation. In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, no action, suit, proceeding or investigation of any kind shall have been instituted or, to the Project Entities' knowledge, pending or threatened, including actions or proceedings of or before any Governmental Authority, to which any Project Entity, the Project or, to the knowledge of the Project Entities, any Major Project Participant (other than any Project Entity), is a party or is subject, or by which any of them or any of their properties or the Project are bound that could

reasonably be expected to have a Material Adverse Effect nor are the Project Entities aware of any reasonable basis for any such action, suit, proceeding or investigation and no injunction or other restraining order shall have been issued and no hearing to cause an injunction or other restraining order to be issued shall be pending or noticed with respect to any action, suit or proceeding if the same could reasonably be expected to have a Material Adverse Effect.

3.3.21 Adverse Information. In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Bank Agent shall not have become aware after the date hereof of any information or other matter affecting any Loan Party, Turnberry Residential, the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole.

3.3.22 Unincorporated Materials. In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, delivery to the Disbursement Agent and the Construction Consultant of a written inventory substantially in the form of Appendix 13 to the Advance Request (but in any event with such changes as are reasonably acceptable to the Disbursement Agent) identifying all Unincorporated Materials and stating the value thereof, together with evidence reasonably satisfactory to the Construction Consultant and the Disbursement Agent that the following conditions have been satisfied:

- (a) all Unincorporated Materials for which full payment has previously been made or is being made with the proceeds of the Advance to be disbursed are, or will be upon full payment, owned by the Project Entities, as evidenced by the bills of sale, certificates of title or other evidence reasonably satisfactory to the Construction Consultant, and all lien rights or claims of the supplier have been or will be released simultaneously with such full payment and all amounts, if any, required to be paid to the supplier thereof with respect to the installation of such Unincorporated Materials (including any Retainage Amounts);
- (b) the Project Entities believe that the Unincorporated Materials consist of components that conform to the Plans and Specifications and that will be ready for incorporation into the Project reasonably promptly following delivery thereof;
- (c) all Unincorporated Materials are properly inventoried, securely stored, protected against theft and damage at the Site or at such other location which has been specifically identified by its address to the Construction Consultant and the Disbursement Agent (or if the Project Entities cannot provide the address of the current storage location, the Project Entities shall list the name and address of the applicable

contracting party supplying or manufacturing such Unincorporated Materials);

(d) with respect to any Unincorporated Materials as to which deposit or other partial payments have been made or will be made out of the requested Advance (but which have not been and will not be fully paid after giving effect to the requested Advance), the Project Secured Parties have, or will have upon payment with the proceeds of the requested Advance, a perfected security interest in the Project Entities' rights to the Unincorporated Materials and the Contracts therefor, with the priority therein contemplated by the Security Documents;

(e) with respect to (i) Unincorporated Materials not stored at the Site from a single or Affiliated suppliers (of which the Project Entities are aware that such suppliers is an Affiliate) with a contract price (or expected aggregate amount to be paid in the case of "cost-plus" Contracts) in excess of \$5,000,000, and (ii) any Contracts for Unincorporated Materials with a contract price (or expected aggregate amount to be paid in the case of "cost plus" Contracts) in excess of \$5,000,000 (excluding, in the case of both clauses (i) and (ii) above, items located outside of the United States or in transit from jurisdictions outside of the United States or vendors located outside of the United States), the Project Entities shall have executed and delivered to the Disbursement Agent such additional security documents (including, without limitation, financing statements, security agreements, collateral access agreements, consents of manufacturers, vendors, warehousemen and bailees) reasonably requested by the Disbursement Agent necessary to grant the Secured Parties such security interest in the Project Entities' rights to such Unincorporated Materials or Contracts;

(f) are insured against casualty, loss and theft for an amount equal to their replacement costs in accordance with Exhibit D;

(g) the value of Unincorporated Materials located at the Site but not expected to be incorporated into the Project within the ensuing calendar month at any time is not more than \$25,000,000 (or any greater amount approved on a case by case basis pursuant to clause (k) below);

(h) the amounts paid by the Project Entities in respect of Unincorporated Materials not at the Site at any one time is not more than \$50,000,000 (or any greater amount approved on a case by case basis pursuant to clause (k) below);

(i) the amount of contract deposits paid by the Project Entities in respect of Unincorporated Materials at any one time is not more than \$50,000,000 (or any greater amount approved on a case by case basis pursuant to clause (k) below);

(j) the Construction Consultant shall have confirmed the accuracy of the certification required in subparagraph (c), and in connection therewith the Construction Consultant may, but shall not be required to, visit the site of and inspect the Unincorporated Materials at the Project Entities' expense; and

(k) The Disbursement Agent and the Construction Consultant, at the request of the Borrowers, may from time to time mutually agree to increase the thresholds set forth in Sections 3.3.22 (e), (g), (h) and (i).

3.3.23 Retail Advances. In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to that Advance Request.

3.3.24 Other Documents. In the case of each Advance from the Bank Proceeds Account, the Bank Agent shall have received such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other conditions set forth above.

Notwithstanding the foregoing provisions of this Section 3.3, even if the conditions set forth in this Section 3.3 have not been satisfied in respect of any particular Advance Date then, unless a Stop Funding Notice stating that an Event of Default has occurred has been delivered by the Controlling Person:

(i) on the next date upon which any Debt Service is due in respect of the Second Mortgage Notes (but not on any subsequent dates), the Trustee shall apply any remaining balances in the Second Mortgage Proceeds Account to pay such Debt Service;

(ii) the Bank Agent shall apply the remaining balances contained in the Bank Proceeds Account (or, shall cause the making of Loans under the Bank Credit Facility) to the extent required (x) to pay Debt Service on the Bank Credit Facility on the next date upon which such Debt Service is due if such due date is prior to the Initial Bank Advance Date and (y) in all other cases, on the dates described below:

(A) first, to pay Debt Service associated with the Bank Credit Facility during the one month period following such Scheduled Advance Date (on each date upon which such Debt Service is required to be paid); and

(B) thereafter, to the making of Advances to the Interest Account on the Scheduled Advance Date in the amount



required to pay the portion of the scheduled interest associated with the Second Mortgage Notes requested on that Scheduled Advance Date which will not be satisfied pursuant to clause (i).

3.4 **Concerning the Letters of Credit.** The Borrowers may request the issuance of Letters of Credit under the Bank Credit Facility at any time and from time to time following the Closing Date (and the issuance date thereof need not be on an Advance Date and shall not constitute an Advance for purposes hereof), provided that:

- (a) Prior to the Initial Bank Advance Date, the aggregate effective amount of such Letters of Credit, and any unreimbursed draws with respect thereto, shall not exceed \$50,000,000;
- (b) The amount and terms of such Letters of Credit shall comply with the provisions of the Bank Credit Agreement;
- (c) As of the most recent Advance Date, all of the applicable conditions precedent set forth in this Section 3 shall have been satisfied;
- (d) No Default or Event of Default shall have occurred and shall remain continuing;
- (e) The Construction Consultant shall have concurred that the issuance of the requested Letter of Credit supports the payment of Project Costs; and
- (f) The requested Letter of Credit shall comply with the procedural matters set forth in Section 3 of the Bank Credit Agreement.

3.5 **Conditions Precedent to Advances by the Retail Agent and the Retail Lenders.**

3.5.1 Shared Cost Advances. The obligation of the Retail Agent and the Retail Lenders to make Advances under the Retail Facility for Shared Costs is subject only to the prior satisfaction of the conditions precedent set forth in this Section 3.5.1:

- (1) Advance Request. The Project Entities shall have requested the payment of amounts payable from the Retail Facility for Shared Costs pursuant to Article 2 (it being understood that the related Advance Request may be amended in any fashion, and omit any attachment to the extent approved by the Controlling Person).
- (2) No Prohibited Scope Change. There shall not have been any Scope Change to items constituting Shared Costs which is inconsistent with Section 6.2, and the Resort Budget shall not have been amended in a

manner with respect to Shared Costs which is materially inconsistent with Section 6.4, except with the consent of the Retail Agent, *provided* that the Retail Agent and the Retail Lender shall not be entitled to refuse to fund pursuant to this Section 3.5.1(2) to the extent that the Project Entities shall have, from a source of funds other than the Retail Facility (or the Project Secured Parties on their behalf), paid for or shall concurrently pay or shall have reserved for payment in the Requested Cost Reports any costs associated with any such inconsistent Scope Change or change in respect of Shared Costs.

(3) Advance by Bank Lenders. The Initial Bank Advance Date shall have occurred (or shall concurrently occur) and the Bank Agent shall, on the date specified in the relevant Advance Request, make any Advances required of it pursuant to that Advance Request, (i) without having waived any condition precedent to such Advances, or (ii) to the extent that the Bank Agent waives any such condition, without having received any additional benefit as consideration for such waiver for which the Retail Agent and the Retail Lenders did not receive a pro rata share of the same benefit (it being agreed that the continued progress of the Project shall not, in and of itself, constitute such a benefit).

(4) Advance Within Limits. The aggregate principal amount of Advances made to the Retail Affiliate under the Retail Facility for Shared Costs shall not exceed the Retail Lenders Shared Cost Commitment.

(5) Documents Enforceable. The Retail Facility Agreement and the Retail Security Documents shall continue to be enforceable in accordance with their respective terms.

(6) No Prohibition. No order, judgment or decree of any court, arbitrator or governmental authority shall purport to enjoin or restrain the Retail Lenders from making the Advances to be made by them on the Advance Date.

(7) Retail Air Space Lease. The Retail Air Space Lease shall not have been surrendered and shall remain in full force and effect, and the Retail Air Space Lease shall not have been terminated or cancelled for any reason or any circumstances whatsoever (except, in each such case, to the extent converted to a valid fee interest in accordance with the terms thereof).

**Notwithstanding any other provision of this Agreement or the Operative Documents to the contrary, (a) there shall be no other conditions to the making of Advances for Shared Costs by the Retail Agent and the Retail Lenders pursuant to the Retail Facility, and the Retail Agent and the Retail Lenders shall make all requested Advances for Shared Costs pursuant to the Retail Facility upon satisfaction of the conditions set forth in this Section**

**3.5.1 and (b) the Disbursement Agent and the other parties hereto shall not purport to waive the conditions set forth in this Section 3.5 without the prior consent of the Retail Agent.**

3.5.2 Other Retail Costs Advances. The obligation of the Retail Agent and the Retail Lenders to make Advances under the Retail Facility for Other Retail Costs is subject only to the prior satisfaction of the conditions precedent set forth in this Section 3.5.2:

- (1) Advance Request: Delivery to the Disbursement Agent and Construction Consultant of an Advance Request requesting the payment of amounts payable from the Retail Facility for Other Retail Costs, together with all then required attachments, exhibits and certificates.
- (2) Miscellaneous Conditions. The conditions set forth in Section 3.5.1 (other than the conditions set forth in clauses (1), (2) (3) and (4) thereof shall be satisfied in respect of the requested Advance.
- (3) Advance Within Limits. After giving effect to the requested Advance, the aggregate principal amount of Advances made to Retail Affiliate under the Retail Facility for Other Retail Costs shall not exceed \$62,000,000.
- (4) No Defaults. No Default or Event of Default shall have occurred and be continuing.
- (5) Absence of Liens. Other than in connection with any Advance or portion thereof made for the payment of Leasing Commissions, the Disbursement Agent shall have received duly executed acknowledgments of payments and releases of mechanics' and materialmen's liens substantially in the form of Exhibit I (with any modifications required by Nevada Law or, in the case of an Advance or portion thereof made for the payment of Tenant Allowances, in such form as is permitted under the applicable retail lease) from the parties listed in clauses (i) and (ii) below for all work, services and materials, including equipment and fixtures of all kinds, done, performed or furnished with respect to Other Retail Costs (other than Leasing Commissions) from the last day covered by the immediately preceding Advance Request delivered under this Section 3.5.2 through the last day covered by the current Advance Request except for such work, services and materials the payment for which is being disputed in good faith in accordance with NRS Chapter 624 and not otherwise prohibited by the terms of the Retail Facility Agreement. The Persons required to provide such lien releases are each laborer, supplier, contractor, subcontractor or material furnisher party to a fixed price or guaranteed maximum price contract in privity with the Retail Affiliate or, in the case of an Advance or portion thereof made for the payment of Tenant Allowances, the applicable retail tenant, and each of such laborer's,

supplier's, contractor's, subcontractor's or material furnisher's first tier trade subcontractors and materialmen, in each case performing work with a contract price (or expected aggregate amount to be paid in the case of "cost-plus" contracts) in excess of \$100,000.

Notwithstanding the foregoing, if the Retail Affiliate (or any of the foregoing Persons) does not obtain any of the waivers and releases of liens required under the foregoing provisions of this clause (5) (collectively, "Retail Outstanding Releases"), then instead of delivering such Retail Outstanding Releases and as a condition to any progress or other payment from the proceeds of the requested Advance, the Retail Affiliate may obtain and provide to the Disbursement Agent from the Title Insurer bonds or endorsements to the title insurance policies insuring the lien free status of the work; provided, however, that at no time shall the aggregate of all Retail Outstanding Releases represent work with an aggregate value in excess of \$3,000,000. Notwithstanding anything to the contrary contained herein, (i) in no event shall Retail Agent make any Advances for amounts being contested by Retail Affiliate (unless such amounts are being paid to the applicable laborer, supplier, contractor or material furnisher with whom the Retail Affiliate is contesting the amounts owed) and (ii) in the case of an Advance or portion thereof made for the payment of Tenant Allowances, the lien waivers described in this clause (5) shall only be required to satisfy this condition to the extent that the retail tenants receiving such Tenant Allowances are required by the terms of the applicable retail leases to provide such lien waivers to the Retail Affiliate.

(6) Title Policy Endorsements. The Disbursement Agent shall have received a commitment from the Title Insurer, attached to the Advance Request, evidencing the Title Insurer's unconditional commitment to issue a CLTA form 122 endorsement to the Retail Lender's Title Policy insuring the continuing priority of the Lien of the Retail Security Documents (in the amount of the then outstanding principal balance of the Loan (after giving effect to the funding of the applicable Advance)) as security for the requested Advance and confirming and/or insuring that there are no intervening liens or encumbrances which may then or thereafter take priority over the respective Liens of the Deeds of Trust other than Permitted Encumbrances (as defined in the Retail Facility Agreement) and such other intervening liens or encumbrances securing amounts the payment of which is being disputed in good faith by the Retail Affiliate, so long as the Disbursement Agent has received confirmation from the Retail Agent that the Title Insurer has delivered to Retail Agent any endorsement to the Retail Lender's Title Policy required or desirable to assure against loss to the Retail Lenders due to the priority of such lien or encumbrance.

(7) Construction Consultant Advance Certificate. With respect to any Advance the proceeds of which will be applied by (or on behalf of) the

Retail Affiliate for the payment of tenant improvement work (other than tenant improvement work funded by means of Tenant Allowances), the Construction Consultant shall have delivered a Construction Consultant Advance Certificate approving the corresponding Advance Request.

(8) In Balance Requirement. The Retail Affiliate is in compliance with (and the Retail Agent has reasonable evidence that, after giving effect to the funding of the applicable Advance the Retail Agent shall remain in compliance with) Section 5.1.34 of the Retail Facility Agreement.

(9) Violation of Law. The making of the requested Advance shall not violate any law.

(10) Retail Unincorporated Materials. With respect to any Advance the proceeds of which will be applied by (or on behalf of) the Retail Affiliate for the payment of tenant improvement work (other than tenant improvement work performed or contracted for by tenants and funded by means of Tenant Allowances), delivery of evidence reasonably satisfactory to the Construction Consultant and the Disbursement Agent that the following conditions have been satisfied:

(A) all Retail Unincorporated Materials for which full payment has previously been made or is being made with the proceeds of the Advance to be disbursed are, or will be upon full payment, owned by the Retail Affiliate, as evidenced by the bills of sale, certificates of title or other evidence reasonably satisfactory to the Construction Consultant, and all lien rights or claims of the supplier have been or will be released simultaneously with such full payment and all amounts, if any, required to be paid to the supplier thereof with respect to the installation of such Retail Unincorporated Materials (including any Retainage Amounts);

(B) the Retail Affiliate believes that the Retail Unincorporated Materials consist of components that conform to any Plans and Specifications (as defined in the Retail Facility Agreement) and that will be ready for incorporation into the retail component of the Project reasonably promptly following delivery thereof;

(C) all Retail Unincorporated Materials are properly inventoried, securely stored, protected against theft and damage at the construction site at the Site or at such other location which has been specifically identified by its address to the Construction Consultant and the Disbursement Agent (or if the Retail Affiliate cannot provide the address of the current storage location, the Retail Affiliate shall list the name and address of the applicable contracting party supplying or manufacturing such Retail Unincorporated Materials);

(D) with respect to any Retail Unincorporated Materials as to which deposit or other partial payments have been made or will be made out of the requested Advance (but which have not been and will not be fully paid after giving effect to the requested Advance), the Retail Agent on behalf of the Retail Lenders have, or will have upon payment with the proceeds of the requested Advance, a perfected security interest in the Retail Affiliate's rights to the Retail Unincorporated Materials and the Contracts therefor, with the priority therein contemplated by the Retail Security Documents.

