

ACREL 2019 Mid-Year Meeting – La Quinta
“Construction Lending Menu: A Smorgasbord of Recent Issues” Roundtable
Sample Liquidated Damages Provisions in Completion Guaranties

Sample 1 - *Costs (including debt service and liens) minus undisbursed loan proceeds and reserves; lender intent to complete not required; consultant determination conclusive but must provide supporting documentation.*

In lieu of Lender completing the Project pursuant to Section A or requiring Guarantor to complete the Project pursuant to Section B, Lender shall have the option to require that Guarantor pay to Lender, as liquidated damages for Guarantor's then remaining Guaranteed Obligations, an amount equal to (1) the excess, if any, of all Costs to Complete incurred by Lender or that would be incurred by Lender to cause the Guaranteed Obligations to be fully performed, over (2) the Guaranty Credit. “Costs to Complete” shall mean all costs incurred by Lender or that would be incurred by Lender to cause Completion of the Construction Improvements to occur under Section A (even if Lender does not intend to do so), including without limitation (i) such costs as are reasonably and in good faith estimated by Lender's construction consultant to achieve Completion of the Construction Improvements in accordance with the Approved Plans and Specifications; (ii) payment of all debt service that would accrue during the time period necessary to fully perform the Guaranteed Obligations under Section A, and (iii) payment of all Liens included in the Guaranteed Obligations. Guarantor further agrees that any amount estimated by Lender's construction consultant shall be conclusive for purposes of determining Costs to Complete, so long as such consultant provides reasonably detailed supporting documentation for such determination.

“Guaranty Credit” means the sum of (x) all un-advanced Loan proceeds under the Loan Agreement that are or would have been available to be funded for payment of costs comprising the Guaranteed Obligations if all conditions to advances of such proceeds had been satisfied, and (y) all funds held in a Reserve Accounts designated for payment of a specific Guaranteed Obligation.

If Lender elects to be paid in accordance with this section, any such payment shall be retained by Lender as liquidated damages for Guarantor's then remaining obligations under this Guaranty as Lender's sole remedy hereunder. The parties agree that Lender's actual damages in such event would be extremely difficult or impracticable to determine. After negotiation, the parties have agreed that, considering all the circumstances existing on the date of this Guaranty, the liquidated damages amount as determined in accordance with the foregoing is a reasonable estimate of the damages that Lender would incur if the Guaranteed Obligations are not timely and fully performed. Payment of the liquidated damages amount to Lender under the

circumstances provided for herein is not intended as a forfeiture or penalty, but is intended to constitute liquidated damages to Lender.

Sample 2 - *Costs (excluding carry costs and TIs) minus undisbursed loan proceeds and reserves; consultant reasonable determination; completion by lender not required – but if not used for completion, lender must apply liquidated damages to outstanding loan obligations.*

If the Borrower does not achieve Substantial Completion in accordance with the terms of the Loan Agreement, Guarantor shall, within ten (10) Business Days after written demand by Lender: (a) diligently proceed to achieve Substantial Completion at no cost to Lender; and (b) subject to the Borrower's (and Guarantor's) right to contest the same in accordance with the Loan Agreement, fully pay, bond or otherwise discharge all claims for labor performed and material and services furnished in connection with the construction of the Project. In such event, Lender shall make the undisbursed Loan funds available to Guarantor for the purposes of achieving Substantial Completion and fulfilling Guarantor's other obligations under this Guaranty, subject to Guarantor's satisfaction of the applicable conditions for release of such proceeds set forth in the Loan Documents.

Notwithstanding the foregoing, Lender may elect by written notice to Guarantor that, in lieu of requiring Guarantor to perform (or causing to be performed) the work required to achieve Substantial Completion, Guarantor shall be required to make a payment to Lender equal to the Liquidated Payment Amount. "Liquidated Payment Amount" shall mean an amount equal to the anticipated cost of achieving Substantial Completion substantially in accordance with the Approved Plans, minus the sum of (x) the undisbursed Loan funds available for the purposes of completing such work, and (y) any undisbursed Reserves established for the purposes of paying such costs (including the Deficiency Account Reserve). The anticipated cost to achieve Substantial Completion shall be the amount reasonably estimated by Lender's construction consultant of the anticipated cost (including all hard and soft costs but excluding carry costs and TI/LC expenses) of achieving Substantial Completion in accordance with the Approved Plans, together with reasonable backup documentation confirming the calculation [subject to Borrower's contest rights set forth in Exhibit X]. Lender shall be entitled to the payment of the Liquidated Payment Amount even if it has not commenced or completed the applicable work. Nevertheless, if Lender does not apply the Liquidated Payment Amount received from Guarantor to the costs of achieving Substantial Completion, then Lender shall apply such amount to the repayment of the Loan Obligations.

