Discounted Payoffs in Commercial Real Estate Lending – Practical Strategies

A Presentation To

American College of Mortgage Attorneys

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I. INTRODUCTION

Our panel is presenting a workout case study in which one of the options is an early discounted payoff (a "DP") of a mortgage loan with a $20,000,000 balance.

This paper presents sample DP document forms, discusses DP practice issues, and explores the DP option in the case study.

II. SAMPLE DISCOUNTED PAYOFF DOCUMENTS AND THE STRATEGIES THEY IMPLEMENT

A. Formal versus Informal Documentation of the Discounted Payoff

A Discounted Payoff is usually preceded by an agreement setting forth the expected terms. The agreement can take the more formal and comprehensive approach of the two DP Agreements attached as Exhibits A and B, or the less formal approach of the DP Letter attached as Exhibit C.

The decision between the more or less formal approaches will depend upon:

1. The degree to which formal matters such as release of the Lender by the Borrower and confidentiality have already been covered in a pre-negotiation agreement with the Borrower;

2. The degree to which the Lender has the leverage to require the Borrower to agree to the more comprehensive content; and

3. The amount of time until the parties will know whether the Discounted Payoff will close. The longer the time, the more likely the Lender will require a formal agreement.

B. Discounted Payoff Agreement

1. The Discounted Payoff Agreement ("DP Agreement I") attached as Exhibit A takes a more comprehensive approach to documenting the discounted payoff transaction.

2. DP Agreement I Section 10 contains a full release from the Borrower and the Guarantor to the Lender that is granted at the time of execution of the DP Agreement, and is not contingent upon the consummation of a DP. A Borrower with more
leverage may not be willing to give the full release except in connection with the actual consummation of the discounted payoff.

Should the Lender insist upon the execution of a formal DP Agreement with an up-front release of the Lender as a condition to pursuing a potential DP? For some lenders, the up-front release is a mandatory condition to pursuing a discounted payoff or any other workout discussions. These lenders believe that it is worthless to spend time and effort on a negotiation when the opposing party is just waiting for an opportunity to start a lawsuit at the best opportunity. Why not just go straight to remedies and fight it out? These lenders would rather spend their limited time on other borrowers who want to cooperate and work together.

Other lenders may be more flexible on the up-front release requirement, so long as the full release of the lender is part of the documentation that resolves the DP.

3. The release of the Borrower and the Guarantor upon payoff is set forth in Section 4 of DP Agreement 1. The Lender must decide whether to require exceptions to the scope of this release.

The most common exception to the release of the Borrower and the Guarantor is the environmental liability that typically arises under the nonrecourse carveouts and the Environmental Indemnification Agreement. Lenders rarely release environmental liability, since a normal loan payoff would not release that liability, since a significant environmental problem can be discovered in the future despite good prior due diligence, and since the environmental indemnity includes a valuable indemnification against defense costs.

The Lender may also insist on retaining liability under some or all of the non-environmental carveouts. However, since the loan will be paid off, and since most of the carveouts no longer have much relevance after payoff, the Lender may be willing to bargain away the continuing liability for non-environmental carveouts in order to win other points in the DP negotiation.

4. If the Lender is concerned that other borrowers may discover the existence of the DP and the amount of the discount provided, the Lender can insist upon a DP Agreement that contains the confidentiality provision set forth in Section 7 of DP Agreement 1.

5. The Discounted Payoff Agreement ("DP Agreement II") attached as Exhibit B also takes a more comprehensive approach to documenting the discounted payoff transaction. The numbers used in DP Agreement II are taken from the workout case study being used for our panel presentation.

6. DP Agreement II allows the release in favor of Lender to occur only upon consummation of the DP. DP Agreement I requires release in favor of Lender upon execution of DP Agreement I.
7. DP Agreement II Section 8 warns that Lender may report to the IRS that Borrower has incurred cancellation of debt income. This warning can prevent post-closing misunderstandings and disputes.

8. DP Agreement II Section 14 makes the effectiveness of DP Agreement II contingent upon the approval of Lender's senior management. This type of provision is useful in any kind of document that is to be executed by the Lender prior to senior management approval.

9. DP Agreement II Section 2 imposes a tough non-refundable deposit requirement. This provision may not be obtainable from a cash-poor borrower that is dependent upon the closing of a sale transaction to fund the DP. However, when the funding is coming from the Borrower's equity owners, this non-refundable deposit could be obtainable, and would assure the Lender that the Borrower is serious.

10. DP Agreement II also includes some of the income, expense and escrow allocation features that can be found in the Discounted Payoff Letter and the Escrowed Funds Distribution Agreement described below. See the sections on those documents for more discussion of allocations.

    DP Agreement II Section 4 applies escrows held by Lender toward the required DP target payoff amount.

    DP Agreement II Section 5 requires that any net cash flow from the property and any amounts held in suspense with the Lender must be paid to the Lender in excess of the required discounted payoff target number. The Lender can apply those funds to cover its legal and closing expenses or as further reduction of principal. In contrast, the below Discounted Payoff Letter and Escrowed Funds Distribution Agreement allocate funds in ways more favorable to the Borrower.

    The allocation of miscellaneous income, escrows, legal fees and other expenses is a hotly negotiated issue in a DP because both sides feel that added "new money" is being sought.

    The owners of the Borrower are probably going to have to come out of pocket to cover any net costs of the DP transaction that are not absorbed by the Lender. The Borrower's owners may be unable or unwilling to fund an additional nickel beyond what has already been lost in funding the property to date. On the other hand, if the DP offers a less expensive outcome than foreclosure from an economic or tax perspective, the owners of the Borrower may be willing to put in some fresh cash to close the DP.

    From the Lender's point of view, the payment of net closing expenses beyond the agreed discount requires the Lender to take new dollars of capital loss. The Lender feels that the bargain is being changed and the Borrower is trying to take more than it deserves. The Lender officer in charge of the DP may lack the authority to take a
larger haircut than is already authorized, and may be unable or unwilling to go back to senior management for added approvals.

The allocations of miscellaneous income, escrows, legal fees and other expenses must be made at an early point in the DP discussions and must be based on reasonable assumptions, to avoid hard choices and negative surprises on the closing date.

11. A DP Agreement, or a shorter form DP Letter as described below, seems to be primary document that is typically executed in a DP. CMBS special servicers and non-CBMS lenders do not appear to use letters of intent prior to execution of a DP Agreement.

C. Discounted Payoff Letter

1. The Discounted Payoff Letter (the “DP Letter”) attached as Exhibit C takes a less formal approach. The DP Letter can be used when the Lender does not wish to make any long-range commitments to a DP.

2. The DP Letter is best used when a property sale closing is imminent. The DP Letter contemplates the existence of a firm, specific, quick-closing sale contract signed by at least the purchaser. The DP Letter should be issued in response to a favorable review of the purchase contract by the Lender.

3. The DP Letter sets a deadline for accomplishment of the DP payoff, and expires if that deadline is not met.

4. The DP Letter sets financial parameters for the DP transaction, with an attached pro forma closing statement that must be followed with minimal variations.

   The pro forma closing statement is an important part of the DP Letter because it contains many of the controversial allocations.

D. Escrowed Funds Distribution Agreement

1. The Escrowed Funds Distribution Agreement (the “Escrow Agreement”) attached as Exhibit D is a flexible tool that should be used to tie down some of the financial complexities that cannot be fully addressed on the pro forma closing statement attached to the DP Letter.

2. Section D of the Recitals of the Escrow Agreement provides that funds in existing escrows held with respect to the loan will be transferred to the title company and applied as part of the payoff to the Lender.

3. Section E of the Recitals establishes a new escrow called the Reserve Funds escrow. This escrow is unique because it is created outside of the closing and without the
knowledge of the purchaser, by direct transfer from the Lender after the Lender receives the payoff.

A Reserve Funds Escrow can be established when the purchase contract does not create an escrow to satisfy purchaser claims that might arise after closing pursuant to the purchase contract, such as adjustments due to re-proration or demands to pay bills received post-closing for work done pre-closing.

Since the purchaser’s potential claims have not yet been asserted, the Borrower naturally wishes to withhold funds from the payoff to pay those contingent claims, but the Lender does not wish to reduce its payoff just because a claim might later appear. Both the Lender and the Borrower do not wish the purchaser to become aware of the existence of the escrow because they do not want to encourage purchaser to manufacture claims in an amount equal to the escrow.

The Reserve Funds Escrow satisfies these conflicting needs by providing the undisclosed Reserve Funds escrow for a reasonable period of time necessary to determine whether the purchaser claims will be asserted. After the claims period expires, the remaining funds are returned to the Lender.