(E) With respect to (i) Retail Unincorporated Materials not stored at the construction site of the retail component of the Project from a single or Affiliated suppliers (of which the Retail Affiliate are aware that such suppliers is an Affiliate) with a contract price (or expected aggregate amount to be paid in the case of "cost-plus" Contracts) in excess of \$2,000,000, and (ii) any Contracts for Retail Unincorporated Materials with a contract price (or expected aggregate amount to be paid in the case of "cost plus" Contracts) in excess of \$2,000,000 (excluding items located outside of the United States or in transit from jurisdictions outside of the United States), the Retail Affiliate shall have executed and delivered to the Disbursement Agent such additional security documents (including, without limitation, financing statements, security agreements, collateral access agreements, consents of manufacturers, vendors, warehousemen and bailees) reasonably requested by the Disbursement Agent as are necessary to grant the Retail Agent on behalf of the Retail Lenders such security interest in the Retail Affiliate's rights to such Retail Unincorporated Materials or Contracts;

(F) are insured against casualty, loss and theft for an amount equal to their replacement costs in accordance with Exhibit D;

(G) the value of Retail Unincorporated Materials located at the construction site of the retail component within the Project but not expected to be incorporated into the retail component within the ensuing calendar month at any time is not more than \$4,000,000 (or any greater amount approved on a case by case basis pursuant to clause (k) below);

(H) the amounts paid by the Retail Affiliate in respect of Retail Unincorporated Materials not at the Site at any one time is not more than \$4,000,000 (or any greater amount approved on a case by case basis pursuant to clause (k) below);

(I) the amount of contract deposits paid by the Retail Affiliate

in respect of Retail Unincorporated Materials at any one time is not more than \$4,000,000 (or any greater amount approved on a case by case basis pursuant to clause (k) below);

(J) the Construction Consultant shall have confirmed the accuracy of the certification required in subparagraph (c), and in connection therewith the Construction Consultant may, but shall not be required to, visit the site of and inspect the Retail Unincorporated Materials at the Retail Affiliate's expense; and

(K) The Retail Agent, Disbursement Agent and the Construction Consultant, at the request of the Retail Affiliate, may from time to time collectively agree to increase the thresholds set forth in Sections 3.5.2 (10)(e), (g), (h) and (i).

(11) Costs and Expenses. With respect to any Advance for tenant improvements, Disbursement Agent and/or Retail Agent may require an inspection of the Site to inspect the progress of the work for which the Advance Request relates and all materials being used in connection therewith and to examine all plans and shop drawings relating thereto which are or may be kept at the Site and are in the possession of the Retail Affiliate (or for which the Retail Affiliate has the right to make available to the Retail Agent). Retail Affiliate shall pay all reasonable out-of-pocket expenses reasonably incurred by Retail Agent in processing the Advance Request including, without limitation, any inspection costs (whether performed by Retail Agent or an independent inspector selected by Retail Agent) and reasonable legal fees and expenses.

(12) Evidence of Licenses and Permits. If reasonably required by Retail Agent, Retail Agent shall have received evidence reasonably satisfactory to Retail Agent that the Retail Affiliate possesses all rights, licenses, permits and authorizations, governmental or otherwise, necessary to undertake the Advance.

(13) Satisfactory Leasing with respect to Leasing Commissions. With respect to any Advance relating to leasing commissions, (a) such leasing commission shall be (i) market, reasonable and customary for properties similar to the retail component of the Project and the portion of the retail component leased for which a commission is due or (ii) being paid pursuant to the Leasing Agreement (as defined in the Retail Facility Agreement) previously entered into in accordance with the Retail Facility Agreement, (b) the amount of such leasing commission is (i) determined pursuant to an arms length transactions between Retail Affiliate and each such leasing agent to which a commission is due or (ii) being paid pursuant to the Leasing Agreement (as defined in the Retail Facility Agreement) previously entered into in accordance with the Retail Facility Agreement; (c) the lease for which such leasing commission is due has

been entered into in accordance with the terms of the Retail Facility Agreement or, if Retail Agent's approval is not required, conforms with all requirements set forth in Section 5.1.17 of the Retail Facility Agreement and (d) Retail Agent shall have received a certificate from the leasing agent that, other than as set forth in such certificate (and provided such sums set forth on such certificate are not delinquent), no further sums are due to it in connection with the applicable lease.

(14) Satisfactory Leasing with respect to Tenant Improvement Allowances. With respect to any Advance relating to tenant improvement allowances, (a) such tenant improvement allowance shall be market, reasonable and customary for properties similar to the retail component of the Project and the portion of the Retail Air Space Parcels leased for which such tenant improvement allowance is due, (b) the amount of such tenant improvement allowance is determined pursuant to arms length transactions between Retail Affiliate the applicable tenant, (c) the lease for the tenant receiving such tenant improvement allowance has been approved by Retail Agent in accordance with the terms of the Retail Credit Agreement or, if Retail Agent's approval is not required, conforms with all requirements set forth in Section 5.1.17 of the Retail Credit Agreement, (d) to the extent such Advance request is for payment of a Tenant Allowance to a tenant Retail Agent shall have received evidence reasonably satisfactory to Retail Agent (including, but not limited to, copies of any items that such tenant is required to deliver pursuant to the terms of its lease) that such tenant allowance is then due from Retail Affiliate to such tenant pursuant to the terms of such tenant's lease and (e) if requested by Retail Agent for any completed tenant improvements, Retail Agent shall have received a written certificate from the tenant(s) for which such tenant improvements have been performed stating that (i) such tenant improvements have been completed in a manner satisfactory and acceptable to such tenant(s) and (ii) Retail Affiliate is not in default under the applicable tenant's lease.

Notwithstanding anything to the contrary contained herein, Retail Lenders shall only be obligated to make Advances under this Agreement for Other Retail Costs set forth in the Retail Budget, as amended from time to time and for Shared Costs (and only then upon satisfaction of the terms and conditions contained in this Agreement).

### 3.6 No Waiver or Estoppel.

3.6.1 The occurrence of the Closing Date and making of any Advance hereunder shall not preclude any Funding Agent from later asserting that (and enforcing any remedies it may have if) any representation, warranty or certification made or deemed made by the Project Entities in connection with such Advance was not true and accurate when made in all material respects (or, in respect of Advances solely from the Second Mortgage Proceeds Account, such representation, warranty or certification was not correct in a manner which



results in a Material Adverse Effect). No course of dealing or waiver by any Funding Agent or Secured Party in connection with any condition precedent to any Advance under this Agreement or any Facility Agreement shall impair any right, power or remedy of any such Funding Agent or Secured Party with respect to any other condition precedent, or be construed to be a waiver thereof; nor shall the action of any Funding Agent or Secured Party in respect of any Advance affect or impair any right, power or remedy of any Funding Agent or Secured Party in respect of any other Advance.

3.6.2 Unless otherwise notified to the Project Entities by a Funding Agent or Secured Party and without prejudice to the generality of Section 3.6.1, the right of any Funding Agent or Secured Party to require compliance with any condition under this Agreement or its respective Facility Agreement which may be waived by such Funding Agent or Secured Party in respect of any Advance is expressly preserved for the purpose of any subsequent Advance.

### 3.7 Waiver of Conditions.

3.7.1 At such times as the Trustee is the Controlling Person, the Trustee shall be entitled to waive (in accordance with the terms of the Indenture) the conditions precedent under Section 3.3 of this Agreement without consent by the other Funding Agents.

3.7.2 At such times as the Bank Agent is the Controlling Person, the Bank Agent shall be entitled to waive the conditions precedent under Section 3.3 without the consent of the other Funding Agents.

3.7.3 The Retail Agent shall at all times be entitled to waive the conditions precedent under Section 3.5 without the consent of the other Funding Agents.

3.8 **Previously Paid Project Costs.** If, at any time and from time to time, the Project Entities shall be unable to satisfy the conditions precedent to any Advance set forth in Sections 3.3, 3.4 or 3.5 (other than Section 3.3.8), the Project Entities shall be entitled to allow Affiliates (other than any Project Entity) to pay Project Costs then due and owing (which payment may be additional equity contributions by such Affiliates to the Project Entities) and to later reimburse such Affiliates for the payments of such Project Costs (which reimbursement may take the form of distributions to such Affiliates) from Resort Sources or Retail Sources, as applicable, at the time (if any) that the Project Entities are able to satisfy the conditions precedent to Advances set forth in Section 3.3, 3.4 or 3.5, as applicable; *provided, however*, that with respect to the Retail Affiliate, any such costs so advanced by an Affiliate thereof (i) may not constitute Indebtedness of the Retail Affiliate towards such Affiliate unless the same is subordinated to the obligations under the Retail Facility pursuant to documentation reasonably satisfactory to the Retail Agent (which shall permit reimbursement of such amounts subject to clause (ii) below but shall also include a provision to the effect that such Affiliate agrees to forbear from the exercise of any remedies against the Retail Affiliate for failure to repay the same until payment in full of the Retail Facility) and (ii) may not be reimbursed to such Affiliate at any time when an Event of Default has occurred and is continuing or if the Retail Affiliate would be rendered insolvent or

will be unable to pay its debts as the same become due and payable.

**3.9 Loss Proceeds.** If, at any time:

- (a) an Event of Loss occurs that causes the In Balance Test to no longer be satisfied; and
- (b) as a result thereof, and in order to cause the In Balance Test to be satisfied pending receipt of any Loss Proceeds in connection with such Event of Loss and the deposit of such Loss Proceeds into the Loss Proceeds Account, any Affiliate of the Project Entities (other than any Project Entity) deposits or causes to be deposited additional equity contributions into the Equity Funding Account;

then, upon deposit of Loss Proceeds in respect of such Event of Loss into the applicable Loss Proceeds Account and so long as no Default or Event of Default has occurred and is continuing or would occur after giving effect thereto, the Project Entities shall be entitled to submit a request for an Advance (in form and substance, and with such attachments, certificates and exhibits, as reasonably requested by the Disbursement Agent) requesting an Advance to be used to make a reimbursement to such Affiliate (which reimbursement may take the form of a distribution to such Affiliate) in an amount equal to the lesser of (i) the amount of the Loss Proceeds received and deposited into such Loss Proceeds Account and (ii) the amount of such additional cash equity contribution deposited into the Equity Funding Account. Such Advance shall be made for such purpose so long as the conditions precedent set forth in Section 3.3 are satisfied.

## **ARTICLE 4**

### **REPRESENTATIONS AND WARRANTIES**

The Project Entities make all of the following representations and warranties to and in favor of (a) the Funding Agents, the Lenders and the Disbursement Agent as of the Closing Date, (b) the Disbursement Agent on each Advance Date, and (c) each Project Secured Parties, as of the date of the making of each Advance by that Project Secured Party, in each case except as such representations relate to an earlier date (in which case such representations and warranties shall be true and correct in all material respects as of such earlier date):

**4.1 Organization.**

4.1.1 As of the Closing Date, each of the Loan Parties is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization, has all requisite corporate or limited liability company power and authority to carry on its business as now conducted and (i) to own or hold under lease and operate the properties it purports to own or hold under lease, (ii) to carry on its business as now being conducted and as now proposed to be conducted in respect of the Project, (iii) to incur Indebtedness and create a Lien on its property, and (iv) to execute, deliver and perform under each of the

Operative Documents to which each is a party.

4.1.2 As of the date of each Advance, each of the Project Entities and each Completion Guarantor is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization, has all requisite corporate or limited liability company power and authority to carry on its business as then conducted and (i) to own or hold under lease and operate the properties it purports to own or hold under lease, (ii) to carry on its business as then being conducted and as then proposed to be conducted in respect of the Project, (iii) to incur Indebtedness and create a Lien on its property, and (iv) to execute, deliver and perform under each of the Operative Documents to which each is a party.

4.2 **Authorization; No Conflict.** Each of the Loan Parties has taken all necessary corporate or limited liability company action, as the case may be, to authorize the execution, delivery and performance of the Financing Agreements and the other Operative Documents to which each is a party, and neither the execution, delivery or performance thereof nor the consummation of the transactions contemplated thereby by each such Loan Party, (a) contravenes the formation documents or any other Legal Requirement then applicable to or binding on each such Loan Party in any material respect, (b) contravenes or results in any breach or constitutes any default under, or results in or requires the creation of any Lien upon any of such Loan Party's properties or under any security or agreement or instrument to which such Loan Party is a party or by which it or any of its respective properties may be bound, except for Permitted Liens or (c) does or will require the consent or approval of any Person other than as set forth on Exhibits G and H.

4.3 **Legality, Validity and Enforceability.** Each of the Operative Documents to which the Loan Parties are a party is a legal, valid and binding obligation of each such Loan Party, as the case may be, enforceable against the Loan Parties, as the case may be, in accordance with its terms, subject only to bankruptcy and similar laws and principles of equity. None of the Operative Documents to which the Loan Parties are a party have been amended or modified except in accordance with this Agreement.

4.4 **Compliance with Law, Permits and Operative Documents.** As of the Closing Date, each Loan Party is in compliance with all Legal Requirements and Permits and Operative Documents to which it is a party in all material respects, and no notices of violation of any Permit or Operative Document relating to the Project have been issued, entered or received by any Loan Party. As of the date of each Advance, each of the Project Entities is in compliance with all Legal Requirements and Permits and Operative Documents to which it is a party, and no notices of violation of any Permit or Operative Document relating to the Project have been issued, entered or received by any of the Project Entities, in each case, except for non-compliance or violations that, in the aggregate, could not reasonably be expected to have a Material Adverse Effect.

4.5 **Permits.** There are no material Permits that are required or will become required under existing Legal Requirements for the ownership, development, construction, financing or operation of the Project, other than the Permits described in Exhibit G. Exhibit G accurately states the stage in construction by which each such Permit is required to be obtained. Each

Permit described in Exhibit G as required to be obtained by the date that this representation is deemed to be made is in full force and effect and is not at such time subject to any appeals or further proceedings or to any unsatisfied condition (that is required to be satisfied by the date that this representation is deemed to be made) that could reasonably be expected to materially and adversely modify any such Permit, to revoke any such Permit, to restrain or prevent the construction or operation of the Project or otherwise impose adverse conditions on the Project or the financing contemplated under the Financing Agreements. Each Permit described in Exhibit G as not required to have been obtained by the date that this representation is deemed to be made (other than the gaming license) is of a type that is routinely granted on application and compliance with the conditions for issuance. The Project Entities have no reason to believe that any Permit so indicated will not be obtained before it becomes necessary for the ownership, development, construction, financing or operation of the Project or that obtaining such Permit will result in undue expense or delay. Neither the Project Entities nor any of their Affiliates are in violation of any condition in any Permit the effect of which could reasonably be expected to have a Material Adverse Effect.

**4.6 Litigation.** There are no pending or, to the Project Entities' knowledge, threatened actions, suits, proceedings or investigations of any kind, including actions or proceedings of or before any Governmental Authority, to which any Project Entity or Major Project Participant (other than any Project Entity) is a party or is subject, or by which any of them or any of their properties or the Project are bound that could reasonably be expected to have a Material Adverse Effect nor, are the Project Entities aware of any reasonable basis for any such action, suit, proceeding or investigation.

**4.7 Financial Statements.**

4.7.1 The financial statements of Parent and its consolidated Subsidiaries, and Las Vegas Holdings and its consolidated Subsidiaries, delivered to the Lenders pursuant to Section 3.1 on the Closing Date were prepared in conformity with GAAP, consistently applied and fairly present in all material respects the financial position (on a consolidated basis) of the entities described in such financial statements as of the respective dates thereof and the results of operations and cash flows (on a consolidated basis) of the entities described therein for each of the periods then ended, subject, in the case of any such unaudited financial statements, to the absence of footnote disclosures and changes resulting from audit and normal year-end adjustments. As of the Closing Date, Parent and its Subsidiaries do not have any material "Guarantee Obligations" (as defined in the Bank Credit Agreement), contingent liabilities and liabilities for taxes, or any long-term leases or unusual forward or long-term commitments, including, without limitation, any interest rate or foreign currency swap or exchange transaction or other obligation in respect of derivatives, that are not reflected in the most recent financial statements referred to in this paragraph and that are required to be reflected in such financial statements (other than as reflected on Exhibit O).

4.7.2 As of the Closing Date, since December 31, 2006, there has been no development or event that has or could reasonably be expected to have a

Material Adverse Effect. As of each Advance Date following the Closing Date, there has been no development or event that has or could reasonably be expected to have a Material Adverse Effect since the Closing Date.

4.7.3 With respect to the financial statements required pursuant to Section 6.1 of the Bank Credit Agreement, the audited balance sheets as of the required date of delivery of (i) Parent and its consolidated Subsidiaries, and (ii) Las Vegas Holdings and its consolidated Subsidiaries, and the related consolidated and consolidating statements of income and of cash flows for the periods then ended, present fairly in all material respects the consolidated and consolidating financial condition of (i) Parent and its consolidated Subsidiaries and (ii) Las Vegas Holdings and its consolidated Subsidiaries, respectively, as at such date, and the respective consolidated and consolidating results of its operations and its consolidated and consolidating cash flows for the period then ended. All such financial statements, including the related schedules and notes thereto, have been prepared in accordance with GAAP applied consistently throughout the periods involved (except as approved by the aforementioned firm of accountants and disclosed therein).

4.7.4 The pro forma consolidated balance sheet of Las Vegas Holdings delivered pursuant to Section 3.1.14 fairly presents the consolidated pro forma financial position of Las Vegas Holdings as of the Closing Date in accordance with GAAP, after giving effect to all transactions contemplated to occur on the Closing Date, except for the absence of footnotes and normal year-end adjustments, and there are no material contingent liabilities of Las Vegas Holdings and its Subsidiaries not reflected thereon.

