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**To:** **CRE Outside Counsel**

**From:** **Jennifer Rentenbach, Assistant General Counsel**

 **Susanna Post, Senior Counsel**

**Date: September 10, 2018**

**Subject: Updates to CRE form Loan Agreements – Swap-Related Updates; Loan Assumption Rights**

 Please note that we are providing this memorandum to only one contact at each of our outside law firms. Please circulate this memorandum to each of your firm’s attorneys who may work on matters for the SunTrust Commercial Real Estate (“***CRE***”) line of business.

 Attached are updated versions of the CRE form Loan Agreements, which are in process of being uploaded to our CRE Loan Documentation Website. These versions include the updates detailed below. Redline change pages of our syndicated term loan agreement are attached for your reference as well.

 In any deal where for any reason you are not using the most recent version of our form loan agreement, please make sure these updates, as applicable, are included in your documents along with any other subsequent form updates.

 **Updates:**

1. **Swap-Related Updates:** We have updated several aspects of our form loan agreements with respect to swaps or other hedges provided by SunTrust (or another lender that is part of the syndicated bank group) in connection with the loan. These changes are detailed in full on **Exhibit A** to this memo. These changes:
2. Clarify that a swap provided by SunTrust will remain secured by the loan collateral if SunTrust were to sell the loan, or its position in the loan, but retain the swap.
3. Provide certain protections for SunTrust as Administrative Agent if another lender in a syndicated loan provides a swap that is secured by the loan collateral.
4. For deals that include a borrower right to obtain a partial release of loan collateral by making a principal paydown, these changes require that a corresponding notional reduction of any swap provided by SunTrust be made as a condition to the partial release, to prevent unsecured swap exposure.

A few corresponding updates to our security instruments and guarantees are also detailed on Exhibit A (updated versions of those documents with these changes will be uploaded to the outside counsel website in the near term).

1. **Loan Assumption Provisions:** An updated version of Section 7.11 (Loan Assumption) from our term loan agreements, along with updates to the related “Permitted Owner” definition, are detailed on **Exhibit B** to this memo. **The loan assumption provisions should not be included in an individual deal unless they were included in the executed term sheet, or the applicable SunTrust credit officer has otherwise approved the inclusion of a loan assumption right in a deal; loan assumption rights are not a standard feature of all our term loan deals.**
2. **Division of LLCs under New Delaware Law:** We have added a provision to Section 5.17 (Single Purpose Entity) of our loan agreements to address the recent changes to Delaware law permitting LLCs and LPs to divide into two or more entities.

A few other minor updates and “clean-up” changes are also included in the revised loan agreements attached.

 Please let us know if you have questions about these matters.  Thank you for your continued partnership.

Exhibit A

**Swap-Related Updates to Syndicated Loan Agreements:**

1. ***Added definitions:***

“Lender-Related Hedge Provider” shall mean any Person that, at the time it enters into a Hedging Transaction with Borrower,[[1]](#footnote-1) (i) is a Lender or an Affiliate of a Lender and (ii) except when the Lender-Related Hedge Provider is SunTrust Bank or any of its Affiliates, has provided prior written notice to Administrative Agent which has been acknowledged by Borrower of (x) the existence of such Hedging Transaction and (y) the methodology to be used by such parties in determining the obligations under such Hedging Transaction from time to time. In no event shall any Lender-Related Hedge Provider acting in such capacity be deemed a Lender for purposes hereof to the extent of and as to Hedging Obligations. In no event shall the approval of any such Person in its capacity as Lender-Related Hedge Provider be required in connection with the release or termination of any security interest or Lien of the Administrative Agent.

“Secured Parties” shall mean Administrative Agent, the Lenders, [the Issuing Bank] and the Lender-Related Hedge Providers.