Section 1 of the Escrow Agreement states that the Reserve Funds are the Lender’s property. This statement is correct since the Reserve Funds are being funded from the Lender after receipt of its payoff. Since the Borrower could file a subsequent bankruptcy, the Lender would not want to weaken its ownership rights in the Reserve Funds by mistakenly providing in the Escrow Agreement that the Reserve Funds are owned by the Borrower. Thus, the Escrow Agreement does not contain the customary escrow provisions declaring that the Borrower owns the escrowed funds and has the obligation to pay taxes on interest income.

4. Recital G and Section 1 of the Escrow Agreement require delivery of the property Operating Account Funds balance to the Lender by the Borrower outside of closing, in addition to the Payoff Amount required on the closing statement. Section 4 requires delivery to the Lender by the Borrower outside of closing of all other property-related funds, such as utility deposits. The disposition of all of these miscellaneous sources of funds should be negotiated and documented between the Borrower and the Lender in advance in the Escrow Agreement.

5. Recital F and Section 5 of the Escrow Agreement deal with a separate Post-Closing Operating Reserve that is being set up pursuant to the purchase contract, and is of course known to the purchaser. Section 5 attempts to force the Borrower to minimize the existence of any Operating Expense bills for pre-closing work that arrive post-closing. Section 5 then requires that any excess proceeds in the Operating Expenses escrow are delivered to the Lender.
E. Default Waiver Letter

The Default Waiver Letter attached as Exhibit E can be used to provide a limited payment default waiver to the Borrower when the Lender is willing to make a temporary concession to allow time for a DP closing to occur, if the Borrower is no longer able to make the required debt service payments.

III. ISSUES

DP transactions often present the issues and challenges described below:

A. Lender’s Degree of Flexibility

1. The savvy Borrower should realize that it needs to read the Lender’s degree of flexibility and interest in pursuing the DP or other workout. This read needs to take place at two levels. The first level is reading the Lender’s general approach to flexibility on DPs and other workouts. The Borrower should ask the Lender, any mortgage correspondent and Borrower’s counsel about the Lender’s flexibility in DPs and other workouts, requesting examples of the kinds of workouts that the Lender is likely to accept.

The second level is reading the flexibility of the particular loan officer assigned. A DP or other workout is not going to succeed without an advocate inside the Lender who is willing to go to the trouble and effort to champion the DP or other workout and carry it through internal approval levels. A wise Borrower will attempt to create a positive relationship with the assigned loan officer and develop a plan that fits the flexibility and comfort level of the loan officer.

The Borrower must not alienate the assigned loan officer. When the Borrower attacks the loan officer and acts in a hostile and uncooperative manner, the Borrower is losing the help of the one person who can stand up inside the Lender and push for what the Borrower is hoping to achieve.

B. Due Diligence – Finding Out What is Going On

1. Lenders must move quickly to obtain a solid internal valuation of the collateral property. The new valuation probably requires a fresh outside appraisal. Lender’s counsel should remind the loan officer to obtain the appraisal and conduct the valuation analysis early in the workout process, to prepare for quick decisions on possible DPs, deeds-in-lieu of foreclosure and foreclosure bid prices.

The workout case study used by our panel indicates that the appraised value of the property is expected to be $16,000,000, if the added investment of $4,000,000 in tenant improvements and leasing commissions is not made.
The discounted payoff haircut in the case study is $4,300,000, making the discounted payoff amount applied to principal $15,700,000 on a $20,000,000 loan balance.

The $16,000,000 appraised value is an uncertain number based on a theoretical analysis that will vary depending upon the appraiser chosen, the date the appraisal is made, and other unknowable factors. The $16,000,000 appraised value of the property and the $15,700,000 amount to be received from a DP are relatively close to the same value, once uncertainty is taken into account. Therefore, it is worthwhile to consider the DP as a possible option, but the DP is not clearly the best option.

2. Lenders face a tension between avoiding direct negotiation with the purchaser and determining whether the purchase offer is serious.

On the one hand, lenders do not want to create any third party reliance rights in the purchaser, who may sue to recoup the value of the lost transaction if the DP does not close on the terms the purchaser expects. Lenders can protect against third party reliance to some degree by inserting non-reliance language in key DP documents. Most importantly, Lender should not sign any document signed by the purchaser, and should not be sending direct communications, such as e-mails, to the purchaser.

Lenders can further enhance protection against third party reliance by avoiding direct contact and negotiation with the purchaser as much as possible.

On the other hand, the promise of a coming purchase can be used as a delaying tactic by a desperate Borrower. The Borrower may know that the prospective purchase is not real, or the Borrower may honestly suffer from the "rose colored glasses" distortion that is common to developers in any circumstance. In either case, the Lender needs to get a good handle on the probability of a quick purchase closing, and this requires some sort of direct confirmation from the purchaser.

Lenders typically require a copy of the signed purchase agreement, with all amendments and side letters, to confirm the reality of the purchase. If the Borrower and the Borrower’s selling broker can only produce chatter about contracts that are coming, the Lender should move on to exercise of remedies.

The Lender needs to scrutinize the purchase contract terms to determine how much purchaser money is "hard money" subject to forfeit upon purchaser default, how long the "free look" period will be before the money goes hard, when the closing date is scheduled, what delay rights the purchaser has, and whether the seller has specific performance rights. The purchase contract should also appear sound and commercially reasonable in other respects.

The Lender will also need to determine whether the purchaser entity is credible and solvent and has a reasonable chance to obtain any needed purchase financing. The Lender can require the Borrower to provide information about the purchaser and the purchaser’s financing in order to give the Lender a comfort level with the DP.
Purchasers who are involved in a DP understand that they need to assist the Borrower in persuading the Lender to go forward with a DP that is completely optional for the Lender.

3. If a Borrower proposes a DP but does not yet have a prospective purchaser, some lenders will permit a reasonably brief marketing period prior to commencing remedies, but may require that debt service payments or net cash flow payments be made during that time.

4. The most difficult question in a DP can be how much the Borrower is expected to pay at closing. As discussed above in the section on DP documents, the amount of the basic discount or “haircut,” and the allocation of income, escrows, legal fee expenses and other expenses will be tricky and controversial. These financial terms should be agreed upon early. The Lender will need updated property operating statements, financial statements of the Borrower and the Guarantor, escrow balances, and projections of property income and expenses prior to making those decisions.

If closing costs come in above expectations, a DP closing can run into problems or even be cancelled as both the Lender and the Borrower are unable or unwilling to contribute more funds to the transaction. Prudent lenders and borrowers will try to reasonably estimate and affirmatively manage closing costs, and should consider agreeing in advance on what would happen if various types of closing costs run high.

Borrowers almost always pay all of their own legal fees in a DP. Lenders usually require borrowers to pay lenders’ DP legal fees, but that could be subject to negotiation depending on how impoverished the Borrower is.

Lenders should pay none, or at most half, of their own attorneys’ fees in a DP. If lenders agree to pay all of their own attorneys’ fees, that may encourage borrowers to over-negotiate, or that may encourage borrowers to become lazy and save their own money by instructing their counsel to do as little as possible. If lenders want to manage closing costs, they may be wiser to keep the payment of lenders’ attorney fees as a borrower responsibility, and make any needed financial concessions in areas that are more predictable.

In the case study, the DP yields an application to principal of $15,700,000, while a foreclosure obtains a property that would appraise for $16,000,000. These numbers give the Lender a difficult decision on whether to take a DP. If allocation of income and expenses discussed above would cause the Lender’s net receipts to fall much below $15,700,000, that reduction may be enough to cause the Lender to decline the DP.

5. The Lender should beware of “money leaks” such as the Borrower/seller or its affiliate getting back a real estate sales commission or a fee to its management company. These money leaks essentially come from the Lender’s pocket since every purchaser dollar diverted to the Borrower is one more dollar of haircut for the Lender.
The Lender might be persuaded to allow some of these money leaks if the Borrower or its affiliate is providing a genuine service at a customary market price that would have been paid to a third party. On the other hand, the Lender may prohibit or reduce any money leaks on the basis that the Borrower should make a small sacrifice by providing free services in return for the substantial favor of a DP haircut.

If the Lender is especially concerned with the possibility of undisclosed money leaks in a particular DP transaction, the Lender can add enhanced representations to the DP documents, and can add ongoing personal liability provisions allowing the pursuit of money leaks that are later discovered.

C. Dealing with the Borrower

1. The Lender should always avoid alleged lender control of the Borrower. The DP can easily be construed as Lender controlled, even when it is really an accommodation in response to a Borrower request.

   To combat this problem, the Lender should state verbally and in the DP documents that the DP is permissive rather than mandatory, and is being offered at the Borrower’s request. Lender’s counsel should remind Lender’s business personnel that the DP is an option that is being offered to Borrower on certain terms and during a certain window. E-mails and verbal communications from Lender personnel should avoid speaking in terms of what the Lender is requiring the Borrower to do.