#### 4.8 Security Interests.

(a) The security interests granted to the Secured Parties pursuant to the Security Documents (i) constitute as to personal property included in the Project Security and, with respect to subsequently acquired personal property included in the Project Security, will constitute, a perfected security interest under the UCC and/or other applicable law and (ii) have, and, with respect to such subsequently acquired property, will have been perfected under the UCC and/or other applicable law as aforesaid, and (A) as among the Secured Parties, with the priority contemplated by the Project Lenders Intercreditor Agreement and the Retail Intercreditor Agreement but as to each Secured Party only to the extent that it is a party to the relevant Intercreditor Agreement and (B) as between the Secured Parties and any third Persons, grant the Secured Parties superior priority and rights over the rights of any such third Persons now existing or hereafter arising whether by way of mortgage, lien, security interests, encumbrance, assignment or otherwise, subject to the rights and priorities of Permitted Liens. All such action as is necessary has been taken to establish and perfect the Secured Parties' rights in and to the Project Security, including any recording, filing, registration, giving of notice or

other similar action. As of the Closing Date, no filing, recordation, re-filing or re-recording is necessary to perfect and maintain the perfection of the interest, title or Liens of the Security Documents except those which have been made, except for any filings or recordings for Liens as to which the Title Insurer has issued or committed to issue its Title Policies. The Project Entities have properly delivered or caused to be delivered to the Disbursement Agent all Project Security that requires perfection of the Lien and security interest described above by possession.

(b) No authorization, approval or other action by, and no notice to or filing with, any Governmental Authority is required for either (i) the pledge or grant by the Project Entities of the Liens purported to be created in favor of the Secured Parties pursuant to any of the Security Documents, or (ii) the exercise by the Disbursement Agent, or the other Secured Parties of any rights or remedies in respect of any Project Security (whether specifically granted or created pursuant to any of the Security Documents or created or provided for by applicable law), except for filings or recordings contemplated by Section 4.8(a), *provided* that it is acknowledged that pursuant to Nevada Gaming Laws, once the companies are licensed by or registered with the Nevada Gaming Authorities, the approval of the pledge of the Equity Interests in the Companies by the Nevada Gaming Authorities will be required in order for such pledge of the Equity Interests in the Companies to remain effective and that foreclosure upon the Equity Interests and certain other assets of the Companies may only be accomplished in accordance with the requirements of Nevada Gaming Laws.

(c) Except as may have been filed in favor of the Funding Agents or with respect to UCC financing statements for which termination statements will be filed in connection with the Indebtedness to be refinanced on the Closing Date, no effective UCC financing statement, fixture filing or other instrument similar in effect covering all or any part of the Project Security is on file in any filing or recording office other than in connection with Permitted Liens.

(d) All information supplied to the Disbursement Agent and the Funding Agents by or on behalf of the Loan Parties or any of their Affiliates with respect to any of the Project Security is accurate and complete in all material respects.

#### 4.9 Defaults.

4.9.1 There is no default or event of default under any of the Financing Agreements; and

4.9.2 There is no Default or Event of Default hereunder.

4.10 **Taxes.** The Project Entities have filed, or caused to be filed, all tax and informational returns that are required to have been filed by them in any jurisdiction, and have paid all taxes shown to be due and payable on such returns and all other taxes and assessments payable by them, to the extent the same have become due and payable (other than (a) those taxes that it is contesting in good faith and by appropriate proceedings and (b) those taxes not yet due, *provided* that with respect to each of clause (a) and (b) the Project Entities have established reserves therefor by allocating, in the relevant Remaining Cost Report, amounts that are adequate for the payment thereof and are required by GAAP).

4.11 **Representations and Warranties.**

4.11.1 All representations and warranties of each Project Entity contained in the Material Contracts are true and correct as of each date when made or deemed made, except to the extent that any failure to be true and correct could not reasonably be expected to have a Material Adverse Effect.

4.11.2 To the best knowledge of the Project Entities, all representations and warranties of each party to each Material Contract (other than the Project Entities), are true and correct as of each date when made or deemed made, except to the extent that any failure to be true and correct could not reasonably be expected to have a Material Adverse Effect.

4.12 **Environmental Laws.**

(a) Except as set forth in the Phase I Report, the Project Entities are, and within the period of all applicable statutes of limitation have been, in material compliance with all applicable Environmental Laws.

(b) Except as set forth in the Phase I Report, to the knowledge of the Project Entities, Hazardous Substances are not present at, on, under, in, or about the Site, or at any other location (including, without limitation, any location to which Hazardous Substances have been sent for re-use or recycling or for treatment, storage or disposal) which could reasonably be expected to (i) give rise to liability of any of the Project Entities under any applicable Environmental Law or otherwise result in costs to any of the Project Entities that could reasonably be expected to have a Material Adverse Effect, or (ii) materially interfere with any of the Project Entities' continued operations, or (iii) materially impair the fair saleable value of the Site.

(c) There is no judicial, administrative or arbitral proceeding (including any notice of violation or alleged violation) under or relating to any Environmental Law to which any of the Project Entities are, or to the knowledge of the Project Entities will be, named as a party that is pending or, to the knowledge of the Project Entities, threatened (in the case of each Advance Date after the Closing Date, except as could not, individually or in the aggregate, reasonably be expected to have a Material Adverse

Effect).

(d) No Project Entity has received any written request for information, or been notified that it is a potentially responsible party, under or relating to the federal Comprehensive Environmental Response, Compensation, and Liability Act or any similar Environmental Law, in each case with respect to the Site.

(e) No Project Entity has entered into or agreed to any consent, decree, order, or settlement or other agreement, or is subject to any judgment, decree, or order or other agreement, in any judicial, administrative, arbitral, or other forum for dispute resolution, relating to compliance with or liability under any Environmental Law or Environmental Claim (in the case of each Advance Date after the Closing Date, in each case with respect to the Site and except as could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect).

(f) No Project Entity has assumed or retained, by contract or operation of law, any liabilities of any kind, fixed or contingent, known or unknown, under any Environmental Law or with respect to any Hazardous Substances, in each case with respect to the Site (in the case of each Advance Date after the Closing Date, except as could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect).

(g) Except as could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect, or as set forth in the Phase I Report, (i) Hazardous Materials Activities are not presently occurring, and, to the Project Entities' knowledge, have not previously occurred, at, on, under, in or about the Site, and (ii) none of the Project Entities have ever engaged in any Hazardous Materials Activities at any location.

**4.13 Utilities.** All utility services necessary for the construction and the operation of the Project for its intended purposes are or will be available at the Site as and when required on commercially reasonable terms.

**4.14 In Balance Test.** As of each Advance Date which occurs on or following the initial Advance from the Second Mortgage Proceeds Account, the In Balance Test is satisfied.

**4.15 Sufficiency of Interests and Contracts.**

4.15.1 The Borrowers own the Retained Site and the Site Easements in fee simple subject only to the matters described in the Title Policies. Other than those services to be performed and materials to be supplied that can be reasonably expected to be commercially available when and as required, the Borrowers own or hold under lease all of the property interests and have entered into all documents and agreements necessary to develop, construct, complete,



own and operate the Project (including access to municipal or other sufficient water rights) in accordance with all Legal Requirements and the Project Schedule and as contemplated in the Operative Documents.

4.15.2 Each of the Funding Agents have received a true, complete and correct copy of each of the Material Contracts in effect or required to be in effect as of the date this representation is made or deemed made. A list of all Contracts having a total contract amount or value in excess of \$5,000,000 (excluding Contracts entered into in the ordinary course of business for services or materials that are easily obtained from replacement contractors or vendors on similar terms) is attached hereto as Exhibit J. Each Material Contract is in full force and effect, enforceable against the Persons party thereto in accordance with its terms, subject only to bankruptcy and similar laws and principles of equity.

4.15.3 All conditions precedent to the obligations of the respective parties (other than the Project Entities) under the Material Contracts have been satisfied or will be satisfied on or prior to the required stage in the development, construction or operation of the Project (except to the extent immaterial to the prosecution of the completion of the Project), and the Project Entities have no reason to believe that any such unsatisfied condition precedent which could reasonably be expected to have a Material Adverse Effect cannot be satisfied on or prior to the appropriate stage in the development, construction or operation of the Project.

#### 4.16 **Intellectual Property.**

(a) The Project Entities own or have the right to use all patents, trademarks, permits, service marks, trade names, copyrights, franchises, formulas, licenses and other rights with respect thereto, that are necessary for the operation of their business as contemplated in the Operative Documents, except where failure to obtain such rights could not reasonably be expected to have a Material Adverse Effect. Nothing has come to the attention of the Project Entities to the effect that any product, process, method, substance, part or other material presently contemplated to be sold by or employed by the Project Entities in connection with their business will infringe any license or other right owned by any other Person.

(b) Pursuant to the Intellectual Property License Agreements, the Project Entities have valid licenses to use the "Fontainebleau" federal trademark and associated trademarks and intellectual property reasonably necessary for and in connection with the operation of the Project. The Intellectual Property License Agreements are the legal, valid and binding obligation of the licensor thereunder, enforceable in accordance with its terms.

**4.17 Budgets and Remaining Cost Reports.**

**4.17.1 Each of the Budgets delivered on the Closing Date:**

- (a) are, to the Project Entities knowledge, as of the date of their delivery, based on reasonable assumptions as to all legal and factual matters material to the estimates set forth therein;
- (b) are, as of the date of their delivery, consistent with the provisions of the Operative Documents in all material respects;
- (c) set forth (for each Line Item Category, and in total), as of the date of their delivery, the amount of all reasonably anticipated Project Costs required to achieve Final Completion; and
- (d) fairly represent, as of the date of their delivery, the Project Entities expectations as to the matters covered thereby.

**4.17.2 Each Remaining Cost Report delivered hereunder is in the form attached as Appendix 8 to Exhibit C-1, and sets forth:**

- (a) In column D headed "Resort Budget":
  - (1) for the "Debt Service Through Scheduled Opening Date" line item, the total amount of cash Debt Service anticipated to be accrued in respect of the Indebtedness of the Companies through the Scheduled Opening Date (as in effect from time to time);
  - (2) for each Line Item Category, an amount no less than the total anticipated Project Costs from the commencement through the completion of the work contemplated by such Line Item Category, as determined by the Project Entities.
  - (3) In each other line item, the associated anticipated expenses through Final Completion as determined by the Project Entities.

The Disbursement Agent shall be entitled to rely on certifications to such effect from the Project Entities or the Construction Consultant in approving any determination made by the Project Entities;

- (b) In column N, headed "Balance to Complete" an aggregate amount equal to the remaining anticipated Project Costs through the Final Completion Date (which amount is accurate as to each item set forth in such column);
- (c) In the section headed "In Balance Test Adjustments" for In Balance calculations:

- (1) the Unallocated Contingency Balance; and
  - (2) the Required Minimum Cash Support, Required Minimum Liquidity Account, and the Required Minimum Excess Revolver Support Amount and any additional Cash Support delivered for the Completion Guarantees;
- (d) with respect to Project Costs previously incurred, is true and correct in all material respects; and
- (e) sets forth, as of the date of their delivery, and based on reasonable assumptions as to all legal and factual matters material to the estimates set forth therein, the amount of all reasonably anticipated Project Costs required to achieve Final Completion.

4.18 **Fees and Enforcement.** Other than amounts that have been paid in full or will have been paid in full by the dates when due, no fees or taxes, including without limitation stamp, transaction, registration or similar taxes, are required to be paid by the Project Entities for the legality, validity, or enforceability of this Agreement or any of the other Operative Documents.

4.19 **ERISA.** Either (a) there are no ERISA Plans or Multiemployer Plans for the Project Entities or any member of the Controlled Group or (b) to the extent that the following could not reasonably be expected to have a Material Adverse Effect, (i) the Project Entities and each member of the Controlled Group have fulfilled in all material respects their obligations (if any) under the minimum funding standards of ERISA and the Code for each ERISA Plan and for contributions to any Multiemployer Plan; (ii) each ERISA Plan is in compliance in all material respects with the currently applicable provisions of ERISA and the Code; (iii) neither the Project Entities nor any member of the Controlled Group have incurred any liability to the PBGC or an ERISA Plan under Title IV of ERISA (other than liability or contributions for premiums due in the ordinary course).

4.20 **Subsidiaries.** As of the Closing Date, each of the Subsidiaries of Parent are shown on Exhibit K and Parent does not have any Subsidiaries or owns the whole or any part of the issued share capital or other direct ownership interest of any company or corporation or other Person except as shown on Exhibit K.

4.21 **Labor Disputes and Acts of God.** Neither the business nor the properties of any Project Entity, nor, to the knowledge of the Project Entities, any Major Project Participant are affected by any Force Majeure Event, that could reasonably be expected to have a Material Adverse Effect.

4.22 **Liens.**

4.22.1 As of the Closing Date, except for Permitted Liens, the Project Entities have not secured or agreed to secure any Indebtedness by any Lien upon any of their present or future revenues or assets or Equity Interests and the Project

Entities do not have outstanding any Lien or obligation to create Liens on or with respect to any of their properties or revenues, other than Permitted Liens and as provided in the Security Documents.

4.22.2 As of each Advance Date, except for Permitted Liens, the Project Entities have not secured or agreed to secure any Indebtedness by any Lien upon any of their present or future revenues or assets or Equity Interests and the Project Entities do not have outstanding any Lien or obligation to create Liens on or with respect to any of their properties or revenues, other than Permitted Liens and as provided in the Security Documents.

4.23 **Title.** Each of the Project Entities owns and has good, legal and beneficial title to the property which each company purports to grant Liens pursuant to the Security Documents free and clear of all Liens, except Permitted Liens.

4.24 **Investment Company Act.** Neither the Project Entities nor any of their respective Affiliates are an "investment company" or a company "controlled" by an "investment company," within the meaning of the Investment Company Act of 1940.

4.25 **Project Schedule.** To the Project Entities' knowledge, the Project Schedule accurately specifies in summary form the work that the Project Entities propose to complete in each calendar quarter from the Closing Date through the Final Completion of the Project, all of which is expected to be achieved.

4.26 **Legal Parcel.** The Site has been properly subdivided or is entitled to exception therefrom, and constitutes a separate legal lot or parcel. The lease of the Retail Air Space Parcels does not constitute a violation of the Nevada subdivision map act or any similar Nevada law governing subdivision of real property.

4.27 **Location of Accounts and Records.** The Project Entities' books of accounts and records are located at the address for notices set forth for the Project Entities in Section 11.1. The federal employer identification numbers shown on Exhibit K for Parent and each of its Subsidiaries are accurate.

4.28 **Margin Regulations.** None of the Project Entities are engaged principally, or as one of its principal activities, in the business of extending credit for the purpose of purchasing or carrying margin stock (as defined in Regulations T, U or X of the Federal Reserve Board), and no part of the proceeds of the Advances or the revenues from the Project will be used by the Project Entities to purchase or carry any such margin stock or to extend credit to others for the purpose of purchasing or carrying any such margin stock or otherwise in violation of Regulations T, U or X.

4.29 **Governmental Regulation.** No Project Entity is subject to regulation under any federal or state statute or regulation which may limit or condition its ability to incur Indebtedness other than (following the granting of Nevada gaming licenses to the Project Entities), as required by Nevada Gaming Law.

4.30 **Solvency.** As of the Closing Date, the Companies are, and after giving effect to the incurrence of all Indebtedness and obligations being incurred in connection with the Operative Documents will be and will continue to be, Solvent on a consolidated basis. As of each Advance Date, the Companies and their respective Subsidiaries are Solvent on a consolidated basis.

4.31 **Plans and Specifications.** The Plans and Specifications (a) are, to the Project Entities' knowledge, based on reasonable assumptions as to all legal and factual matters material thereto, (b) are, and except to the extent permitted under Sections 6.1 and 6.2 will be from time to time, consistent with the provisions of the Operative Documents in all material respects, (c) have been prepared in good faith with due care, and (d) fairly represent the Project Entities' expectation as to the matters covered thereby. The Final Plans and Specifications (i) have been prepared in good faith with due care, and (ii) are accurate in all material respects and fairly represent the Project Entities' expectation as to the matters covered thereby.

The parties hereto acknowledge and agree that all knowledge of Parent and its Subsidiaries shall be imputed to the Project Entities in the making of the representations set forth herein, both as of the Closing Date and as of each Advance Date. All of these representations and warranties shall survive the Closing Date and the making of the Advances until, with respect to each Funding Agent and the Lenders, the Obligations under such Funding Agent's and Lenders' respective Facilities have been repaid in full in immediately available funds and their respective Facility Agreements and the other respective Financing Agreements and the commitments thereunder have terminated.

## ARTICLE 5

### AFFIRMATIVE COVENANTS

The Project Entities jointly and severally covenant and agree for the benefit of the Funding Agents, the Lenders and the Disbursement Agent that until this Agreement is terminated pursuant to Section 11.18, they shall:

#### 5.1 Use of Proceeds.

5.1.1 Deposits. Except as permitted by Section 6.8, deposit or cause to be deposited all funds received by or on behalf of the Project Entities prior to the Opening Date into the applicable Account specified in Article 2 of this Agreement, *provided* that:

- (a) the Project Entities shall also deposit or cause to be deposited into the applicable Account all Loss Proceeds received following the Opening Date but prior to the Final Completion Date;
- (b) the Project Entities may establish and maintain other accounts for the purposes described in Section 6.8; and
- (c) the income and receipts of the Retail Affiliate shall not be subject

to this Section 5.1.1.

