


## CONSTRUCTION/PERMANENT LOAN AGREEMENT

This "Agreement" means this Construction/Permanent Loan Agreement, which is dated **04/30/2012**.

"Borrower" is **Marc L. Motter**  
**Carol A. Motter**

"Lender" is National Bank of Commerce.

  
20120503000153340 1/15 \$54.00  
Shelby Cnty Judge of Probate, AL  
05/03/2012 09:59:27 AM FILED/CERT

### Recitals

WHEREAS, Borrower is the owner of that certain Real Estate (the "Real Estate") as more particularly described on the Mortgage (as hereinafter defined); and

WHEREAS, Borrower has applied to Lender for a mortgage loan in the maximum principal amount of **\$225,000** (the "Loan") to provide for the construction and permanent financing of certain improvements (the "Improvements") on the Real Estate; and

WHEREAS, simultaneously with the execution and delivery hereof, Borrower has made, executed and delivered to Lender a certain first mortgage note of even date herewith (along with any addendum or rider thereto, the "Note"), and a certain first mortgage (along with any addendum or rider thereto, the "Mortgage") covering (among other things) the Real Estate and Improvements, which Mortgage shall secure any sums due or to become due under the Note, the Mortgage, this Agreement or any of the other documents executed in connection with the Loan (collectively, the "Loan Documents"); and

WHEREAS, Borrower acknowledges and agrees that the Mortgage shall encumber (among other things) the Real Estate and Improvements for the purpose of securing repayment of the Loan and Borrower's other obligations under the Loan Documents or at law or in equity ; and

WHEREAS, Borrower has requested Lender to disburse the proceeds of the Loan in installments as construction of the Improvements progresses, and to provide for the conversion of the Loan from a construction loan to an amortizing loan based on the terms set forth in the Note.

### Agreement

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth, and of other good and valuable consideration, the receipt and sufficiency of all of which is hereby acknowledged, Borrower and Lender hereby covenant and agree as follows:

#### **I. DEFINITIONS**

The terms defined in the Recitals shall have the meanings assigned therein. As used in this Agreement the following terms shall have the respective meanings assigned to them in this Article and include the plural as well as the singular, and vice versa.

"Advances" means the advances of the Loan proceeds made by Lender to Borrower in installments, which proceeds Borrower shall use solely for the purpose of paying the costs of acquiring, constructing and equipping the Project (as hereinafter defined), as reflected in the Project Budget.

"Base Rate" means the prime rate of interest as published on the first business day of the month in The Wall Street Journal under the heading "Money Rates". If there is a range of published rates, the highest rate shall be the Base Rate.

"Collateral" means the Real Estate, the Improvements and all other property of any kind that now or hereafter secures the Loan under any of the Loan Documents.

"Contractor" means **G. S. Masters, Inc.** or another person acceptable to Lender. Lender may withhold its acceptance of any person or company as a Contractor in its sole and absolute discretion, for any reason, or for no reason at all. Lender's acceptance or nonacceptance of any person as Contractor shall in no wise be deemed to reflect on whether such person or company is in any way competent or suitable for any purpose or undertaking.



“Construction Inspector” means an employee of the Lender, any person authorized in writing by Lender to inspect the Project to protect Lender’s interests. Lender’s authorization of a person as a Construction Inspector shall be at Lender’s sole and absolute discretion and may be withheld for any reason or no reason at all.

“Conversion Date” means a date at least one day prior to the date the construction of the Project is to be completed in accordance with the Plans, but in no case later than **04/29/2013**.

“Construction Account” means a checking account established by Borrower at Lender and into which Advances may be deposited by Lender and from which Borrower shall pay the costs for which such Advances are made.

“Construction Period” means the period of time between the date of this Agreement and the Conversion Date, which period shall be no more than **twelve (12)** calendar months.

“Disbursement Schedule” means that schedule of disbursements which is appended to this Agreement.

“Governmental Authority” means any federal, state, county, municipal or other government, domestic or foreign, and any agency, authority, department, commission, bureau, board, court or other instrumentality thereof.

“Governmental Requirements” means all laws, rules, regulations, ordinances, judgments, decrees, codes, and orders of any Governmental Authority applicable to any of the Collateral (as hereinafter defined).

“Lien” means any mortgage, pledge, security interest, assignment, lien, charge, encumbrance or other preferential arrangement of any kind.

“Plans” means the plans and specifications for the Improvements to be constructed on the Real Estate, which have been delivered to, and approved by, Lender.

“Project” means the Improvements to be constructed on the Real Estate pursuant to the Plans.

“Project Budget” means the construction budget for the Project which has been accepted in writing by Lender prior to the execution of this Agreement.

## **II. LOAN TERMS; DISBURSEMENTS AND COLLATERAL.**

**Section 2.01. Loan.** On the terms and conditions set forth in this Agreement and the other Loan Documents, Lender agrees to lend the maximum principal amount of **\$225,000** (the “Maximum Principal Amount”) to Borrower; provided, that Lender shall have no obligation to lend more than the amount required to complete the Project or the amount for which the completed project is expected to appraise at any time, whichever is less.

**Section 2.02. Advances.** So long as no Event of Default has occurred under this Agreement or any of the other Loan Documents, during the Construction Period Lender shall, at the request of Borrower (or subject to the terms hereof, upon Lender’s own initiative) and upon the terms and subject to the conditions set forth in this Agreement and the other Loan Documents make Advances from time to time (but not more frequently than monthly unless Lender otherwise consents) as, in the opinion of Lender, funds are necessary to pay the costs of acquiring, constructing and equipping the Project (“Project Costs”), as reflected in the Project Budget; provided, that in no event shall Lender be required to make Advances more frequently than as described in the Disbursement Schedule or in amounts greater than indicated in the Disbursement Schedule. Lender shall make Advances, on not less than three business days’ prior written notice from Borrower, at Lender’s option: (a) by draft payable to Borrower, (b) by deposit to the Construction Account, (c) by joint draft payable to Borrower and Contractor or (d) by joint draft payable to Borrower and the closing agent; provided, however, that nothing contained in this Agreement shall be construed as imposing any duty on Lender to pay bills incurred in connection with the Project or to see that they are paid. Lender’s obligation to make Advances hereunder shall terminate, if not sooner terminated pursuant to the provisions of this Agreement, at the end of the Construction Period. Lender may require requests in writing to be transmitted via email to an address designated by Lender.

