

THIS AGREEMENT IS FOR ILLUSTRATIVE PURPOSES AND SHOULD NOT BE USED WITHOUT FAMILIARITY WITH THE ISSUES ADDRESSED HEREIN AND/OR WITHOUT CONSULTATION WITH LAWYERS FAMILIAR WITH SUCH ISSUES. EVERY INTERCREDITOR AGREEMENT IS UNIQUE AND IS PREPARED AND NEGOTIATED WITH RESPECT TO THE PARTICULAR CIRCUMSTANCES ARISING UNDER THE APPLICABLE TRANSACTION.

## SUBORDINATION AND INTERCREDITOR AGREEMENT

This SUBORDINATION AND INTERCREDITOR AGREEMENT ("**Agreement**") is made and effective as of *[date]* between *[name of agent administering real estate term loan facilities]*, in its capacity as the Agent for the Lenders (each as defined in the RE Loan Agreement described below, collectively "**RE Lender**") and *[name of lender providing operating revolving loan facilities]* ("**OP Lender**"), and is acknowledged by *[name of real estate term loan borrower]* ("**RE Borrower**") and *[name of operating loan borrower]* ("**OP Borrower**" and together with RE Borrower the "**Borrower**"). [This Agreement shall also be acknowledged by *[names of secured guarantors, if any]* as secured guarantors and mortgagors to *[OP Lender/RE Lender]*].

### RECITALS

A. RE Lender and RE Borrower have entered a *[name of loan or credit agreement]* dated as of *[date]* (as amended, modified, supplemented, renewed or restated from time to time, the "**RE Loan Agreement**") pursuant to which RE Lender has agreed to provide certain loans and credit accommodations to RE Borrower in accordance with the terms and conditions more particularly described in the RE Loan Agreement. RE Lender's credit accommodations to RE Borrower are secured by certain security agreements, encumbrances, liens, and UCC and fixture filings (collectively the "**RE Financing Agreements**") including, without limitation, liens on the real property and interests of RE Borrower described on Exhibit A attached hereto (the "**Real Property**") and security interests in the following property and interests of RE Borrower, whether now owned or existing or hereafter acquired or arising and wheresoever located together with all products and proceeds thereof (collectively, the "**RE Collateral**"):

*[Description of collateral in which RE Lender and OP Lender each have an interest.]*

B. OP Lender and OP Borrower have entered a *[name of loan or credit agreement]* dated as of *[date]* (as amended, modified, supplemented, renewed or restated from time to time, the "**OP Loan Agreement**") pursuant to which OP Lender has agreed to provide certain loans and credit accommodations to OP Borrower in accordance with the terms and conditions more particularly described in the OP Loan Agreement. OP Lender's credit accommodations to OP Borrower are secured by certain security agreements, encumbrances, liens, and UCC and fixture filings (collectively the "**OP Financing Agreements**") including, without limitation, security interests in the following property and interests of OP Borrower, whether now owned or existing or hereafter acquired or arising and wheresoever located together with all products and proceeds thereof (collectively, the "**OP Collateral**"):

*[Description of collateral in which RE Lender and OP Lender each have an interest.]*

C. It is a condition precedent to OP Lender and RE Lender's agreement to extend or continue to extend credit and financial accommodations to Borrower that OP Lender and RE Lender enter into this Agreement in order to confirm the relative priorities of their respective security interests in and/or liens on the "**Collateral**" (as such term is defined below).

**1. Definitions.**

(a) The following capitalized terms shall have the following meanings for all purposes in this Agreement:

"**Agreement**" shall have the meaning set forth in the introduction.

"**Adjusted Rent**" shall have the meaning set forth in Section 5(k).

"**Arbitration**" shall have the meaning set forth in Section 5(k).

"**Borrower**" shall have the meaning set forth in the introduction.

"**Code**" shall have the meaning set forth in Section 1(b).

"**Collateral**" means any and all property and assets of Borrower, whether real, personal or mixed, or tangible or intangible, upon which either or both OP Lender and RE Lender have a lien or security interest including, without limitation, the OP Collateral and the RE Collateral.

"**Construction Materials**" means any and all Goods and Equipment regardless of their location that are intended to be installed and/or constructed as or into any Improvements on the Real Property. For avoidance of doubt, no OP Equipment Collateral shall be considered Construction Materials.

"**Crops**" shall mean shall mean, with respect to the Real Property, all crops and Farm Products now or hereafter grown, Growing or to be grown on such Land and all products and proceeds of such crops. For avoidance of doubt: (a) Crops shall not include Permanent Plantings, but shall include the Crops Growing thereon, and (b) Perennial Crops shall be included within the definition of Crops.

