Negotiating a Commercial Real Estate Loan Term Sheet

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DISCLAIMER: This is a sample loan term sheet for discussion purposes only in connection with the associated webinar. This loan term sheet and webinar are being provided for educational purposes only and are not intended to be construed as legal advice. The purpose of the term sheet and webinar is solely to highlight concepts and issues routinely encountered in commercial loan transactions for you to discuss with your legal counsel as applicable. Every loan transaction is unique and based upon specific facts and circumstances, and every lender has different underwriting requirements. Please consult your legal counsel for legal advice for each and every loan transaction.
Borrower (Lender’s Version):

ABC Company LLC, a Delaware limited liability company. Borrower shall be a special purpose entity formed solely for the purposes of owning, developing, operating and financing the Property. Borrower shall be the fee title owner of the Property.

[ALTERNATIVE: Borrower shall be required to be a newly formed "SPE" or a "recycled" entity with limited purpose and separateness covenants, in the form specified by the Lender, to be contained in their respective organizational documents and in the loan documents plus limited purpose and separateness covenants to be contained in organizational documents and in the loan documents, in the form specified by the Lender, of the general partner or managing member of the Borrower. Borrower and the SPE Component Entities will be required to have one "independent director" or "independent manager" who comply with criteria specified by Lender. The independent director or independent manager's responsibility will be limited solely to voting on matters involving insolvency and bankruptcy issues and such individual vote will be required to approve (i) any election by Borrower to voluntarily seek protection from creditors under any applicable bankruptcy or insolvency laws, and (ii) the dissolution of Borrower.]
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Recourse (Lender’s Version):

The Loan will be non-recourse to Borrower and to the Guarantor, subject to Lender’s standard recourse carve-out provisions.

[ALTERNATE: The Loan will be fully recourse to Borrower and Guarantor OR fully recourse to Borrower and limited recourse to Guarantor up to 75% of the original principal loan balance and Lender’s standard recourse carve-out provisions OR fully recourse to Borrower, and non-recourse to the Guarantors, subject to Lender’s standard recourse carve-out provisions.]
Recourse (Lender’s Version):

[INCLUSION FOR RECOUSE CARVE OUT: (a) [Borrower and Guarantors] shall be fully and personally liable on a joint and several basis for any and all liability, loss, cost or damage incurred by Lender resulting from misapplication or misappropriation of insurance proceeds, condemnation awards, rents, tenant security deposits or other payments, unintentional misrepresentations, gross negligence or willful misconduct, waste to the Property, wrongful removal of personal property, failure to pay taxes or insurance, breach of environmental representations, warranties, covenants or indemnities in the loan documents, Borrower’s setting forth any defense to foreclosure following monetary default, failure to establish a lender-controlled deposit account and cause property revenues to be deposited therein.]
Recourse (Lender’s Version):

(b) The Loan shall be fully recourse to [Borrower and Guarantors] on a joint and several basis in the event any of the following shall occur: a voluntary bankruptcy proceeding is commenced by Borrower or an involuntary bankruptcy proceeding against Borrower in which Borrower or any controlling person of Borrower joins in the filing, solicits petitioning creditors or files an answer consenting or acquiescing or, without obtaining Lender's consent and in violation of the loan documents, Borrower incurs indebtedness or causes or permits a sale, transfer or encumbrance of the Property or any part thereof or any direct or indirect interest in Borrower, a breach of any representation, warranty or covenant regarding Borrower's status as a bankruptcy-remote special purpose entity or loss of franchise.]
Recourse (Borrower’s Revisions):

The loan will be non-recourse to Borrower and to the Guarantor, subject to Lender’s standard recourse carve-out provisions.