**Section 2.03. Interest.** Notwithstanding anything to the contrary in the Note, from the date hereof until the Conversion Date, interest shall accrue on the Advances outstanding from time to time as follows:

( ) The unpaid balance shall bear interest at a rate which shall always be % per annum above the announced Base Rate, as established from time to time. The rate of interest shall be adjusted with each adjustment of the Base Rate as of the first day of the month following



such adjustment or adjustments. Under this option, the length of time from the Conversion Date to the date of the first interest rate adjustment as provided in the Note shall be reduced by the duration of the Construction Period.

( X ) The rate as stated in paragraph 2 of the Note. Under this option, the length of time from the Conversion Date to the date of the first interest rate adjustment as provided in the Note shall be reduced by the duration of the Construction Period as reflected in the Note.

( ) The unpaid balance shall bear interest at a fixed rate of % per annum. Under this option, the length of time from the Conversion Date to the date of the first interest rate adjustment as provided in the Note shall be reduced by the duration of the Construction Period.

Commencing on the Conversion Date and thereafter, interest shall accrue as provided in the Note or any modification thereto under the terms of Article IV.

**Section 2.04. Payments.** Notwithstanding anything to the contrary in the Note (or any of the other Loan Documents), until the Conversion Date, all accrued interest on the Loan shall be payable monthly in arrears on the first day of each month commencing on **06/01/2012**, with all accrued and unpaid interest becoming due and payable on the Conversion Date along with any prepayment of interest required by Section 8.13 hereof. Thereafter, the Loan shall be converted into a permanent mortgage loan, and principal and interest shall be payable in accordance with the terms of the Note and Mortgage.

**Section 2.05. Right of Rescission.** If the Loan is subject to a rescission period under the Truth-in-Lending Act (15 U.S.C. 1601 et. seq.), then Borrower shall not (and shall not allow Contractor or any subcontractor or supplier to) start construction on the Project or allow delivery of materials to the Real Estate for a period of three (3) business days after the Loan has been closed.

### **III. CONDITIONS OF ADVANCES**

Lender's obligation to make the Advances is subject to the following conditions precedent:

**Section 3.01. Conditions to Each Advance.** Lender's obligation to make each Advance hereunder is subject to the following conditions precedent:

(a) As of the date of this Agreement, through the date any Advance is actually made, the representations and warranties set forth in Article V hereof shall be true and correct.

(b) As of the date of this Agreement, through the date any Advance is actually made, Borrower shall be in compliance with all the covenants set forth in this Agreement, and no Event of Default, nor any event which upon notice or lapse of time or both would constitute such an Event of Default, shall have occurred and be continuing.

(c) Each request for an Advance shall be supported by the following, each of which must be satisfactory in form and content to Lender: (i) An inspection sheet duly completed by the Construction Inspector based on a personal inspection of the Project (an "Inspection") conducted immediately prior to the date the Advance is requested, which Inspection shall show that the percentage of completion of the construction of the Project will equal or exceed the percentage of total Loan proceeds disbursed after taking into account the requested Advance; (ii) if all or any portion of the requested Advance is to be paid to the Contractor, (A) a written waiver of Lien executed by the Contractor acknowledging that the Contractor has been paid all that is due to the Contractor under the construction contract for work performed prior to the date of the most recent payment made to the Contractor and waiving any Lien on the Collateral for such work, and (B) the Contractor's sworn statement on Exhibit A certified by the Construction Inspector, who shall inspect the Project on Lender's behalf; (iii) if all or any portion is to be paid to any persons who have provided work or materials to the Project other than the Contractor, a written waiver of Lien executed by the such person acknowledging that such person has been paid all that is due to such person for work performed or materials supplied prior to the date of the most recent payment made to such person and waiving any Lien on the Collateral for such work or materials; and (iv) a written statement from Borrower that there have been no changes in the Project Budget. Lender may, in its sole discretion, make Advances without requiring the Construction Inspector's certification or any of the forgoing listed items; however, by making one or more Advances without such certification or other items, Lender shall not waive its right to require such certification or other items for any subsequent Advance.



**Section 3.02. Conditions to First Advance.** In addition to the conditions precedent set out in Section 3.01 with respect to each Advance, Lender's obligation to make the first Advance hereunder is subject to the following conditions precedent:

- (a) All filings, recordings and other actions that are necessary or desirable in the opinion of Lender to establish, protect, preserve and perfect the Liens on the Collateral intended to be created by the Loan Documents shall have been duly made or taken, and all fees, taxes and other charges relating to such filings and recordings shall have been paid by Borrower; and Lender shall have legal, valid and perfected Liens on all of the Collateral, prior in time and in right to all other Liens thereon.
- (b) Borrower shall furnish to Lender at Borrower's expense a current mortgagee's title insurance policy in a form satisfactory to Lender (including affirmative mechanic's and materialmen's cause and a pending disbursement clause) in an amount equal to the Maximum Principal Amount, issued by a title insurance company acceptable to Lender and showing the Mortgage to be a valid first mortgage Lien on the fee simple title to the Real Estate, subject only to the current year's taxes and to such other exceptions as shall be acceptable to Lender.
- (c) Borrower shall provide Lender with an executed counterpart of Borrower's construction contract with the Contractor which contract shall provide for all work required to complete the Project and shall contain the following items: (a) a completion date (specified by day, month and year) which shall be prior to the Conversion Date; and (b) a provision that no change in the scope of the work, no increases or decreases in the contract amount (by change order or otherwise), and no extension of the completion date may be made without the prior written consent of Lender.
- (d) Borrower shall furnish Lender with a survey, made and certified by a licensed surveyor or engineer acceptable by Lender, indicating compliance with any building setback lines or other restrictions, the Plans, and any Governmental Requirements. This survey must also show permanent ingress and egress to the Project and must contain a certification as to whether or not the Project lies in a flood hazard area.
- (e) Borrower shall have complied with the equity contribution requirements set forth in Section 6.10.
- (f) If required by Lender, Borrower shall have established the Construction Account.
- (g) Lender shall have received all other items requested by Lender in connection with the Loan as Lender shall deem reasonably necessary or expedient for its protection, each of which must be satisfactory in form and content to Lender in its sole discretion.