"**Crop Equipment**" means all of Borrower's Equipment or Fixtures of any kind or description whether now owned or hereafter acquired (including all accessions, parts, additions, replacements and substitutions thereto) located on the Real Property and used to grow, process, pack, handle, and store Crops [including, without limitation, all [*specific equipment list or reference to list in exhibit*], and excluding all OP Equipment Collateral.

"**Current Crop**" shall mean all Crops Growing on the Real Property as of the date of Foreclosure.

"**Equipment**" means any and all "goods" (as defined in the Code) (including without limitation, equipment, machinery, implements, tools, parts and accessories) that are at any time owned by Borrower, together with any and all accessions, parts and appurtenances and any other "equipment" (as defined in the Code).

**"Enforcement Action"** means (a) any action by OP Lender or RE Lender to foreclose a lien or security interest against any Collateral, (b) any action by OP Lender or RE Lender to take possession of, or sell or otherwise realize upon, or to exercise any other rights or remedies with respect to any Collateral, including a sale or other disposition, after default by Borrower, of any Collateral by any Borrower with the consent of, or at the direction of, OP Lender or RE Lender, (c) the taking of any other actions by OP Lender or RE Lender to collect or enforce all or any part of the obligations payable to OP Lender or RE Lender, or any claims in respect thereof, including the taking of control or possession of, or the exercise of any right of setoff with respect to, any property or assets of any Borrower or the sale or other disposition of any interest in such property or assets, and/or (d) the commencement by OP Lender or RE Lender of any legal proceedings or actions against or with respect to any Collateral to facilitate the actions described in clauses (a), (b) and (c) above; provided, that the mere issuance of a default notice involving a Borrower shall not be deemed to be an Enforcement Action.

**"Farm Products"** shall have the meaning defined under the provisions of the Code, but shall in all events include all Crops.

**"Fixtures"** shall mean "fixtures" as defined in the Code.

**"Foreclosure"** means the sale, conveyance, or transfer of all or any portion of the Real Property as a result of or in lieu of foreclosure.

**"Growing"** shall mean, with respect to the Real Property, (i) in the case of annual Crops, the seed or seedlings for such Crops have been planted or transplanted on such Real Property; and (ii) in the case of Crops grown on Permanent Plantings, the plantings are emergent or buds have formed, as applicable. Perennial Crops shall be deemed to be Growing as of [*date*] of each year.

**"Improvements"** shall mean any and all buildings, appurtenances, Fixtures, equipment, trees, bushes, groves, orchards, or other improvements of any kind or description located or to be constructed on the Real Property.

**"Insolvency Proceeding"** means, as to any Borrower, any of the following: (a) any case or proceeding with respect to such person under the Bankruptcy Code or any other federal or state bankruptcy, insolvency, reorganization or other law affecting creditors' rights or any other or similar proceedings seeking any stay, reorganization, arrangement, composition or readjustment of the obligations and indebtedness of any Borrower; (b) any proceeding seeking the appointment of any trustee, receiver, liquidator, custodian or other insolvency official with similar powers with respect to any Borrower or any of its assets; (c) any proceeding for liquidation, dissolution or other winding up of the business of any Borrower; or (d) any assignment for the benefit of creditors or any marshaling of assets of any Borrower.

**"Irrigation Equipment"** means all of Borrower's Equipment and Fixtures of any kind or description whether now owned or hereafter acquired (including all accessions, parts, additions, replacements and substitutions thereto) used to divert, deliver, control, apply, irrigate, or drain water on, to, or from the Crops and/or the Real Property.

**"License"** shall have the meaning set forth in Section 5.

**"Marketing Agreements"** mean any and all agreements entered into by any Borrower with any Person (i) for the production of or marketing of Crops, (ii) for the licensing of any trade labels of any Borrower, or (iii) which are reasonably necessary to continue the marketing and sale of Crops in the ordinary course of business of the Borrower. Marketing Agreements shall not include any patents, rights, and agreements related to the varieties of trees, bushes, or other plantings on the Real Property.

**"OP Borrower"** shall have the meaning set forth in the introduction.

**"OP Collateral"** shall have the meaning set forth in the recitals.

**"OP Financing Agreements"** shall have the meaning set forth in the recitals.

**"OP Lender"** shall have the meaning set forth in the introduction.

**"OP Equipment Collateral"** means any Equipment which (a) is (i) acquired by OP Borrower after the date of this Agreement, (ii) financed directly by OP Lender pursuant to the terms of the OP Loan Agreement, and (iii) located on or used in real property which is not the Real Property; (b) is otherwise located on or used in real property which is not the Real Property; or (c) consists of Rolling Stock. OP Equipment Collateral shall not include any RE Priority Collateral consisting of Irrigation Equipment, Crop Equipment, and Construction Materials.

**"OP Loan Agreement"** shall have the meaning set forth in the recitals.

**"OP Priority Collateral"** means all Collateral whether now owned or existing or hereafter acquired or arising and wheresoever located, together with all products and proceeds thereof, excluding the RE Priority Collateral.