Sample 4 – *Costs (excluding debt service and carry costs) minus undisbursed loan proceeds only; lender intent to complete not required; consultant good faith and absent manifest error.*

Notwithstanding anything to the contrary contained herein, [if Lender elects, in its sole discretion, not to advance any undisbursed loan proceeds, in lieu of Guarantor's performance obligations hereunder,] Guarantor shall pay to Lender as liquidated damages (and as Guarantor's sole liability under this Guaranty in such event) an amount (the "Liquidated Damages Amount") equal to the excess, if any, of (i) all of the Construction Costs (excluding carry costs and debt service) which would have been incurred in order to achieve Final Completion of the Project (even if Lender does not intend to accomplish Final Completion of the Project) (including any market rate construction management fees) in accordance with the Plans and Specifications including, without limitation, those Construction Costs occasioned by, or arising as a result of, any Event of Default under any documents evidencing, securing or relating to the Loan (irrespective of the absence of any amount in the Project Budget for a particular item of such Construction Costs), over (ii) an amount equal to (a) the remaining construction funds as of the earlier of the Maturity Date or the acceleration of the Loan (the "Determination Date") following an Event of Default under the Loan Agreement, less (b) any further amounts disbursed pursuant to the Loan Agreement or this Guaranty on or after the Determination Date and prior to payment to Lender of the amount determined in accordance with this paragraph; provided, however, that Lender shall have no right to request the foregoing payment from Guarantor from and after the date, if any, that Borrower, Guarantor or other guarantor has fully completed construction of the Improvements in accordance with the terms of this Guaranty and the other Loan Documents. The aforesaid Construction Costs (excluding carry costs and debt service) shall be equal to the amount of such Construction Costs (excluding carry costs and debt service) as estimated by the Construction Consultant. Any such amount estimated by the Construction Consultant as aforesaid shall, in the absence of error, be conclusive for purposes of determining Guarantor's liability hereunder, provided that the Construction Consultant has made such estimate or determination in good faith and absent manifest error. Such payment shall be due no later than ten (10) business days following the giving of a written demand therefor from Lender, and shall accrue interest at the default rate from and after the expiration of such ten (10) business day period until the same is paid in full. It is agreed that if Lender so elects to receive such payment, any such payment shall be retained by Lender as liquidated damages. The parties acknowledge and agree that the actual damages of Lender in such event would be extremely difficult or impracticable to determine. After negotiation, the parties have agreed that, considering all the circumstances existing on the date of this Guaranty, the Liquidated Damages Amount as determined in accordance with the foregoing is a reasonable estimate of the damages that Lender would incur in the event that Borrower has not timely and fully completed the construction of the Improvements in accordance with the Loan Documents. The payment of the Liquidated Damages Amount to Lender under the circumstances provided for herein is not intended as a forfeiture or penalty, but is intended to constitute liquidated damages to Lender.

Sample 3 - *Costs (lender direct, out-of-pocket costs only) minus undisbursed loan proceeds and reserves; risk of co-lender not funding is on Guarantor; costs reasonably determined by lender.*

Without limitation of any other right or remedy of Lender hereunder and under applicable law, upon the occurrence and during the continuance of an Event of Default, upon Lender's written demand, Guarantor shall pay to Lender as liquidated damages all Net Completion Costs, as **reasonably determined by Lender** (the "Liquidated Damages Payment"). Any Liquidated Damages Payment to Lender under this clause (c) shall be retained by Lender as liquidated damages, not as a penalty. As used herein:

(i) The term "Net Completion Costs" means the positive difference, if any, between the Completion Costs and the Available Construction Related Loan Proceeds.

(ii) The term "Available Construction Related Loan Proceeds" means an amount equal to the sum of (A) the then unfunded portions of the Building Loan and the Project Loan that were allocated to the payment of costs of the Work, including, without limitation, any unfunded amounts allocated to contingency which can be utilized for the applicable Work pursuant to the applicable Loan Agreement (taking into account actual reallocations pursuant to the Building Loan Agreement and/or the Project Loan Agreement, as applicable), **provided, however, that Available Construction Related Loan Proceeds shall exclude any such unfunded amounts which are the obligation of a Defaulting Co-Lender**, (B) available Excess Cash Flow Funds on deposit in the Excess Cash Flow Account to the extent that Borrower would be entitled to disbursements of Excess Cash Flow Funds for the applicable Work in accordance with the terms of the Loan Agreement, (C) available Reserve Funds on deposit in the Extension Building Loan Leasing Cost Reserve Account, the Extension Project Loan Leasing Cost Reserve Account and/or any other reserves established pursuant to the Loan Documents for the express and specific purpose of funding the applicable portion of the Work, in each case, to the extent that Borrower would be entitled to disbursements of said Reserve Funds for the applicable Work in accordance with the terms of the Loan Documents, and (D) available Deficiency Deposits then being held by Lender which were deposited for the completion or payment of the Work to the extent that Borrower would be entitled to disbursements of said Deficiency Deposits for the applicable Work in accordance with the terms of the Loan Agreement.

(iii) The term "Completion Costs" means all of Lender's **direct out-of-pocket costs necessary** to be paid in order to achieve full lien free completion of the Work as required under the Loan Documents and, as applicable, the Leases.