At its sole discretion, Lender may waive any of the requirements set forth in this Section 3.03.

**Section 3.03. Conditions to First Advance After Completion of Foundation.** In the case of the first Advance following the completion of the foundation for the Project, Borrower must provide Lender with an updated survey of the Real Estate showing the location of the Improvements on the Real Estate, in form satisfactory to Lender in Lender's sole discretion, and evidence satisfactory to Lender in Lender's sole discretion that the property has been treated against wood infestation.

**Section 3.04. Conditions to Final Advance and Conversion to Permanent Loan.** Borrower covenants and agrees that Borrower shall furnish, or cause to be furnished, to Lender, (i) at least 10 days prior to the Conversion Date the items listed in subsections (a) through (h) below and (ii) at least by the Conversion Date the items listed in subsection (i) below, all in form and content satisfactory to Lender, all of which are conditions precedent to Lender's obligation to make the final Advance and to allow conversion hereunder:

- (a) A final as built survey, made and certified by a licensed surveyor or engineer acceptable by Lender, in a form acceptable to Lender and Lender's title insurer, showing the location of all Improvements, rights of way, easements, encroachments, encumbrances and other matters (either of record or visible) on or affecting the Real Estate;
- (a) An endorsement, in form and content satisfactory to Lender, to the mortgagee title insurance policy obtained pursuant to Section 3.02(b) of this Agreement deleting any "pending disbursements" clause, any exception for mechanics' and materialmen's liens, any other language generally applicable to construction loans and any survey exception, and containing no exceptions other than those contained in the original mortgagee title insurance policy obtained pursuant to said Section 3.02(b) [except as otherwise approved by Lender in Lender's sole discretion];



- (b) A paid up original hazard insurance policy or policies meeting the requirements of Section 6.08 of this Agreement;
- (c) A certificate of occupancy or other appropriate certificate of approval from the appropriate Governmental Authority evidencing compliance with all Governmental Requirements (including any state or local health department approvals of wells or septic tanks);
- (d) At Lender's discretion either a final inspection with re-certification of value by the original appraiser showing **\$563,000** in value or an appraisal from an independent appraiser acceptable to Lender indicating the value of the Project as completed to be at least equal to the appraised value, which final appraisal shall be ordered by Lender or an appraisal management company designated by Lender;
- (e) A termite soil treatment guarantee from a person acceptable to Lender guaranteeing that the Real Estate has been treated against termite infestation and that no infestation is currently present on the Real Estate or in the Improvements;
- (f) A final written waiver of Lien executed by the Contractor acknowledging that the Contractor has been paid all that is due to the Contractor under the construction contract for work performed and waiving any Lien on the Collateral for all work;
- (g) A properly executed letter from Borrower accepting the Improvements as completed; and
- (h) At closing, a deposit or payment of the following sums and evidence of the payment of all ad valorem taxes due and payable during the Construction Period;
  - (i) All interest due on the amounts disbursed through the Conversion Date;
  - (ii) Pre-paid interest, if any, from the Conversion Date through the end of the month in which the Conversion Date falls (with the first principal and interest payment date being the first day of the second month following the Conversion Date);
  - (iii) Necessary escrow amounts as required by the Mortgage and other Loan Documents, including, but not limited to, hazard insurance, taxes, and private mortgage insurance.

#### IV. REQUEST FOR ALTERNATIVE LOAN PROGRAM

**Section 4.01. Request for Alternative Loan Program.** Thirty (30) days prior to the Conversion Date, Borrower may request that the Note be amended, modified or replaced so that the Loan shall not convert to the amortizing loan described in the Note and Mortgage, but shall instead convert to an alternative loan program that may be a fixed interest rate, a variable interest rate or an adjustable interest rate program and that may have a different payment schedule, maturity date or amortization schedule, all based on the mortgage loan programs, if any, that the Lender is willing to offer to Borrower at that time and based on the type of mortgage loan program Borrower requests (the "Alternative Loan Program"). In connection with such request, Borrower must provide the following information to Lender at Borrower's sole expense:

- (1) Final inspection with re-certification of value from original appraiser showing no change in value, ordered by Lender; and
- (2) Such other information as Lender may request, in Lender's sole discretion, in connection with its underwriting requirements and other considerations.

In addition to the above-referenced items in Section 4.01, Borrower shall also provide to Lender, at Borrower's sole cost and expense, the following additional information at least thirty (30) days prior to the Conversion Date:

- (1) Updated employment information;
- (1) Updated financial information;
- (2) Appraisal conducted by an appraiser selected by Lender or an appraisal management company engaged by Lender;



- (3) Certification that there has been no material adverse change in the financial condition of Borrower since the date of the application for the Loan;
- (4) Updated credit report ordered by Lender; and
- (5) Such other information as Lender may request, in Lender's sole discretion, in connection with its underwriting requirements.

After Lender has reviewed the above information, Lender may, in Lender's sole discretion, offer to Borrower as an alternative to the loan terms provided for in the Note and Mortgage an Alternative Loan Program. In the event Lender offers to Borrower an Alternative Loan Program, Borrower must notify Lender of its election to accept the Alternative Loan Program offered by Lender, if any, within ten (10) days of Lender's offering the Alternative Loan Program to Borrower or within such other period of time as Lender may specify in Lender's sole and absolute discretion. Within the time required by Lender, Borrower must execute any and all additional documents required by Lender in connection with the Alternative Loan Program, including, without limitation, application documents, rate lock agreements, a modified or amended note, and an amended mortgage. Any and all costs incurred in connection with the execution and recording of these additional documents and Borrower's request for an Alternative Loan Program shall be borne by Borrower, including, but not limited to, recording taxes, mortgage taxes, stamp taxes and intangibles taxes.