**"Perennial Crops"** shall mean biennial or perennial crops such as, without limitation, alfalfa and hay grasses.

**"Permanent Plantings"** shall mean all trees, vines or bushes upon which Crops are or may be grown, and for avoidance of doubt, shall not include Perennial Crops.

**"Person"** shall mean any individual, sole proprietorship, partnership, limited liability company, joint venture, trust, unincorporated organization, association, corporation, institution, entity, party or government (whether national, federal, state, provincial, county, city, municipal, tribal, or otherwise, including without limitation, any instrumentality, division, agency, body or department thereof).

**"Post-Foreclosure Crops"** means any and all Crops grown or Growing on the Real Property from and after the date of a Foreclosure, excluding the Current Crop, but including (a) Crops which are not harvested and severed from the Real Property prior to (i) the expiration of the License period as set forth in Section 5, if the License is exercised, or (ii) the expiration of the period in which, pursuant to Section 5, OP Lender may elect to exercise the License, if the OP Lender fails to timely notify RE Lender that OP Lender is exercising the License, or (b) Crops surrendered by OP Lender pursuant to Section 6.

**"RE Borrower"** shall have the meaning set forth in the introduction.

**"RE Collateral"** shall have the meaning set forth in the recitals.

**"RE Financing Agreements"** shall have the meaning set forth in the recitals.

**"RE Lender"** shall have the meaning set forth in the introduction.

**"RE Loan Agreement"** shall have the meaning set forth in the recitals.

**"RE Priority Collateral"** shall mean the following Collateral whether now owned or existing or hereafter acquired or arising and, except as otherwise provided, wheresoever located (a) the Real Property, (b) Irrigation Equipment, (c) Crop Equipment, (d) all Construction Materials together with all related construction contracts and plans and any assignments thereof to RE Lender, (e) all insurance proceeds related to RE Lender Priority Collateral, including but not limited to construction related insurance proceeds, (f) Post-Foreclosure Crops, (g) any letters of credit from Borrower to RE Lender, (g) all Swaps and Derivatives between Borrower and RE Lender or any of its affiliates, and (f) all products and proceeds of the foregoing.

**"Real Property"** shall have the meaning set forth in the recitals.

**"Rent"** shall have the meaning set forth in Section 5(k).

**"Rolling Stock"** means all loaders, forklifts, and any other mobile or motor vehicles owned by OP Borrower.

**"Swaps and Derivatives"** means (a) any and all interest rate swap transactions, basis swap transactions, basis swaps, credit derivative transactions, forward rate transactions, commodity swaps, commodity options, forward commodity contracts, equity or equity index swaps or options, bond or bond price or bond index swaps or options or forward foreign exchange transactions, cap transactions, floor transactions, currency options, spot contracts or any other similar transactions or any of the foregoing (including, but without limitation, any options to enter into any of the foregoing), and (b) any and all transactions of any kind, and the related confirmations, which are subject to the terms and conditions of, or governed by, any form of master agreement published by the International Swaps and Derivatives Association, Inc. or any International Foreign Exchange Master Agreement.

(b) All capitalized terms contained in this Agreement which are not specifically defined in this Agreement shall have the meanings set forth in the Uniform Commercial Code of [*applicable state*] ("**Code**") to the extent the same are used or defined therein.

2. **Benefitted Parties.** All terms, conditions, rights, and covenants in this Agreement are solely for the benefit of OP Lender and RE Lender and shall not in any manner benefit or be actionable by any other Person including, without limitation, Borrower.

3. **Scope of Agreement.** Nothing contained in this Agreement is intended to affect or limit in any manner the security interests, encumbrances, or liens that OP Lender and RE Lender have or hereafter acquire in any of the Collateral with respect to any rights of any Borrower and

any Person other than OP Lender and RE Lender. OP Lender and RE Lender specifically reserve any and all of their respective rights, security interests, encumbrances, liens, and rights and claims to assert security interests, encumbrances, and liens against any Borrower and any Person other than OP Lender and RE Lender.

**4. Priorities and Limitations.** Subject to the terms and conditions in this Agreement:

(a) OP Lender hereby subordinates any and all security interests and liens that OP Lender now has or hereafter acquires in or on the RE Priority Collateral to the perfected security interests or liens which RE Lender now has or may hereafter acquire therein or thereon.

(b) RE Lender hereby subordinates any and all security interests and liens that RE Lender now has or hereafter acquires in or on the OP Priority Collateral to the perfected security interests or liens which OP Lender now has or may hereafter acquire therein or thereon.

(c) Notwithstanding Section 4(a) and Section 4(b), OP Lender shall not have any lien, encumbrance, or security interest whatsoever in (i) the Real Property or (ii) Post-Foreclosure Crops.