1. **References to “for the benefit of Administrative Agent[itself] and the Lenders” changed to “for the benefit of Administrative Agent[itself] and the Secured Parties” in each of the following places:**
2. Recital D, describing the Security Instrument / Definition of Security Instrument
3. Definition of Assignment of Contracts
4. Definition of Assignment of Leases and Rents
5. Definition of Collateral
6. Definition of Environmental Indemnification Agreement
7. Definition of Guaranty
8. *Revised definition of Obligations (changes highlighted in blue):*

“**Obligations**” shall mean (a) all amounts owing by Borrower to Administrative Agent or any Lender pursuant to or in connection with this Agreement or any other Loan Document, including without limitation, all principal, interest (including any interest accruing after the filing of any petition in bankruptcy or the commencement of any insolvency, reorganization or like proceeding relating to Borrower, whether or not a claim for post-filing or post-petition interest is allowed in such proceeding), all reimbursement obligations, fees, expenses, indemnification and reimbursement payments, costs and expenses (including all fees and expenses of counsel to Administrative Agent or any Lender incurred pursuant to this Agreement or any other Loan Document), whether direct or indirect, absolute or contingent, liquidated or unliquidated, now existing or hereafter arising hereunder or thereunder, (b) all Hedging Obligations owed by Borrower[[2]](#footnote-2) to any Lender-Related Hedge Provider, and (c) all Bank Product Obligations, together with all renewals, extensions, modifications or refinancings of any of the foregoing; provided, however, that with respect to Obligations guaranteed by any Guarantor, such Obligations shall not include any Excluded Swap Obligations.

1. ***Revised Section 2.12 (Hedging Transactions) (changes highlighted in blue):***

## Section 2.12. Hedging Transactions

**.** **[Borrower may enter into a Hedging Transaction in connection with the Loan.][As promptly as practicable, and in any event within \_\_\_\_\_ days after the Closing Date, Borrower will enter into, and thereafter maintain in effect, one or more Hedging Transactions on such terms and with such parties as shall be reasonably satisfactory to Administrative Agent, the effect of which shall be to fix or limit the interest cost to Borrower with respect to at least \_\_% of the Loan.]** In the event that a Lender-Related Hedge Provider provides a Hedging Transaction to Borrower in connection with the Loan, (i) the incremental exposure to the Lender-Related Hedge Provider shall be secured by the Collateral on a pro rata and pari passu basis with the Loan and (ii) in connection with any prepayment of the Loan, Borrower shall terminate, at Borrower’s cost, the required portion of the Hedging Obligations. In the event that Borrower enters into any Hedging Transaction with a party other than Administrative Agent, Borrower shall cause a Collateral Assignment of Hedge to be duly executed by the applicable parties thereto. Nothing herein constitutes an offer or recommendation to enter into any “swap” or trading strategy involving a “swap” within the meaning of Section 1a(47) of the Commodity Exchange Act. Any such offer or recommendation, if any, will only occur after Administrative Agent or a Lender has received appropriate documentation from Borrower regarding whether Borrower is qualified to enter into a swap under Applicable Law.

1. *Section 8.3 (Application of Proceeds from Collateral) – revised final paragraph:*

All amounts allocated pursuant to the foregoing clause third to the Lenders as a result of amounts owed to the Lenders under the Loan Documents shall be allocated among, and distributed to, the Lenders *pro rata* based on their respective Pro Rata Shares. Notwithstanding the foregoing, (a) no amount received from any Guarantor (including any proceeds of any sale of, or other realization upon, all or any part of the Collateral owned by such Guarantor) shall be applied to any Excluded Swap Obligation of such Guarantor and (b) Hedging Obligations shall be excluded from the application described above if Administrative Agent has not received written notice thereof, together with such supporting documentation as the Administrative Agent may request, from the Lender-Related Hedge Provider. Each Lender-Related Hedge Provider that has given the notice contemplated by the preceding sentence shall, by such notice, be deemed to have acknowledged and accepted the appointment of the Administrative Agent pursuant to the terms of Article X hereof for itself and its Affiliates as if a “Lender” party hereto.