[ALTERNATE: The Loan will be fully recourse to Borrower and Guarantor OR fully recourse to Borrower and limited recourse to Guarantor up to 75% of the original principal loan balance and Lender’s standard recourse carve-out provisions OR fully recourse to Borrower, and non-recourse to the Guarantors, subject to Lender’s standard recourse carve-out provisions.]
Recourse (Borrower’s Revisions):

[INCLUSION FOR RE COURSE CAR VE OUT: (a) [Borrower and Guarantors] shall be fully and personally liable on a joint and several basis for any and all liability, loss, cost or damage incurred by Lender resulting from misapplication or misappropriation of insurance proceeds, condemnation awards, rents, tenant security deposits or other payments, unintentional misrepresentations, gross negligence or willful misconduct, intentional waste to the Property, wrongful removal of personal property, failure to pay taxes or insurance to the extent the Property generates sufficient income, breach of environmental representations, warranties, covenants or indemnities in the loan documents, Borrower’s setting forth any defense to foreclosure following monetary default that is determined by a court to be without merit or brought in bad faith, failure to establish a lender-controlled deposit account and cause property revenues to be deposited therein.
Recourse (Borrower’s Revisions):

(b) The Loan shall be fully recourse to [Borrower and Guarantors] on a joint and several basis in the event any of the following shall occur: a voluntary bankruptcy proceeding is commenced by Borrower or an involuntary bankruptcy proceeding against Borrower in which Borrower or any controlling person of Borrower joins in the filing, solicits petitioning creditors or files an answer consenting or acquiescing or, without obtaining Lender's consent and in violation of the loan documents, Borrower incurs indebtedness or causes or permits a sale, transfer or encumbrance of the Property or any part thereof or any direct or indirect interest in Borrower in violation of the Loan Agreement, a breach of any representation, warranty or covenant regarding Borrower's status as a bankruptcy-remote special purpose entity and such failure is cited as a factor in a court's decision that results in a substantive consolidation, or loss of franchise without replacement by a Qualified Franchise within sixty (60) days thereafter.]
Cash Management (Lender’s Version):

Borrower shall be required to establish at closing a deposit account [with Lender (which account shall be under the sole dominion and control of Lender)] [for the benefit of Lender (in which Lender shall be granted a first priority security interest and shall have “control” pursuant to a deposit account control agreement acceptable to Lender at a financial institution acceptable to Lender], into which all rents and revenues from the Property shall be deposited. On each business day, funds on deposit in the deposit account shall be transferred: (a) other than during a Cash Sweep Period (as defined below) and provided no default exists under the loan documents, to Borrower's operating account (from which Borrower shall make debt service payments and payments of all amounts due under the loan documents), and (b) during a Cash Sweep Period, to a cash management account established and controlled by Lender. Borrower shall establish Borrower’s operating account [with Lender][at a financial institution acceptable to Lender in all respects], and Lender shall be granted a first priority security interest in Borrower’s operating account. Provided no default exists under the loan, funds on deposit in the cash management account shall be used on each monthly payment date to fund debt service payments, escrow and reserve deposits and other payments due under the loan documents, to pay operating expenses related to the Property in accordance with an annual budget approved by Lender, and any excess funds (“Excess Cash”) shall be held in escrow as additional collateral for the loan until earlier of repayment of the loan or cessation of a Cash Sweep Period.
Cash Management (Lender’s Version):

“Cash Sweep Period” shall mean any one or more of the following periods: (a) commencing at such time as the debt service coverage ratio (as determined by Lender) falls below 1.15x on a trailing twelve (12) month basis (tested quarterly) and continuing until such time as the debt service coverage ratio is at least 1.25x on a trailing twelve (12) month basis (tested quarterly for two consecutive quarters).