**5. Access.** RE Lender agrees that OP Lender may, at any time within ninety (90) days following written notice to OP Lender that a Foreclosure has occurred, enter upon the Real Property upon reasonable notice to RE Lender to permit OP Lender or its agents or employees to take possession of the OP Priority Collateral, to exercise its rights, powers and remedies with respect to the OP Priority Collateral, and to care for and maintain OP Priority Collateral. Such ninety (90) day period shall be extended one day for each day that OP Lender may be prohibited from removing the OP Priority Collateral due to reasons beyond the control of OP Lender (including, without limitation, the bankruptcy of any single Borrower), provided that OP Lender otherwise complies with the requirements of this Agreement during the period of any such extension. OP Lender shall further be permitted to cultivate and/or harvest any Crops Growing as of the date of the Foreclosure for a period that may not extend beyond the ninetieth (90th) day (subject to extension in the manner set forth in the previous sentence) after the last date for harvest of such Crops according to usual industry practice in the area. Within thirty (30) days following written notice to OP Lender that a Foreclosure has occurred, OP Lender shall notify RE Lender of its election to cultivate and/or harvest the Crops or such rights shall be deemed waived without further action. Upon such election, OP Lender shall notify RE Lender ten (10) days prior to the date it intends to cultivate and/or harvest the Crops and exercise the rights described below. To that end, RE Lender hereby grants to OP Lender a nonexclusive license (the "**License**") as follows:

(a) OP Lender or OP Lender's employees or authorized agents may enter and use: (i) all or any portion of the Real Property on which Crops Growing as of the date of the Foreclosure or any other OP Priority Collateral are located, (ii) any Crop Equipment located upon the Real Property, and (iii) any water or water rights appurtenant to the Real Property and Fixtures located thereon that are within RE Lender's possession or control, to care for, maintain, irrigate, cultivate, produce, handle, harvest, and store such Crops and OP Priority Collateral and remove the OP Priority Collateral. If OP Lender or OP Lender's employees or authorized agents enter or use any of the facilities, machinery or equipment described in this Section 5(a), OP Lender shall obtain and/or maintain insurance on the Real Property and RE Collateral for the duration of such use in

accordance with the RE Financing Agreements and shall provide proof of such insurance to RE Lender at RE Lender's request.

**(b)** OP Lender or OP Lender's employees or authorized agents may use all Irrigation Equipment and Crop Equipment located on the Real Property at OP Lender's expense as needed by OP Lender for the purposes authorized by the License. RE Lender will not prohibit or preclude OP Lender from using, or interfere with OP Lender's use of, any such property for the purposes authorized by the License, and RE Lender will not sell, move, disable, or otherwise dispose of such property during the term of the License.

**(c)** Subject to the time limitations set forth in Section 5, OP Lender or OP Lender's employees or authorized agents may remove, market and sell the Crops grown or Growing as of the date of the Foreclosure and the other OP Priority Collateral.

**(d)** OP Lender shall have no obligation to pay RE Lender for the License or the use of any of the Borrower's property within RE Lender's possession or under its control for the purposes authorized by the License, except as specifically provided otherwise in this Section 5.

**(e)** Even though the License is nonexclusive, RE Lender will not grant a license to any other party that would unreasonably or materially interfere with OP Lender's ability to complete, harvest, care for, maintain and remove the Crops within the time limitations set forth in this Section 5.

**(f)** OP Lender's exercise of the rights granted by the License shall be at OP Lender's own risk as to the quality, quantity, condition, operability, adequacy and suitability of the Real Property, water, and any of Borrower's property, or the legality or enforceability of such License or of RE Lender's possession of the Real Property; and RE Lender has not made and will not make any representations or warranties to OP Lender regarding such matters.

**(g)** If OP Lender exercises the rights granted by the License, OP Lender shall do so in a good and farmerlike manner in accordance with the standards and practices customarily employed for similar farming operations in the vicinity and in compliance with all applicable laws, ordinances and regulations, including those relating to agricultural chemicals, toxic materials, hazardous materials and petroleum products.

**(h)** OP Lender agrees that it shall be responsible for all water, electrical and other expenses related to OP Lender's activity on the Real Property and that it will be responsible for the proper maintenance and repair of any Equipment, Fixtures, and improvements (subject to ordinary wear and tear) used by it or its employees or agents in the course of activities conducted on the Real Property pursuant to the provisions of this Section 5 and all such costs shall be deemed to be additional advances to OP Borrower and secured by the OP Priority Collateral and shall be part of the indebtedness owing by OP Borrower to OP Lender to which the subordination of RE Lender applies. OP Lender agrees to indemnify, defend, and hold RE Lender and its respective agents, partners, officers, directors, employees, attorneys, successors and assigns harmless from all claims, demands, liabilities, losses, damages, costs and expenses, including, without limitation, reasonable attorneys' fees and disbursements, arising out of or resulting from the use of the Real Property by

OP Lender excluding only such matters caused by the negligence of or the willful and deliberate acts of RE Lender.