1. ***New Section 10.17 (Secured Hedging Obligations):***

## Section 10.17. Secured Hedging Obligations . No Lender-Related Hedge Provider that obtains the benefits of Section 8.3, the Security Instrument or any Collateral by virtue of the provisions hereof or of any other Loan Document shall have any right to notice of any action or to consent to, direct or object to any action hereunder or under any other Loan Document or otherwise in respect of the Collateral (including the release or impairment of any Collateral) other than in its capacity as a Lender and, in such case, only to the extent expressly provided in the Loan Documents. Notwithstanding any other provision herein to the contrary, Administrative Agent shall not be required to verify the payment of, or that other satisfactory arrangements have been made with respect to, Hedging Obligations unless Administrative Agent has received written notice of such Hedging Obligations, together with such supporting documentation as Administrative Agent may request, from the applicable Lender-Related Hedge Provider.

**Swap-Related Updates to Bilateral Loan Agreements:**

1. *Revised definition of Obligations (changes highlighted in blue):*

 “Obligations” shall mean (a) all amounts owing by Borrower to Lender pursuant to or in connection with this Agreement or any other Loan Document, including without limitation, all principal, interest (including any interest accruing after the filing of any petition in bankruptcy or the commencement of any insolvency, reorganization or like proceeding relating to Borrower, whether or not a claim for post-filing or post-petition interest is allowed in such proceeding), all reimbursement obligations, fees, expenses, indemnification and reimbursement payments, costs and expenses (including all fees and expenses of counsel to Lender incurred pursuant to this Agreement or any other Loan Document), whether direct or indirect, absolute or contingent, liquidated or unliquidated, now existing or hereafter arising hereunder or thereunder, (b) all Hedging Obligations owed by Borrower[[3]](#footnote-3) to SunTrust Bank or any Affiliate of SunTrust Bank, and (c) all Bank Product Obligations, together with all renewals, extensions, modifications or refinancings of any of the foregoing; provided, however, that with respect to Obligations guaranteed by any Guarantor, such Obligations shall not include any Excluded Swap Obligations.

1. *Revisions to Section 2.12 (revisions noted in blue):*

## Section 2.12. Hedging Transactions

**.** **[Borrower may enter into a Hedging Transaction in connection with the Loan.][As promptly as practicable, and in any event within \_\_\_\_\_ days after the Closing Date, Borrower will enter into, and thereafter maintain in effect, one or more Hedging Transactions on such terms and with such parties as shall be reasonably satisfactory to Lender, the effect of which shall be to fix or limit the interest cost to Borrower with respect to at least \_\_% of the Loan.]**  In the event that SunTrust Bank or an Affiliate of SunTrust Bank provides a Hedging Transaction to Borrower, (i) the incremental exposure to SunTrust Bank or such Affiliate shall be secured by the Collateral on a pro rata and pari passu basis with the Loan and (ii) in connection with any prepayment of the Loan, Borrower shall terminate, at Borrower’s cost, the required portion of the Hedging Obligations. In the event that Borrower enters into any Hedging Transaction with a party other than SunTrust Bank, Borrower shall cause a Collateral Assignment of Hedge to be duly executed by the applicable parties thereto. Nothing herein constitutes an offer or recommendation to enter into any “swap” or trading strategy involving a “swap” within the meaning of Section 1a(47) of the Commodity Exchange Act. Any such offer or recommendation, if any, will only occur after SunTrust Bank has received appropriate documentation from Borrower regarding whether Borrower is qualified to enter into a swap under Applicable Law.

**Sample Partial Collateral Release Provision (added as Optional section at end of Article IX in each loan agreement):**

***Necessary language to protect lender swap exposure is highlighted in blue***

##  [Section 9.\_\_.Partial Release. Administrative Agent shall release the lien and security interest granted to or held by Administrative Agent for the benefit of the Secured Parties upon [*describe release parcel*], upon the express condition that each and all of the following conditions precedent shall have been fulfilled or complied with to the satisfaction of Administrative Agent (a “Partial Release”):

### a written request for the Partial Release is provided to Administrative Agent by the date that is at least thirty (30) days in advance of the desired date upon which Borrower wishes to effect the Partial Release, together with such information regarding the requested Partial Release as Administrative Agent may reasonably request in connection therewith;