**SECTION 4.02. LENDER'S DISCRETION TO REFUSE.** LENDER MAY, IN LENDER'S SOLE DISCRETION, REFUSE TO OFFER BORROWER AN ALTERNATIVE LOAN PROGRAM.

**Section 4.03. Modification Fee.** In addition to any other costs, fees and expenses incurred or owed by Borrower hereunder or under the Alternative Loan Program, Borrower shall pay to Lender a fee of \$ (or such other sum as Lender may specify in writing before Borrower accepts any offer of an Alternative Loan Program) in connection with the modification of the Loan to an Alternative Loan Program; which fee shall be due and payable upon the execution of the documents that will modify the Loan to the Alternative Loan Program.

## **V. REPRESENTATIONS AND WARRANTIES OF BORROWER**

Borrower represents and warrants to Lender as follows:

**Section 5.01. Information Furnished by Borrower.** (a) The documents furnished in support of the Loan request are true and correct and accurately set out the facts contained therein; (b) the financial statements provided in support of the Loan request were prepared in accordance with good accounting practice and are correct and complete and fairly present the financial position of each person that said financial statements purport to reflect; and (c) the financial positions so reflected have not suffered any material adverse changes prior to the date hereof.

**Section 5.02. Taxes.** Borrower has filed or caused to be filed all federal, state and local tax returns that are required to be filed by Borrower, and has paid all taxes, assessments and other charges due.

**Section 5.03. Title to Properties.** Borrower has good and marketable title to all the properties and assets (including the Collateral) reflected as being owned by Borrower on the financial statements referred to in Section 5.01(b) hereof. All such properties and assets (including the Collateral) are free and clear of Liens except as otherwise permitted or required by the provisions of this Agreement or the Loan Documents.

**Section 5.04. Mechanics' Liens.** On and as of the date of this Agreement there is no commencement of work (including but not limited to demolition or site preparation) on the Real Estate. No materials to be used in the construction of the Improvements have been ordered or delivered.

**Section 5.05. Project.** (a) The construction of the Project in accordance with the Plans and the use of the Real Estate as a single family residence will not violate any restrictive covenant or any applicable zoning, planning or building restriction or other Governmental Requirements; (b) the Real Estate has convenient and adequate access at the perimeter to all electric, gas, water, sewer, telephone and other utility services necessary for the construction of the Project and the intended use of the Real Estate; (c) the Real Estate has access to existing public roads and highways (including all necessary rights and Governmental Approvals for related ingress and egress) as adequate for the intended use of the Real Estate and to comply with any Governmental Requirements; (d) when the Project is completed in accordance with the Plans, the Real Estate will have paved, off-street parking adequate to comply with all Governmental Requirements and will comply with all applicable building codes and standards and other applicable Governmental Requirements and will qualify for a Certificate of Occupancy (or local equivalent); (e) the Plans are satisfactory to Borrower, comply with all local Governmental



Requirements, and have been approved by any required Governmental Authorities and by all other persons whose approval is required, (f) Borrower has obtained all material certificates, licenses, authorizations, registrations, permits and other approvals of Governmental Authorities necessary for the construction of the Project, including all required zoning, building, land use, environmental occupancy, fire, safety and other approvals; (g) the present contemplated use and occupancy of the Real Estate do not conflict with or violate any of the same; and (h) the Borrower presently intends to occupy the completed Project as Borrower's personal, single family residence.

**Section 5.06. No Misleading Information.** Neither this Agreement nor any of the other Loan Documents nor any certificate, written statement or other document furnished to Lender by or on behalf of Borrower in connection with the transactions contemplated hereby contains any untrue statement of material fact or omits a material fact necessary to make the statements contained herein or therein not misleading; and there is no fact known to Borrower that Borrower has not disclosed in writing to Lender that materially and adversely affects or, so far as Borrower can now reasonably foresee, will materially and adversely affect the condition or operations of Borrower or the ability of Borrower to perform its obligations hereunder and under the other Loan Documents to which such Borrower is a party. Neither Borrower nor anyone acting on behalf of Borrower has coerced or otherwise influenced or attempted to coerce or to influence any appraiser, and Borrower neither knows or has reason to know of any attempted influence or coercion by any other party, including but not limited to Lender.

**Section 5.07. Environmental.** Except as has been heretofore disclosed in writing to Lender with specific reference to this Section the Real Estate is in compliance with all applicable environmental laws, rules and regulations.

## **VI. COVENANTS AND AGREEMENTS OF BORROWER**

**Section 6.01. Construction of Project.** Subject to the terms of Section 2.05, Borrower shall cause (a) construction of the Project to be commenced as soon as possible after the date hereof, but not to exceed ten (10) days, (b) work on the Project to be carried on continuously and with dispatch until completed, and (c) the Project to be fully completed in accordance with the Plans on or before the Conversion Date. Borrower will devote all reasonable efforts and energy to the construction of the Project. Borrower shall locate and construct the Project strictly in accordance with the Plans and with all applicable Governmental Requirements.

**Section 6.02. Changes in Plans; No Cost Overruns.** The Plans shall not be changed or added to without the prior written consent of Lender. If any changes in the Plans shall be consented to, Borrower shall immediately deposit the additional cost thereof with Lender (such deposit to be disbursed by Lender upon the completion of the changes). Borrower shall not, without the prior written consent of Lender, permit the cost of the Project to Borrower to exceed the amount allocated to the cost of the Project in the Project Budget.

**Section 6.03. Use of Loan Proceeds.** Borrower agrees to use the proceeds of the Loan only for the purpose of constructing the Improvements on the Real Estate in accordance with the Plans. No monies shall be diverted by Borrower to any other purpose, or commingled with any other funds.

**Section 6.04. Payment of Bills, etc.** Borrower shall pay or cause to be paid promptly all bills for labor and materials going into the construction of the Project and all other charges related to the Project, and shall submit to Lender all such receipts, affidavits, canceled checks or other evidence of payment of all debts connected with the Project as may be requested by Lender from time to time. Borrower shall, on each check used to pay costs related to the Project, identify the bill, invoice or statement being paid and the Project by a reference to the lot and block number or other identification of the Real Estate satisfactory to Lender.