Borrower shall covenant to promptly notify Lender of the occurrence of any event or condition which, pursuant to any of the foregoing, would result in the commencement or cessation of a Cash Sweep Period. Excess Cash held by Lender shall be returned to Borrower upon the cessation of a Cash Sweep Period.
Cash Management (Borrower’s Revisions):

Borrower shall be required to establish at closing a deposit account [with Lender (which account shall be under the sole dominion and control of Lender)] [for the benefit of Lender (in which Lender shall be granted a first priority security interest and shall have “control” pursuant to a deposit account control agreement acceptable to Lender at a financial institution acceptable to Lender], into which all rents and revenues from the Property shall be deposited. On each business day, funds on deposit in the deposit account shall be transferred: (a) other than during a Cash Sweep Period (as defined below) and provided no default exists under the loan documents, on the first business day of each week to Borrower’s operating account (from which Borrower shall make debt service payments and payments of all amounts due under the loan documents), and (b) during a Cash Sweep Period, on each business day, to a cash management account established and controlled by Lender. Borrower shall establish Borrower’s operating account [with Lender][at a financial institution acceptable to Lender in all respects], and Lender shall be granted a first priority security interest in Borrower’s operating account. Provided no default exists under the loan, funds on deposit in the cash management account shall be used on each monthly payment date to fund debt service payments, escrow and reserve deposits and other payments due under the loan documents, to pay operating expenses related to the Property in accordance with an annual budget approved by Lender, and any excess funds (“Excess Cash”) shall be held in escrow as additional collateral for the loan until earlier of repayment of the loan or cessation of a Cash Sweep Period.
Cash Management (Borrower’s Revisions):

“Cash Sweep Period” shall mean any one or more of the following periods: (a) commencing at such time as the debt service coverage ratio (as determined by Lender) falls below 1.15x on a trailing twelve (12) month basis (tested quarterly) and continuing until such time as the debt service coverage ratio is at least 1.25x on a trailing twelve (12) month basis (tested quarterly for two consecutive quarters).

Borrower shall covenant to promptly notify Lender of the occurrence of any event or condition which, pursuant to any of the foregoing, would result in the commencement or cessation of a Cash Sweep Period. Excess Cash held by Lender shall be returned to Borrower upon the cessation of a Cash Sweep Period.
Transfers (Lender’s Version):

Transfers of any direct or indirect interest in the Property and/or any ownership interest therein or in the Borrower, will not be permitted without Lender’s prior express written approval, which approval may be given or withheld in Lender’s sole and absolute discretion.
Transfers (Borrower’s Revisions):

Transfers of any direct or indirect interest in the Property and/or any ownership interest therein or in the Borrower, will not be permitted without Lender’s prior express written approval, which approval may be given or withheld in Lender’s sole and absolute discretion, except as follows ("Permitted Transfers").

Transfers up to 49% of the direct or indirect ownership interests in the Borrower as well as transfers by devise, descent or by operation of law upon the death or legal incapacity of a natural person or for estate planning purposes, provided such transfers do not result in a change in control of Borrower or any entity controlling Borrower, shall be permitted based on criteria set forth in the loan documents.
Prepayment (Lender’s Version):

The Loan may be prepaid, in whole or in part [in whole, but not in part], at any time upon not less than ten (10) days’ prior written notice, without penalty or premium, other than payment of (i) the applicable Exit Fee, (ii) accrued and unpaid interest to the date of prepayment, (iii) any applicable Make Whole Payment (hereinafter defined), and (iv) all applicable LIBOR breakage costs.

Upon any prepayment in full of the Loan, Borrower shall pay the difference (“Make-Whole Payment”) between (i) the amount of interest paid on the Loan to the date of prepayment, and (ii) an amount equal to the amount of interest that would have accrued on the Loan Amount from the closing date through the date that is twelve (12) months after the closing date, at the arithmetic mean of the Interest Rate in effect from the closing date through the date of prepayment.
Prepayment (Lender’s Version):

[ALTERNATE: Except as provided herein, Borrower shall have no right to prepay the Loan except during the last three (3) months of the Loan Term the Loan may be prepaid at par.]