### no Default or Event of Default shall have occurred and be continuing;

### *[add deal-specific conditions, including any required principal paydown, condition for easement agreements if needed, etc.]*;

### *Include if a principal paydown is required in connection with the partial release:* If a Lender-Related Hedge Provider has provided a Hedging Transaction to Borrower in connection with the Loan, Borrower shall: (i) terminate the notional amount of the Hedging Transaction in the amount of the principal prepayment required by clause \_\_\_\_\_, and (ii) pay any costs associated with such notional reduction or termination to the Lender-Related Hedge Provider;

 *OR (bilateral version)*

### *Include if a principal paydown is required in connection with the partial release:* If SunTrust Bank or an Affiliate of SunTrust Bank has provided a Hedging Transaction to Borrower in connection with the Loan, Borrower shall: (i) terminate the notional amount of the Hedging Transaction in the amount of the principal prepayment required by clause \_\_\_\_\_, and (ii) pay any costs associated with such notional reduction or termination to SunTrust Bank;

### Borrower pays to Administrative Agent all reasonable, out-of-pocket costs and expenses of Administrative Agent, including the reasonable fees, charges and disbursements of counsel for Administrative Agent, in connection with the review, approval and consummation of the Partial Release and preparation of any amendments, modifications or waivers of the Loan Documents in connection therewith (whether or not the transactions contemplated in this Section shall be consummated);

### Borrower shall execute and deliver such agreements and instruments in favor of, and provide such further assurances to, Administrative Agent, in order to maintain, in Administrative Agent’s reasonable discretion, the first priority lien and security interest of Administrative Agent in the remainder of the Property, including without limitation, reasonable survey updates and title updates and endorsements, if requested by Administrative Agent, in its reasonable discretion, in connection with the consummation of the Partial Release.

### Upon satisfaction of the above conditions, Administrative Agent shall provide Borrower any documents reasonably necessary to effect the release of the applicable portion of the Property from the Liens of the Security Instrument and other applicable Loan Documents (except for provisions or agreements that expressly survive such release, including but not limited to indemnities with respect to environmental matters and the Environmental Indemnification Agreement).]

**Swap-Related Updates to form Security Instruments and syndicated form Guaranty:**

Corresponding updates should be made to security instruments and guarantees as follows (updated versions of our security instruments and guarantees with these changes will be uploaded to the outside counsel website in the near term):

 **Syndicated form Security Instruments:**

1. In Section 2.1(d), revision noted in blue:

### the payment and performance of all Hedging Obligations owed by Grantor[[4]](#footnote-4) to any Lender-Related Hedge Provider (other than Excluded Swap Obligations) and all Bank Product Obligations, together with all renew­als, extensions, modifications or refinancings of any of the foregoing.

1. Throughout document, change “for the benefit of Administrative Agent[itself] and the Lenders” to “for the benefit of Administrative Agent[itself] and the Secured Parties”.

**Bilateral form Security Instruments:**

In Section 2.1(d), revision noted in blue:

### the payment and performance of all Hedging Obligations owed by Grantor[[5]](#footnote-5) to SunTrust Bank or any Affiliate of SunTrust Bank (other than Excluded Swap Obligations) and all Bank Product Obligations, together with all renew­als, extensions, modifications or refinancings of any of the foregoing

**Syndicated form Guaranty:**

Throughout, change “for the benefit of Administrative Agent[itself] and the Lenders” to “for the benefit of Administrative Agent[itself] and the Secured Parties”.