(i) The License granted herein shall expire upon the removal of all of the OP Priority Collateral or the date set forth in this Section 5, whichever occurs first.

(j) RE Lender acknowledges and agrees that the provisions of this Section 5 shall be binding upon RE Lender itself (and its successors and assigns) and/or upon any Person who acquires the Real Property pursuant to Foreclosure.

(k) If Operating Lender elects to occupy and use any Improvements for the purposes of storing or processing any Crops pursuant to its rights under the License, OP Lender and RE Lender shall mutually determine a rental amount for the use and operation of the Improvements payable to RE Lender (or to a receiver appointed in connection with the Foreclosure) in an amount equal to the market rental rates paid for similar crop processing and storage facilities in the area (the "**Rent**"). Absent mutual agreement on the Rent, OP Lender and RE Lender may initiate arbitration under such rules and with such administrator as the parties shall mutually agree with a single arbitrator in a mutually agreeable location all as governed by the Federal Arbitration Act (the "**Arbitration**"). The Arbitration shall determine the Rent. Until the Rent is determined by the Arbitration, OP Lender shall pay to RE Lender monthly Rent in a reasonable amount determined by OP Lender, which amount shall be subject to adjustment by the Arbitration (the "**Adjusted Rent**"). Any surplus or shortage of Adjusted Rent which is over or under the Rent paid as of the date of the Arbitration award shall be payable in accordance with any award rendered in the Arbitration.

6. **No Obligation to Exercise Rights to Cultivate Crops.** OP Lender shall have no obligation to exercise its rights under the License or to care for, irrigate, cultivate, produce or harvest Crops following Borrower's default, OP Borrower's default, and/or a Foreclosure. RE Lender shall have no duty or obligation to maintain, care for, cultivate, or harvest any Crops growing on the Real Property. If OP Lender declines to continue its rights under the License and/or fails to finance cultivation and or harvest of the Crops, OP Lender shall immediately notify RE Lender and RE Lender's security interest in such Crops and the proceeds and products therefrom shall be senior in all respects to the security interest of OP Lender and OP Lender's security interest in and to such Crops and the proceeds and products therefrom shall automatically terminate. Notwithstanding anything in this Agreement, if OP Lender has exercised any of its rights under the License, OP Lender shall not surrender or abandon any Real Property or Crops for which it has exercised any such rights before providing at least 10 days prior written notice of such surrender or abandonment to RE Lender, during which notice period OP Lender shall continue perform all of its obligations arising under the License with respect to any Real Property or Crops for which it has exercised any rights under the License.

7. **Notice of Possession by RE Lender.** If RE Lender acquires all or any portion of the Real Property in any manner other than by trustee's, sheriff's or similar deed following a foreclosure of any of its liens, RE Lender shall give OP Lender written notice of such acquisition within ten (10) days of the date of such acquisition, and the date of such acquisition shall be deemed to be the date of Foreclosure for the purposes of this Agreement.

**8. Marketing Agreements.** Notwithstanding OP Lender's priority security interest in the Marketing Agreements, RE Lender shall, subject to the terms of this Agreement and specifically subject to the License hereunder, have the right to control, market, sell, and transfer the RE Lender Priority Collateral in accordance with Loan Agreement and applicable law following and during any Enforcement Action. OP Lender shall, at RE Lender's request, authorize, license, or confer on RE Lender the right to use the Marketing Agreements for such purposes on a non-exclusive basis concurrently with OP Lender's use of the Marketing Agreements. OP Lender's failure to provide and/or RE Lender's failure to request such authorization shall not, in and of itself, prevent, limit, or adversely affect any of RE Lender's rights or remedies under the Loan Agreement or applicable law.

**9. Notice.**

(a) Upon any breach or default by any Borrower in any of its obligations to either or both of OP Lender and RE Lender including, without limitation those obligations secured by the OP Financing Agreements and/or the RE Financing Agreements, OP Lender or RE Lender, as the case may be, will give the other written notice thereof within three (3) business days after notice of the occurrence of such default is provided to any Borrower, and OP Lender or RE Lender, as the case may be, further agree to notify the other in the event such default is cured or waived.

(b) Prior to commencing a foreclosure proceeding or the exercise of any other right to take possession of the Real Property or any other RE Collateral, RE Lender shall give notice of such event to OP Lender. If the event of default is one that can be cured by the payment of money to RE Lender or consists of the failure to pay taxes or assessments on the Real Property, then OP Lender shall have twenty (20) days after receipt of such notice to remit the amount so specified to RE Lender in good funds or to pay the taxes or assessments (but without any obligation to do so whatsoever) and, if such payment is made with such twenty day period, RE Lender shall not commence any foreclosure proceeding or exercise any other right to take possession of the Real Property or any other RE Collateral on the basis thereof.