5.1.2 **Project Costs.** Apply Advances made hereunder only to (i) pay Project Costs in accordance with the terms of this Agreement and the Financing Agreements, (ii) to repay Loans under the Bank Revolving Facility made to reimburse draws on any Letters of Credit under the Bank Credit Facility or (iii) to reimburse Affiliates to the extent permitted by Sections 3.8 and 3.9. The Project Entities shall use the proceeds of Advances made by the Retail Lenders under Section 3.5.1 solely to pay for Shared Costs and of Advances made by the Retail Lenders under Section 3.5.2 solely to pay for Other Retail Costs.

5.2 **Diligent Construction of the Project.** Take or cause to be taken all action, make or cause to be made all contracts and do or cause to be done all things necessary to construct the Project diligently in accordance with the Prime Construction Agreement, the Final Plans and Specifications and the other Operative Documents.

5.3 **Reports; Cooperation; Financial Statements.**

5.3.1 Prior to the Final Completion Date, deliver to the Bank Agent, the Retail Agent, the Construction Consultant and the Disbursement Agent together with each month's Advance Request (or if no Advance Request is submitted during any calendar month, within 20 days following the end of such calendar month), a monthly status report describing in reasonable detail the progress of the construction of the Project since the immediately preceding report hereunder, including without limitation, the cost incurred to the end of such month, an estimate of the time and cost required to complete the Project and such other information which the Bank Agent, the Retail Agent or the Disbursement Agent may reasonably request including information and reports reasonably requested by the Construction Consultant.

5.3.2 Deliver to the Bank Agent, the Retail Agent and the Disbursement Agent together with each month's final Advance Request (or if no Advance Request is submitted during any calendar month, within 20 days after the end of such calendar month), a monthly status report describing in reasonable detail the progress of the leasing activities with respect to the Project, if any, and all leases, if any, that have been entered into since the immediately preceding report hereunder.

5.3.3 Deliver to the Bank Agent, the Retail Agent, the Construction Consultant and the Disbursement Agent together with each month's Advance Request (or if no Advance Request is submitted during any calendar month, within 20 days after the end of such calendar month), all progress reports provided by each Contractor pursuant to the Material Contracts and such additional information as the Funding Agents or the Disbursement Agent may reasonably request.

5.4 **Notices.** Promptly, upon an officer of such Project Entity acquiring notice or giving notice, or upon an officer of such Project Entity obtaining knowledge thereof, as the case

may be, provide to the Disbursement Agent, the Construction Consultant and the Funding Agents written notice of:

5.4.1 Any Default or Event of Default of which the Project Entities have knowledge, describing such Default or Event of Default and any action being taken or proposed to be taken with respect thereto.

5.4.2 Any event, occurrence or circumstance which reasonably could be expected to cause the In Balance Test to fail to be satisfied or render the Project Entities incapable of, or prevent the Project Entities from (a) achieving the Opening Date on or before the Scheduled Opening Date, or (b) meeting any material obligation of the Project Entities under the Prime Construction Agreement or the other Material Contracts as and when required thereunder.

5.4.3 Any termination or event of default or notice thereof under any Material Contract or any notice under NRS 624.610 issued by any Contractor.

5.4.4 Any (a) fact, circumstance, condition or occurrence at the Site that results in noncompliance with any Environmental Law that has resulted or could reasonably be expected to result in a Material Adverse Effect, and (b) pending or, to the Project Entities' knowledge, threatened, Environmental Claim against the Project Entities or any Contractor arising in connection with its occupying or conducting operations on or at the Project or the Site which could reasonably be expected to have a Material Adverse Effect.

5.4.5 Any change in the Responsible Officers of the Project Entities, and such notice shall include a certified specimen signature of any new officer so appointed and, if requested by any Funding Agent or the Disbursement Agent, satisfactory evidence of the authority of such new Responsible Officer.

5.4.6 Any proposed material change in the nature or scope of the Project or the business or operations of the Project Entities.

5.4.7 Any notice of any material schedule delay delivered under the Prime Construction Agreement and all remedial plans and updates thereof.

5.4.8 Any other event or development which could reasonably be expected to have a Material Adverse Effect.

5.4.9 Promptly upon any Person becoming a Subsidiary of any of the Project Entities, written notice thereof.

5.4.10 "Substantial Completion" or "Final Completion" certificates or notices thereof delivered under any Material Contract.

5.5 **Material Contracts and Permits.** If requested by the Disbursement Agent or the Construction Consultant, deliver to the Disbursement Agent, the Funding Agents and the

Construction Consultant promptly, but in no event later than 20 days after the receipt thereof by the Project Entities, copies of (a) all Material Contracts and Permits described on Exhibit G that are obtained or entered into by the Project Entities after the Closing Date, (b) any amendment, supplement or other modification to any such Permit received by the Project Entities after the Closing Date.

**5.6 Storage Requirements for Off-Site Materials and Deposits.** Cause all Unincorporated Materials to be stored and identified in accordance with the requirements of Section 3.3.22.

**5.7 Plans and Specifications.** Maintain at the Site a complete set of Final Plans and Specifications, as in effect from time to time and provide the Construction Consultant and each Funding Agent with all requested access thereto upon reasonable notice.

**5.8 Payment and Performance Bonds.** Cause the General Contractor to cause each Contractor listed on Exhibit W to provide a Payment and Performance Bond prior to the date of the initial Advance from the Second Mortgage Proceeds Account. The Project Entities shall also cause the General Contractor to cause each Contractor (working under any first tier Contracts with an aggregate value or contract price of more than \$25,000,000 entered into following the Closing Date), within 15 calendar days after execution of its Contract, to provide a Payment and Performance Bond to secure its obligations under that Contract, *provided* that in consultation with the Construction Consultant, the Disbursement Agent may agree to eliminate or reduce the requirement of a Payment Performance Bond with respect to any Contract, or extend the period for delivery thereof. Each such Payment and Performance Bond shall name the Bank Agent and the Trustee as additional obligees and shall otherwise be in substantially the form of Exhibit L or as otherwise approved by the Disbursement Agent. Promptly after receipt thereof, deliver the originals of such Payment and Performance Bonds to the Disbursement Agent with a copy to the Construction Consultant.

**5.9 Retainage Amounts.** Unless the Disbursement Agent otherwise agrees in consultation with the Construction Consultant, withhold from each payment to the General Contractor a retainage amount equal to 10% of each payment to be made to each first and second tier Contractor performing labor at the Site under the General Contractor pursuant to its respective Subcontract; *provided, however*, that at such time as (i) the applicable Contractor shall have completed 50% of the work under its respective Subcontract and (ii) if a Payment and Performance Bond is required under Section 5.8 or Section 3.1.33 with respect to such Subcontract and to the extent required pursuant to the terms of the Payment and Performance Bond and applicable Legal Requirements in order to prevent a suretyship defense to performance under such Payment and Performance Bond, the Project Entities shall have obtained a "Consent of Surety to Reduction in or Partial Release of Retainage" (AIA form G707A) from the surety that issued such Payment and Performance Bond and delivered such consent to the Disbursement Agent with a copy to the Construction Consultant, then the Project Entities may terminate the requirement of further retainage to the extent that the cumulative retainage is equal to 5% of the contract value (as adjusted by change orders, if any). Upon the substantial completion of the work under each Contract, the Construction Consultant may consent to any reduction of the retainage amounts previously retained under that Subcontract and the corresponding amount required to be withheld under this Section 5.9, or release of any previously retained amount.



**5.10 Construction Consultant.**

5.10.1 Cooperate and direct the Architect and the General Contractor to cooperate with the Construction Consultant in the performance of the Construction Consultant's duties hereunder and under the Construction Consultant Engagement Agreement, *provided* that the Construction Consultant shall provide reasonable prior notice to the Project Entities prior to communicating with the Architect or Contractors. Without limiting the generality of the foregoing, the Project Entities shall and shall direct the Architect and the General Contractor to: (i) communicate with and promptly provide all invoices, documents, plans and other information reasonably requested by the Construction Consultant relating to the work, (ii) authorize any subcontractors or subconsultants of any tier to communicate directly with the Construction Consultant regarding the progress of the work, (iii) provide the Construction Consultant with access to the Site and, subject to required safety precautions, the construction areas, (iv) solely in the case of the General Contractor, provide the Construction Consultant with reasonable working space and access to telephone, copying and telecopying equipment and (v) otherwise facilitate the Construction Consultant's review of the construction of the Project and preparation of the certificates required hereby.

5.10.2 Pay or cause to be paid to the Construction Consultant out of the Advances made hereunder all amounts required hereunder and under the Construction Consultant Engagement Agreement.

5.10.3 In addition to any other consultation required hereunder, following the end of each quarter, upon the request of any Funding Agent, consult with any such Person regarding any adverse event or condition identified in any report prepared by the Construction Consultant.

5.11 **Insurance.** At all times maintain in full force and effect the insurance policies and programs listed on Exhibit D.

**5.12 Application of Insurance and Condemnation Proceeds.**

5.12.1 If any Event of Loss occurs with respect to the Project, (i) promptly upon discovery or receipt of notice thereof, provide written notice thereof to the Disbursement Agent with respect to any Event of Loss over \$100,000, and (ii) diligently pursue all their rights to compensation against all relevant insurers, reinsurers and/or Governmental Authorities, as applicable, in respect of such event to the extent that the Project Entities have a reasonable basis for a claim for compensation or reimbursement, including, without limitation, under any insurance policy required to be maintained hereunder.

5.12.2 All amounts and proceeds (including instruments) in respect of any Event of Loss, including the proceeds of any insurance policy required to be maintained by the Project Entities hereunder (collectively, "Loss Proceeds")

shall be applied as provided in this Section. All Loss Proceeds shall be paid by the insurers, reinsurers, Governmental Authorities or other payors directly to the Disbursement Agent for deposit in the Resort Loss Proceeds Account, provided that to the extent that such Loss Proceeds are payable in respect of property of the Retail Affiliate, then such Loss Proceeds shall be remitted to the Retail Loss Proceeds Account.

5.12.3 If any Loss Proceeds are paid directly to the Project Entities or any Funding Agent or Lender (i) such Loss Proceeds shall be received in trust for the Disbursement Agent, (ii) such Loss Proceeds shall be segregated from other funds of the Project Entities or such other Person, and (iii) the Project Entities or such other Person shall pay (or, if applicable, the Project Entities shall cause such of its affiliates to pay) such Loss Proceeds over to the Disbursement Agent in the same form as received (with any necessary endorsement). In the event that for a period of 90 days after any Loss Proceeds are remitted to the Disbursement Agent, the Project Entities are not entitled to obtain Advances pursuant to this Agreement, then the Project Entities shall use all other such proceeds and all funds on deposit in the Retail Loss Proceeds Account and the Resort Loss Proceeds Account to prepay the Bank Loans, the Second Mortgage Notes and the Retail Facility in accordance with the Bank Credit Agreement, the Second Mortgage Indenture and the Retail Facility Agreement (with the Retail Facility receiving (in addition to any funds contained in the Retail Loss Proceeds Account) that portion of any Loss Proceeds which are proportionately equal to the percentage of Shared Costs which have been Advanced by the Retail Lenders).

**5.13 Compliance with Material Contracts.** Duly and promptly comply with their respective obligations, and enforce all of their respective rights under all Material Contracts, except where the failure to comply or enforce such rights, as the case may be, could not reasonably be expected to have a Material Adverse Effect.

**5.14 Utility Easement Modifications.** Cause all utility or other easements that would interfere in any material respect with the construction or maintenance of the Improvements within the Project to be removed as expeditiously as possible. In any event, the Project Entities shall remove such easements before they interfere in any material respect with the prosecution in accordance with the Project Schedule of the work involved with the Project, and in any event, prior to the Completion Date. In the event such easements are not removed prior to such time as is reasonably determined by the Construction Consultant and the Project Entities fail to provide title insurance to the Project Secured Parties in a form reasonably satisfactory to them insuring over any loss the Project Secured Parties may suffer as a result of Project Entities' failure to so remove such easements, then the Project Entities (a) agree that the Disbursement Agent shall have the right to authorize such advances as it deems appropriate in order to remove or insure over the utility easements as exceptions to the title insurance policies in favor of the Project Secured Parties, and (b) hereby grant to the Disbursement Agent an irrevocable power of attorney to take such further steps in the name of the Project Entities as the Construction Consultant determines are appropriate in order to remove or insure over such easements.

5.15 **Retail Leasing Arrangements.** Diligently pursue the objectives of the leasing and marketing plan (as amended from time to time in accordance with the Retail Facility Agreement) for the Retail Air Space Lease submitted by the Retail Affiliate to the Retail Lender, and will use all commercially reasonable efforts to achieve the objectives of that leasing and marketing plan (as amended from time to time in accordance with the Retail Facility Agreement).

## ARTICLE 6

### NEGATIVE COVENANTS

The Project Entities covenant and agree, with and for the benefit of the Funding Agents, the Lenders and the Disbursement Agent that until this Agreement is terminated pursuant to Section 11.18, they shall not:

#### 6.1 Waiver, Modification and Amendment.

6.1.1 Directly or indirectly enter into, amend, modify, terminate (except in accordance with its terms), supplement or waive a right or permit or consent to the amendment, modification, termination (except in accordance with its terms), supplement or waiver of any of the provisions of, or give any consent under:

(a) any Permit, the effect of which could reasonably be expected to have a Material Adverse Effect;

(b) any material provision of any Payment and Performance Bond supporting a Contractor's obligations in excess of \$25,000,000 if the result thereof is materially adverse to the Funding Agents, the Lenders or the Disbursement Agent; or

(c) any Contract unless entering into, amending, modifying or terminating such Contract:

(1) could not reasonably be expected to have a Material Adverse Effect;

(2) the Project Entities concurrently comply with the procedures set forth in Section 6.1.2 and Section 6.2; and

(3) does not result in a prospective failure of the In Balance Test to be satisfied unless the Project Entities concurrently comply with the provisions of Section 6.9.1.

6.1.2 Notwithstanding Section 6.1.1, the Project Entities may:

(a) enter into Contracts consistent with the Plans and Specifications, the Project Schedule and the Budgets, as each is in effect from time to time, provided that:

- (i) for each Material Contract, the Project Entities shall concurrently submit to the Disbursement Agent an Additional Contract Certificate together with all exhibits, attachments and certificates required thereby, each duly completed and executed;
  - (ii) if entering into such Contract will result in any amendment of the Budgets, the Project Entities have complied with the requirements of Section 6.4;
  - (iii) if entering into such Contract will have the effect of a Scope Change, the Project Entities have complied with the provisions of Section 6.2; and
  - (iv) if a Payment and Performance Bond is required under Section 5.8 with respect to such Contract, the Project Entities shall have obtained and delivered such Payment and Performance Bond to the Disbursement Agent within the time period required under Section 5.8; or
- (b) from time to time, amend any Contracts if the amendment could not reasonably be expected to have a Material Adverse Effect. Each such amendment shall be in writing and shall identify with particularity all changes being made, provided that:
- (i) for Material Contracts, the Project Entities have submitted to the Disbursement Agent a Contract Amendment Certificate together with all exhibits, attachments and certificates required thereby each duly completed and executed;
  - (ii) if such amendment will result in an amendment to either of the Budgets, the Project Entities have complied with the requirements of Section 6.4;
  - (iii) if such amendment will have the effect of a Scope Change, the Project Entities have complied with the provisions of Section 6.2; and
  - (iv) if a Payment and Performance Bond is required under Section 5.8 with respect to such Contract after giving effect to the amendment or was delivered under Section 3.1.33 with respect to such Contract and except to the extent such amendment does not effect a change of the greater of \$1,000,000 or 10% or more to the aggregate contract price or value under such Contract, the Project Entities shall have obtained the written consent of the surety that issued such Payment and Performance Bond to such amendment and delivered such consent to the Disbursement Agent with a copy to the Construction Consultant.

6.2 **Scope Changes.**

6.2.1 Scope Changes.

(a) Without obtaining the consent of the Bank Agent, direct, consent to or enter into any Scope Change if such Scope Change will result in the Project being inconsistent with the standards described on Exhibit M-1;

(b) Without obtaining the consent of both (i) the Bank Agent, and (ii) the Trustee acting in accordance with the Second Mortgage Indenture, direct, consent to or enter into any Scope Change if such Scope Change will result in the Project being inconsistent with the standards described on Exhibit M-2;

(c) direct, consent to or enter into any Scope Change with respect to any Line Item Category in the Resort Budget if such Scope Change will increase the aggregate amount of the Project Costs reflected in the Resort Budget in any amount unless both:

(i) the Project Entities have accounted for such increase by means of any combination of:

(A) receipt of common equity contributions to the Companies in the amount of such increase (other than from funds already in the Accounts) and such contributions are deposited in the Equity Funding Account or applied to the temporary reduction of any outstanding Revolving Loans under the Bank Credit Agreement; or

(B) the allocation of Realized Savings obtained with respect to a Line Item Category of the Resort Budget in the amount of such increase to pay for such Scope Change; or

(C) allocation of the Unallocated Contingency Balance (but the aggregate of the amounts allocated to pay for Scope Changes pursuant to this clause (C) shall not, as of any date, exceed the lesser of (i) 50% of the amount by which (a) the "Unallocated Contingency" in column N of the Remaining Cost Report exceeds (b) the "Required Minimum Contingency" line item in the In Balance Test Adjustments section of the Remaining Cost Report; or (ii) \$25,000,000).