Exhibit B

**Updated loan assumption provisions**

“**Permitted Owner**” shall mean a transferee of the Property in connection with an assumption of the Loan pursuant to Section 7.11 (Loan Assumption), which transferee has been approved by Lender in its sole discretion.[[6]](#footnote-6)  The following criteria are a non-exhaustive list of the factors that Lender will expect to be satisfied in determining whether or not to approve a proposed transferee:

Permitted Owner shall be a Person (or, with respect to items (i) and (ii) below, an Affiliate of such Person which is not less than 51% owned and Controlled by such Person):

1. which has a Net Worth of at least $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and Unencumbered Liquid Assets of not less than $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**[and Annual Net Cash Flow of not less than $\_\_\_\_\_\_\_\_]** **[*or* which has total assets (in name or under management) at least equal to $\_\_\_\_\_\_\_\_\_\_\_\_ (exclusive of its interests in and any liabilities relating to the collateral securing the Loan)];**
2. is experienced in the ownership, management and leasing of properties similar to the Property;
3. which, along with its constituent entities, is not, and has not been, subject to a bankruptcy or other insolvency action or a material governmental or regulatory investigation which resolved in a final, non-appealable conviction for criminal activity involving moral turpitude or a civil proceeding in which such entity has been found liable in a final non-appealable judgment to have attempted to hinder, delay or defraud creditors, in each case for the past seven (7) years;
4. which satisfies Lender’sinternal requirements related to “know-your-customer” rules, anti-money laundering policies and procedures and other similar client identification policies and procedures (in each case, as consistently applied by Lender) and related laws, rules and regulations (including without limitation, the Patriot Act and rules and regulations of OFAC) and has provided to Lender all material documentation and other information required by regulatory authorities under, such laws, rule and regulations;
5. which, along with its constituent entities, has never threatened litigation against Lender or been an adverse party to Lender in any litigation;
6. which, as a result of the proposed assumption, would not violate Lender’s individual or related borrower limits as established by Lender from time to time in its reasonable discretion.

## Section 7.11 Loan Assumption

## .[[7]](#footnote-7) In connection with any Transfer of the Property to a Permitted Owner, Borrower shall have the right to request Lender’s consent to, and Lender may approve in its sole discretion,[[8]](#footnote-8) a one-time[[9]](#footnote-9) Transfer of the Property and the assumption of the Loan by the purchaser of the Property. Any such assumption of the Loan shall be conditioned upon, among other things, (i) no Event of Default shall have occurred and be continuing, (ii) such purchaser being a Permitted Owner, (iii) the delivery of financial information, including, without limitation, audited financial statements, for such purchaser and the direct and indirect owners of such purchaser, (iv) the Property producing at least a \_\_\_\_\_ Debt Yield and at least a \_\_\_\_\_ Debt Service Coverage Ratio, (v) the delivery of evidence that the purchaser is a single purpose entity as described in Section 5.17 of this Agreement, (vi) the execution and delivery of all documentation reasonably requested by Lender, in form and substance reasonably satisfactory to Lender, including without limitation, (A) a written assumption agreement whereby the proposed transferee assumes all obligations of Borrower under the Loan Documents, and (B) the Replacement Guaranty and the Replacement Environmental Indemnification Agreement; (vii) the delivery of opinions of counsel requested by Lender, including, without limitation, opinions with respect to the valid formation, due authority and good standing of the purchaser, any additional pledgors and the Replacement Guarantor and the enforceability of the Loan Documents, as modified by the loan assumption agreement, and the Replacement Guaranty and the Replacement Environmental Indemnification Agreement, and any other matters requested by Lender, (viii) the delivery of an endorsement to the Title Insurance Policy in form and substance acceptable to Lender, insuring the lien of the Security Instrument, as assumed, subject only to the Permitted Encumbrances, (ix) the proposed transferee shall have delivered certificates of insurance as required under Exhibit 5.5 of this Agreement; (x) Borrower or the proposed transferee shall have delivered such UCC, litigation, tax and bankruptcy searches with respect to the Property, the proposed transferee and Replacement Guarantor as Lender may reasonably require; (xi) the payment of an assumption fee equal to \_\_\_\_\_\_\_\_ percent (\_\_\_% ) of the outstanding amount of the Loan; (xii) the payment to Lender of a processing fee equal to [$15,000.00], (xiii) the delivery of evidence reasonably acceptable to Lender that the Property will be managed by a qualified property manager approved by Lender in its reasonable discretion; (xiv) all third-party out-of-pocket costs and expenses related to any assumption are to be paid by Borrower, and (xv) the payment of all of Lender’s third-party out-of-pocket costs and expenses, including, without limitation, reasonable attorneys’ fees and costs, actually incurred by Lender in connection with such assumption. For avoidance of doubt, any Hedging Transaction entered into with Lender or an Affiliate of Lender as a counterparty shall not be transferable to a Permitted Owner in connection with an assumption of the Loan unless otherwise approved by Lender in its sole discretion.[[10]](#footnote-10)