(c) Prior to commencing a foreclosure proceeding or the exercise of any other right to take possession of any OP Collateral, OP Lender shall give notice of such event to RE Lender. If the event of default is one that can be cured by the payment of money to OP Lender, then RE Lender shall have twenty (20) days after receipt of said notice to remit the amount so specified to OP Lender in good funds (but without any obligation to do so whatsoever) and, if such payment is made with such twenty day period, OP Lender shall not commence any foreclosure or exercise any other right to take possession of any of the collateral of OP Lender on the basis thereof.

**10. Effectiveness of Subordinations.**

(a) The subordinations, agreements and priorities set forth herein shall remain in full force and effect, regardless of whether any party hereto in the future seeks to rescind, amend, terminate, or reform by litigation or otherwise, their respective agreements with Borrower.

(b) The subordinations, agreements and priorities set forth herein are expressly conditioned upon the nonavoidance and perfection of the security interests, encumbrances, and/or liens to which another security interest, encumbrance, and/or lien is subordinated, and if the

security interests, encumbrances, and/or liens to which another security interest is subordinated are not perfected or are avoided for any reason, then the subordination provided for herein shall not be effective as to that particular collateral which is the subject of the unperfected or avoided security interest.

(c) The subordinations, agreements, and priorities specified herein are applicable irrespective of the time or order of attachment or perfection of the security interests or other interests referred to herein, the time or order of filing of financing statements, or recording of mortgages or deeds of trust, the acquisition of purchase money or other security interests, or the time of giving or failure to give notice of the acquisition or expected acquisition of purchase money or other security interests.

**11. Distribution of Proceeds of the Collateral.** Prior to an Enforcement Action (and notice thereof in accordance with Section 9) or an Insolvency Proceeding, OP Lender and RE Lender shall each be entitled to receive and retain payments in accordance with their respective agreements with Borrower, as applicable, regardless of the source of those payments. After an Enforcement Action (and notice thereof in accordance with Section 9) or an Insolvency Proceeding, as between OP Lender and RE Lender (a) the proceeds of the OP Priority Collateral shall be paid to OP Lender for application against all indebtedness owing to OP Lender under the OP Loan Agreement and OP Financing Agreements, and the balance of such proceeds remaining after payment in full of all such indebtedness, if any, shall be paid to RE Lender to be applied to the payment of indebtedness owing to RE Lender under the RE Loan Agreement and RE Financing Agreements and (b) the proceeds of the RE Priority Collateral shall be paid to RE Lender for application against all indebtedness owing to RE Lender under the RE Loan Agreement and RE Financing Agreements, and the balance of such proceeds remaining after payment in full of all such indebtedness, if any, shall be paid to OP Lender to be applied to the payment of indebtedness owing to OP Lender under the OP Loan Agreement and OP Financing Agreements.

**12. Form of Notice.** Whenever it is provided herein that any notice, demand, request, consent, approval, declaration, or other communication shall or may be given to or served upon either of the parties by the other, or whenever either of the parties desires to give or serve upon the other a communication with respect to this Agreement, each such notice, demand, request, consent, approval, declaration or other communication shall be in writing and shall be delivered either in person with receipt acknowledged or by registered or certified mail, return receipt requested, postage prepaid, addressed to each party at its address set forth below, or at such other address as may be substituted by notice given as herein provided. Giving of any notice required hereunder may be waived in writing by the party entitled to receive such notice. Every notice, demand, request, consent, approval, declaration or other communication hereunder shall be deemed to have been duly given or served on the date on which personally delivered, with receipt acknowledged, or three (3) days after the same shall have been deposited in the United States mail. Failure or delay in delivering copies of any notice, demand, request, consent approval, declaration, or other communication to the person designated above to receive copies shall in no way adversely affect the effectiveness of such notice, demand, request, consent, approval, declaration, or other communication. The failure or oversight of a party in providing notice shall not affect the right of any party under this Agreement nor shall it nullify or render void or have any adverse impact upon any action taken by either party under this Agreement.