D. Keeping the Lender’s Options Open

1. The Lender should always maintain an exit strategy from the DP that cuts off the discounted payoff offer at a clear point in time, so that lender can proceed freely after that point with remedies. The DP documents should specify that the DP is no longer available after a fixed date.

2. The Lender will need to decide whether to hold off on exercise of remedies during a DPO window or proceed simultaneously with remedies.

   Slowing down remedies loses time, which can allow property deterioration, mounting losses due to missed interest payments, and missed opportunities to market the property after foreclosure before the selling market deteriorates further. Slowing down remedies also reduces the Lender’s leverage. The Lender needs that leverage in order to make the Borrower realize that the problems have to be addressed one way or another without further delay. Many borrowers will not take tough action until forced by the pressure of remedies that have reached the point of tangible action.

   However, speeding up remedies harms the borrower’s negotiating strength by forcing the Borrower to disclose to the market that it is presently in default and has been
noticed for foreclosure. When the Borrower loses negotiating strength the price typically declines, and the Lender's haircut gets deeper.

If the property is a slow judicial foreclosure state, most lenders would proceed simultaneously with DP and foreclosure. For property in other states, the decision to pursue simultaneous remedies will depend on the circumstances.

E. Special Situations

1. DPs have become common in residential real estate, and are usually referred to as short sales. Residential real estate DPs are driven by special regulations, and are troubled by a huge clog of potential discounted payoff candidates who are vying for the attention of overwhelmed servicing personnel. Residential real estate DP work is a very different practice area that requires familiarity with its own body of law and procedures.

2. In a CMBS transaction, the loan will probably need to be transferred to the special servicer before a discounted payoff can be negotiated. However, if the loan is current, it may not be eligible for transfer to the special servicer.

3. The existence of a second mortgage lien will complicate a discounted payoff. If the second lien holder expects to receive little or nothing in the discounted payoff, the second lien holder has little incentive to cooperate. The first lienholder may be forced to foreclose or at least progress toward foreclosure to give the second lienholder incentive to act.

4. The ability to complete a DP can be threatened when the Borrower is likely to be forced into bankruptcy in the near future. However, the DP can be completed after filing with the permission of the Court, so it is reasonable to move forward with the DP until a bankruptcy is filed or immediately expected.

F. Benefits

1. DP benefits to the Borrower include the ability to avoid having a foreclosure or deed-in-lieu on its record. Many lenders are more reluctant to lend in the future to borrowers that have had a foreclosure or deed-in-lieu.

2. Lenders benefit from DPs because bad assets do not stay on the books as impaired loans or REO. Bad assets and REO are continually coming up in intensive management reviews and constantly increasing the dollar volume of undesirable bad asset categories on financial reports.

On the other hand, a DP will generate a quick and certain realization of loss on the loan. That loss could be delayed and maybe eliminated by extending the loan. How much of a threat to a lender is the quick loss generated by a DP or deed-in-lieu? This quick loss is not as much of a negative for many lenders as it may appear, since the
loan has probably already been reserved against prior to the DP or deed-in-lieu. For those lenders who are struggling to maintain certain levels of capital for regulatory purposes and for those lenders who are fighting to support lender stock price, the faster loss from a DP may be something to be avoided. Those lenders are more vulnerable to giving up a forced workout in order to avoid exercising any remedies.

3. Lenders should be able to save significant legal fees and expenses by permitting a DP versus pursing a foreclosure, especially in a judicial foreclosure state.

A successful DP also saves the expenses of administering, maintaining, repairing, re-tenanting and selling the property. All of those costs would be incurred in a foreclosure or deed-in-lieu.

However, if a DP is pursued and fails, then the Lender will have all of the expenses of the DP, followed by all of the other expenses that the Lender was trying to avoid.

The DP is an expenses gamble.

IV. CONCLUSION

The DP is a viable tool in the workout kit. In order to decide whether a DP is the right choice in a default or workout situation, the practitioner will need to conduct a comparison of the DP versus the other alternatives. The analysis of the alternatives must be based on the law and facts applicable to the loan in question, and should take into account the issues discussed in the section above.
EXHIBIT A
DISCOUNTED PAYOFF AGREEMENT I

DISCOUNTED PAYOFF AGREEMENT

THIS DISCOUNTED PAYOFF AGREEMENT is dated as of ____, 20__, and is by and among ___________________________________________ [successor to ___________________________________________ (“Lender”), ___________________________________________ (collectively “Borrower”) and ___________________________________________ (collectively “Guarantor”).

RECITALS.

A. Borrower is indebted to the Lender as evidenced by a ___________________________________________ dated ____, 20__, in the face amount of $______ (the “Note”). Reference to the Note is intended to include all prior and subsequent renewals, extensions, modifications and continuations of the Note.

B. The Note has a current outstanding principal balance of $______, plus accrued interest of $______ as of ____, 20__. Interest continues to accrue at the rate of $______ per day based upon the interest rate in effect as of the date hereof. [The maturity date of the Note [is][was] ____, 20__], and the Lender has [the immediate right to make][has previously made] demand for payment of the Note and pursue its rights and remedies.

C. The Note is guaranteed by the Guarantor as evidenced by the ___________________________________________ dated ____, 20__ (the “Guaranty”).

[D. The Note is secured by, without limitation, liens on real property as evidenced by a Deed of Trust [Mortgage] dated ____, 20__ (the “Deed of Trust” [the “Mortgage”]), and recorded ____, 20__ as Instrument No. __________ in the Official Records of the County of __________, State of __________.]

[E. The Note is further secured by, without limitation, liens on __________’s [accounts, equipment, inventory, and general intangibles] as evidenced by a Security Agreement dated ____, 20__ (the “Security Agreement”) which security interest is perfected by various UCC-1 financing statements.]

F. The Note, the Guaranty[the Deed of Trust][Mortgage],[the Security Agreement] and all other agreements, documents and instruments executed from time to time in connection with the loan evidenced by the Note or related thereto are collectively referred to as the “Loan Documents.”

G. Borrower and Guarantor have requested that the Lender accept payment from _______________ Borrower or Guarantor of $__________ (the “Discounted Payoff Amount”) in full satisfaction of the Note and the obligations under the Guaranty in respect thereof and the Lender
is willing to do so subject to the execution, delivery and strict performance of the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the foregoing and for good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. ACKNOWLEDGMENT OF THE INDEBTEDNESS. Borrower and Guarantor acknowledge and agree that the recitals herein are true and correct, that the indebtedness evidenced by the Note is due and owing to the Lender without offset, defense or counterclaim, and further acknowledge and agree that the Note, the Guaranty and the other Loan Documents, including without limitation any arbitration provisions and/or jury trial waiver provisions contained therein, are valid and binding and fully enforceable according to their terms.

2. EXECUTION OF THIS AGREEMENT. The Lender’s Agreement to accept the Discounted Payoff Amount in full satisfaction of the Note is expressly conditioned upon (a) receipt of an original of this Agreement fully executed by Borrower and Guarantor; and (b) execution by Lender of this Agreement on or before ___, 20__. Unless and until the Borrower and Guarantor execute and return this Agreement to the Lender by such date and the Lender signs this Agreement, the Lender shall have no obligation to accept the Discounted Payoff Amount in full satisfaction of the Note and the Lender shall continue to be entitled to immediately exercise all rights and remedies available to it.

3. PAYMENT OF LENDER INDEBTEDNESS. The Lender hereby agrees to accept, in full satisfaction of the indebtedness evidenced by the Note, and the Borrower hereby agrees to pay, the Discounted Payoff Amount of $_____ in the following form: $_____ by cashier’s check or by confirmed wire transfer, if such sum is received in immediately available funds no later than ___ p.m. _______ time on ___, 20__, or such later date or time that the Lender in its sole discretion designates in writing to the Borrower (the “Deadline”). Time is of the essence, and Lender shall have no obligation to accept the Discounted Payoff Amount after the Deadline.

[If Lender desires to reserve some or all of its rights to pursue remedies prior to the expiration of the Deadline, Lender should describe its reserved rights.]

4. RELEASE OF DOCUMENTS AND COLLATERAL. Conditioned upon the execution of this Agreement, the representations and warranties contained in this Agreement being true and correct, and the Lender’s receipt of the Discounted Payoff Amount in accordance with the terms of this Agreement, the Lender will [reconvey the [Deed of Trust][Mortgage]] [and][release the financing statements], and Borrower and Guarantor shall without further act be released and discharged from their respective obligations and liabilities under the Loan Documents in respect of the Note, except for those obligations and liabilities [that are set forth in __________ (the “Carveouts”), or] [that are set forth in __________ (the “Environmental Indemnification Agreement”) or] that by their terms survive the payment in full of the indebtedness or that arise under this Agreement. Nothing in this Agreement modifies or
waives any rights that the Lender may have with respect to any other financial relationships between the Lender and the Borrower or the Guarantor.