**Section 6.05. Sale or Encumbrance of Collateral/Assumption of Loan Prohibited.** All terms of the Note and Mortgage are incorporated herein by reference, specifically including those provisions prohibiting the transfer or encumbrance of any Collateral without Lender's consent and the granting of any additional Liens on the Collateral.

**Section 6.06. Payment of Expenses, etc.** To the fullest extent allowed by law, Borrower shall pay all taxes, insurance premiums, recording fees, title insurance premiums, title examination fees, survey fees, appraisal costs, fees and expenses of the Construction Inspector, attorneys' fees (including the reasonable fees and disbursements of Lender's counsel) and all other expenses and costs of every kind reasonably incurred by Lender in connection with (a) the making or collecting of the Loan, (b) the preparation and review of this Agreement (whether or not the transactions contemplated by this Agreement shall be consummated) and the other Loan Documents, (c) the enforcement of this Agreement and the other Loan Documents, (d) maintaining unimpaired Lender's Lien under the Loan Documents, and (e) otherwise connected with, or growing out of, this



transaction, including any such expenses and costs incurred in connection with the successful defense of any action, counterclaim, cross claim or other claim asserted by any other party against Lender in connection with any of the foregoing. The provisions of this Section 6.06 shall survive (i) the payment in full of the principal and interest on the Loan and all fees, charges and expenses related thereto and (ii) the termination of this Agreement.

**Section 6.07. Payment of Taxes, etc.** Borrower shall promptly pay and discharge any taxes, assessments, indebtedness, charges and claims against the Collateral, or any part thereof, that may become due and payable during the existence of the Loan.

**Section 6.08. Insurance.** Borrower shall keep all Improvements fully insured at all times during construction and after completion, and shall keep fully insured all personal property included in the Collateral, including all building materials at any time located on the Real Estate. In addition, Borrower shall cause the Contractor to maintain such workmen's compensation insurance in connection with the Project as may be required by law and Borrower shall, and shall cause the Contractor to, maintain general liability insurance and builder's risk insurance in such amounts as Lender may reasonably require. All such insurance policies shall be issued by such companies and insure against such hazards (including flood) as Lender may reasonably require, and such policies shall contain appropriate loss payable clauses in favor of Lender and the originals thereof shall be deposited with Lender.

**Section 6.09. Lender's Right of Access and Sign.** Lender, its agents and the Construction Inspector shall, at all reasonable times during the construction of the Project, have the right of entry and free access to the Project and the right to inspect all work done, labor performed and materials furnished in, on or connected with the Project, to inspect all books, contracts, subcontracts and records of Borrower relating to the Project, and to demand and receive from Borrower, the Contractor, and Borrower's agents and employees any information regarding the Project and the finances connected therewith. Lender may cause a sign indicating that construction financing has been provided by the Lender to be display by Borrower at the Project. The sign shall be placed in a location satisfactory to the Lender for as long as the Construction Period continues.

**Section 6.10. Borrower to Provide Equity and Additional Funds, if Necessary.** Before requesting an Advance, Borrower shall pay all construction costs until an amount equal to the difference between the projected cost of completion of the construction and the amount of the Loan has been paid. At all times Borrower will leave as the undisbursed portion of the Loan an amount sufficient to complete the construction of the Project and to pay all bills and charges in connection therewith. If Lender at any time is of the opinion that the undisbursed portion of the Loan is inadequate to complete construction of the Project, Borrower will, upon Lender's request, pay out of Borrower's own funds all costs of the construction of the Project until such time as the undisbursed portion of the Loan is, in Lender's opinion, sufficient to complete the Project and pay all bills and charges in connection therewith.

**Section 6.11. Inspections.** Borrower covenants and agrees that the Construction Inspector shall have access at all reasonable time to conduct Inspections of the Real Estate and Improvements. In addition, the Construction Inspector shall also be given access to all records, contracts, sub-contracts, bills, invoices and statements of Borrower or Contractor, if consented to by Contractor, that relate to the Project or the Real Estate. An Inspection fee of **\$300.00** will be charged on each loan and shall be collected at closing to be applied against each Inspection. It is anticipated that this fee will cover the cost of **six** Inspections. If more than **six** Inspections are actually made, additional fees of \$50.00 for each Inspection shall be due and payable at the time each such Inspection in excess of **six** is requested. **IT IS UNDERSTOOD AND AGREED THAT THE CONSTRUCTION INSPECTOR SHALL MAKE THE INSPECTIONS FOR THE SOLE BENEFIT OF LENDER AND NEITHER BORROWER NOR THE CONTRACTOR SHALL BE ENTITLED TO CLAIM ANY LOSS OR DAMAGE AS THE RESULT OF ANY INSPECTION OR ANY FAILURE TO CONDUCT AN INSPECTION. LENDER SHALL HAVE NO LIABILITY FOR ANY ACT, OMISSION, OR REPRESENTATION OF ANY CONSTRUCTION INSPECTOR.**

**Section 6.12. General Covenants.** Borrower covenants and agrees that from the date hereof and until payment in full of the principal of and interest on the Note and all fees and charges with respect thereto, or the termination of this Agreement by Lender in writing, Borrower shall:

(a) Do all things necessary to comply with all Governmental Requirements; at all times maintain, preserve and protect all of the Collateral and keep the same in good repair, working order and condition, and from time to time make all needful and proper repairs, replacements and improvements thereto.