13. **Waiver of Marshalling.** RE Lender and OP Lender each specifically waives and renounces any rights which each may have, whether at law or in equity, to require the other to marshal any Collateral, or any portion thereof, or to otherwise seek satisfaction from any particular assets of Borrower or from any other Person.
14. **Additional Documents.** RE Lender and OP Lender agree to execute and deliver, upon the request of the other, such documents and instruments (appropriate for filing or recording, if requested) as may be reasonably necessary or appropriate to fully implement or to fully evidence the understandings and agreements contained in this Agreement.
15. **Governing Law.** The validity of this Agreement, its construction, interpretation and enforcement, and the rights of the parties hereunder, shall be determined under, governed by and construed in accordance with the laws of the State of [*state*].
16. **Attorneys' Fees.** In the event it becomes necessary for either RE Lender or OP Lender to commence any proceedings or actions to enforce the provisions of this Agreement, the court, arbitrator(s), or other body before which the same shall be heard shall award to the prevailing party all costs and expenses thereof, including, but not limited to, reasonable attorneys' fees, the usual and customary and lawfully recoverable court costs, and all other expenses in connection therewith, at any arbitration or any trial or any appeals of any trial.
17. **Runs With The Land; Successors and Assigns.** This Agreement shall run with the Real Property and shall be binding upon, and inure to the benefit of, the successors and assigns of RE Lender and OP Lender.
18. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, admissible into evidence, and all of which together shall be deemed to be a single instrument.
19. **Termination of Agreement.** The agreements contained herein shall continue in full force and effect until either of OP Borrower's or RE Borrower's obligations and liabilities to either of OP Lender and RE Lender, as applicable, are paid and satisfied in full and all corresponding financing arrangements, liens, and security interest are terminated and/or released. At such time, OP Lender and RE Lender, as applicable, shall execute and deliver to the other any reasonable documentation evidencing such releases and the termination of this Agreement.
20. **Borrower Indemnity.** Borrower, by the execution of its acknowledgment hereto, agrees to indemnify and hold OP Lender and RE Lender, and their respective agents, partners, officers, directors, employees, attorneys, successors and assigns, harmless from and against any and all claims, actions, damages, costs, expenses (including reasonable attorneys' fees, to include outside counsel fees and all allocated costs of in-house counsel) and/or liability arising from or in any manner relating to OP Lender and/or RE Lender's compliance with this Agreement and/or the exercise of any of its rights hereunder. Borrower, by the execution of its acknowledgment hereto, hereby irrevocably authorizes RE Lender to comply with any instructions or directions which OP Lender may give to RE Lender pursuant hereto and/or in connection with OP Lender's exercise of its rights, powers and remedies with respect to the OP Collateral.

21. **Effect of Bankruptcy.** This Agreement shall be and remain enforceable notwithstanding any Insolvency Proceeding by or against any Borrower.

22. **No Waiver; Integration; Amendments.** No delay, failure or discontinuance of RE Lender or OP Lender in exercising any right, power or remedy hereunder or under any of its respective loan documents shall affect such right, power or remedy; nor shall any single or partial exercise of any such right, power or remedy preclude, waive or otherwise affect the further exercise thereof or the exercise of any other right, power or remedy. The rights, powers and remedies of RE Lender and OP Lender hereunder are cumulative and not exclusive. Any waiver, permit, consent or approval of any kind by RE Lender or OP Lender of any breach of or default under this Agreement, or any such waiver of any provisions or conditions hereof, must be in writing and shall be effective only to the extent set forth in such writing. This Agreement constitutes the entire understanding of the parties as to the matters set forth in this Agreement. This Agreement may be amended or modified only in writing signed by OP Lender and RE Lender.

23. **OP Lender Disclosure.** OP Lender shall have no obligation to disclose to RE Lender any information or material about Borrower which is acquired by OP Lender in any manner, even if RE Lender is unsuccessful in obtaining any such information or material from Borrower.

24. **RE Lender Disclosure.** RE Lender shall have no obligation to disclose to OP Lender any information or material about Borrower which is acquired by RE Lender in any manner, even if OP Lender is unsuccessful in obtaining any such information or material from Borrower.

25. **Remedies Enforcement - OP Lender.** Nothing contained in this Agreement shall impose on OP Lender any direct or indirect obligations to RE Lender of any kind with respect to the manner or time in which OP Lender exercises or refrains from exercising any of its rights or remedies with respect to the indebtedness of OP Borrower to OP Lender or any of the OP Collateral. RE Lender understands that there may be various agreements between OP Lender and OP Borrower evidencing and governing the indebtedness of OP Borrower to OP Lender, and RE Lender acknowledges and agrees that such agreements are not intended to confer any benefits on RE Lender. Nothing contained in this Agreement shall impose on OP Lender any obligation to RE Lender with respect to the administration of the indebtedness of OP Borrower to OP Lender and any of OP Lender's agreements with OP Borrower. Nothing in this Agreement shall impair or adversely affect any right, privilege, power or remedy of OP Lender with respect to the indebtedness of OP Borrower to OP Lender or any security therefor, including, without limitation, OP Lender's right to: (a) waive or release any of OP Lender's security or rights; (b) waive or ignore any defaults by OP Borrower; and/or (c) restructure, renew, modify or supplement the indebtedness of OP Borrower to OP Lender, or any portion thereof, or any agreement with OP Borrower relating thereto. Except only as set forth in Section 9 and subject to Section 12, this Agreement shall not create any obligation of OP Lender to give notice to or seek the consent of RE Lender prior to the exercise of any rights, privileges, powers and remedies of OP Lender in connection with the indebtedness of OP Borrower to OP Lender.