5. DEFAULT UNDER TERMS OF AGREEMENT. The parties to this Agreement understand and agree that the forbearance of the Lender in the immediate collection of the amounts due and owing to it is conditioned upon receipt of the Discounted Payoff Amount in accordance with the terms of this Agreement, and the execution of, and strict performance by Borrower and Guarantor under, this Agreement. Borrower agrees that if Borrower fails to pay the Discounted Payoff Amount when due in accordance with the terms and conditions of this Agreement, or if any amount applied in payment of the Note is or must be, or is claimed or ordered to be, rescinded, avoided or returned by Lender to any person or entity for any reason whatsoever (including, without limitation, bankruptcy, insolvency, or reorganization of Borrower, Guarantor or any other person), the full amount of indebtedness evidenced by the Note (without the discount of the Note granted by the Lender pursuant to this Agreement) shall become immediately due and payable in full without notice or demand and the Lender shall be entitled to all of its rights and remedies as provided by the Note, the Guaranty and other loan documents.

6. REPRESENTATIONS AND WARRANTIES.

(a) Borrower and Guarantor represent and warrant that Borrower and Guarantor are the owners of and have not assigned, sold, transferred, or otherwise disposed of any of the Released Claims.

(b) Each individual executing this Agreement represents and warrants that he or she is duly authorized to execute this Agreement and has all requisite power, authority, and approval required to enter into, execute, and deliver this Agreement, including the Release in paragraph 10.

(c) Borrower and Guarantor also acknowledge that the Lender's agreement herein is in no way intended as nor shall be construed as an admission as to the amounts due and payable in connection with the Note or the value of the Lender's collateral, or, except as provided herein, as a waiver by Lender of any of Lender's rights or remedies. It is expressly understood and agreed by Borrower and Guarantor that this Agreement is being made solely for the purpose of avoiding the expense and inconvenience of litigation and that it is not an admission of wrongful conduct or of any liability to any other party, all of which is expressly denied.

(d) Borrower represents and warrants that Borrower understands that this Agreement constitutes a forgiveness of debt by Lender and as such, Lender shall file all applicable documents required by bank regulatory agencies and taxing authorities in connection with the forgiveness of debt by national banks.

7. CONFIDENTIALITY. Borrower and Guarantor, for and on behalf of themselves, and their agents, heirs, insurers, successors and assigns, covenants that they will keep this Agreement and all negotiations with the Lender concerning the Note and this
Agreement strictly confidential and, except as may otherwise be required by law, will not disclose the terms of this Agreement or the content of any of Borrower's and Guarantor's negotiations with the Lender to any person or entity, except to their legal, tax and other advisors, but only after advising them of this obligation of confidentiality. Borrower and Guarantor shall be responsible for any breach of this provision by any person to whom Borrower or Guarantor shall provide information or documents required to be kept confidential under this provision.

8. SEVERABILITY OF PROVISIONS. If any provision of this Agreement shall be held invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of this Agreement shall not be impaired thereby; provided, however, that if the “General Release and Indemnity” provision hereof, or any portion thereof, is held to be invalid, illegal or unenforceable in any respect, the Lender may terminate this Agreement, the effect of which will be to (i) reinstate the full amount owed under the Loan Documents and all liens and encumbrances granted to the Lender under the Loan Documents; (ii) permit the Lender to retain the Discounted Payoff Amount and apply it to the amounts owed under the Loan Documents in accordance with the Loan Documents; and (iii) permit the Lender to take any such action as is permitted by the Loan Documents and applicable law to collect the remaining amounts owed under the Loan Documents following the application of the Discounted Payoff Amount.

9. ATTORNEY’S FEES. To the extent allowed by the documents and applicable law, if any action or proceeding is brought to enforce or interpret this Agreement, the prevailing party, in addition to all other legal or equitable remedies possessed, shall be entitled to be reimbursed for all costs and expenses, including reasonable attorney’s fees incurred by reason of such action or proceeding.

10. GENERAL RELEASE AND INDEMNITY. In consideration of the Lender’s execution of this Agreement, the Borrower and Guarantor do hereby, on behalf of themselves, their agents, insurers, heirs, successors and assigns, release, acquit and forever discharge the Lender and ______________, and any and all of their parent corporations, subsidiary corporations, affiliated corporations, insurers, indemnitors, successors and assigns, together with all of their present and former directors, officers, agents, attorneys and employees (together, the “Released Parties”) from any and all claims, demands or causes of action of any kind, nature or description, whether arising in law or equity or upon contract or tort or under any state or federal law or otherwise, which the Borrower and Guarantor, or either of them, have had, now have or have made claim to have against the Released Parties for, upon or by reason of any act, omission, matter, cause or thing whatsoever relating to any or all of the Note, Guaranty, the Loan Documents or the loan described therein, and arising from the beginning of time to and including the date of this Agreement (the “Released Claims”), whether such claims, demands and causes of action are matured or unmatured, liquidated or unliquidated, known or unknown, fixed, contingent, direct or indirect, including but not limited to any relating to the formation, commitment, handling, servicing and exercise of remedies regarding the loan, and shall indemnify and hold harmless the Released Parties from any and all expenses, costs, liability and fees (including but not limited to attorney’s fees and expenses) incurred by any such Released Party as a result of any such action or proceeding instituted by Borrower, Guarantor or any third party. Borrower and Guarantor irrevocably covenant and agree forever to refrain from initiating,
filing, instituting, maintaining or proceeding upon, or encouraging, advising or voluntarily assisting any other person or entity to initiate, institute, maintain or proceed upon any Released Claim of any nature whatsoever released in this General Release and Indemnity.

11. OTHER RELATIONSHIPS. This Agreement only pertains to the Note [and the Guaranty]. The parties acknowledge that they may, now or in the future, have other lending, borrowing or financial relationships, all of which are not affected by this Agreement.

12. APPLICABLE LAW. The substantive laws of the applicable state as originally provided in the Loan Documents shall govern the construction of this Agreement and the rights and remedies of the parties hereto.

13. ENTIRE AGREEMENT; NO ORAL AGREEMENTS. This Agreement and the documents referred to herein or delivered pursuant hereto contain the entire agreement and understanding between the parties concerning the subject matter hereof, and supersede and replace all prior negotiations, proposed agreements and agreements written or oral concerning the subject matter hereof. Each of the parties to this Agreement acknowledges that no other party to this Agreement, nor any agent or attorney of any such party, has made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement, to induce it to execute this Agreement. Each of the parties further acknowledges that it is not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement.

Except for the matters specifically set forth herein, this Agreement does not alter, amend, modify or release any right of Lender, or any obligations of Borrower in connection with the Loan Documents.

THIS WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

This Agreement may not be modified orally but only by a written agreement executed by each of the parties and designated as an amendment or modification of this Agreement.

14. GENDER. Whenever, in this Agreement, the context may so require, the masculine or neuter gender shall be deemed to refer to and include the feminine, masculine, and neuter, and the singular to refer to and include the plural.

15. SUCCESSORS AND Assigns. This Agreement will be binding upon and inure to the benefit of the parties hereto and their respective permitted successors, assigns, heirs, devisors, executors, administrators, affiliates, representatives, assigns, officers, agents, and employees wherever the context requires or admits.
16. **COUNTERPARTS.** This Agreement may be executed in any number of counterparts, each of which shall be an original and enforceable against any party who signed it, but all of which together shall constitute one and the same document.

17. **TIME IS OF THE ESSENCE.** Time is of the essence with respect to each provision in this Agreement.

18. **ADVICE OF COUNSEL.** The Borrower and Guarantor acknowledge that they have reviewed this Agreement in its entirety, having consulted such legal, tax or other advisors as they deem appropriate and understand and agree to each of the provisions of this Agreement and further acknowledge that they have entered into this Agreement voluntarily.

19. **ASSIGNMENT.** The Lender expressly retains and reserves its rights to sell and assign its interests under the Loan Documents and this Agreement and to fully disclose its files in connection therewith to potential purchasers of the Lender’s interests.

20. **RULES OF CONSTRUCTION; RELIANCE.** The parties hereto agree that any rule of construction to the effect that ambiguities are resolved against the drafting party shall not apply to the interpretation of this Agreement. This Agreement is for the sole benefit of the parties hereto, and no prospective purchasers or other third parties may rely upon this Agreement.

21. **PARAGRAPH HEADINGS.** The headings and titles of the several paragraphs of this Agreement are inserted solely for convenience of reference and are not a part of and are not intended to govern, limit or aid in the construction of any term or provision of this Agreement.

22. **AUTHORITY.** Each individual executing this Agreement on behalf of a partnership, corporation, limited liability company or other entity represents and warrants that he or she is duly authorized to execute and deliver this Agreement on behalf of such entity, and that this Agreement is binding on such entity.