(ii) the Project Entities amend the Resort Budget to the extent required under Section 6.4.1 so as to reflect the proposed Scope Change;

(d) direct, consent to or enter into any Scope Change if such Scope Change would increase the amount of Other Retail Costs except to the extent that the Retail Affiliate is in compliance with Section 5.1.34 of the Retail Facility Agreement;

(e) direct, consent to or enter into any Scope Change if such Scope Change results in any of the following circumstances (in each case, as determined by the Project Entities and set forth in a certificate of the Project Entities delivered to the Disbursement Agent and the Funding Agent, which certificate shall be countersigned by the Construction Consultant in the case of any Scope Change which is not a Minor Scope Change):

(i) could reasonably be expected to result in the delay of the Opening Date beyond the Scheduled Opening Date;

(ii) could reasonably permit or result in any materially adverse modification of, or materially impairs the enforceability of, any material warranty under the Prime Construction Agreement or any other Contract and could materially and adversely impact the Project;

(iii) is not permitted by a Contract and could materially and adversely impact the Project;

(iv) could reasonably present a significant risk of the revocation or material adverse modification of any material Permit;

(v) could reasonably cause the Project or any portion thereof not to comply in all material respects with all Legal Requirements (provided that the Construction Consultant shall be entitled to determine that no violation of any Legal Requirement will occur on the basis of a certification by the Project Entities to such effect unless the Construction Consultant is aware of any inaccuracies in such certification); or

(vi) could reasonably result in a material adverse modification to, or cancellation or termination of any insurance policy required to be maintained by the Project Entities pursuant to Section 5.11.

Prior to implementing any Scope Change (other than a Minor Scope Change or the acceptance of non-conforming work), the Project Entities shall submit an Additional Contract Certificate or Contract Amendment Certificate and otherwise comply with the provisions of Sections 6.1.2(a) or (b), as applicable. Prior to implementing any Scope Change (including a Minor Scope Change but excluding the acceptance of non-conforming work) under any Contract as to which the Project Entities are required to obtain a Payment and Performance Bond pursuant

to Section 5.8 or Section 3.1.33 except to the extent such Scope Change does not effect a change of the greater of \$1,000,000 or 10% or more to the aggregate contract price or value under such Contract, the Project Entities shall obtain the written consent of the surety under the relevant Payment and Performance Bond to such Scope Change.

6.2.2 Substantial and Final Completion. Accept (or be deemed to have confirmed) any notice of "Substantial Completion" or "Final Completion" of all or any portion of the Project issued by any Contractor under any Material Contract without the written approval of the Construction Consultant and the Architect.

6.3 **Amendment to Operative Documents.** Enter into any agreement (other than this Agreement and the Financing Agreements) restricting its ability to amend any of the Financing Agreements or other Operative Documents.

6.4 **Resort Budget and Project Schedule Amendments.** Directly or indirectly, amend, modify, allocate, re-allocate or supplement or permit or consent to the amendment, modification, allocation, re-allocation or supplementation of, any of the Line Item Categories or other provisions of the Resort Budget or modify or extend the Scheduled Opening Date except as follows:

6.4.1 Permitted Budget Amendments.

(a) Concurrently with the implementation of any Scope Change that increases the amount of Project Costs necessary to achieve Final Completion, the Project Entities shall submit a Budget/Schedule Amendment Certificate and amend the Resort Budget in accordance with the provisions of Section 6.4.1(c) and (d) below to the extent necessary so that the amount set forth therein for each Line Item Category shall reflect all Scope Changes that have been made to such Line Item Category.

(b) The Project Entities may, from time to time, amend the Resort Budget in accordance with the provisions of Section 6.4.1(c), (d) and (e) in order to increase, decrease or otherwise reallocate amounts allocated to specific Line Item Categories of the Resort Budget.

(c) The Project Entities shall implement any amendment to the Resort Budget by delivering to the Disbursement Agent a Budget/Schedule Amendment Certificate together with all exhibits, attachments and certificates required thereby, each duly completed and executed. Such Budget/Schedule Amendment Certificate shall describe with particularity the Line Item Category increases, decreases, contingency allocations, and other proposed amendments to the Resort Budget.

(d) Increases to the aggregate amount budgeted for any Line Item Category in the Resort Budget will only be permitted to the extent the

increase does not result in the failure of the In Balance Test to be satisfied.

(e) Decreases to the aggregate amount budgeted for any Line Item Category of the Resort Budget will only be permitted upon obtaining Realized Savings in such Line Item Category.

(f) Notwithstanding the foregoing provisions of this clause neither Budget will be increased or decreased by reason of any change in any Line Item in the other Budget.

6.4.2 Permitted Schedule Amendments. The Project Entities may, from time to time, amend the Project Schedule, by complying with the provisions of Section 6.4.1(c) and (d) with respect to the changes in the Resort Budget that will result from the extension of the Scheduled Opening Date and delivering to the Disbursement Agent a Budget/Schedule Amendment Certificate:

(a) containing a revised Project Schedule and if applicable, reflecting any new Scheduled Opening Date; and

(b) attaching a certificate of the Construction Consultant to the effect the resulting changes to the Project Schedule will not result in the Opening Date occurring following the Outside Date.

If an Event of Loss or a Force Majeure Event occurs, then the Project Entities shall be permitted to extend the Outside Date beyond March 31, 2010 to the extent that the Project Entities certify in writing, and the Construction Consultant confirms, to the Disbursement Agent that such extension corresponds to the amount of time reasonably necessary to overcome any delays caused by the Event of Loss or Force Majeure Event; *provided that* no such extension may extend the Outside Date beyond September 30, 2010.

6.4.3 Amendment Certificates. Upon submission of the Budget/Schedule Amendment Certificate to the Disbursement Agent, together with all exhibits, attachments and certificates required pursuant thereto, each duly completed and executed, such amendment shall become effective hereunder, and the relevant Budget and, if applicable, the Project Schedule and the Scheduled Opening Date, shall thereafter be as so amended.

6.5 **Opening Date.** Permit the Opening Date to occur unless each of the Opening Date Certificates have been delivered, *provided* that the Disbursement Agent may, in consultation with the Construction Consultant waive or modify any of the Opening Date Certificates in any manner required to permit the Opening Date provided that all of the conditions in the body of this Agreement are satisfied and all material amenities associated with the Project are substantially complete, and may permit any corresponding modification of any General Contractor's Advance Certificate delivered concurrently with or after the Project Entities' Opening Date Certificate.



**6.6 Zoning and Contract Changes and Compliance.** (a) Initiate or consent to or acquiesce to any zoning downgrade of the Site or seek any material variance under any existing zoning ordinance except, in each case, to the extent such downgrade or variance could not reasonably be expected to materially and adversely affect the occupancy, use or operation of the Project, (b) use or permit the use of the Site in any manner that could result in such use becoming a non-conforming use (other than a non-conforming use otherwise in compliance with applicable land use laws, rules and regulations by virtue of a variance) under any zoning ordinance or any other applicable land use law, rule or regulation or (c) initiate or consent to or acquiesce to any change in any laws, requirements of Governmental Authorities or obligations created by private contracts which now or hereafter could reasonably be likely to materially and adversely affect the occupancy, use or operation of the Project.

**6.7 Unincorporated Materials.** Cause or permit (a) the value of Unincorporated Materials located at the Site but not expected to be incorporated into the Project within the ensuing calendar month to exceed the amounts set forth in Section 3.3.22 (as adjusted from time to time pursuant to Section 3.3.22(j)).

**6.8 Deposit Account Arrangements.** Prior to the Opening Date, open or maintain any bank, deposit or any other accounts at any financial institution other than:

- (a) the Accounts provided for herein;
- (b) any accounts for payroll, acceptance of advance deposits in respect of the Project, acceptance of deposits for the purchase of Condo Units that are not Bonded Condo Deposits, and other similar matters in the ordinary course of business none of which shall constitute an "Account" hereunder or shall be subject to this Agreement, *provided* that (i) none of the proceeds of the Advances hereunder shall be deposited therein (other than Advances for payroll amounts to the extent constituting Project Costs), and (ii) each such account (other than any payroll or zero-balance accounts) shall be subject to control agreements in favor of (x) in the case of the Companies, (1) the Bank Agent and (2) the Trustee, and (y) in the case of the Retail Affiliate, the Retail Agent.

Notwithstanding anything herein to the contrary, the Project Entities may cause to be deposited into any such account for acceptance of advance deposits or Condo Unit deposits any such advance deposits in respect of the Project or deposits for Condo Units which are not Bonded Condo Deposits, refund any such deposits from such accounts, pay payroll expenses from any such account established for such purpose and receive and make payments from such accounts described in clause (b) above in the ordinary course of business.

**6.9 In Balance Test.**

6.9.1 At any time from and after the initial Advance of funds from the Second Mortgage Proceeds Account, permit the In Balance Test to fail to be satisfied on two consecutive Scheduled Advance Dates, *provided* that to the extent that any

Force Majeure Event exists as of any such Scheduled Advance Date, then no default shall exist under this sentence until a third consecutive Scheduled Advance Date occurs upon which the In Balance Test is not satisfied. Without limiting the ability of the Project Entities to satisfy the In Balance Test in another manner consistent with this Agreement, the Project Entities may from time to time take any of the following actions (or any combination thereof) to cause the In Balance Test to be satisfied:

- (a) Induce Turnberry Residential to provide additional Cash Support for its Completion Guaranty;
- (b) Induce Parent or other Solvent Persons which are reasonably acceptable to the Bank Agent to provide the Bank Agent and the Trustee with additional Completion Guaranties or Cash Support; or
- (c) Deposit additional cash resulting from contributions to the permanent equity capital of the Companies into the Equity Funding Account;

provided that the Project Entities shall not be entitled to increase the Cash Support Amount to an amount which is in excess of \$200,000,000.

6.9.2 To the extent that, as of any date of determination, the amount of the Available Funds is in excess of the Remaining Costs, then the Project Entities may request that the Disbursement Agent release Cash Support to the extent of such excess; provided that the Project Entities shall not be entitled by this Section 6.9.2 to request:

- (a) the release of the Liquidity Account; or
- (b) the release of any Cash Support to the extent that the resulting Cash Support would be less than \$50,000,000 minus the cumulative amount of all drawings which have then been made pursuant to Completion Guaranties pursuant to this Agreement;
- (c) any release of Cash Support if any Default or Event of Default has occurred and remains continuing.

Each such request shall be in writing and shall provide supporting detail of the Project Entities' calculation of the In Balance Test in a manner reasonably acceptable to the Disbursement Agent and the Bank Agent. The Disbursement Agent, the Construction Consultant and the Bank Agent shall promptly review any such request submitted by the Project Entities and, provided that the Disbursement Agent, the Construction Consultant and the Bank Agent agree with the Project Entities calculations submitted pursuant to this Section, the Disbursement Agent shall promptly and in any event within ten Banking Days following any such request release Cash Support in the amount requested.

#### 6.10 LEED Shortfalls.

In the event that a LEED Shortfall Amount is determined to exist, the Companies shall obtain contributions to their permanent equity capital (in addition to any other contributions to their capital which may be required by reason of the failure of the In-Balance Test to be satisfied, or otherwise), within sixty days following the date upon which such LEED Shortfall Amount first exists in the amount thereof, *provided* that to the extent that a LEED Shortfall Amount exists prior to April 6, 2008, no such contribution shall be required until the later of the last day of such sixty day period and June 6, 2008 (the "LEED Calculation Date"). Notwithstanding anything in this Agreement to the contrary, until the LEED Calculation Date, the Project Entities shall not be required to recognize as Project Costs or Remaining Cost (whether in the Budget, Remaining Cost Report, the representations hereunder or otherwise) any additional costs arising by reason of any change in Nevada State laws governing the partial sales and use tax exemption of the Project arising by reason of its proposed qualification pursuant to the Leadership in Energy and Environmental Design ("LEED") program, and the Project Entities shall at all times be entitled to use the proceeds of the Advances hereunder to pay such costs.

### ARTICLE 7

#### EVENTS OF DEFAULT

7.1 **Events of Default.** The occurrence of any of the following events shall constitute an event of default ("Event of Default") hereunder:

7.1.1 Other Financing Documents. The occurrence of an "Event of Default" under and as defined by any one or more of the Facility Agreements, *provided* that from and after the date upon which any such "Event of Default" is cured or waived in accordance with the terms of the applicable Facility Agreement, it shall no longer constitute an Event of Default hereunder.

7.1.2 Inability to Deliver Advance Request. The failure of the Project Entities to submit an Advance Request which is approved (including by waiver of the applicable conditions) on two consecutive Scheduled Advance Dates, *provided* that to the extent that such failure results from any Force Majeure Event or to the extent that on each such Scheduled Advance Date the Project Entities receive funds pursuant to Sections 3.8 and 3.9 in an amount which is sufficient to pay all Project Costs which are scheduled to be paid on such Scheduled Advance Dates, then one additional Advance Date may pass.

7.1.3 Representations.

- (a) Any representation, warranty or certification confirmed or made on the Closing Date pursuant to this Agreement or any Financing Agreement by any of the Project Entities shall be found to have been incorrect in any material respect; or
- (b) Any representation, warranty or certification confirmed or made by any of the Project Entities in this Agreement on any date following the Closing Date but prior to the Initial Bank Advance Date (including any Advance Request or other certificate submitted with respect to this Agreement) shall be found to have been incorrect when made or deemed to be made, unless the failure of any such representation and warranty to be true and correct could not reasonably be expected to result in a Material Adverse Effect; or
- (c) Any representation, warranty or certification confirmed or made by any of the Project Entities in this Agreement on or following the Initial Bank Advance Date (including any Advance Request or other certificate submitted with respect to this Agreement) shall be found to have been incorrect when made or deemed to be made in any material respect; or
- (d) Any representation, warranty or certification confirmed or made by any of the Project Entities in any Material Contract or any certificate submitted with respect to any Material Contract shall be found to have been incorrect in any material respect when made or deemed to be made except to the extent that any failure to be true and correct could not reasonably be expected to have a Material Adverse Effect.

7.1.4 Covenants.

- (a) The Project Entities shall fail to perform or observe any of their respective obligations under Sections 5.1, 5.8, 5.9, 6.1, 6.2, 6.3, 6.4, 6.5, 6.6 or 6.9.1;
- (b) The Project Entities shall fail to perform or observe any of their respective obligations under Sections 5.4.1, 5.4.7, 5.7 or 5.14 within five days after a Responsible Officer of the Project Entities obtaining actual knowledge thereof;
- (c) The Project Entities shall fail to at all times maintain in full force and effect the insurance policies and programs listed on Exhibit D (except 30 days grace after notice from the Controlling Person shall be allowed in the case of automobile, workers compensation, pollution liability and design errors and omissions insurance); or
- (d) The Project Entities shall fail to perform or observe any of their

obligations under Articles 5 or 6 (other than those listed in Sections 7.1.4(a), (b) or (c)) where such default shall not have been remedied within 30 days after the earlier of (i) the Project Entities or any other Project Entity becoming aware of such breach or default or (ii) notice of such failure from the Disbursement Agent or any Funding Agent to the Project Entities.

7.1.5 Breach of Contracts.

(a) The General Contractor or any Project Entity shall breach or default (after giving effect to applicable cure and grace periods) under any term, condition, provision, covenant, representation or warranty contained in any Contract with a contract price or value in excess of \$100,000,000 and such breach or default (i) has had or could reasonably be expected to have a Material Adverse Effect and (ii) continues unremedied for thirty days after the earlier of (A) the Project Entities becoming aware of such breach or default or (B) receipt by the Project Entities of notice from the Disbursement Agent or any Funding Agent of such breach or default; or

(b) Any party thereto (other than the General Contractor or a Project Entity) shall breach or default under any term, condition, provision, covenant, representation or warranty contained in any Contract with a contract price or value in excess of \$100,000,000 and such breach or default could reasonably be expected to result in a Material Adverse Effect and shall continue unremedied for thirty days after the earlier of (i) the Project Entities becoming aware of such breach or default or (ii) receipt by the Project Entities of notice from the Disbursement Agent or any Funding Agent of such breach or default; *provided, however,* that:

(A) if the breach or default is reasonably susceptible to cure within 60 days but cannot be cured within such 30 days despite such other party's good faith and diligent efforts to do so, the cure period shall be extended as is reasonably necessary beyond such 30 day period (but in no event longer than 60 days) if remedial action reasonably likely to result in cure is promptly instituted within such 30 day period and is thereafter diligently pursued until the breach or default is corrected; and

(B) no Default or Event of Default shall be deemed to have occurred as a result of such breach if the Project Entities provide written notice to the Funding Agents within ten Banking Days after the Project Entities becoming aware of such breach that the Project Entities intend to replace such Contract (or that replacement is not necessary) and (1) the Project Entities obtain a replacement obligor or obligors reasonably acceptable to the Disbursement Agent (in consultation with the Construction Consultant) for the affected

party (if in the judgment of the Disbursement Agent (in consultation with the Construction Consultant) a replacement is necessary), (2) the Project Entities enter into a replacement Contract in accordance with Section 6.1 within 60 days of such breach (if in the reasonable judgment of the Disbursement Agent (in consultation with the Construction Consultant) a replacement is necessary); provided, however that the replacement Contract may require the Project Entities to pay amounts to the replacement obligor in excess of those that would have been payable under the breached Contract if such additional payments in the reasonable judgment of the Disbursement Agent, in consultation with the Construction Consultant, do not cause the In Balance Test to fail to be satisfied and (3) such breach or default, after considering any replacement obligor and replacement Contract and the time required to implement such replacement, has not and could not reasonably be expected to have a Material Adverse Effect; or

(c) The Project Entities shall have received, and the right to stop work thereunder shall thereafter become effective, a "stop work" notice under NRS 624.610 or otherwise with respect to any Contract with a contract price or value in excess of \$50,000,000.