26. **Remedies Enforcement - RE Lender.** Nothing contained in this Agreement shall impose on RE Lender any direct or indirect obligations to OP Lender of any kind with respect to the manner or time in which RE Lender exercises or refrains from exercising any of its rights or remedies with respect to the indebtedness of RE Borrower to RE Lender or any of the RE

Collateral. OP Lender understands that there may be various agreements between RE Lender and RE Borrower evidencing and governing the indebtedness of RE Borrower to RE Lender, and OP Lender acknowledges and agrees that such agreements are not intended to confer any benefits on OP Lender. Nothing contained in this Agreement shall impose on RE Lender any obligation to OP Lender with respect to the administration of the indebtedness of RE Borrower to RE Lender and any of RE Lender's agreements with RE Borrower. Nothing in this Agreement shall impair or adversely affect any right, privilege, power or remedy of RE Lender with respect to the indebtedness of RE Borrower to RE Lender or any security therefor, including, without limitation, RE Lender's right to: (a) waive or release any of RE Lender's security or rights; (b) waive or ignore any defaults by RE Borrower; and/or (c) restructure, renew, modify or supplement the indebtedness of RE Borrower to RE Lender, or any portion thereof, or any agreement with RE Borrower relating thereto. Except only as set forth in Section 9 and subject to Section 12, this Agreement shall not create any obligation of RE Lender to give notice to or seek the consent of OP Lender prior to the exercise of any rights, privileges, powers and remedies of RE Lender in connection with the indebtedness of Borrower to RE Lender.

**27. Waiver of Jury Trial.** RE Lender and OP Lender each hereby irrevocably waive the right to trial by jury in any action or proceeding based upon, arising out of, or in any way relating to this Agreement, as it may be amended from time to time, whether sounding in contract or tort or otherwise. The foregoing waiver of right to trial by jury includes a waiver of the right to trial by jury with respect to determinations of awards or claims related to attorney's fees or the reasonableness thereof.

**28. Construction.** RE Lender and OP Lender acknowledge that each party and its counsel have reviewed and revised this Agreement and that the rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement. The captions in this Agreement are for convenience of reference only and shall not be used to interpret this Agreement.

**29. Subsequent Advances and Agreements.** This Agreement shall constitute a continuing agreement, and RE Lender and OP Lender may, without notice to the other, respectively, lend monies, extend credit and make other financial accommodations to or for the account of any Borrower, on the faith hereof in accordance with the terms of the respective loan documents of RE Lender and OP Lender. Except as set forth herein, RE Lender and OP Lender, respectively, at any time and from time to time, may enter into such agreement or agreements with Borrower, as applicable, amending or restating the terms of any respective loan documents of RE Lender or OP Lender, as they may deem proper, extending the time of payment or renewing or otherwise altering the terms of all or any of the indebtedness of Borrower or affecting any security underlying any or all of such indebtedness, or may exchange, sell or surrender or otherwise deal with any Collateral, or may release any balance of funds or Collateral under the respective loan documents of RE Lender and OP Lender, without notice to the other and without in any way impairing or affecting this Agreement.

**30. Recording.** Promptly following the execution of this Agreement, OP Lender and RE Lender shall record a memorandum of this Agreement in the form set forth in Exhibit B in each county where the Real Property is located, and thereafter promptly record additional memoranda

in each county where any additional Real Property is located in which RE Lender is hereafter granted a lien or security interest by any Borrower.

[Signature Pages Follow]

## ACKNOWLEDGMENT

[*Borrower names*] (collectively, the "**Borrower**"), hereby acknowledges receipt of the foregoing Subordination and Intercreditor Agreement (the "**Agreement**"), consents thereto, and agrees to recognize all priorities and other rights granted thereby to the parties thereto, and will do no act or perform any obligation which is not in accordance with the priorities and agreements set forth in the Agreement. Borrower further agrees that OP Lender and RE Lender may exchange information regarding Borrower and may advise each other of any breaches or defaults by Borrower or any terminations of any advances. By the execution hereof, Borrower further agrees to the indemnity set forth in Section 20 of the Agreement and further agree to execute and deliver to OP Lender and/or RE Lender such additional documents and authorizations as either OP Lender and RE Lender may require to carry out the intent and purposes of the Agreement. Without limiting any provision hereof or of any other document, the undersigned hereby agrees that the terms of the Agreement do not give any of them any substantive rights against OP Lender or RE Lender, and the undersigned shall not use any violation of this Agreement by any party as a defense to the enforcement by OP Lender and RE Lender of any of their rights or remedies.

[Signature Pages Follow]

**EXHIBIT A**

**Legal Description of the Real Property**

[Attached]

**EXHIBIT B**

**Form of Recording Memorandum**

[Attached]