[ADD STATE SPECIFIC PROVISIONS AS REQUIRED]
EXHIBIT B
DISCOUNTED PAYOFF AGREEMENT

Property: Your Neighborhood Crossing Shopping Center
100 End of the Road
Hotter Than Hell, Texas 66666
Servicer Loan No. 991073351
Local Title Company GF: 10101 ND9

DISCOUNTED PAYOFF AGREEMENT

This Discounted Payoff Agreement (this "Agreement"), is dated effective as of ______, 2011 (the "Effective Date"), between Big Bad Lender ("Lender"), whose address is ________________________, with a copy of any notices required or permitted hereunder to ____________, and Lucky Borrower, an Illinois limited partnership ("Borrower"), whose address is ________________, and Lucky Bad-Boy Guarantor ("Guarantor"), whose address is ________________.

RECITALS

A. Borrower is indebted to Lender under a loan (the "Loan") evidenced and/or secured by the following:

1. Promissory Note (the "Note"), dated May 27, 2005, executed by Borrower, originally payable to the order of Funding Lender ("Original Lender"), in the original stated principal amount of $20,000,000.00;

2. Loan Agreement dated of even date with the Note (the "Loan Agreement"), by and between Borrower and Original Lender;

3. Indemnity Agreement ("Guaranty"), dated May 27, 2005, executed by Guarantor;

4. Environmental Indemnity Agreement ("Environmental Indemnity"), dated May 27, 2005, executed by Borrower and Guarantor;

5. Deed of Trust, Security Agreement and Fixture Filing (the "Security Instrument"), dated May 27, 2005, recorded on June 1, 2005 as Instrument No. ____________ in the Real Property Records, Ugly County, Texas (the "Records"), executed by Borrower for the benefit of Original Lender, and covering the real and personal property more particularly described therein (the "Property"), more particularly described on Exhibit A attached hereto;

6. Assignment of Leases and Rents (the "ALR"), executed by Borrower for the benefit of Original Lender, filed June 1, 2005, as Instrument No. __________ of the Records; and
7. UCC-1 Financing Statement (the "UCC") filed 06/03/2005, as Instrument No. _______ of the Records.

B. The Note, Loan Agreement, Security Instrument, ALR, Guaranty, Environmental Indemnity, UCC, and all other documents and instruments securing or evidencing the Loan are hereinafter, collectively, referred to as the "Loan Documents".

C. The Loan Documents were transferred and assigned to, and are currently held by, Lender, pursuant, inter alia, to an assignment filed March 24, 2006 as Instrument No. _______ of the Records.

D. Capitalized terms used, but not defined, in this Agreement shall have the meanings ascribed to them in the Security Instrument.

AGREEMENTS

NOW, THEREFORE, in consideration of the recitals and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. Discounted Note Payoff (the "DPO"). Lender agrees to accept the sum of $15,700,000.00 in U.S. cash (the "DPO Amount") in full satisfaction and accord of the entire indebtedness owed by Borrower to Lender under the Note, and otherwise, and any obligation owed by Guarantor to Lender under the Guaranty, on the terms and conditions set forth in this Agreement.

   (A) The parties shall deposit all required items into an escrow opened with Escrow Agent (defined below) for the purpose of closing the DPO (the "Escrow"), which closing (the "Closing") shall be on or before April 13, 2011 (which is the date 75 days after the Effective Date) (the "Closing Date") provided that Lender agrees to make good faith efforts to obtain Senior Management approval per the terms of Section 14 below within 15 days after the Effective Date.

   (B) Closing shall be held in escrow through Local Title Company, Inc. ("Escrow Agent") (having an address of __________, facsimile ________, __________@________.com). Borrower shall pay all escrow fees, overnight delivery expenses and recording costs associated with the Closing. This Agreement and any additional escrow instruction letters given from Borrower and/or Lender (or their respective legal counsel) as required to effect its terms shall be provided to the Escrow Agent. Escrow Agent shall deliver an insured closing letter in connection with the transaction.

   (C) Borrower may, at its election, provide separate escrow instructions to Escrow Agent relative to Borrower's financial arrangements whereby Borrower's business partners, investors, lenders or other capital sources will be wiring funds to Escrow Agent to facilitate the DPO. In that regard,
Borrower will provide to Escrow Agent a copy of any organizational documents or other documents that Escrow Agent may reasonably request to show the relationship between such capital sources and Borrower. Such arrangement shall be the subject of a separate escrow with Escrow Agent and shall not involve Lender.

2. **Payment.** The DPO Amount shall be payable as follows:

(A) Borrower shall initially pay a non-refundable deposit of $900,000.00 (the “Deposit”) to Escrow Agent pursuant to the wire instructions in Section 5(B) below within three (3) business day after full execution of this Agreement and the opening of Escrow; the Deposit shall be applied to the DPO Amount at Closing; and

(B) The remaining $14,800,000.00, net of the Released Amounts defined in Section 4 below, for which amounts Borrower shall receive a credit (after giving effect to such amounts to be netted out, the “Balance”) shall be payable by Borrower on the Closing Date.

3. **Retention of Deposit and Extension Fees by Lender.**

(A) Lender hereby agrees to accept such DPO Amount, subject to the fulfillment of all conditions in Section 5 below.

(B) The Deposit shall be non-refundable whether or not Borrower timely pays the Balance, except in the event Lender breaches its obligations contained herein or if Senior Management approval is not obtained pursuant to Section 14 below, in which event the Deposit shall be refunded to Borrower.

4. **Funds Held in Escrows, Reserves or Impounds.** With respect to any amounts held in escrows, reserves or impounds (but excluding amounts held in suspense) currently maintained with Lender (collectively, the “Released Amounts”), such amounts will be credited to the Balance on the Closing Date minus, however, any amounts paid by Lender towards taxes, insurance or other disbursements permitted by the Loan Documents.

5. **Conditions Subsequent.** This Agreement shall be effective upon the full execution by the parties hereto subject to the fulfillment of the following conditions subsequent:

(A) Borrower shall remit all positive net cash flow (gross revenue minus operating expenses, herein “Net Cash Flow”) to Lender from the Property as follows:

(i) For the period of January 1, 2011 through the Closing Date, Borrower shall remit all Net Cash Flow to Lender from the Property, if any, at Closing; all such remittances shall be made via the wire transfer instructions in subsection 5(B) below;
(ii) With respect to the definition of Net Cash Flow, the phrase "operating expenses" (as used in subsection 5(A) above) shall be deemed to exclude any holdbacks, and any payments into (or disbursements from) any impounds for taxes or insurance premiums or any other reserves or escrows;

(iii) The Net Cash Flow paid by Borrower (and any amounts held in suspense with Lender) shall not be credited against the Balance, and Lender may retain and apply same to amounts due on the Loan in such manner as Lender shall deem appropriate in Lender's sole discretion including, without limitation, towards any prior servicing advances, interest on advances, fees and expenses of the Lender, and any of Lender's unpaid legal expenses and fees, or otherwise, prior to the application towards any interest or principal; and

(iv) Borrower shall present reasonable evidence and operating statements supporting the determination of revenue and operating expenses to Lender via email once per month on or before the 15th day of the following month.

(B) Escrow Agent shall have received the Deposit in immediately available U.S. funds on or before 3:00 p.m. Eastern Time within two (2) business days following the Effective Date as follows (these are the wire instructions for Local Title Company: ________________

(C) Escrow Agent shall have received the Balance, the Net Cash Flow, Lender's reasonable attorneys' fees per Section 5(E) below, and the Escrow Agent's fees and expenses per Section 1(B) above in immediately available U.S. funds per the wiring instructions in Section 5(B) above on or before 2:00 p.m. Dallas, Texas time on the Closing Date.

(D) Lender shall have obtained the approval of Senior Management (as defined in Section 14 below).

(E) Borrower shall have paid Lender's reasonable attorneys' fees incurred in connection with this transaction at Closing.