- (a) Furnish to Lender at such times or intervals as Lender may reasonably request, reports of the progress of construction of the Project, the actual cost of the Improvements compared to estimates, and such other information regarding the Project as Lender may reasonably request.
- (b) Promptly notify Lender in writing of any action, suit or proceeding against any of the Collateral by or before any Governmental Authority.
- (c) Promptly give notice in writing to Lender of the occurrence of any Event of Default, or any event that upon notice of lapse of time or both would constitute an Event of Default.
- (d) (1) Make full and timely payment of the principal of, and interest on, the Loan and all other indebtedness, obligations and liabilities of Borrower to Lender, whether now existing or hereafter arising, and (2) duly comply with all the terms and covenants contained in this Agreement and the other Loan Documents, all at the times and places and in the manner set forth therein.
- (e) At Borrower's cost and expense, upon request of Lender, duly execute and deliver, or cause to be duly executed and delivered, to Lender such further instruments and do, or cause to be done, such further acts as may be reasonably necessary or proper in the opinion of Lender or its counsel to carry out more effectively the provisions and purposes of this Agreement and the other Loan Documents.
- (f) Refrain from using, storing, or disposing of, or suffering the use, storage, or disposal of, any toxic substances, hazardous wastes or other hazardous materials on or under the Real Estate or in the Improvements, and comply with all applicable building and zoning codes and other land use regulations, any applicable environmental laws or regulations, and any other applicable laws or regulations. Borrower shall give immediate oral and written notice to Lender of its receipt of any notice of a violation of any law, rule or regulation covered by this paragraph, or of any notice of any other claim relating to the environmental condition of the Real Estate, or of its discovery of any matter which would make the representations and warranties set forth in Section V and/or the covenants above inaccurate or misleading in any respect.

**Section 6.13. Indemnification.** Borrower hereby agrees to indemnify, to defend and and to hold Lender, (including Lender's employees, officers, agents, and directors) harmless from any and all claims, demands, causes of action, losses, costs, damages, and expenses arising from, relating to, or in any caused, in whole or in part, by (1) the violation of any representation, warranty or covenant set forth in this Agreement, (2) Borrower's failure to perform any obligation required by this Agreement, (3) Borrower's or the Real Estate's or Improvements' failure to fully comply with all environmental laws, rules and regulations, or with all occupational health and safety laws, rules and regulations, or (4) any other matter related to environmental conditions on, under or affecting the Real Estate or Improvements. This indemnification shall survive the closing of the Loan, payment of the indebtedness evidenced by the Note, the exercise of any right or remedy under any Loan Documents, any subsequent sale or transfer of the Real Estate or the Improvements, the termination of this Agreement, and all similar or related events or occurrences.

## **VII. DEFAULT AND REMEDIES**

**Section 7.01. Events of Default.** The following shall constitute Events of Default under this Agreement:

- (a) if Borrower fails to pay to Lender when due the principal or interest on the Loan or any other sum due under this Agreement or any of the other Loan Documents, or any other debt secured thereby; or
- (a) if in the judgment of Lender any of the proceeds of the Loan are being, or at any time have been, diverted to a purpose other than payment or discharge of Project Costs; or
- (b) if Borrower fails to comply with any of the provisions or covenants of this Agreement or any of the other Loan Documents or if any other default or event of default occurs thereunder; or
- (c) if any statement, representation or warranty contained herein, in any of the other Loan Documents or in any report, certificate or other instrument delivered to Lender under this Agreement or any of the other Loan Documents shall be untrue in any material respect as of the time made; or
- (d) if Borrower at any time prior to the completion of the Project abandons the Project, or ceases work thereof for a period of more than ten consecutive calendar days, or fails diligently to prosecute the work on the Project; or
- (e) if any unreasonable delay in the construction and development of the Project and the Improvements occurs, whether as the result of energy shortages, any Governmental Requirement relating to environmental



protection, sewage treatment, zoning, energy conservation or other matter, lack of utilities (including gas, electricity, water and sewage treatment), or other reason whatsoever, or if it reasonably appears to Lender that, upon completion of the Project there will not be adequate access to the Project or that utilities will not be available in sufficient quantities to permit the operation of the Project; or

(f) if any law is passed imposing, or authorizing the imposition of, any specific tax upon this Agreement, any of the other Loan Documents, the principal of or interest on, the Loan, or permitting or authorizing the deduction of any such tax from the principal of, or interest on, the Loan, or by virtue of which any tax, Lien or assessment upon the Collateral shall be chargeable against Lender; or

(g) if any of the material stipulations contained in this Agreement or any of the other Loan Documents is declared invalid or inoperative by any Governmental Authority; or

(h) if the Project is not completed in strict compliance with the Plans and all Governmental Requirements and all of the requirements of Section 3.04 complied with by the Conversion Date; or

(i) if Lender at any time deems itself insecure for any reason with respect to the Loan or the Collateral; or

(j) in the event of the Borrower's death.

**Section 7.02. Remedies.** Upon the happening of any Event of Default hereunder, Lender may at its option, without notice to anyone, take any or all of the following actions:

(a) Refuse to make any further Advances;

(a) Declare the total outstanding Loan and all other indebtedness, obligations and liabilities of Borrower to Lender, whether now existing or hereafter incurred, contracted or arising, immediately due and payable;

(b) Declare the Note in default and subject to foreclosure and foreclose the Mortgage by suit in equity or under power of sale and foreclose any other of the Loan Documents in such manner as provided for therein and by applicable law;

(c) In connection with a default under Section 7.01(i), in addition to the other remedies provided for herein, Lender may, at its option, without notice to anyone, take any or all of the following actions:

(i) grant an extension of time to complete construction and modify any Loan Documents accordingly (including, but not limited to increasing the interest rate for the permanent phase of the Loan, as provided below), charging a reasonable fee for such extension and any and all out-of-pocket expenses incurred by Lender;

(ii) disburse any remaining Loan proceeds into an escrow account to be maintained and disbursed by Lender for construction as provided in this Agreement, and require Borrower to commence making regular monthly payments of principal and interest on the entire Loan amount as called for in the Loan Documents; or

(iii) charge a fee of one hundred Dollars (\$100.00) per day that Borrower fails to complete construction after the Conversion Date. Borrower and Lender agree that it is difficult to estimate the actual damage to Lender caused by Borrower's failure to complete construction by the Conversion Date. Borrower and Lender agree that the amount set forth in this Section is a good faith estimate of Lender's damages in the event that Borrower fails to complete construction by the Conversion Date, or fails to comply with all conversion requirements set forth in Section 3.04. Borrower and Lender agree that this amount is not intended to be a penalty.