7.1.6 Termination or Invalidation of Material Contracts; Abandonment of Project.

(a) Any of the Material Contracts with a contract price or value in excess of \$100,000,000 shall have terminated (other than in accordance with its express terms), become invalid or illegal, or otherwise ceased to be in full force and effect, provided that with respect to any such Material Contract other than the Prime Construction Agreement, no Default or Event of Default shall be deemed to have occurred as a result of such termination if the Project Entities provide written notice to the Funding Agents within ten Banking Days after any Project Entity becoming aware of such Contract ceasing to be in full force and effect; and

(i) the Project Entities obtain a replacement obligor or obligors reasonably acceptable to the Disbursement Agent (in consultation with the Construction Consultant), for the affected party (if in the judgment of the Disbursement Agent (in consultation with the Construction Consultant) a replacement is necessary);

(ii) the Project Entities enter into a replacement Contract in accordance with Section 6.1 within 60 days of such termination; provided, however that the replacement Contract may require the Project Entities to pay additional amounts to the replacement obligor that would have otherwise been payable under the terminated Contract if such additional payments in the reasonable

judgment of the Disbursement Agent, in consultation with the Construction Consultant, do not cause the In Balance Test to fail to be satisfied; or

(b) The Project Entities shall (i) abandon the Project or (ii) for a period in excess of ten days otherwise cease to pursue the operations of the Project, except to the extent resulting from a Force Majeure Event.

7.1.7 Government Authorizations. The Project Entities fail to observe, satisfy or perform, or there is a violation or breach of, any of the terms, provisions, agreements, covenants or conditions attaching to or under the issuance to such Person of any Permit or any such Permit or any provision thereof is suspended, revoked, cancelled, terminated or materially and adversely modified or fails to be in full force and effect or any Governmental Authority challenges or seeks to revoke any such Permit if such failure to perform, violation, breach, suspension, revocation, cancellation, termination or modification could reasonably be expected to have a Material Adverse Effect.

7.1.8 Future Advances. With respect to any of the Deeds of Trust, if any "borrower" (as that term is defined in NRS 106.310) who may send a notice pursuant to NRS 106.380(1), (i) delivers, sends by mail or otherwise gives, or purports to deliver, send by mail or otherwise give, to a beneficiary under any of the Deeds of Trust (A) any notice of an election to terminate the operation of any such Deed of Trust as security for any secured obligation, including, without limitation, any obligation to repay any "future advance" (as defined in NRS 106.320) of "principal" (as defined in NRS 106.345), or (B) any other notice pursuant to NRS 106.380(1), (ii) records a statement pursuant to NRS 106.380(3), or (iii) causes any Deed of Trust, any secured obligation, or any Secured Party to be subject to NRS 106.380(2), 106.380(3) or 106.400.

7.2 **Remedies.** Upon the occurrence and during the continuation of an Event of Default, the Controlling Person may, subject to the terms of the Project Lender Intercreditor Agreement, and without further notice of default, presentment or demand for payment, protest or notice of non-payment or dishonor, or other notices or demands of any kind, all such notices and demands being waived (to the extent permitted by applicable law) notify the Project Entities and each Funding Agent of its determination that it will not permit further Advances hereunder. Thereafter, each of the Funding Agents may exercise any or all rights and remedies at law or in equity (in any combination or order that the Funding Agents may elect, subject to the foregoing), including without limitation or prejudice to the Funding Agents' other rights and remedies, the following:

7.2.1 refuse, and the Funding Agents shall not be obligated, to make any Advances or make any payments from any Account or other funds held by the Disbursement Agent by or on behalf of the Project Entities or suspend or terminate the Commitments; and

7.2.2 exercise any and all rights and remedies available to it under any of the

Financing Agreements (including the exercise of rights in respect of each Account in which that Funding Agent has been granted a Lien in accordance with this Agreement).

## ARTICLE 8

### THE CONSTRUCTION CONSULTANT

8.1 **Removal and Fees.** The Bank Agent may, in its sole discretion, remove the Construction Consultant and, upon such removal, a replacement acceptable to the Bank Agent shall be appointed in consultation with the Project Entities. Notice of any replacement Construction Consultant shall be given by the Bank Agent to the Funding Agent, the Disbursement Agent and the Project Entities. All reasonable fees and expenses of the Construction Consultant (whether the original ones or replacements) shall be paid by the Project Entities. No other Funding Agent shall have the right to remove the Construction Consultant or appoint a replacement. The Project Entities have reviewed the Construction Consultant Engagement Agreement and hereby agree to reimburse the Disbursement Agent and the Funding Agents for the fees of the Construction Consultant set forth therein.

8.2 **Duties.** The Construction Consultant is obligated to the Funding Agents to carry out the activities required of them in this Agreement and in the Construction Consultant Engagement Agreement. The Project Entities acknowledge that they will not have any cause of action or claim against the Construction Consultant resulting from any decision made or not made, any action taken or not taken or any advice given by the Construction Consultant in the due performance in good faith of its duties.

8.3 **Acts of Disbursement Agent.** The Disbursement Agent will take such actions as any Funding Agent or the Project Entities may reasonably request to cause the Construction Consultant to act diligently in the issuance of all certificates required to be delivered by the Construction Consultant and to otherwise fulfill their obligations to the Funding Agents.

## ARTICLE 9

### THE DISBURSEMENT AGENT

9.1 **Appointment and Acceptance.** Each of the Funding Agents hereby irrevocably appoints and authorizes the Disbursement Agent to act on its behalf hereunder and under the Control Agreements (including any future Control Agreements which may hereafter be executed). The Disbursement Agent accepts such appointments and agrees to exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties hereunder consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds.

#### 9.2 **Duties and Liabilities of the Disbursement Agent Generally.**

9.2.1 **Meetings, Etc.** Commencing upon execution and delivery hereof, the Disbursement Agent shall have the right to meet periodically at reasonable



times, upon three Banking Days' notice, with representatives of the Project Entities, the Construction Consultant, the General Contractor, the Architect and such other Contractors, employees, consultants or agents as the Disbursement Agent shall reasonably request to be present for such meetings. The Disbursement Agent may perform such inspections and tests of the Project as it deems reasonably appropriate in the performance of its duties hereunder. In addition, the Disbursement Agent shall have the right at reasonable times upon prior notice to review all information (including Contracts) supporting the amendments to the Resort Budget, amendments to any Contracts, Advance Requests, to inspect materials stored at the Site or at any other location, to review the insurance required pursuant to the terms of the Financing Agreements, to confirm receipt of endorsements from the Title Insurer insuring the continuing priority of the liens of the Deeds of Trust as security for each Advance hereunder, and to examine the Plans and Specifications and all shop drawings relating to the Project. The Disbursement Agent is authorized to contact any Contractor for purposes of confirming receipt of progress payments. The Disbursement Agent shall be entitled to examine, copy and make extracts of the books, records, accounting data and other documents of the Project Entities, including without limitation bills of sale, statements, receipts, conditional and unconditional lien releases, contracts or agreements, which relate to any materials, fixtures or articles incorporated into the Project. From time to time, at the request of the Disbursement Agent, the Project Entities shall make available to the Disbursement Agent a Project Schedule. The Project Entities agree to cooperate with the Disbursement Agent in assisting the Disbursement Agent to perform its duties hereunder and to take such further steps as the Disbursement Agent reasonably may request in order to facilitate the Disbursement Agent's performance of its obligations hereunder.

9.2.2 Powers, Rights and Remedies. The Disbursement Agent is authorized to take such actions and to exercise such powers, rights and remedies under this Agreement and the Control Agreements as are specifically delegated or granted to the Disbursement Agent by the terms hereof or thereof, together with such powers, rights and remedies as are reasonably incidental thereto. The Disbursement Agent agrees to act in accordance with the instructions of the Controlling Person and, in the absence of such instructions, shall take such actions or refrain from acting as it deems reasonable subject to any express requirements of this Agreement.

Neither the Funding Agents nor the Disbursement Agent shall instruct the securities intermediary under any Control Agreement to take an action inconsistent with the Project Entities' instructions except to the extent expressly permitted by this Agreement or the relevant Control Agreement.

9.2.3 Notice of Events of Default. If the Disbursement Agent is notified that an Event of Default or a Default has occurred and is continuing, the Disbursement Agent shall promptly and in any event within five Banking Days

provide notice to each of the Funding Agents of the same and otherwise shall exercise such of the rights and powers vested in it by this Agreement and the documents constituting or executed in connection with this Agreement, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the reasonable administration of its own affairs.

9.2.4 No Risk of Own Funds. None of the provisions of this Agreement shall require the Disbursement Agent to expend or risk its own funds or otherwise to incur any personal financial liability in the performance of any of its duties hereunder or under the Control Agreements, or in the exercise of any of its rights or powers if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not reasonably assured to it.

9.2.5 No Imputed Knowledge. Notwithstanding anything to the contrary in this Agreement, the Disbursement Agent shall not be deemed to have knowledge of any fact known to it in any capacity other than the capacity of Disbursement Agent, or by reason of the fact that the Disbursement Agent is also a Funding Agent or Lender. The Disbursement Agent's duties and functions hereunder shall in no way impair or affect any of the rights and powers of, or impose any duties or obligations upon the Disbursement Agent in its capacity as a Funding Agent or as a Lender. The Disbursement Agent shall have the same rights and powers hereunder as any other Funding Agent or Lender and may exercise the same as though it were not performing its duties and functions hereunder. The Disbursement Agent and its Affiliates may accept deposits from, lend money to and generally engage in any kind of banking, trust, financial advisory or other business with the Project Entities or any of their Affiliates as if it were not performing the duties specified herein, and may accept fees and other consideration from the Project Entities for services in connection with this Agreement and otherwise without having to account for the same to the Lenders. Each party hereto acknowledges that, as of the Closing Date, Bank of America is the Disbursement Agent hereunder and acting as securities intermediary under the Control Agreements in respect of the Accounts (other than the Second Mortgage Proceeds Account), a Funding Agent and as a Lender under certain of the Facilities.

### 9.3 **Particular Duties and Liabilities of the Disbursement Agent.**

9.3.1 Reliance For Instructions. The Disbursement Agent may, from time to time, in the event that any matter arises as to which specific instructions are not provided herein or in a Control Agreement (as applicable), request directions from the Funding Agents or the Controlling Person with respect to such matters and may refuse to act until so instructed and shall be fully protected in acting or refusing to act in accordance with such instructions. The Disbursement Agent is further authorized by the Funding Agents and the Lenders to enter into agreements supplemental to this Agreement for the purpose of curing any formal

defect, inconsistency, omission or ambiguity in this Agreement (without any consent or approval by the Funding Agents or the Lenders) provided that in no event shall the Disbursement Agent enter into any supplemental agreement in respect of this Agreement with respect to Sections 3.5, 3.7.3, 5.11 or 5.12, or any other provision of this Agreement directly materially and adversely affecting the rights of the Retail Agent, without the consent of the Retail Agent.

9.3.2 Reliance Generally. The Disbursement Agent may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval or other paper or document believed by it on reasonable grounds to be genuine and to have been signed or presented by the proper party or parties. Notwithstanding anything else in this Agreement to the contrary, in performing its duties hereunder, including approving any Advance Requests, making any other determinations or taking any other actions hereunder, the Disbursement Agent shall be entitled to rely on certifications from the Project Entities (and, where contemplated herein, certifications from third parties, including the Construction Consultant) as to satisfaction of any requirements and/or conditions imposed by this Agreement. The Disbursement Agent shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items or to investigate any other facts or circumstances to verify compliance by the Project Entities with their obligations hereunder.

9.3.3 Court Orders. The Disbursement Agent is authorized, in its exclusive discretion, to obey and comply with all writs, orders, judgments or decrees issued by any court or administrative agency affecting any money, documents or things held by the Disbursement Agent. The Disbursement Agent shall not be liable to any of the parties hereto, their successors, or representatives by reason of the Disbursement Agent's compliance with such writs, orders, judgments or decrees, notwithstanding the fact that such writ, order, judgment or decree is later reversed, modified, set aside or vacated.

9.3.4 Requests of the Project Entities. Any request, direction, order or demand of the Project Entities mentioned herein shall be sufficiently evidenced (unless other evidence in respect thereof be herein specifically required) by an instrument signed by one of its Responsible Officers, and any resolution of the Project Entities may be evidenced to the Disbursement Agent by a copy thereof certified by the Secretary or an Assistant Secretary of the Project Entities.

9.3.5 Reliance on Opinions of Counsel. The Disbursement Agent may consult with counsel and any written opinion of counsel shall be full and complete authorization and protection in respect of any action taken or omitted by it hereunder or under any Control Agreement in good faith and in accordance with such opinion of counsel.

9.3.6 Action through Agents or Attorneys. The Disbursement Agent may execute any of the trusts or powers hereunder or perform any duties hereunder or

under any Control Agreement either directly or by or through agents or attorneys appointed with due care, and the Disbursement Agent shall not be responsible for any act on the part of any agent or attorney so appointed.

9.3.7 Marshaling of Assets. The Disbursement Agent need not marshal in any particular order any particular part or piece of the Project Security held by the Disbursement Agent in its capacity as Disbursement Agent hereunder or under any Control Agreement, or any of the funds or assets that the Disbursement Agent may be entitled to receive or have claim upon.

9.3.8 Disagreements.

(a) In the event of any disagreement between a Funding Agent and the Project Entities or any other Person or Persons whether or not named herein, and adverse claims or demands are made in connection with or for any of the investments or amounts held pursuant to this Agreement or under any Control Agreement, the Disbursement Agent shall be entitled at its option to refuse to comply with any such claim or demand so long as such disagreement shall continue, and in so doing, the Disbursement Agent shall not be or become liable for damages or interest to such Funding Agent or the Project Entities or any other Person or Persons for the Disbursement Agent's failure or refusal to comply with such conflicting or adverse claims or demands. The Disbursement Agent shall be entitled to continue so to refrain and refuse so to act until:

(i) the rights of the adverse claimants have been fully adjudicated in the court assuming and having jurisdiction of the claimants and the investments and amounts held pursuant to this Agreement or under any Control Agreement; or

(ii) all differences shall have been adjusted by agreement, and the Disbursement Agent shall have been notified thereof in writing by all persons deemed by the Disbursement Agent, in its sole discretion, to have an interest therein.

(b) In addition, the Disbursement Agent may file a suit in interpleader for the purpose of having the respective rights of all claimants adjudicated, and may deposit with the court all of the investments and amounts held pursuant to this Agreement or under any Control Agreement. The Project Entities agree to pay all costs and reasonable counsel fees incurred by the Disbursement Agent in such action, said costs and fees to be included in the judgment in any such action.

9.4 **Segregation of Funds and Property Interest.** Except as otherwise expressly provided in the Financing Agreements, monies and other property received by the Disbursement Agent shall, until used or applied as herein provided, be held for the purposes for which they were received, and shall be segregated from other funds except to the extent required herein or

by law. To the extent that the Disbursement Agent also acts as securities intermediary, (a) the Disbursement Agent shall note in its records that all funds and other assets in the Accounts described in Section 2.2, have been pledged to the Secured Parties (as their interests appear in the matrix set forth in that Section) and that the Disbursement Agent is holding such items for such Secured Parties. Accordingly, it is the intention of the parties that all such funds and assets shall not be within the bankruptcy "estate" (as such term is used in 11 U.S.C. § 541) of the Disbursement Agent. The Disbursement Agent shall not be under any liability for interest on any monies received by it hereunder, except as otherwise specified in this Agreement. The Disbursement Agent hereby expressly waives any right of set-off or similar right it may have against or in relation to the Accounts and any monies, Cash Equivalents or other amounts on deposit therein.

**9.5 Compensation and Reimbursement of the Disbursement Agent.** The Project Entities covenant and agree to pay to the Disbursement Agent from time to time, and the Disbursement Agent shall be entitled to, the fees set forth in the letter agreement between the Project Entities and the Disbursement Agent, and the Project Entities will further pay or reimburse the Disbursement Agent upon its request for all reasonable expenses, disbursements and advances incurred or made by the Disbursement Agent in accordance with any of the provisions of the Financing Agreements or the documents constituting or executed in connection with the Project Security including any Control Agreements (including the reasonable compensation and the reasonable expenses and disbursements of its counsel and of all persons not regularly in its employ). The obligations of the Project Entities under this Section 9.5 to compensate the Disbursement Agent and to pay or reimburse the Disbursement Agent for reasonable expenses, disbursements and advances shall constitute additional indebtedness (and shall be deemed permitted indebtedness under each Financing Agreement) hereunder and shall survive the satisfaction and discharge of this Agreement.

**9.6 Qualification of the Disbursement Agent.** Any successor to the initial Disbursement Agent hereunder shall at all times be a corporation with offices in New York City, New York which (a) is authorized to exercise corporation trust powers, (b) is subject to supervision or examination by the applicable Governmental Authority, (c) shall have a combined capital and surplus of at least \$500,000,000, (d) shall have a long-term credit rating of not less than A- or A3, respectively, by S&P or Moody's; and provided, that any such bank with a long-term credit rating of A- or A3 shall not cease to be eligible to act as Disbursement Agent upon a downward change in either such rating of no more than one category or grade of such minimum rating, as the case may be; and (e) with respect to any replacement of the Person acting as Disbursement Agent as of the Closing Date, shall be acceptable to each of the Bank Agent and the Trustee acting pursuant to the Project Lender Intercreditor Agreement (and so long as no Event of Default then exists shall be approved by the Project Entities, such approval not to be unreasonably withheld or delayed). In case at any time the Disbursement Agent shall cease to be eligible in accordance with the provisions of this Section 9.6, the Disbursement Agent shall resign immediately upon appointment of a successor Disbursement Agent in accordance with Section 9.7.