6. **Documents Deliverable by Lender.** Lender shall deliver to the Escrow Agent on or prior to the Closing Date the following: (a) a signed and notarized release in the form attached hereto as Exhibit B (to be sent for recordation by the Escrow Agent within one business day after the Closing Date), and (b) the original Note (which original Note shall be transmitted to Borrower via FedEx by Escrow Agent immediately after Closing).
7. **Release of Lender.** Borrower and Guarantor hereby (effective as of the Closing Date if Closing occurs), each unconditionally and irrevocably release and forever discharge Lender and its successors, assigns, servicers, agents, directors, officers, employees, and attorneys (collectively, the "Indemnities") from all Claims, as defined below, and agree to indemnify the Indemnites, hold the Indemnites harmless, and defend the Indemnites with counsel reasonably acceptable to the Indemnites from and against any and all claims, losses, causes of action, costs and expenses of every kind or character in connection with the Claims. As used in this Agreement, the term "Claims" shall mean any and all possible claims, demands, actions, costs, expenses and liabilities whatsoever, known or unknown, at law or in equity, which Borrower and Guarantor or any of their respective directors, partners, principals, affiliates, members, shareholders, officers, agents, employees or successors, may now or hereafter have against the Indemnites, if any, and irrespective of whether any such Claims arise out of contract, tort, violation of laws, or regulations, or otherwise in connection with the Loan or any of the Loan Documents, including, without limitation, any contracting for, charging, taking, reserving, collecting or receiving interest in excess of the highest lawful rate applicable thereto and any loss, cost or damage, of any kind or character, arising out of or in any way connected with or in any way resulting from the acts, actions or omissions of any of the Indemnites related to the Loan or the Property. Borrower and Guarantor agree that Lender has no fiduciary or similar obligations to Borrower and Guarantor and that their relationship has been strictly that of creditor and debtor. This release is accepted by Lender pursuant to this Agreement and shall not be construed as an admission of liability on its part. The terms and provisions of this paragraph shall survive Closing.

8. **Borrower Acknowledgements.** Borrower and Guarantor acknowledge that such discounted payoff may result in tax consequences with respect to debt forgiveness and/or debt cancellation relative to the discounted payoff being effected hereby and Lender’s servicer may report same to the Internal Revenue Service ("IRS") and may send IRS Form 1099-C Cancellation of Debt Form (or other substitute or comparable form) to the Borrower and the IRS, and Borrower may be required to report the amount of the canceled debt as income to the IRS.

9. **Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall constitute an original, but all of which when taken together shall constitute one and the same instrument.

10. **Final Agreement.** THIS AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES HERETO AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

11. **Governing Law.** This Agreement shall be governed by the laws of the State of where the Property is located.

12. **Authority to Sign and Bind.** In the event that a party to this Agreement is not a natural person, the natural person signing this Agreement on behalf of such party warrants that he/she has the authority to bind the entity to the terms set forth herein.
13. **Successors and Assigns; Reliance.** This Agreement shall be binding upon the parties hereto and their respective successors and permitted assigns. This Agreement is for the sole benefit of the parties hereto, and no prospective purchasers or other third parties may rely upon this Agreement.

14. **Agreement is Fully Subject to Senior Management Approval.** The parties acknowledge and agree that it shall be a condition to Lender’s obligations hereunder that Lender shall obtain the final approval of the transaction contemplated herein from the senior loan committee of Big Bad Lender (collectively, “Senior Management”). Unless and until Lender notifies Borrower and Guarantor in writing (which notification may be via e-mail) that such Senior Management approval has been obtained, this Agreement shall not be enforceable against Lender. If either (a) Lender notifies Borrower that Senior Management has declined approval of the transaction contemplated by this Agreement, or (b) Lender has not positively notified Borrower that Senior Management approval has been obtained on or prior to 5:00 p.m. Ugly, Texas time on March 11, 2011, then this Agreement shall be deemed terminated, the Deposit shall be returned to Borrower, and neither party shall have any liability to the other party hereunder. By entering into this Agreement, Lender shall not be deemed to have made any promises, representations or covenants to Borrower that it will enter into a DPO, forbearance, loan modification, amendment or any other agreement related to the Loan, and Lender disclaims same.

**SIGNATURE PAGES FOLLOW**
IN WITNESS WHEREOF, the parties have caused this Agreement to be properly executed and delivered by their duly authorized officers to be effective as of the Effective Date.

BORROWER:

LUCKY BORROWER, a Delaware limited partnership

By: __________________
Name: __________________
Title: __________________

STATE OF ________________  $
COUNTY OF ________________  $

BEFORE ME, a Notary Public of the State and County aforesaid, personally appeared ____________________________, of Lucky Borrower, an Illinois limited partnership, who acknowledged to me that he/she signed this instrument, on behalf of said entity.

WITNESS MY HAND AND OFFICIAL SEAL this ___ day of ____________, 2011.

__________________________________
Notary Public

My Commission Expires: ______________
GUARANTOR:

Lucky Bad-Boy Guarantor,
a ______ corporation

By: ________________________________
Name: ______________________________
Title: ______________________________

STATE OF __________________________ §
COUNTY OF __________________________ §

BEFORE ME, a Notary Public of the State and County aforesaid, personally appeared ______________ of Lucky Bad-Boy Guarantor, a ______ corporation, who acknowledged to me that he/she signed this instrument, on behalf of said entity.

WITNESS MY HAND AND OFFICIAL SEAL this ___ day of _____________, 2011.

______________________________
Notary Public

My Commission Expires: ___________
LENDER:

BIG BAD LENDER
a ____________

By: ________________________________

Name: ______________________________
Title: ______________________________

STATE OF TEXAS §
§

COUNTY OF _______ §

BEFORE ME, a Notary Public of the State and County aforesaid, personally appeared______________, as ______________ of Big Bad Lender, who acknowledged to me that he signed this instrument, on behalf of said entity.

WITNESS MY HAND AND OFFICIAL SEAL this ___day of ____________, 2011.

__________________________________________
Notary Public

My Commission Expires: ______________
EXHIBIT A
LEGAL DESCRIPTION
RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO

Local Title Company, Inc.
My Street, 99th Floor
Ugly, Texas 66666
Phone: ______

Your Neighborhood Crossing Shopping Center
100 End of the Road
Hotter Than Hell, Texas 66666
Servicer Loan No. 991073351
Local Title Company GF: 10101 ND9

RELEASE OF DEED OF TRUST, ASSIGNMENT OF RENTS
AND OTHER LOAN DOCUMENTS

This Release of Deed of Trust, Assignment of Rents and Other Loan Documents (this “Release”), is dated effective as of ____________, 2011 (the “Effective Date”), by Big Bad Lender (“Beneficiary”), for the benefit of Lucky Borrower, an Illinois limited partnership (“Borrower”), and Lucky Bad-Boy Guarantor (collectively, “Guarantor”).

RECITALS

A. Borrower is indebted to Beneficiary under a loan (the “Loan”) evidenced and/or secured by the following:

1. Promissory Note (the “Note”), dated May 27, 2005, executed by Borrower, originally payable to the order of Funding Lender (“Original Lender”), in the original stated principal amount of $20,000,000.00;

2. Loan Agreement dated of even date with the Note (the “Loan Agreement”), by and between Borrower and Original Lender;

3. Indemnity Agreement (“Guaranty”), dated May 27, 2005, executed by Guarantor;
4. Environmental Indemnity Agreement ("Environmental Indemnity"), dated May 27, 2005, executed by Borrower and Guarantor;

5. Deed of Trust, Security Agreement and Fixture Filing (the "Security Instrument"), dated May 27, 2005, recorded on June 1, 2005 as Instrument No. _______ in the Real Property Records, Ugly County, Texas (the "Records"), executed by Borrower for the benefit of Original Lender, and covering the real and personal property more particularly described therein (the "Property"), more particularly described on Exhibit A attached hereto;

6. Assignment of Leases and Rents (the "ALR"), executed by Borrower for the benefit of Original Lender, filed June 1, 2005, as Instrument No. _______ of the Records; and

7. UCC-1 Financing Statement (the "UCC") filed 06/03/2005, as Instrument No. _______ of the Records.

B. The Note, Loan Agreement, Security Instrument, ALR, Guaranty, Environmental Indemnity, UCC, and all other documents and instruments securing or evidencing the Loan are hereinafter, collectively, referred to as the "Loan Documents".

C. The Loan Documents were transferred and assigned to, and are currently held by, Beneficiary, pursuant, inter alia, to an assignment filed March 24, 2006 as Instrument No. _______ of the Records.

D. The undersigned Beneficiary desires to release the liens of the Security Instrument, ALR and UCC.

NOW THEREFORE, the undersigned Beneficiary hereby releases Borrower and Guarantor from their respective obligations and liabilities under the Loan Documents and in complete satisfaction of all rights of the Lender under or with respect to the Loan Documents (other than with respect to any indemnifications relating to any environmental matters which shall survive this release), and releases the Property from the lien of the Security Instrument and ALR, as well as from any UCC financing statements filed against Borrower including, without limitation, the UCC.

SIGNATURE PAGE FOLLOWS
Beneficiary:

BIG BAD LENDER,
a ____________

By: __________________________

Name: _________________________
Title: __________________________

STATE OF TEXAS

§

COUNTY OF UGLY

§

§

BEFORE ME, a Notary Public of the State and County aforesaid, personally appeared ____________, as ________________ Big Bad Lender, a ____________, who acknowledged to me that he signed this instrument, on behalf of said entity.

WITNESS MY HAND AND OFFICIAL SEAL this ___ day of ______________, 2011.