(d) Enter into possession of the Real Estate and the Project, perform any work and labor and purchase any materials and fixtures that Lender deems necessary or desirable to complete the Project substantially in accordance with the Plans or to protect the Project from damage or destruction, and employ watchmen to protect the Project from injury; and

(f) Exercise any other remedies or rights that Lender may have hereunder, under any of the other Loan Documents or applicable law, including the right to specific performance.

All sums paid or advanced by Lender in exercising any of the foregoing remedies shall constitute Advances to Borrower under the Loan (whether or not in excess of the Maximum Principal Amount) and shall bear interest



at the rate set forth herein and be secured by the Loan Documents. For the purposes set forth in this Section 7.02, Borrower hereby constitutes and appoints Lender its true and lawful attorney in fact, with full power of substitution in the premises, to complete the Project in the name of Borrower, and hereby empowers Lender to use any funds of Borrower, including any funds that remain unadvanced under the Loan, for the purpose of completing the Project, and to perform all acts that in the judgment of Lender are desirable or advisable to complete the Project, including the right to make additions, changes or corrections in the Plans; to employ contractors, subcontractors, agents, architects and inspectors; to pay, settle and compromise all bills and claims incurred in completing the Project and all existing bills and claims which may be Liens against any of the Collateral; to execute all applications and certificates in the name of Borrower which may be required by any of the documents entered into by Borrower in connection with the construction of the Project; and to do any other act that Borrower could do in Borrower's own behalf in order to enable Lender to complete the Project and pay the Loan. This power of attorney shall be deemed to be a power coupled with an interest and cannot be revoked. In addition to the other remedies set forth above, during the continuation of any event which upon notice or lapse of time or both would become an Event of Default, Lender shall have no obligation to make any further Advances hereunder.

All remedies set forth herein are cumulative in nature. Lender's exercise of any remedy shall not be deemed a waiver of any other right or remedy under this Agreement, or under the other Loan Documents, or at law or equity.

VIII. MISCELLANEOUS

**Section 8.01. Notices.** Any request, demand, authorization, direction, notice, invoice, consent or other document provided or permitted by this Agreement to be made upon, given or furnished to, or filed with, Lender or Borrower shall be sufficient for every purpose hereunder if in writing and mailed, first class postage prepaid (except as otherwise provided in this Agreement), addressed to such person at the address set forth below:

(a) if to Lender, at:

National Bank of Commerce  
1919 Cahaba Road  
Birmingham, AL 35223

(a) if to Borrower, at:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Borrower shall notify Lender in writing immediately in the event that Borrower changes its address.

**Section 8.02. Governing Law.** This Agreement and the other Loan Documents shall be construed in accordance with and governed by Federal Law and the laws of the state where the Real Estate is located, except as specifically provided therein to the contrary.

**Section 8.03. Non Waiver.** Neither any failure nor any delay on the part of Lender in exercising any right, power or privilege under this Agreement or any of the other Loan Documents shall operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise or the exercise of any other right, power or privilege.

**Section 8.04. Modification, etc.** No modification, amendment or waiver of any provision of this Agreement or any of the other Loan Documents, and no consent to any departure by Borrower therefrom, shall be effective unless the same shall be in writing and signed by Lender, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. No notice to or demand on Borrower in any case shall entitle Borrower to any other or further notice or demand in the same, similar or other circumstances.

**Section 8.05. Severability.** Any provision of this Agreement or any other Loan Document to which Borrower is or is to be a party which 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 or thereof or affecting the validity or enforceability of such provision in any other jurisdiction.



**Section 8.06. Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall constitute an original, but when taken together all such counterparts shall constitute but one agreement, and any party may execute this Agreement by executing any one or more of such counterparts.

**Section 8.07. Lender's Right to Appear in Litigation.** Lender shall have the right, but not the obligation, to appear in, or to defend any action or proceeding purporting to affect the rights or duties of the parties, or any of them, under this Agreement or any of the other Loan Documents, and in connection therewith, Lender may pay out of the Loan proceeds all necessary expenses, employ counsel, and pay reasonable attorney's fees and disbursements, for all of which Borrower agrees to repay Lender upon demand.

**Section 8.08. Lender's Right to Commingle Funds.** Lender shall have the right to commingle the proceeds of this Loan with any other loans made to Borrower by Lender and shall have the right to withhold payment of any sums due to Borrower hereunder in the event of any default whatever in any such other loans. Any such withheld payments may be credited to such other loans by Lender upon notification to Borrower.

**Section 8.09. Borrower is not Lender's Agent.** Borrower is not and shall not be the agent of Lender for any purpose, and this Agreement is not, and shall not be construed to be, a third party beneficiary contract in any respect or to any extent.

**Section 8.10. Lender is not Borrower's Agent.** Under the terms of this Agreement and the Loan Documents, Lender is not the agent of Borrower, and will not become the agent of Borrower by exercising any rights hereunder (except in the case that Lender, after an Event of Default, enters into possession of the Real Estate to complete the Project, and then only as agent to complete Borrower's obligations), and Borrower agrees to indemnify and hold Lender harmless from any costs or damages whatsoever arising hereunder from any cause whatsoever.