**9.7 Resignation and Removal of the Disbursement Agent.** The Trustee (until the Exhaustion of the Second Mortgage Proceeds Account), and the Bank Agent (at any time

thereafter) shall have the right should they reasonably determine that the Disbursement Agent has breached or failed to perform its obligations hereunder or has engaged in willful misconduct or gross negligence, upon the expiration of 30 days following delivery of written notice of substitution to the Disbursement Agent, each of the Funding Agents and the Project Entities, to cause the Disbursement Agent to be relieved of its duties hereunder and to select a substitute disbursement agent to serve hereunder. The Disbursement Agent may resign at any time upon 45 days' written notice to all parties hereto. Such resignation shall take effect upon the earlier of receipt by the Disbursement Agent of an instrument of acceptance executed by a successor disbursement agent meeting the qualifications set forth in Section 9.6 and consented to by the other parties hereto or 45 days after the giving of such notice. Upon selection of a substitute disbursement agent, the Funding Agents and the Project Entities and the substitute disbursement agent shall enter into an agreement substantially identical to this Agreement and, upon appointment of a substitute Disbursement Agent, the Disbursement Agent shall promptly transfer to the substitute Disbursement Agent originals of all books, records, and other documents in the Disbursement Agent's possession relating to this Agreement.

**9.8 Merger or Consolidation of the Disbursement Agent.** Any corporation into which the Disbursement Agent may be merged or converted or with which it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Disbursement Agent shall be a party, or any corporation succeeding to the corporate trust business of the Disbursement Agent, shall, if eligible hereunder, be the successor of the Disbursement Agent hereunder; provided, that such corporation shall be eligible under the provisions of Section 9.6 without the execution or filing of any paper with any party hereto or any further act on the part of any of the parties hereto except where an instrument of transfer or assignment is required by law to effect such succession, anything herein to the contrary notwithstanding.

**9.9 Statements; Information.**

**9.9.1 Monthly Statements.** The Disbursement Agent shall provide to the Funding Agents and the Project Entities a monthly statement of all deposits to, and disbursements from, each Account (other than in respect of the Second Mortgage Proceeds Account) and interest and earnings credited to each account established and maintained hereunder and under the other Operative Documents. The Disbursement Agent shall forward to the Funding Agents any such statements delivered to it by the securities intermediaries under the Control Agreements.

**9.9.2 Information Requests.** The Disbursement Agent shall, at the expense of the Project Entities (i) as promptly as is reasonably practicable after receipt of any reasonable written request by the Project Entities or any Funding Agent, but not more frequently than monthly (unless a Default or an Event of Default shall have occurred), provide the Project Entities or such Funding Agent, as the case may be, with such information as the Project Entities or such Funding Agent may reasonably request regarding all categories, amounts, maturities and issuers of investments made by the Disbursement Agent pursuant to this Agreement and regarding amounts available in the Accounts, and (ii) upon the reasonable

written request of the Project Entities, arrange with the Project Entities for a mutually convenient time for a Responsible Officer of the Reviewing Accountant to visit the offices of the Disbursement Agent to examine and take copies of records relating to and instruments evidencing the investments made by the Disbursement Agent pursuant to this Agreement.

**9.10 Limitation of Liability.** The Disbursement Agent's responsibility and liability under this Agreement shall be limited as follows: (a) the Disbursement Agent does not represent, warrant or guaranty to the Funding Agents or the Lenders the performance by the Project Entities, the General Contractor, the Construction Consultant, the Architect, or any other Contractor of their respective obligations under the Operative Documents and shall have no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing; (b) the Disbursement Agent shall have no responsibility to the Project Entities, the Funding Agents or the Lenders as a consequence of performance by the Disbursement Agent hereunder except for any bad faith, fraud, gross negligence or willful misconduct of the Disbursement Agent as finally judicially determined by a court of competent jurisdiction; (c) the Project Entities shall remain solely responsible for all aspects of their business and conduct in connection with the Project, including but not limited to the quality and suitability of the Plans and Specifications, the supervision of the work of construction, the qualifications, financial condition and performance of all architects, engineers, contractors, subcontractors, suppliers, consultants and property managers, the accuracy of all applications for payment, and the proper application of all disbursements; and (d) the Disbursement Agent is not obligated to supervise, inspect or inform the Project Entities of any aspect of the development, construction or operation of the Project or any other matter referred to above. The Bank Agent, the Retail Agent and the Representative (on behalf of the Trustee and the Second Mortgage Holders) have each made their own independent investigation of the financial condition and affairs of the Project Entities in connection with the making of the extensions of credit contemplated by the Financing Agreements and has made and shall continue to make its own appraisal of the creditworthiness of the Project Entities. Except as specifically set forth herein, the Disbursement Agent shall not have any duty or responsibility, either initially or on a continuing basis, to make any such investigation or any such appraisal on behalf of the Funding Agents or Lenders or to provide any Funding Agent or Lender with any credit or other information with respect thereto. The Disbursement Agent shall not have, by reason of this Agreement, a fiduciary relationship in respect of any Person; and nothing in this Agreement, expressed or implied, is intended to or shall be so construed as to impose upon the Disbursement Agent any obligations in respect of this Agreement except as expressly set forth herein or therein. The Disbursement Agent shall have no duties or obligations hereunder except as expressly set forth herein, shall be responsible only for the performance of such duties and obligations and shall not be required to take any action otherwise than in accordance with the terms hereof. The provisions of this Article 9 are solely for the benefit of the Disbursement Agent and the Funding Agents and Lenders and the Project Entities shall have no rights as third party beneficiaries of any of the provisions thereof. In performing its functions and duties under this Agreement, the Disbursement Agent does not assume and shall not be deemed to have assumed any obligation towards or relationship of agency or trust with or for the Project Entities or any of their Affiliates. Neither the Disbursement Agent nor any of its officers, directors, employees or agents shall be in any manner liable or responsible for any loss or damage arising by reason of any act or omission to

act by it or them hereunder or in connection with any of the transactions contemplated hereby, including, but not limited to, any loss that may occur by reason of forgery, false representations, the exercise of its discretion, or any other reason, except as a result of their bad faith, fraud, gross negligence or willful misconduct as finally judicially determined by a court of competent jurisdiction.

## ARTICLE 10

### SAFEKEEPING OF ACCOUNTS

10.1 **Application of Funds in Accounts.** Amounts deposited in the Accounts shall be applied as provided in this Agreement. The Disbursement Agent shall at all times act and direct the securities intermediaries under the Control Agreements so as to implement the application of funds provisions and procedures herein set forth. The Disbursement Agent is hereby authorized to reduce to cash any Cash Equivalent (without regard to maturity) in any Account in order to make any application required hereunder.

10.2 **Event of Default.** Upon the occurrence and during the continuance of an Event of Default of which it has written notice from a Funding Agent, the Disbursement Agent shall not deposit or cause to be deposited any amounts into the Payment Accounts, the Interest Account or the Cash Management Account, unless instructed to the contrary by the relevant Controlling Person. The Disbursement Agent is hereby irrevocably authorized by the Project Entities to apply, or cause to be applied, amounts in any Account and any other sums held under any Control Agreement to the payment of Debt Service or other amounts or obligations due or payable to the Secured Parties (in each case, only to the extent that such Secured Party holds a Lien in the relevant Account) when instructed to do so by the Controlling Person.

10.3 **Perfection.** The Disbursement Agent shall take any steps, from time to time, requested by the Bank Agent or the Trustee to confirm or cause the securities intermediaries under the Control Agreements to confirm and maintain the priority of their respective security interests in the Accounts.

10.4 **Second Mortgage Proceeds Account.** Notwithstanding any other provision hereof, the parties hereto acknowledge that the security interest granted under the Security Documents to the Trustee in the Second Mortgage Proceeds Account (including any Cash Equivalents held therein) is for the sole and exclusive benefit of the Trustee on behalf of the Second Mortgage Holders.

10.5 **Bank Proceeds Account.** Notwithstanding any other provision hereof, the parties hereto acknowledge that the security interest granted under the Security Documents to the Bank Agent in the Bank Proceeds Account (including any Cash Equivalents held therein) is for the sole and exclusive benefit of the Bank Agent and the Bank Lenders, and subject to the terms of the Project Lenders Intercreditor Agreement, only the Bank Agent shall have the right to direct the Disbursement Agent with respect thereto.

10.6 **Retail Funding Account and Retail Payments Account.** Notwithstanding any other provision hereof, the parties hereto acknowledge that the security interest granted under the



Retail Facility Security Documents to the Retail Agent in the Retail Funding Account and the Retail Payment Account (including any Cash Equivalents held therein) is for the sole and exclusive benefit of the Retail Agent and the Retail Lenders.

## ARTICLE 11

### MISCELLANEOUS

11.1 **Addresses.** Any communications between the parties hereto or notices provided herein to be given may be given to the following addresses:

- If to the Project Entities:           c/o Fontainebleau Las Vegas, LLC,  
Whitney Thier, Esquire  
General Counsel  
2827 Paradise Road  
Las Vegas, NV 89109  
Telephone No.: (702) 495-8108  
Facsimile No.: (702) 495-8112
- If to the Bank Agent:                Donna F. Kimbrough,  
Assistant Vice President  
Bank of America, N.A.  
Mail Code: TX1-492-14-11  
Bank of America Plaza  
901 Main Street  
Dallas, TX 75202-3714  
Telephone No.: (214) 209-1569  
Facsimile No.: (214) 290-9436
- If to the Trustee:                    Wells Fargo Bank, N.A., as Trustee  
Corporate Trust Services  
MAC N9311-110  
625 Marquette Avenue  
Minneapolis, MN 55479  
Attention: Fontainebleau Resorts Account Manager  
Telephone (612) 316-4305  
Telecopier: (612) 667-9825
- If to the Retail Agent:               Lehman Brothers Holdings Inc., as Retail Agent  
c/o Lehman Brothers Holdings  
399 Park Avenue  
New York, New York 10022  
Attention: Josh Freedman  
Facsimile No.: (212) 713-1278

If to the Disbursement Agent: Bank of America, N.A., as Disbursement Agent for  
Fontainebleau Resorts  
Mail Code: TX1-492-14-11  
Bank of America Plaza  
901 Main Street  
Dallas, TX 75202-3714  
Telephone No.: (214) 209-1569  
Facsimile No.: (214) 290-9436

All notices or other communications required or permitted to be given hereunder shall be in writing and shall be considered as properly given (a) if delivered in person, (b) if sent by overnight delivery service, or (c) if sent by prepaid telex, or by telecopy with correct answer back received. Notice so given shall be effective upon receipt by the addressee, except that communication or notice so transmitted by telecopy or other direct written electronic means shall be deemed to have been validly and effectively given on the day (if a Banking Day and, if not, on the next following Banking Day) on which it is validly transmitted if transmitted before 4:00 p.m., recipient's time, and if transmitted after that time, on the next following Banking Day; provided, however, that if any notice is tendered to an addressee and the delivery thereof is refused by such addressee, such notice shall be effective upon such tender. Any party shall have the right to change its address for notice hereunder to any other location by notice to the other parties in the manner set forth hereinabove.

**11.2 Further Assurances.** From time to time the Project Entities shall execute and deliver, or cause to be executed and delivered, such additional instruments, certificates or documents, and take all such actions, as the Funding Agents or the Disbursement Agent may reasonably request for the purposes of implementing or effectuating the provisions of this Agreement and the other Operative Documents, or of more fully perfecting or renewing the rights of the Funding Agents and the Lenders with respect to the Project Security (or with respect to any additions thereto or replacements or proceeds or products thereof or with respect to any other property or assets hereafter acquired by any Project Entity which may be deemed to be part of the Project Security) pursuant hereto or thereto. Upon the exercise by the Funding Agents, the Disbursement Agent or any Lender of any power, right, privilege or remedy pursuant to this Agreement or the other Operative Documents which requires any consent, approval, recording, qualification or authorization of any Governmental Authority, the Project Entities shall execute and deliver, or will cause the execution and delivery of, all applications, certifications, instruments and other documents and papers that the Funding Agent, the Disbursement Agent or such Lender may be required to obtain from the Project Entities for such governmental consent, approval, recording, qualification or authorization.

**11.3 Delay and Waiver.** No delay or omission to exercise any right, power or remedy accruing upon the occurrence of any Default or Event of Default or any other breach or default of the Project Entities under this Agreement shall impair any such right, power or remedy of the Funding Agents, the Lenders, the Disbursement Agent or any other Secured Party nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or in any similar breach or default thereafter occurring, nor shall any waiver of any single Default, Event

of Default or other breach or default be deemed a waiver of any other Default, Event of Default or other breach or default theretofore or thereafter occurring. Any waiver, permit, consent or approval of any kind or character on the part of any of the Funding Agents, the Lenders, the Disbursement Agent or any other Secured Party, of any Default, Event of Default or other breach or default under this Agreement or any other Financing Agreement, or any waiver on the part of any of the Funding Agents, the Lenders, the Disbursement Agent or any other Secured Party, of any provision or condition of this Agreement or any other Operative Document, must be in writing and shall be effective only to the extent in such writing specifically set forth. All remedies, either under this Agreement or any other Financing Agreement or by law or otherwise afforded to any of the Funding Agents, the Lenders, the Disbursement Agent or any other Secured Party, shall be cumulative and not alternative.

**11.4 Additional Security; Right to Set-Off.** Regardless of the adequacy of any other collateral, any Secured Party may execute or realize on its security interest in any deposits or other sums credited by or due from any such Person to the Project Entities, may apply any such deposits or other sums to or set them off against the Project Entities' obligations to the Project Secured Parties under this Agreement and the other Financing Agreements at any time after the occurrence and during the continuance of any Event of Default.

**11.5 Entire Agreement.** This Agreement and any agreement, document or instrument attached hereto or referred to herein integrate all the terms and conditions mentioned herein or incidental hereto and supersede all oral negotiations and prior writings in respect to the subject matter hereof, all of which negotiations and writings are deemed void and of no force and effect.

**11.6 Governing Law.** This Agreement shall be governed by the laws of the State of New York of the United States of America and shall for all purposes be governed by and construed in accordance with the laws of such state without regard to the conflict of law rules thereof other than Section 5-1401 of the New York General Obligations Law, *provided, however*, that to the extent any terms of this Agreement are incorporated in and made part of any other Financing Agreement, any such term so incorporated shall for all purposes be governed by and construed in accordance with the law governing the Financing Agreement into which such term is so incorporated.

**11.7 Severability.** In case any one or more of the provisions contained in this Agreement should be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby, and the parties hereto shall enter into good faith negotiations to replace the invalid, illegal or unenforceable provision.

**11.8 Headings.** Paragraph headings have been inserted in this Agreement as a matter of convenience for reference only and it is agreed that such paragraph headings are not a part of this Agreement and shall not be used in the interpretation of any provision of this Agreement.

**11.9 Limitation on Liability.** NO CLAIM SHALL BE MADE BY THE PROJECT ENTITIES OR ANY OF THEIR AFFILIATES AGAINST THE FUNDING AGENTS, THE LENDERS, THE DISBURSEMENT AGENT, THE CONTROLLING PERSON OR ANY OTHER SECURED PARTY OR ANY OF THEIR RESPECTIVE AFFILIATES, DIRECTORS,

EMPLOYEES, ATTORNEYS OR AGENTS FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL OR PUNITIVE DAMAGES (WHETHER OR NOT THE CLAIM THEREFOR IS BASED ON CONTRACT, TORT OR DUTY IMPOSED BY LAW), IN CONNECTION WITH, ARISING OUT OF OR IN ANY WAY RELATED TO THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT OR THE OTHER OPERATIVE DOCUMENTS OR ANY ACT OR OMISSION OR EVENT OCCURRING IN CONNECTION THEREWITH; AND THE PROJECT ENTITIES HEREBY WAIVE, RELEASE AND AGREE NOT TO SUE UPON ANY SUCH CLAIM FOR ANY SUCH DAMAGES, WHETHER OR NOT ACCRUED AND WHETHER OR NOT KNOWN OR SUSPECTED TO EXIST IN ITS FAVOR.

**11.10 Waiver of Jury Trial.** ALL PARTIES TO THIS AGREEMENT HEREBY KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVE ANY RIGHT 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 AGREEMENT OR ANY OTHER FINANCING AGREEMENTS, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN), OR ACTIONS OF ANY PARTY TO THIS AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR THE FUNDING AGENTS, DISBURSEMENT AGENT AND EACH OF THE OTHER LENDERS AND SECURED PARTIES TO ENTER INTO THIS AGREEMENT.