My Commission Expires:

__________________________________________
Notary Public

Title (and Rank)

My commission expires: ____________________
Exhibit A

to Release

B-1
VIA FEDEX AND EMAIL

Attn: _______ 

RE: Deed of Trust and Security Agreement (the "Deed of Trust") executed by ____________, a ____________, ("Borrower") in favor of ____________, a ____________ ("Lender") dated ____________, 20__, and Purchase and Sale Agreement (the "Sale Agreement") dated ____________, 20__ between Borrower and ____________ ("Buyer")

Gentlemen:

Capitalized terms used but not defined in this letter shall have the meanings given to them in the Sale Agreement.

Subject to the terms and conditions of this Letter, Lender agrees to deliver to Escrow Holder, prior to Closing, an appropriate instrument in recordable form (the "Release") releasing and reconveying the Deed of Trust, provided that Escrow Holder shall have first executed and delivered to Lender closing instructions (the "Closing Instructions") in Lender's form wherein Escrow Holder shall have agreed that it shall be authorized to record the Release, or otherwise deliver the Release to anyone other than Lender, only:

(a) after Escrow Holder shall have wire transferred immediately available funds to Lender, on or before ____________, 20__, in the amount of the greater of (i) $__________ or (ii) the amount shown on the Settlement Statement (as defined below) as the "Total Due to Lender" (the "Payoff Amount"); and

(b) Lender shall have approved in writing a settlement statement (the "Settlement Statement") prepared by Escrow Holder detailing Adjustments, Charges and Deductions, Title Company Charges, Payments and Credits and the Payoff Amount materially consistent with Exhibit A attached hereto.
Lender recognizes that depending upon the actual Closing Date, the Settlement Statement may reflect per diem changes to the real estate tax and other Operating Expense Adjustments shown on Exhibit A, and Lender will approve appropriate such adjustments to the same. Lender shall not approve any other changes to Exhibit A that increase any amounts payable to Borrower or to any of its affiliates or that otherwise reduce the Payoff Amount by more than $__________.

Lender shall have no obligation to authorize the recordation of the Release, or the delivery of the Release to any party other than Lender, if the Closing shall not have occurred and Lender shall not have received the Payoff Amount pursuant hereto on or before ________, 20__, (the “Deadline”). Time is of the essence in this transaction.

This Letter is issued by Lender subject to the express condition that, by accepting this Letter, Borrower (on behalf of itself and its members) acknowledges and agrees that, except to the extent modified in this Letter and in any other written documents executed and delivered by Lender, the Deed of Trust, and all other documents executed and delivered by Borrower or any of its members in connection with the loan secured by the Deed of Trust, are in full force and effect in accordance with their terms. In the event of any assertion by Borrower or its members that renders the foregoing condition unsatisfied, this Letter shall be null and void.

[If Lender desires to reserve some or all of its rights to pursue remedies prior to the expiration of the Deadline, Lender should describe its reserved rights. The description of these reserved rights may need to be place in a separate document if this letter may be seen by parties other than Borrower, if Borrower would find the reservation here to be too heavy-handed.]

This Letter is for the sole benefit of Borrower and may not be relied upon by Buyer or anyone else other than Borrower.

________________________________, a ______________________

By: _________________________________________
Name: _______________________________________
Title: ________________________________________
EXHIBIT D

ESCROWED FUNDS DISTRIBUTION AGREEMENT

ESCROWED FUNDS DISTRIBUTION AGREEMENT

EFFECTIVE DATE: 

AMONG:

AND: 

("Lender")

AND: 

("Borrower")

("Escrowee")

RECITALS:

A. On or about ____________, 20__ Lender made a loan to Borrower in the principal amount of ____________________ and ___________________ Dollars ($ ___________________), (the "Loan") evidenced by Borrower's $ ____________________ Promissory Note payable to the order of Lender (the "Note") and secured by Borrower's Deed of Trust and Security Agreement dated ____________, 20__ made by Borrower, in favor of Lender, recorded in the real property records of ____________ County, State of ____________, as Document No. ___________________ (the "Deed of Trust") covering certain property in ____________ County, ____________ (the "Property"), more particularly described in the Deed of Trust. The Loan is additionally secured by, among other instruments, that certain Escrow Agreement (the "Existing Escrow Agreement") among Lender, Borrower and Escrowee as well as certain other security instruments executed in connection with the Loan of even date with the Note and Mortgage (collectively, the "Loan Documents").

B. Substantially contemporaneously herewith, Borrower and ________________, a ________________ ("Buyer"), have entered into that certain Purchase and Sale Agreement dated ____________, 20__ (the "Sale Agreement"), wherein, and pursuant to the terms thereof, Borrower has agreed to sell the Property to Buyer. The Sale Agreement calls for the Property to be conveyed to Buyer free of the liens of the Deed of Trust and other Loan Documents, and sets forth a sales price for the Property which, when added to funds owned or controlled by Borrower, is less than the amount outstanding under the Loan.

C. Substantially contemporaneously herewith, Lender has issued its "Approval Letter" (as defined in the Sale Agreement), wherein, and pursuant to the terms thereof, Lender has agreed, upon the closing of the sale of the Property pursuant to the Sale Agreement (the "Closing") and receipt of the "Payoff Amount" (as defined in the Approval Letter) on or before the deadline set forth in the Approval Letter, to release the liens of the Deed of Trust and other Loan Documents.

D. As contemplated in the Approval Letter, all escrowed funds held by Escrowee on the date hereof pursuant to the Existing Escrow Agreement, less only the amount, if any, of such funds
that may be hereafter disbursed at Borrower’s written request and upon Lender’s express written approval, shall be delivered to Lender at the Closing (and shall comprise a portion of the Payoff Amount).

E. Subject to the terms and provisions of this Agreement, Borrower and Lender have agreed that, immediately following the Closing (but outside of the Closing), Lender shall deliver to Escrowee, from the Payoff Amount, immediately available funds in the amount of $_________ (the “Reserve Funds”) to be held and disbursed by Escrowee pursuant to this Agreement.

F. Pursuant to the Approval Letter and the closing statement attached thereto, at Closing $_________ shall be transferred into a reserve (the “Post-Closing Operating Reserve”) held by Escrowee for the benefit of Borrower to pay “Operating Expenses” (as defined below) after Closing. The Post-Closing Operating Reserve, which is not a part of, and may not be commingled with, the Reserve Funds, shall also be held and disbursed by Escrowee pursuant to this Agreement.

G. In addition, subject to the terms and provisions of this Agreement, Borrower and Lender have agreed that, immediately following the Closing (but outside of the Closing), Borrower shall deliver to Lender all funds then held in the Operating Account (the “Operating Account Funds”); the Operating Account Funds are in addition to the Payoff Amount and are not Reserve Funds.

NOW, THEREFORE, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and agreed, the parties hereby agree as follows:

1. DEPOSIT OF RESERVE FUNDS; INTEREST ON RESERVE FUNDS; PURPOSE OF RESERVE FUNDS; DEPOSIT OF OPERATING ACCOUNT FUNDS.

Immediately following the Closing and receipt of the Payoff Amount, Lender shall deliver the Reserve Funds to Escrowee. Escrowee shall deposit the Reserve funds in an FDIC insured interest-bearing account. Escrowee’s annual fee for maintaining the escrow account hereunder shall be $______, which shall be paid by Reserve Funds. Interest earned on the Reserve Funds shall be for the benefit of Lender (the Reserve Funds are owned by Lender, subject to disbursement pursuant to this Agreement) and shall be disbursed to Lender on a monthly basis by Escrowee. The purpose of the Reserve Funds is, subject to the terms and provisions set forth herein, to provide a source of funds to disburse to Borrower in the event Borrower should timely receive one or more “Claims” (as defined below) from Seller. Immediately following the Closing, Borrower shall deliver the Operating Account Funds to Lender.

2. DISBURSEMENT OF RESERVE FUNDS.

(a) If, within one hundred eighty (180) days after the date of Closing (the “Closing Date”) (said one hundred eighty (180) day period is herein called the “At Risk Period”), Borrower should receive a written claim or demand from Buyer relating to the Property and
alleging that Buyer is entitled to damages or other amounts from Borrower pursuant to the Sale Agreement (a “Claim”), Borrower shall promptly (subject to the further terms hereof) deliver a copy of the Claim to Lender and Escrowee. Borrower covenants and agrees that, prior delivering a Claim to Lender and Escrowee, Borrower shall exert diligent good faith efforts to (i) contest any Claim that Borrower believes to be frivolous or overstated, and (ii) negotiate with Buyer to reduce the amount of any Claim as much as possible (and Borrower’s delivery of a copy of any Claim to Lender shall include a written confirmation (the “Confirmation”) that Borrower has complied with the requirements of this sentence). Subject to Section 2(b) below, upon receipt, prior to the expiration of the At Risk Period, of a copy of a Claim and the applicable Confirmation from Borrower and a written statement from Borrower that Borrower wishes to pay the Claim to Buyer immediately, Lender shall promptly deliver written instructions to Escrowee to disburse the amount of the Claim to Borrower from the Reserve Funds. Borrower covenants and agrees that all Reserve Funds released to Borrower pursuant to this Agreement shall be promptly paid to Buyer to settle applicable Claims. If Escrowee holds any “Holdover Funds” (as defined below) pursuant to Section 2(b) below after the expiration of the At Risk Period, Lender shall, promptly upon receipt from Borrower of a written certification from Borrower that it has determined to immediately pay the Holdover Funds (or specified portion thereof) to Buyer with respect to a “Remaining Claim” (as defined below), deliver written instructions to Escrowee to disburse the Holdover Funds (or specified portion thereof) to Borrower from the Reserve Funds to pay to Buyer with respect to the Remaining Claim.