**Section 8.11. Security Interest in Personal Property and Construction Documents.** Borrower does hereby grant a security interest of first priority to Lender in and to all (a) any and all construction contracts, quotes, bids, proposals and agreements now or hereafter existing relating to the Project, including that certain construction contract with the Contractor dated 11/19/2011; (b) the Plans; (c) any and all deposits, licenses, permits or other Governmental Approvals relating to the Project or the Real Estate; and (d) any survey, engineering report or drawing relating to the Project or the Real Estate; together with all rights, powers and privileges, options and other benefits of Borrower under the above items (those items referenced in subsections (a) through (d) collectively the "Construction Documents"), all tools, building supplies, building materials, equipment, machinery, heating, cooling, irrigation, refrigeration, water, electrical power and waste disposal systems brought upon the Real Estate for incorporation therein or use thereon as security for repayment for the Loan. Such security interest shall be governed by the Mortgage and all terms, provisions and conditions thereof. Borrower will do all things necessary to create, perfect and preserve such security interests and the priority thereof and will not suffer or permit any other security interests to exist therein. In an Event of Default under this Agreement or an event of default under any other Loan Document, Lender shall have all of the rights and remedies provided in the Loan Documents and in the Uniform Commercial Code as adopted and enforced in the state where the Real Estate is located as well as all others rights and remedies provided by law. Neither the assignment of the Construction Documents nor any action by Lender shall constitute an assumption by Lender of any obligations of Borrower under any of the Construction Documents and Borrower shall continue to be liable for all obligations of Borrower thereunder. Borrower agrees to punctually perform and observe all of the terms, conditions and requirements of the Construction Documents to be observed and performed by Borrower. Borrower agrees to indemnify and hold Lender harmless against and from any loss, cost, liability or expense (including reasonable attorneys' fees, court costs and investigation expenses) resulting from any failure of Borrower to perform its obligations under the Construction Documents, even if such failure was caused by Lender's negligence.

**Section 8.12. Cross-Default.** Any default under the Mortgage, Note, or other Loan Documents, shall constitute an Event of Default under this Agreement, and any Event of Default under this Agreement shall constitute a default under the Mortgage, Note, and other Loan Documents.

**Section 8.13. Prepayment Premium.** Borrower may not prepay the Loan in whole or in part prior to the Conversion Date, unless Borrower shall pay to Lender a prepayment premium equal to one percent (1%) of the principal amount being prepaid. Borrower may prepay all or any part of the Loan without premium or penalty at any time after the Conversion Date, unless otherwise prohibited by the Note or Mortgage as modified. Borrower and Lender agree that the amount set forth in this Section is a good faith estimate of Lender's damages in the event that Borrower prepays the Loan prior to the Conversion Date. Borrower and Lender agree that the actual amount of damages suffered by Lender due to Borrower's violation of the foregoing prohibition on prepayment



will be difficult to determine at the time of such prepayment and that the foregoing amount is a good faith estimate of such damages and is not intended to be a penalty.

**Section 8.14. Miscellaneous.** Plural or singular words used in this Agreement to designate Borrower shall be construed to refer to the person, whether one or more than one, executing this Agreement. All covenants and agreements made herein by Borrower shall bind the heirs, personal representatives, successors and assigns of all those undersigned designated as Borrower; and every option, right and privilege herein reserved or secured to Lender shall inure to the benefit of Lender’s successors and assigns. Time is of the essence of this Agreement.

<b>Section 8.15. <u>WAIVER OF JURY TRIAL/ARBITRATION AGREEMENT.</u></b> <b>BORROWER HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS BORROWER MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY CLAIM, DEMAND, CAUSE OF ACTION OR DISPUTE OF ANY KIND OR NATURE WITH LENDER (OR LENDER’S EMPLOYEES, OFFICERS, AGENTS, INDEPENDENT CONTRACTORS, AND DIRECTORS, OR ANY OF THEM). THIS PROVISION IS A MATERIAL INDUCEMENT FOR LENDER’S ENTERING INTO THIS AGREEMENT. FOR PURPOSES OF THIS AGREEMENT, THE PARTIES AGREE THAT THE MATTERS PROVIDED FOR HEREIN INVOLVE SUBSTANTIAL INTERSTATE COMMERCE. ANY ACTION, DISPUTE, CLAIM, COUNTERCLAIM OR CONTROVERSY (“DISPUTE” OR “DISPUTES”), BETWEEN THE PARTIES, INCLUDING ANY CLAIM BASED ON OR ARISING FROM AN ALLEGED TORT, SHALL BE RESOLVED IN BIRMINGHAM, ALABAMA BY BINDING ARBITRATION IN ACCORDANCE WITH TITLE 9 OF THE U.S. CODE AND THE ARBITRATION RULES FOR COMMERCIAL ARBITRATION (THE “RULES”) OF THE AMERICAN ARBITRATION ASSOCIATION (THE “AAA”). ALL DEFENSES, INCLUDING THOSE DEFENSES BASED ON STATUTES OF LIMITATION, ESTOPPEL, WAIVER, LACHES AND SIMILAR DOCTRINES, THAT WOULD OTHERWISE BE APPLICABLE TO AN ACTION BROUGHT BY A PARTY, SHALL BE APPLICABLE IN ANY SUCH ARBITRATION PROCEEDING, AND THE COMMENCEMENT OF AN ARBITRATION PROCEEDING WITH RESPECT TO THIS AGREEMENT SHALL BE DEEMED THE COMMENCEMENT OF AN ACTION FOR SUCH PURPOSES.</b>	<div>_____</div> <div>Initials</div> <div>_____</div> <div>Initials</div>
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**Section 8.16. Lender’s Disclaimer.** All provisions herein giving the Lender the right, option or ability to review or accept Plans and Specifications, Contractors, Architects, change orders or any other person or items in connection with the Project or the Loan are solely for the benefit of the Lender. Borrower agrees that Lender shall have no duty towards or liability to Borrower or any other person for any act, omission, or representation undertaken by or on behalf of the Contractor. Borrower agrees that Lender shall have no duty towards or liability to Borrower or any other person for any act, or omission, or representation undertaken by or on behalf of the Construction Inspector.

**Section 8.17. Termination of Agreement.** Upon Borrower’s compliance with all terms and conditions of this Agreement and the modification of the Loan into a permanent loan, this Agreement shall terminate and have no further force and effect; provided, all representations and warranties contained herein and all provisions requiring Borrower’s indemnification of Lender shall survive the termination of this Agreement.



IN WITNESS WHEREOF, Borrower and Lender have executed this Agreement on the date first set forth above.

**BORROWER**


*Marc L. Motter*  
Marc L. Motter

*Carol A. Motter*  
Carol A. Motter

**LENDER**


By *L. L. Jones*

Its *Vice President*

  
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Shelby Cnty Judge of Probate, AL  
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TRACI DOLLAR  
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