**11.11 Consent to Jurisdiction.** Any legal action or proceeding by or against the Project Entities or with respect to or arising out of this Agreement may be brought in or removed to the courts of the State of New York, in and for the County of New York, or of the United States of America for the Southern District of New York. By execution and delivery of this Agreement, the Project Entities, accept, for themselves and in respect of its property, generally and unconditionally, the jurisdiction of the aforesaid courts for legal proceedings arising out of or in connection with this Agreement and irrevocably consents to the appointment of the Corporation Service Company as its agent to receive service of process in New York, New York. Nothing herein shall affect the right to serve process in any other manner permitted by law or any right to bring legal action or proceedings in any other competent jurisdiction, including judicial or non-judicial foreclosure of real property interests which are part of the Project Security. The Project Entities further agree that the aforesaid courts of the State of New York and of the United States of America for the Southern District of New York shall have exclusive jurisdiction with respect to any claim or counterclaim of the Project Entities based upon the assertion that the rate of interest charged by or under this Agreement, or under the other Financing Agreements is usurious. The Project Entities hereby waive any right to stay or dismiss any action or proceeding under or in connection with any or all of the Project, this Agreement or any other Operative Document brought before the foregoing courts on the basis of *forum non-conveniens*.

**11.12 Successors and Assigns.** The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. Notwithstanding the foregoing, the Project Entities may not assign or otherwise transfer any of their rights under this Agreement.

**11.13 Reinstatement.** This Agreement shall continue to be effective or be reinstated, as the case may be, if at any time payment and performance of the Project Entities' obligations hereunder or under the other Financing Agreements, or any part thereof, is, pursuant to applicable law, rescinded or reduced in amount, or must otherwise be restored or returned by the Secured Parties. In the event that any payment or any part thereof is so rescinded, reduced, restored or returned, such obligations shall be reinstated and deemed reduced only by such amount paid and not so rescinded, reduced, restored or returned.

**11.14 No Partnership; Etc.** The Secured Parties and the Project Entities intend that the relationship between them shall be solely that of creditors and debtors. Nothing contained in this Agreement or in any of the other Financing Agreements shall be deemed or construed to create a partnership, tenancy-in-common, joint tenancy, joint venture or co-ownership by or between the Secured Parties and the Project Entities or any other Person. The Secured Parties shall not be in any way responsible or liable for the debts, losses, obligations or duties of the Project Entities or any other Person with respect to the Project or otherwise. All obligations to pay real property or other taxes, assessments, insurance premiums, and all other fees and charges arising from the ownership, operation or occupancy of the Project and to perform all obligations under the agreements and contracts relating to the Project shall be the sole responsibility of the Project Entities.

**11.15 Costs and Expenses.**

**11.15.1 Reimbursement of Costs.** The Project Entities shall (subject to the limitations set forth herein and, with respect to each Funding Agent, to the express provisions of the Financing Agreements or any other fee letters or engagement letters to which such Funding Agent is a party) pay the reasonable legal, engineering, other professional and all other fees and costs of the Funding Agents, and the Disbursement Agent and their consultants and advisors, the reasonable travel expenses and other out-of-pocket costs incurred by each of them in connection with the preparation, negotiation, execution and delivery, and where appropriate, registration of the Operative Documents (and all matters incidental thereto), the syndication of the Loans, the administration of the transactions contemplated by the Operative Documents (including, without limitation, the administration of this Agreement, the other Operative Documents and the Security Documents) and the preservation or enforcement of any of their respective rights or in connection with any amendments, waivers or consents required under the Financing Agreements or the Operative Documents *provided* that this shall not require the payment by any of the other Project Entities of any expenses, fees or costs attributable to the Retail Affiliate or the Retail Budget. The Trustee and the Bank Agent shall be entitled to charge the Second Mortgage Proceeds Account and the Bank Proceeds Account, and the Bank Agent shall be entitled to make Advances under the Bank Credit Facility, for the direct payment of such expenses.

**11.15.2 Indemnity.** The Project Entities shall indemnify, defend and hold harmless the Funding Agents, the Lenders, the Construction Consultant, the Disbursement Agent, each of their respective affiliates and each of their

respective officers, directors, partners, trustees, employers, affiliates, shareholders, advisors, agents, attorneys, attorneys-in-fact, representatives and "controlling persons" (within the meaning of the Securities Act of 1933, as amended, and the Securities Exchange Act of 1934, as amended), (collectively, the "Indemnitees") from and against and reimburse the Indemnitees for any and all present and future claims, expenses, obligations, liabilities, losses, damages, injuries (to person, property, or natural resources), penalties, stamp or other similar taxes, actions, suits, judgments, reasonable costs and expenses (including any legal or other expenses reasonably incurred by them in connection with the investigating, preparing to defend or defending, or providing evidence in or preparing to serve or serving as witness with respect to, any lawsuits, investigations, claims or other proceedings (whether or not such Indemnitee is a formal party thereto)) of whatever kind or nature, whether or not well founded, meritorious or unmeritorious, demanded, asserted or claimed against any such Indemnitee including any liability resulting from any delay or omission to pay any such tax (collectively, "Claims") arising in any manner out of or in connection with this Agreement, the Financing Documents or any other Operative Documents, the use of proceeds therefrom, the development, construction, ownership and operation of the Project, the transactions contemplated by this Agreement or any other Operative Document, any other transaction related hereto or thereto of any claim, litigation, investigation or proceeding relating to any of the foregoing (regardless of whether any Indemnitee is a party hereto or thereto) including without limitation (a) any and all Claims arising in connection with the release or presence of any Hazardous Substances at the Site or the Project, whether foreseeable or unforeseeable, including all costs of removal and disposal of such Hazardous Substances, all reasonable costs required to be incurred in (i) determining whether the Project is in compliance and (ii) causing the Project to be in compliance, with all applicable Legal Requirements, all reasonable costs associated with claims for damages to persons or property, and reasonable attorneys' and consultants' fees and court costs, (b) any and all Claims arising out of or based upon any untrue statement or alleged untrue statement of material fact contained in any preliminary or final prospectus or any other similar disclosure document or in any amendment or supplement thereto, any omission or alleged omission to state in any preliminary or final prospectus or any other similar disclosure document or in any amendment or supplement thereto any material fact required to be stated therein or necessary to make the statements therein not misleading or (c) any and all Claims arising in any matter out of, relating to or in connection with any conduct by any Loan Party or their respective employees or agents or any action or failure to act undertaken by any book-running manager under the Facility Agreements at any Loan Party's request or with any Loan Party's consent. No Indemnitee shall be liable for any damages arising from the use by unauthorized Persons of information or other materials sent through electronic, telecommunication or other information transmission systems that are intercepted by other Persons.

11.15.3 Gross Negligence. The indemnity obligation of the Project Entities pursuant to this Section 11.15 shall not apply with respect to an Indemnitee, to the extent arising as a result of the fraud, bad faith, gross negligence or willful misconduct of such Indemnitee, as finally judicially determined by a court of competent jurisdiction, but shall continue to apply to other Indemnitees.

11.15.4 Unenforceability. To the extent that the undertaking in the preceding paragraphs of this Section 11.15 may be unenforceable because it is violative of any law or public policy, the Project Entities will contribute the maximum portion that it is permitted to pay and satisfy under applicable law to the payment and satisfaction of such undertakings.

11.15.5 Foreclosure. The provisions of this Section 11.15 shall survive foreclosure of the Security Documents and satisfaction or discharge of the Project Entities' obligations hereunder, and shall be in addition to any other rights and remedies of any Indemnitee.

11.15.6 Payment Due Dates. Any amounts payable by the Project Entities pursuant to this Section 11.15 shall be payable within ten Banking Days after the Project Entities receive an invoice for such amounts from any applicable Indemnitee, and if not paid when due shall bear interest at the highest default rate set forth in any of the Financing Agreements from and after such applicable date until paid in full in immediately available funds.

11.15.7 Actions; Counsel. In case any action or proceeding shall be instituted involving any Indemnitee for which indemnification is to be sought hereunder, then such Indemnitee shall promptly notify the Project Entities of the commencement of any action or proceeding; *provided, however*, that the failure so to notify the Project Entities shall not relieve the Project Entities from any liability that the Project Entities may have to such Indemnitee pursuant to Section 11.15.2 or from any liability that the Project Entities may have to such Indemnitee.

11.15.8 Settlement. Any Indemnitee against whom any Claim is made shall be entitled, after consultation with the Project Entities and upon consultation with legal counsel wherein such Indemnitee is advised that such Claim is reasonably meritorious, to compromise or settle any such Claim if such Indemnitee determines in its reasonable discretion that failure to compromise or settle such Claim could reasonably subject such Indemnitee to material liability. Any such compromise or settlement shall be binding upon the Project Entities for purposes of this Section 11.15.

11.15.9 Distinct Obligations. Nothing in this Section 11.15 is intended to create any liability of the Retail Affiliate for any amount attributable to the Resort Budget or the other Project Entities or by the other Project Entities for any amounts attributable to the Retail Budget or the Retail Affiliate.

**11.16 Agreements Among Funding Agents and Other Secured Parties.** The Project Entities acknowledge that the parties thereto have entered into the Intercreditor Agreements, and agree that the agreements set forth therein do not violate any obligation to the Project Entities. The Project Entities agree not to take any action to invalidate or challenge the validity of, or assert in writing the invalidity of any provisions of the Intercreditor Agreements. As among the Secured Parties, no provision hereof shall be deemed to relieve or in any way affect the Secured Parties' respective obligations or liabilities under the Intercreditor Agreements. Except for the Retail Affiliate, the Project Entities are not a third party beneficiary of the Intercreditor Agreements and shall have no right to enforce the same against any party. Each of the Funding Agents and the Lenders shall be entitled to deliver copies of the credit documentation among the Project Entities and the other Funding Agents and Lenders to prospective assignees and participants under its respective Facility Agreements subject to its respective obligations in respect of confidentiality to the Project Entities, without restriction as to the other Funding Agents or Lenders.

**11.17 Counterparts.** This Agreement may be executed in one or more duplicate counterparts (including by facsimile) and when signed by all of the parties listed below shall constitute a single binding agreement.

**11.18 Termination.** Subject to Section 11.13, this Agreement shall terminate and be of no further force or effect upon completion of the transactions contemplated by Section 2.23, *provided* that (a) the provisions of Article 9, Section 11.15 and Section 11.21 shall survive the termination of this Agreement, and (b) the Disbursement Agent shall continue to retain any amounts in the Liquidity Account in the manner contemplated by this Agreement and subject to the Control Agreements established pursuant to this Agreement for the benefit of the Bank Agent and the Trustee, *provided* that amounts contained in the Liquidity Account shall thereafter be disbursed in accordance with Section 7.24 of the Bank Credit Agreement (as amended from time to time in accordance with the provisions of the Bank Credit Agreement) and when all funds in such Account have been fully disbursed in accordance with such Section 7.24 of the Bank Credit Agreement the Disbursement Agent shall terminate the Control Agreement established on such Account pursuant to this Agreement. In addition, the Trustee shall cease to be a party to this Agreement on the date that the Second Mortgage Proceeds Account is Exhausted. On such date, (i) the Trustee shall have no further rights or obligations hereunder, (ii) neither the Trustee nor the Second Mortgage Holders shall be entitled to any of the benefits of this Agreement, and (iii) this Agreement shall automatically be amended to delete all references to the Trustee and the Second Mortgage Holders to reflect that the Trustee is no longer a party to this Agreement and to further reflect that neither the Trustee nor the Second Mortgage Holders shall be entitled to any of the benefits of this Agreement; provided however that the Trustee and the Second Mortgage Holders shall continue to (a) be permitted to correct the amount of Debt Service in respect of the Second Mortgage Notes set forth in an Advance Request as provided in Section 2.4.4(c), (b) receive copies of certificates delivered by the Project Entities pursuant to Sections 2.21, 2.22 and 2.23, (c) receive notices delivered under Sections 5.4 and 9.2.3, (d) approve Scope Changes as and to the extent set forth in Section 6.2.1(b), (e) receive the benefit of control agreements entered into pursuant to clause (ii)(x)(2) of the proviso in Section 6.8(b), (f) receive the benefit of the indemnity provisions of Section 11.15 and (g) receive the benefits of the amendment provisions of Section 11.19, and the Trustee shall be entitled to enforce this proviso as a third



party beneficiary.

**11.19 Amendments.** The Bank Agent and the Disbursement Agent are authorized by each of the other Funding Agents to enter into amendments to this Agreement requested by the Project Entities for the purpose of curing any formal defect, inconsistency, omission or ambiguity in this Agreement (without any consent or approval by the other Funding Agents or the Lenders). From the Exhaustion of the Second Mortgage Proceeds Account, the Bank Agent may also amend this Agreement or waive any Default or Event of Default without the consent of the Trustee, the Second Mortgage Holders, the Retail Agent or the Retail Lenders; *provided, however*, that (a) any such waiver by the Bank Agent shall not, without the consent of a majority in interest of the Retail Lenders constitute a waiver of any Default or Event of Default which otherwise independently (not by cross-default or cross-reference to another agreement) constitutes a default or event of default under the Retail Facility; (b) the Bank Agent shall not, without the consent of the Trustee, be permitted to amend Sections 11.6, 11.10, the proviso in the last sentence of Section 11.18 or any of the Sections of this Agreement cross referenced in such proviso to the extent any such amendment would adversely affect the rights of the Trustee as set forth in such proviso and (c) notwithstanding anything to the contrary contained in this Agreement, in no event shall this Agreement be amended in a manner which would (i) have the effect of modifying the provisions of Sections 3.5, 3.7.3, 5.11 or 5.12, (ii) have the effect of modifying any of the Sections or definitions cross referenced or used in Sections 3.5, 3.7.3, 5.11 or 5.12 (unless such modification would not materially and adversely affect such Sections 3.5, 3.7.3, 5.11 or 5.12 as the same relate to the Retail Agent or Retail Lenders) or (iii) increase any of the obligations of the Retail Agent or Retail Lenders hereunder, change the character of the Shared Costs for which the Retail Lenders must fund Advances, increase the liabilities of the Retail Agent or Retail Lender hereunder in any manner, change the order of funding required hereunder in a manner affecting the Retail Agent or Retail Lenders, affect the Retail Agent and the Retail Lender's security interest in the Retail Accounts, diminish the right of the Retail Agent to receive information or reports hereunder, or modify any of the definitions relating to the Shared Costs, Retail Lender's Shared Cost Commitment, Other Retail Costs or the Retail Budget), in each case without the prior written consent of the Retail Agent. Neither the Bank Agent nor the Trustee may amend or waive any of the conditions to the making of Advances by the Retail Agent and the Retail Lenders set forth in Section 3.5.

#### 11.20 [Intentionally Omitted]

**11.21 Confidentiality.** Each of the Funding Agents and the Disbursement Agent agrees to maintain the confidentiality of the Information (as defined below), except that Information may be disclosed (a) to its Affiliates and to its and its Affiliates' respective partners, directors, officers, employees, agents, advisors and representatives (it being understood that the Persons to whom such disclosure is made will be informed of the confidential nature of such Information and instructed to keep such Information confidential), (b) to the extent requested by any regulatory authority purporting to have jurisdiction over it (including any self-regulatory authority, such as the National Association of Insurance Commissioners), (c) to the extent required by applicable laws or regulations or by any subpoena or similar legal process, (d) to any other party hereto, (e) in connection with the exercise of any remedies hereunder or under any other instrument, document or agreement executed in connection herewith or any action or

proceeding relating to this Agreement or the enforcement of rights hereunder or thereunder, (f) subject to an agreement containing provisions substantially the same as those of this Section, to (i) any assignee of or participant in, or any prospective assignee of or participant in, any of its rights or obligations under the Financing Agreements, or (ii) any actual or prospective counterparty (or its advisors) to any swap or derivative transaction relating to Project Entities and their obligations, (g) with the consent of any Project Entity or (h) to the extent such Information (i) becomes publicly available other than as a result of a breach of this Section or (ii) becomes available to them or their respective Affiliates on a nonconfidential basis from a source other than Project Entities.

As used in this Section "Information" means all information received from any Loan Party other than any such information that is available to the Funding Agent or the Disbursement Agent on a nonconfidential basis prior to disclosure by any Loan Party, *provided* that, in the case of information received after the date hereof, such information is clearly identified at the time of delivery as confidential. Any Person required to maintain the confidentiality of Information as provided in this Section shall be considered to have complied with its obligation to do so if such Person has exercised the same degree of care to maintain the confidentiality of such Information as such Person would accord to its own confidential information.

*[Remainder of this page intentionally left blank – signature pages follow]*

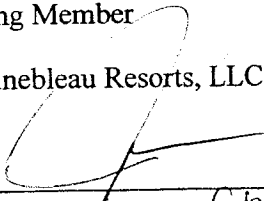
IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed by their officers thereunto duly authorized as of the day and year first above written.

**FONTAINEBLEAU LAS VEGAS HOLDINGS, LLC,**  
a Delaware limited liability company

By: Fontainebleau Resort Properties I, LLC,  
its Managing Member

By: Fontainebleau Resort Holdings, LLC,  
its Managing Member

By: Fontainebleau Resorts, LLC, its Managing  
Member

By:   
Title: Executive Chairman

**FONTAINEBLEAU LAS VEGAS CAPITAL CORP.**  
a Delaware corporation

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

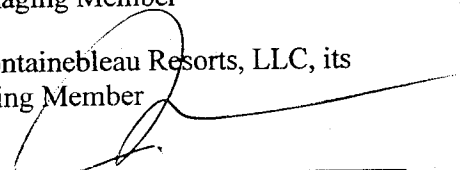
**FONTAINEBLEAU LAS VEGAS RETAIL, LLC,**  
a Delaware limited liability company

By: Fontainebleau Las Vegas Retail Mezzanine, LLC,  
its Managing Member

By: Fontainebleau Las Vegas Retail Parent, LLC,  
its Managing Member

By: Fontainebleau Resort Holdings, LLC,  
its Managing Member

By: Fontainebleau Resorts, LLC, its  
Managing Member

By:   
Title: Executive Chairman