As used herein, the “Permitted Release Date” shall mean the period beginning six months after closing of the loan and shall terminate on the Permitted Defeasance Date. The “Make-Whole Payment” shall be an amount equal to the greater of (A) one percent (1%) of the outstanding principal balance to be prepaid or satisfied, or accelerated and then due and owing, and (B) a formula more particularly set forth in the loan documents. Lender shall not be obligated to accept any prepayment of the loan unless it is accompanied by the Make-Whole Payment due in connection therewith. If for any reason Borrower prepays the Loan on a date other than a payment date, Borrower shall pay Lender interest for the full accrual period during which the prepayment occurs. “Permitted Defeasance Date” means the date that is two (2) years from the “startup day” within the meaning of Section 860G(a)(9) of the Code for the REMIC Trust which holds the portion of the Note last to be securitized.
Prepayment (Lender’s Version):

Provided no event of default under the loan documents shall then exist, Borrower shall have the right at any time during the period following the occurrence of the Permitted Release Date (defined below) until the Permitted Defeasance Date (defined below), to prepay the loan in whole (but not in part) upon not less than thirty (30) days and not more than ninety (90) days prior written notice to Lender specifying the projected date of prepayment and upon payment of an amount equal to the Make-Whole Payment (defined below).
Prepayment (Lender’s Version):

After the earlier of two (2) years from the final securitization of the Loan or the fourth (4th) anniversary of the first monthly payment date, Borrower may cause the release of the Property from the lien of the first mortgage/deed of trust by, among other things, delivery to Lender of non-callable U.S. Treasury securities that provide payments on or before the dates all remaining scheduled payments of the Loan are due, for the period beginning on the release date and ending on the maturity date, in amounts not less than 100% of such scheduled payments including the outstanding principal balance of the Loan as of the maturity date. Borrower's ability to defease the Loan will be conditioned upon, among other things, Lender's receipt of (a) written confirmation from the rating agencies that such defeasance will not result in a qualification, downgrade or withdrawal of the then current ratings assigned to the securities issued pursuant to a securitization of the Loan, (b) an opinion of counsel relating to certain REMIC, tax, perfection, insolvency and other matters in form and substance reasonably satisfactory to Lender and (c) a certificate from an independent certified public accountant certifying that the U.S. Treasury securities delivered to Lender will generate monthly payments equal to or greater than the required amounts set forth above. Borrower shall pay all costs and expenses incurred in connection with a defeasance. Any defeasance not made on a payment date shall include payment of all interest scheduled to accrue on the defeased amount during the related interest period.
Prepayment (Borrower’s Revisions):

The Loan may be prepaid, in whole or in part [in whole, but not in part], at any time upon not less than ten (10) days’ prior written notice, without penalty or premium, other than payment of (i) the applicable Exit Fee, (ii) accrued and unpaid interest to the date of prepayment, (iii) any applicable Make Whole Payment (hereinafter defined), and (iv) all applicable LIBOR breakage costs.

Upon any prepayment in full of the Loan, Borrower shall pay the difference ("Make-Whole Payment") between (i) the amount of interest paid on the Loan to the date of prepayment, and (ii) an amount equal to the amount of interest that would have accrued on the Loan Amount from the closing date through the date that is twelve (12) months after the closing date, at the arithmetic mean of the Interest Rate in effect from the closing date through the date of prepayment.
Prepayment (Borrower’s Revisions):

[ALTERNATE: Except as provided herein, Borrower shall have no right to prepay the Loan except during the last three (3) months of the Loan Term the Loan may be prepaid at par.]