(b) The Reserve Funds are available to be disbursed to Borrower, pursuant to the terms set forth herein, only with respect to Claims delivered to Lender and Escrowee with a Confirmation prior to the expiration of the At Risk Period; in no event shall Reserve Funds be subject to disbursement to Borrower with respect to any Claims delivered to Lender and Escrowee after the expiration of the At Risk Period. Any Reserve Funds then held by Escrowee shall be automatically disbursed by Escrowee to Lender on the seventh (7th) business day following expiration of the At Risk Period. Notwithstanding the foregoing sentence to the contrary, if a Claim shall have been delivered to Borrower during the At Risk Period that shall not have fully resolved at the expiration of the At Risk Period (a “Remaining Claim”), Escrowee shall continue to hold a portion of the Reserve Funds (the “Holdover Funds”) in the aggregate amount of any Remaining Claims after the expiration of the At Risk Period, the amount to be disbursed by Escrowee to Lender pursuant to the preceding sentence shall be reduced by the Holdover Funds, and the Holdover Funds shall continue to be available to pay Borrower with respect to the Remaining Claims. Upon payment or resolution of all Remaining Claims, any Holdover Funds shall be disbursed to Lender. At any time, Lender shall have the unilateral right to direct Escrowee to disburse all Reserve Funds to Borrower. This Agreement shall terminate at such time as Escrowee has disbursed all Reserve Funds and the Post-Closing Operating Reserve pursuant to this Agreement. In addition, if the Closing does not timely occur pursuant to the Sale Agreement (as the Sale Agreement may be amended in writing if such amendments are expressly approved in writing by Lender), this Agreement shall automatically terminate upon the failure of such Closing to timely occur and all of Borrower’s obligations (and the obligations of “Guarantor”, as defined in the Note), and Lender’s rights and remedies, under the Loan Documents shall remain in full force and effect in accordance with their terms.
3. **ONLY AGREEMENT WITH RESPECT TO CLAIMS.**

Borrower acknowledges and agrees that Lender’s obligations hereunder with respect to the Reserve Funds are the only obligations whatsoever of Lender with respect to (i) any Claims, and (ii) the Loan or the Property, and, except for Lender’s obligations hereunder, Borrower hereby releases Lender from any and all claims, liability, loss, cost, expense (including attorneys fees) and damages whatsoever, based upon or arising out of any Claims, the Loan or the Property.

4. **BORROWER COVENANTS TO DELIVER NET PROCEEDS TO LENDER.**

Borrower covenants that the Payoff Amount shall include the net proceeds of the sale of the Property and all funds held or controlled by Borrower (subject to the terms of the Approval Letter) on the Closing Date, except only for the Operating Account Funds to be delivered to Lender pursuant to Section 1 above, and further covenants and agrees that, if and to the extent it holds or receives any funds (by way of example but not of limitation, any utility deposits with respect to the Property that have not been returned to Borrower prior to the Closing Date) on or after the Closing Date that have not been delivered to Lender and included within the Payoff Amount, Borrower shall promptly deliver all of such funds to Lender (such funds shall be delivered directly to Lender and are not part of the Reserve Funds).

5. **DISPOSITION OF POST-CLOSING OPERATING RESERVE.**

Borrower agrees to use diligent good faith efforts to pay, prior to Closing, all legitimate, third-party Property expenses with respect to the period prior to the Closing (“Operating Expenses”). The purpose of the Post-Closing Operating Reserve is, pursuant to this Section 5, to provide a source of payment for Operating Expenses that, despite the preceding sentence, were not paid prior to Closing. Upon receipt of an invoice for Operating Expenses, Borrower shall deliver a copy of the same to Lender for Lender’s approval, which approval shall not be unreasonably withheld, conditioned or delayed, and upon such approval Lender shall deliver written notice of the same to Escrowee, whereupon Escrowee shall pay to Borrower (or the third party creditor) the amount of such invoice. If there are any funds left in the Post-Closing Operating Reserve on the date that is ninety (90) days after the Closing, such funds shall be promptly delivered to Lender by Escrowee.

6. **CONFIDENTIAL.**

The parties covenant and agree to keep confidential the existence, and the terms and provisions, of this Agreement, except to the extent necessary, if applicable (a) in connection with any judicial proceedings, or (b) to disclose to their attorneys, accountants or advisors. Without limiting the foregoing, unless so required in connection with any judicial proceedings, the parties shall not disclose the existence, or terms and provisions, of this Agreement to Buyer.

7. **MISCELLANEOUS PROVISIONS.**

(a) The provisions of this Agreement shall be binding upon and inure to the benefit of the parties and Lender’s and Escrowee’s successors and assigns; provided, however, Borrower
acknowledges and agrees that it shall have no right to assign this Agreement, and in no event shall Buyer or any other third parties have the right to enforce Borrower's rights under this Agreement.

(b) If a suit or an action is instituted in connection with any controversy arising out of this Agreement or to enforce any rights hereunder, the prevailing party shall be entitled to recover such amount as the court may adjudge reasonable as attorneys' or paralegals' fees and costs of litigation at trial or on any appeal or review, in addition to all other amounts provided by law.

(c) This Agreement may not be modified or amended except by the written agreement of the parties. No modification or amendment or attempted waiver of any provision of this Agreement shall be binding unless in writing and signed by the party to be bound. This Agreement may not be modified or amended orally.

(e) This Agreement shall be governed by and construed in accordance with the laws of the State of ____________.

(f) This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

SIGNATURES ON FOLLOWING PAGES
IN WITNESS WHEREOF, Lender, Borrower and Escrowee have executed this Agreement as of the Effective Date set forth above.

BORROWER:

____________________

a ___________________

By: ____________________
Name: ____________________
Title: ____________________

LENDER:

____________________

a ___________________

By: ____________________
Name: ____________________
Title: ____________________

ESCROWEE:

____________________

a ___________________

By: ____________________
Name: ____________________
Title: ____________________

The undersigned executes this Agreement for the purpose of consenting thereto and reaffirming its obligations under that certain Guaranty dated ______, 20__ in favor of Lender with respect to the Loan.

GUARANTOR:

____________________

a ___________________

By: ____________________
Name: ____________________
Title: ____________________
EXHIBIT E

DEFAULT WAIVER LETTER

[LETTERHEAD]

[DATE]

VIA FEDEX and email

__________________________

__________________________

Attn: _____________________

Re: ____________, 20__ $__________ loan (the “Loan”) by

______________________________ (“Lender”) to

______________________________ (“Borrower”)

Dear ________________:

Lender is writing this letter in connection with the above referenced Loan and the documents evidencing and securing the Loan (the “Loan Documents”).

As you know, Borrower is currently in default under the Loan Documents (and an “Event of Default,” as defined in the Loan Documents, has occurred) by reason of Borrower’s failure to timely pay the $__________ Loan payment that was due on ____________, 20__; (the “Unpaid Payment”). In addition, Borrower has advised Lender that it may be unable to timely pay the $__________ Loan payment (“the Next Payment”) that will become due on ____________, 20__.

Lender hereby retroactively waives Borrower’s default for failure to timely pay the Unpaid Payment and agrees that no Event of Default shall be deemed to have occurred under the Loan Documents with respect to the Unpaid Payment, or the Next Payment as long as each such payment is paid to Lender not later than ____________, 20__; provided, however, an Event of Default shall occur under the Loan Documents, without further notice or grace period, if Lender shall not have received the Unpaid Payment and the Next Payment on or before ____________, 20__.

Lender does not hereby waive any other past, present or future payment or performance obligation of Borrower under the Loan Documents that may exist, and except as expressly stated herein, all of Borrower’s obligations under the Loan Documents remain in full force and effect in accordance with their terms.
Yours truly,

_________________________________

a ____________________________

By: ____________________________
Name: __________________________
Title: __________________________

cc: [name of Borrower's counsel (via FEDEX and email)]