***Added definitions:***

**“Net Worth**” means, at any time, (i) the fair market value of the total assets of a Person (excluding goodwill, patents, trademarks, trade names, organization expense, treasury stock, unamortized debt discount and expense, deferred research and development costs, deferred marketing expenses, and other like intangibles) determined in accordance with GAAP, minus (ii) the total liabilities of such Person (including, without limitation, such Person’s contingent liabilities that have accrued under GAAP, accrued and deferred income taxes, and any reserves against assets) determined in accordance with GAAP; provided, however, in no event shall Net Worth be calculated to include the value of the Property.

**“Replacement Environmental Indemnification Agreement”** shall mean an environmental indemnification agreement executed by a Replacement Guarantor and the new Borrower in substantially the same form as was delivered to Lender by Guarantor and Borrower in connection with the closing of the Loan.

“**Replacement Guarantor**” shall mean one or more Persons approved in writing by Lender, such approval to be granted or withheld in the sole discretion of Lender.

**“Replacement Guaranty”** shall mean a guaranty agreement executed by a Replacement Guarantor in substantially the same form as was delivered to Lender by Guarantor in connection with the closing of the Loan.

1. *Note to drafter:* Revise if hedge will be entered into by a related party, not the Borrower itself [e.g. “all Hedging Obligations owed by Borrower (or *[name of entity entering into hedge]* on Borrower’s behalf)”]. [↑](#footnote-ref-1)
2. *Note to drafter:* Revise if hedge will be entered into by a related party, not the Borrower itself [e.g. “all Hedging Obligations owed by Borrower (or *[name of entity entering into hedge]* on Borrower’s behalf)”]. [↑](#footnote-ref-2)
3. *Note to drafter:* Revise if hedge will be entered into by a related party, not the Borrower itself [e.g. “all Hedging Obligations owed by Borrower (or *[name of entity entering into hedge]* on Borrower’s behalf)”]. [↑](#footnote-ref-3)
4. *Note to drafter:* Revise reference if a party other than the Grantor enters into a hedge in connection with the Loan. [↑](#footnote-ref-4)
5. *Note to drafter:* Revise reference if a party other than the Grantor enters into a hedge in connection with the Loan. [↑](#footnote-ref-5)
6. *Note to drafter:* “Sole discretion” standard for approval of a Permitted Owner should not be modified without credit officer approval. [↑](#footnote-ref-6)
7. Note to drafter: Do NOT include a loan assumption provision in a deal unless it was included in the term sheet, or you have confirmation that the approving credit officer has subsequently approved the addition of a loan assumption right. This is not a standard feature of all term loan deals. [↑](#footnote-ref-7)
8. *Note to drafter:* “Sole discretion” standard for approval of a Permitted Owner should not be modified without credit officer approval. [↑](#footnote-ref-8)
9. *Note to drafter:*  Loan assumption right should remain a one-time right. [↑](#footnote-ref-9)
10. *Note to drafter:* Transferability of any hedge provided by SunTrust requires separate approval from SunTrust credit risk management for our Financial Risk Management (“FRM”) (derivatives) department and additional conditions may be imposed in the ISDA documentation. If SunTrust will provide a hedge for the deal, please ensure that the deal team communicates to SunTrust FRM anynegotiated changes to our base form “Permitted Owner” definition and Section 7.11 Loan Assumption provision, as those changes are agreed to, as changes to these provisions may impact ISDA negotiation. [↑](#footnote-ref-10)