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Prepayment (Borrower’s Revisions):

Provided no event of default under the loan documents shall then exist, Borrower shall have the right at any time during the period following the occurrence of the Permitted Release Date (defined below) until the Permitted Defeasance Date (defined below), to prepay the loan in whole (but not in part) upon not less than thirty (30) days and not more than ninety (90) days prior written notice to Lender specifying the projected date of prepayment and upon payment of an amount equal to the Make-Whole Payment (defined below).
Prepayment (Borrower’s Revisions):

After the earlier of two (2) years from the final securitization of the Loan or the fourth (4th) anniversary of the first monthly payment date, Borrower may cause the release of the Property from the lien of the first mortgage/deed of trust by, among other things, delivery to Lender of non-callable U.S. Treasury securities that provide payments on or before the dates all remaining scheduled payments of the Loan are due, for the period beginning on the release date and ending on the maturity date, in amounts not less than 100% of such scheduled payments including the outstanding principal balance of the Loan as of the maturity date. Borrower's ability to defease the Loan will be conditioned upon, among other things, Lender's receipt of (a) written confirmation from the rating agencies that such defeasance will not result in a qualification, downgrade or withdrawal of the then current ratings assigned to the securities issued pursuant to a securitization of the Loan, (b) an opinion of counsel relating to certain REMIC, tax, perfection, insolvency and other matters in form and substance reasonably satisfactory to Lender and (c) a certificate from an independent certified public accountant certifying that the U.S. Treasury securities delivered to Lender will generate monthly payments equal to or greater than the required amounts set forth above. Borrower shall pay all costs and expenses incurred in connection with a defeasance. Any defeasance not made on a payment date shall include payment of all interest scheduled to accrue on the defeased amount during the related interest period.
Property Management (Lender’s Version):

The property manager for the Property shall be subject to the approval of Lender in its sole and absolute discretion and the property management agreement relating to the Property shall be subject to the approval of Lender in its sole and absolute discretion. Borrower shall assign to Lender all of its rights under the management agreement, which shall be subordinate to the loan and the lien of the security instruments. Lender shall have the right to cause Borrower to terminate the management agreement following loan default or a default under the management agreement, if the property manager shall become insolvent or a debtor in bankruptcy, engages in fraud, gross negligence, willful misconduct or misappropriation of funds, or the debt service coverage ratio falls below 1.05x on a trailing twelve (12) month basis, as determined by Lender.
Property Management (Borrower’s Revisions):

The property manager for the Property shall be an affiliate of Borrower or another person subject to the approval of Lender in its sole and absolute discretion and the property management agreement relating to the Property shall be subject to the approval of Lender in its sole and absolute discretion. Borrower shall collaterally assign to Lender all of its rights under the management agreement, which shall be subordinate to the loan and the lien of the security instruments. Lender shall have the right to cause Borrower to terminate the management agreement following loan default or a default under the management agreement, if the property manager shall become insolvent or a debtor in bankruptcy, engages in fraud, gross negligence, willful misconduct or misappropriation of funds, or the debt service coverage ratio falls below 1.05x on a trailing twelve (12) month basis, as determined by Lender.
Property Management (Borrower’s Revisions):

The loan documents shall also contain a provision permitting Borrower to replace the manager with a Qualified Manager (which shall mean (i) a reputable and experienced manager as reasonably determined by Lender, (ii) such manager has not been party to a bankruptcy action within the last ten (10) years, (iii) such manager manages at least 10 office properties totaling at least 5,000,000 sf of gross leasable area, excluding the Property, (iv) such manager has experience in managing properties similar in size, scope, use and value as the Property, (v) Borrower provides a no-downgrade letter from the Rating Agencies, (vi) Borrower provides a non-consolidation opinion if such manager is a Borrower affiliate, (vii) Borrower pays all of Lender's out of pocket costs and expenses and customary processing charges, and (viii) such other customary terms and conditions).
Required Legal Opinion Letters (Lender’s Version):

In addition to providing Lender’s standard form of opinion letter from Borrower’s counsel, Borrower shall be required to provide Lender with a “non-consolidation” opinion letter and such other legal opinions as Lender determines appropriate based on Borrower’s organizational structure. To the extent Borrower is a single member Delaware limited liability company, Borrower will also be required to provide standard Delaware special opinions.
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